

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20947

CARL THOMAS CORTE,

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
USDC No. H-96-CV-1806
- - - - -

June 16, 1998

Before DUHE', DeMOSS and DENNIS, Circuit Judges.

PER CURIAM:*

Carl Thomas Corte, Texas prisoner # 315739, seeks a certificate of appealability (COA) from the denial of his petition filed pursuant to 28 U.S.C. § 2254. COA is GRANTED, and the case is VACATED AND REMANDED for further proceedings. Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982).

The district court erred in dismissing Corte's habeas application pursuant to Rule 9(a) of the Rules Governing Section

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

2254 Cases in the United States District Courts by not advising Corte that such dismissal was being seriously considered and affording Corte an opportunity to rebut the respondent's assertion of prejudice or to explain why his delay in filing the claim is excusable. See McDonnell v. Estelle, 666 F.2d 246, 249-50, 252-53, 255 (5th Cir. 1982).

Following remand, the district court should provide Corte with the opportunity to present evidence to rebut the respondent's evidence of prejudice and to show that Corte's delay in filing the claim was excusable.

COA GRANTED; VACATED AND REMANDED.