

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-20224  
USDC No. H-00-CV-345

Summary Calendar

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EVANS WILLIAM MCKINNELY,

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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June 26, 2000

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:\*

Evans William McKinnely, Texas prisoner # 554193, seeks a certificate of appealability ("COA") to appeal the district court's dismissal without prejudice of his petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. McKinnely's federal petition alleged that a state habeas application had been filed on October 12, 1999, but that no decision had been made. The district court sua sponte dismissed the petition for failure to exhaust state remedies.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

McKinnely has provided this court with evidence that his state application for habeas relief has recently been denied by the Texas Court of Criminal Appeals. Ordinarily, this court will not enlarge the record on appeal with evidence that was not before the district court. See Trinity Indus., Inc. v. Martin, 963 F.2d 795, 799 (5th Cir. 1992). Under these limited circumstances, we find that the interests of justice and judicial economy are best served by granting the COA, VACATING the dismissal and REMANDING for reconsideration of McKinnely's petition in light of the new evidence.

COA GRANTED; VACATED and REMANDED.