

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40942

Summary Calendar

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DELVIN JOHNSON,

Petitioner-Appellant,

v.

WAYNE SCOTT, Director, Texas  
Department of Criminal Justice,  
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(94-CV-22)

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(May 19, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:\*

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Delvin Johnson, a Texas state prisoner proceeding *pro se* and *in forma pauperis*, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the revocation of his parole. The

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

district court denied Johnson's petition on the merits and denied a certificate of probable cause (CPC). Johnson then sought a CPC from this court, which determined that a CPC was not required because Johnson's petition arose under 28 U.S.C. § 2241, not 28 U.S.C. § 2254. Because 28 U.S.C. § 2241 contains restrictions on the judicial districts in which such a petition may be filed, we questioned whether the Eastern District of Texas had subject matter jurisdiction over the case and asked the parties to brief whether the case should be dismissed for lack of subject matter jurisdiction or whether, in the interest of judicial economy, this court should reach the merits of the appeal. The parties having filed such briefs, the matter is now before the court.

## **II. ANALYSIS**

The State of Texas argues that this court erred in determining that Johnson's habeas petition was improperly brought under 28 U.S.C. § 2254. Specifically, the state contends that Johnson's petition, challenging the revocation of his parole, could properly be filed pursuant to *either* 28 U.S.C. § 2254 *or* 28 U.S.C. § 2241. Thus, since Johnson filed his claim under 28 U.S.C. § 2254, the district court had subject matter jurisdiction pursuant to that statute and Johnson cannot appeal to this court absent a certificate of probable cause. 28 U.S.C. § 2253.

We decline the state's invitation to reconsider our determination that Johnson's habeas petition arises under 28 U.S.C. § 2241, not 28 U.S.C. § 2254. In our earlier opinion in this case, we explicitly held that Johnson's petition "is not

properly characterized as arising under § 2254." The state seeks to avoid this unequivocal holding by arguing that the cases we cited, United States v. Gabor, 905 F.2d 76, 77-78 (5th Cir. 1990), and Story v. Collins, 920 F.2d 1247, 1250 (5th Cir. 1991), do not support our conclusion. We need only respond that this court will follow its prior decisions as law of the case without reexamination in subsequent appeals unless: (1) the evidence on a subsequent trial was substantially different; (2) controlling authority has since made a contrary decision of the law applicable to such issues; or (3) the decision was clearly erroneous and would work a manifest injustice. Northern Miss. Communications, Inc. v. Jones, 951 F.2d 652, 656 (5th Cir.), cert. denied, 113 S. Ct. 184 (1992). There being no substantially different evidence involved in this appeal or any intervening decision contrary to our earlier conclusion, the only manner in which this court could change its earlier conclusion would be if it were clearly erroneous and would work a manifest injustice. On numerous occasions in the past, this court has construed a habeas petition challenging the revocation of parole as one arising exclusively under 28 U.S.C. § 2241. See, e.g., Johnson v. Scott, No. 94-10947 (5th Cir. Jan. 12, 1995); Rome v. Kyle, No. 93-5551 (Nov. 30, 1994); Hulsey v. Scott, No. 94-50521 (5th Cir. Oct. 17, 1994). Thus, our conclusion that Johnson's habeas petition is properly entertained pursuant to § 2241 and not § 2254 was not clearly erroneous nor did it work manifest injustice.

The conclusion that Johnson's habeas petition arises exclusively under 28 U.S.C. § 2241 does not end our inquiry. Under 28 U.S.C. § 2241, a habeas application filed by a state prisoner

may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application.

28 U.S.C. § 2241(d).

In the case at hand, a jury of the Criminal District Court of Jefferson County, Texas, convicted Johnson of murder and sentenced him to fifty years imprisonment. Thus, the state court which convicted and sentenced Johnson lies within the boundaries of the Eastern District of Texas, and under the plain language of § 2241, as the state's brief concedes, jurisdiction properly lies in the Eastern District. Since Johnson's habeas petition was filed in the Eastern District of Texas, there is no jurisdictional defect affecting the validity of the district court's decision on the merits.

Again, however, this does not end our inquiry. We explicitly asked the parties in this case to brief the issue of whether this court ought to reach the merits of Johnson's due process and double jeopardy claims in the interest of judicial economy. Johnson's brief does no more than restate his claims in conclusory fashion and the state's brief pays equally scant attention to the merits. We are unable to conclude, based on

what is before us, that the district court erred in its disposition of the merits of Johnson's claims.

### **III. CONCLUSION**

For the foregoing reasons, the judgment of the district court is AFFIRMED.