

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 97-41273

---

DARON FONTENOT,

Movant-Appellant,

versus

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

Respondent-Appellee.

- - - - -  
Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 1:97-CV-302  
- - - - -

December 11, 1998

Before DAVIS, DUHE', and PARKER, Circuit Judges.

PER CURIAM:\*

Daron Fontenot, Texas prisoner # 589653, seeks a certificate of appealability ("COA") in order to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition as barred by limitations.

A COA may be issued only if the prisoner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In cases in which the underlying constitutional issues were never reached, the movant must make a

---

\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

credible showing of error by the district court in its dismissal. See Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997).

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1217 (1996), created the one-year limitations period contained in 28 U.S.C. § 2244(d)(1). The district court's conclusion that Fontenot's § 2254 petition, filed on May 5, 1997, was untimely was based on the assumptions that the one-year limitations period began to run when Fontenot's conviction and sentence became final and that the tolling of the limitations period during the pendency of Fontenot's state habeas corpus application was therefore inconsequential. The district court erred in dismissing the instant petition. See Fields v. Johnson, \_\_\_ F.3d \_\_\_ (5th Cir. Oct. 28, 1998, No. 98-10012), 1998 WL 754901 at \*3 (§ 2244(d)(2) tolling provision applies to the one-year limitations period commencing on AEDPA's effective date). We lack jurisdiction to consider the merits of the unaddressed underlying habeas corpus claims because the district court did not consider whether a COA should be granted on those issues. Whitehead v. Johnson, 157 F.3d 384, 387-88 (5th Cir. 1998).

COA is GRANTED, the district court's judgment is VACATED, and the case is REMANDED for further proceedings.