

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10065
USDC No. 3:94-CV-2153-R

BILLY WAYNE HORTON,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Dep't of Criminal
Justice, Institutional
Division,

Respondent-Appellee.

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

(June 6, 1995)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

BY THE COURT:

Billy Wayne Horton's notice of appeal has been treated as a request for a certificate of probable cause (CPC) pursuant to Fed. R. App. P. 22(b). Horton exhausted his state habeas corpus remedies with respect to the claims raised in the instant petition subsequent to the district court's entry of judgment dismissing his petition for failure to exhaust. See Picard v. Conner, 404 U.S. 270, 275-78 (1971).

Therefore, Horton's motion for CPC is GRANTED, the judgment of the district court is VACATED, and the petition is REMANDED for consideration of the merits. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982). The district court is also directed to

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determine whether Horton was "in custody" for the instant burglary conviction at the time that he filed his federal petition. See Thompson v. Collins, 981 F.2d 259, 261 (5th Cir. 1993); see also Garlotte v. Fordice, 29 F.3d 216, 217 (5th Cir. 1994), cert. granted, 115 S. Ct. 929 (1995), rev'd. 1995 WL 318633 (U.S. May 30, 1995).