

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11014

DAVID GARDNER,

Petitioner - Appellant,

v.

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

May 1, 2001

ON PETITION FOR REHEARING

(Opinion April 4, 2001. 5th Cir. 2001, ____F.3d____)

Before JOLLY, WIENER, and STEWART, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing is granted for the limited purpose of revising the last sentence of our opinion, which we delete and replace with the following:

The judgment of the district court is reversed and the case remanded to that court with instructions to enter an order granting Gardner a writ of habeas corpus unless, within a reasonable time specified by the district court, the State of Texas either (1) conducts a new, constitutionally permissible, sentencing proceeding or (2) vacates Gardner's death sentence and imposes the automatic life sentence specified by Texas law for a defendant who is convicted of capital murder but not

sentenced to death.
REVERSED and REMANDED with INSTRUCTIONS.