

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. No. 97-41492
USDC No. G-97-CV-586

TRAVIS DALE GRAY,

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

April 13, 1998

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

Texas state prisoner Travis Dale Gray, no. 542293, has requested from this court a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition for federal habeas relief. He also requests in forma pauperis (IFP) status on appeal.

Gray argues that the Texas Department of Criminal Justice (TDCJ) has erroneously computed the length of his term of imprisonment and that he should be entitled to mandatory supervised release on January 23, 1999. Any potential dispute between Gray and TDCJ "has not ripened into the definite and concrete controversy" necessary for the adjudication of Gray's

claim. Cross v. Lucius, 713 F.2d 153, 159 (5th Cir. 1983). The controversy is more hypothetical than real and, as such, does not present a federal court with the Article III case or controversy requisite to its jurisdiction.

Although the district court did not specify whether its dismissal was with or without prejudice, such a dismissal is usually with prejudice. See Fed. R. Civ. P. 41(b). Gray's requests for a COA and IFP are GRANTED and the judgment of the district court is MODIFIED to be WITHOUT PREJUDICE to allow him to bring his claim once the controversy is ripe. The judgment is AFFIRMED as MODIFIED.