

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10465
Summary Calendar

THOMAS M. PIERCE,

Petitioner-Appellant,

VERSUS

ANDY COLLINS, Director,
Texas Dept. of Criminal Justice,

Respondent-Appellee.

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

(4:93-CV-395-E)

(April 26, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Thomas M. Pierce, a/k/a Lawrence Leon Taylor, an Arizona state prisoner, was convicted in Arizona by a jury on 85 counts of sexual offenses involving minors and received consecutive sentences

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

totaling 2,975 years. His sentence was enhanced based on, inter alia, a prior Texas state conviction for indecency with a child received on August 23, 1984 in Tarrant County, Texas.

Pierce filed the instant federal habeas petition alleging various constitutional infirmities with the Texas conviction. The matter was referred to a magistrate judge who recommended that the petition be dismissed without prejudice for a lack of jurisdiction because neither Pierce, his custodian, nor the respondents were located in the Northern District of Texas.

The district court adopted the magistrate judge's recommendation and dismissed Pierce's federal habeas petition without prejudice on that basis. Final judgment was entered accordingly. Pierce filed a notice of appeal, and the district court denied a certificate of probable cause ("CPC"). Judge Parker granted a CPC and the parties were directed to brief, inter alia, whether jurisdiction over Pierce's petition exists in the Northern District of Texas.

OPINION

When Pierce moved for a CPC, it was unclear whether Pierce was asserting that he was under a Texas parole-violation detainer lodged against him based on a parole violation related to the underlying Texas state offense used to enhance Pierce's Arizona convictions. The Arizona convictions were enhanced due to, inter alia, Pierce's 1984 conviction in Tarrant County, Texas (case No.

378840) for indecency with a child. It is now clear¹ that a Texas detainer relative to the Tarrant County conviction has been lodged with the Arizona Department of Corrections.

Pierce is "in custody" for § 2254 purposes. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 500 (1973), wherein the Supreme Court held that, even though a prisoner was not physically present within the territorial limits of the district in which he filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, that statute's requirement that the court have jurisdiction over the prisoner's custodian did not deprive the court of jurisdiction over a prison custodian who could be properly served with the petition. In Braden, the petitioner was serving a sentence in Alabama when he applied to the District Court for the Western District of Kentucky for a writ of habeas corpus alleging the denial of his constitutional right to a speedy trial on a Kentucky indictment. Braden, 410 U.S. at 485. The Court reasoned that the warden of the Alabama prison was the agent of Kentucky in holding the prisoner pursuant to a Kentucky detainer. Id. at 488-89 n.4. See also Koetting v. Thompson, 995 F.2d 37, 39 (5th Cir. 1993) (federal prisoner incarcerated in Texas was "in custody" for purposes of district court's jurisdiction over his § 2241 challenge to Missouri detainer lodged against him).

¹ Pierce has moved, inter alia, for leave to submit supplemental exhibits which consist of relevant documentation regarding the parole-violation detainer. By separate order, we have granted such motion.

Such is the case here. Because jurisdiction exists in the Northern District of Texas, the district court erred in dismissing Pierce's petition, without prejudice, for lack of jurisdiction. That order of dismissal is vacated, and the matter is remanded for further proceedings consistent with this opinion.

The appellee asserts that the matter should be dismissed because Pierce has yet to exhaust state remedies. That issue was not considered by the district court and thus is not properly before this court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). This issue is not a purely legal question because it turns, in part, on the factual issue of whether Pierce has submitted these claims to the Texas courts. We do not consider the arguments raised by Pierce concerning the merits.

VACATED and REMANDED.