

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1489

BILLY CONN GARDNER,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(89-CV-588)

(April 14, 1994)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM*:

We reject each of Billy Conn Gardner's contentions and affirm the district court's dismissal of his petition for habeas corpus. We do so for essentially the same reasons stated by Magistrate Judge Tolle filed February 19, 1993, and adopted by Chief Judge Sanders May 5, 1993.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

We add only this word about Gardner's claim under Penry v. Lynaugh, 492 U.S. 302 (1989). The combination of Teague v. Lane, 489 U.S. 288 (1989); Graham v. Collins, 113 S.Ct. 892 (1993); and Johnson v. Texas, 113 S.Ct. 2658 (1993) reinforces the district court's rejection of Gardner's Penry contentions. Gardner found some hope in Motley v. Collins, 3 F.3d 781 (5th Cir. 1993), issued by a divided panel of this court. That opinion has been withdrawn and a new opinion issued. Motley v. Collins, 1994 WL 109209 (5th Cir.) (Tex.). This new opinion and others of this court, see e.g., Clark v. Collins, ___ F.2d ___ (5th Cir. 1994), make plain that so long as the mitigating evidence is relevant to an interrogatory submitted to the jury, there is no Penry violation. Gardner's claim fails under existing law, and Teague stands as a bar to any change in the law sufficient to support Gardner's contention.

The stay pending appeal issued by the district court on May 28, 1993 is vacated. The judgment filed on May 5, 1993 denying all relief is affirmed.