

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60376
Conference Calendar

RICHARD LLOYD ODOM,

Petitioner-Appellant,

versus

EDWARD M. HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee.

- - - - -
Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:94-CV-111WS

- - - - -
(September 20, 1994)

BEFORE KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Richard Lloyd Odom's motion for a certificate of probable cause to appeal the dismissal of his petition filed pursuant to 28 U.S.C. § 2254 is GRANTED. In Braden v. 30th Judicial Circuit Court of Kentucky, 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

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

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. 410 U.S. 484, 500, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973). 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 challenge to Missouri detainer lodged against him).

Although federal district courts do not have jurisdiction to entertain § 2254 petitions if, when the petition is filed, the petitioner is not "in custody" under the conviction or sentence which the petition attacks (see Hendrix v. Lynaugh, 888 F.2d 336, 337 (5th Cir. 1989)), applying Braden's rationale to the instant case, the district court had jurisdiction to entertain the instant petition.

Because Odom has demonstrated that he is a pauper and has presented a nonfrivolous issue on appeal, his motion to proceed in forma pauperis is GRANTED. Carson v. Polley, 689 F.2d 562, 568 (5th Cir. 1982). His motion for the production of "November trial transcripts" is DENIED inasmuch as this Court "will not ordinarily enlarge the record on appeal to include material not before the district court." United States v. Flores, 887 F.2d 543, 546 (5th Cir. 1989). Odom's "motion for consideration" is also DENIED.

The Judgment of the district court dismissing the habeas corpus petition for lack of jurisdiction is REVERSED and the

action is REMANDED for further consideration. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982), (granting CPC and vacating judgment without briefing).