

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40173
USDC No. 5:97-CV-344

KENNETH W. LEWIS,

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 Eastern District of Texas

September 13, 1999

Before JOLLY, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:*

Kenneth W. Lewis, Texas state prisoner # 725023, has filed a request for the issuance of a certificate of appealability (COA) to appeal from the district court's denial of his Fed. R. Civ. P. 60(b) motion in this 28 U.S.C. § 2254 proceeding. Lewis argues that the district court erred by dismissing his § 2254 petition as time-barred. COA is GRANTED with regard to the issue whether Lewis's § 2254 petition was time-barred. Lewis's second state habeas application, although dismissed by the Texas courts as an

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

abuse of the writ, was properly filed and thus tolled the applicable limitation period. See Villegas v. Johnson, ___ F.3d ___ (5th Cir. Aug. 9, 1999, No. 98-10298). With the benefit of the resulting toll, Lewis's federal habeas petition was filed within the limitations period established by the AEDPA. See id. Accordingly, COA is GRANTED, the judgment of the district court is VACATED, and the case is REMANDED for further proceedings.