

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 96-20835  
USDC No. 95-CV-3706

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CHARLES THOMAS KUPKA,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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

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May 29, 1997

Before KING, JOLLY and DENNIS, Circuit Judges.

BY THE COURT:

Charles Thomas Kupka's notice of appeal is construed as a request for a certificate of appealability (COA). See Fed. R. App. P. 22(b). Unless a petitioner meets the "in custody" requirement of the federal habeas corpus statutes, a district court does not have subject-matter jurisdiction to entertain the petition. See Maleng v. Cook, 490 U.S. 488, 490 (1989). It is not clear whether Kupka was "in custody" for purposes of the

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challenged conviction. Accordingly, COA is GRANTED, the judgment of dismissal is VACATED, and the case is REMANDED to the district court for a determination whether the court had jurisdiction to consider the petition.

COA GRANTED. VACATE AND REMAND.