

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40581

JAMES A. BECK,

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of
Criminal Justice, Institutional Division,

Respondent-Appellee.

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

(G-97-CV-388)

December 1, 1998

Before DAVIS, DUHÉ and PARKER, Circuit Judges:

PER CURIAM:*

James A. Beck, Texas Prisoner #282493, petitions this court for a Certificate of appealability. We grant the petition on the issue of exhaustion only.

Beck has made a credible showing that the district court erred in dismissing his application for failure to exhaust. *See Murphy*

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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

v. *Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). Further, the dismissal with prejudice was erroneous. See *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995)(holding that dismissal of a habeas application for failure to exhaust should be without prejudice).

The district court's holding that Beck did not raise a federal question because he does not have a liberty interest in release on parole misses the mark. It appears that Beck is making a claim of liberty interest in mandatory release under Texas law. See *Madison v. Parker*, 104 F.3d 765 (5th Cir. 1997).

We therefore vacate the district court's order of dismissal and remand this case so that the respondent can be served and the district court can consider the merits of Beck's habeas corpus petition.

PETITION FOR COA GRANTED. JUDGMENT VACATED AND CASE REMANDED.