

EXHIBIT "A"
RULING FROM FEDERAL COURT

Case 9:17-cv-00075-RC-KFG Document 2 Filed

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

LEWIS-JAY PORTER

VS. CIVIL ACTION NO. 9:17-CV-75

STATE OF TEXAS

REPORT AND RECOMMENDATION

OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Lewis-Jay Porter, an inmate confined at the Lynaugh Unit of Texas Department of Criminal Justice, Correctional Institutions Division (“TDCJ-CID”), proceeding *pro se*, filed this civil right action against the State of Texas. Plaintiff contends

that his filings with the State of Texas pursuant to the Uniform Commercial Code compel his release from prison.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

A civil rights action is the appropriate means for the recovering damages resulting from illegal administrative procedures or the conditions of confinement. *Richardson v. Fleming*, 651 F.2d 366, 372 (5th Cir. 1981). In this case, plaintiff is not

seeking damages; he is seeking release from prison based on inapplicable legal theories. A petition for writ of habeas corpus is the appropriate means for a prisoner to challenge the fact or duration of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *Jackson v. Johnson*, 475 F.3d 261, 263 n. 2 (5th Cir. 2007); *Cook v. TDCJ Transitional planning Dep't*, 37 F.3d 166, 168 (5th Cir. 1994). Therefore, this filing should be construed as a petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Plaintiff previously filed a federal habeas petition challenging this conviction. That petition was denied. *Porter v. Director*, Cause No. 9:14-CV-142 (E.D. Tex. Sept. 13, 2016). Title 28 U.S.C. § 2244(b) requires individuals who wish to file a

second or successive habeas corpus petition to obtain authorization from the appropriate appellate court before filing a petition. 28 U.S.C. § 2244 (b)(3). The district court must dismiss a claim presented in a second or successive petition if the claim was presented in a prior habeas petition. 28 U.S.C. § 2244(b)(1).

There is no question that this is a successive petition. However, plaintiff failed to provide this court with an order from the Fifth Circuit authorizing consideration of the petition. As a result, the petition should be dismissed without prejudice to plaintiff's ability to refile if he obtains the necessary order from the Fifth Circuit Court of Appeals.

Recommendation

This action should be dismissed without prejudice.

Objections

Within fourteen days after receipt of the magistrates judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar and aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by

the district court except on grounds of plain error.

Douglas v. United States Services Automobile Ass'n,
79 F.3d 1415, 1417 (5th Cir. 1996)(en banc); 28 U.S.C.
§ 636(b)(1); FED R. CIV. P. 72.

SIGNED this 10th day of May, 2017.

/s/ Keith F. Giblin

United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

LEWIS-JAY PORTER

VS. CIVIL ACTION NO. 9:17-CV-75

STATE OF TEXAS

ORDER ADOPTING THE MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION

Plaintiff Lewis-Jay Porter, a prisoner confined in the
Texas Department of Criminal Justice, Correctional
Institutions Division, proceeding *pro se*, filed this
civil action against the State of Texas.

The court ordered that this matter be referred to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court.

The Magistrate Judge construed the action as a successive petition for writ of habeas corpus and recommended dismissing the petition as a successive petition.

The court has received and considered the Report and Recommendation of the United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence.

No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties. Plaintiff does not deny that this is a

successive petition, but he requests the court to stay in this proceeding while he seeks authorization from the United States Court of Appeals for the Fifth Circuit. Because plaintiff should have sought leave from the Fifth Circuit before filing this action, the motion will be denied.

ORDER

Accordingly, the findings of fact and conclusions of law of the Magistrate Judge are correct, and the report of the Magistrate Judge (document no. 2) is **ADOPTED**. Plaintiff's motions regarding a stay (document nos. 4 and 5) are **DENIED**. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendation.

So **ORDERED** and **SIGNED** this **17** day of **July**,
2017.

/s/ Ron Clark,

United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

LEWIS-JAY PORTER

VS. CIVIL ACTION NO. 9:17-CV-75

STATE OF TEXAS

FINAL JUDGMENT

Pursuant to the Order Adopting the Report and

Recommendation of the United States Magistrate

Judge, filed in this matter this date, it is

ORDER and ADJUDGED that this civil action is

DISMISSED. All motions not previously ruled on

are **DENIED**.

So, ORDERED and SIGNED this 17 day of July,
2017.

/s/ Ron Clark, United States District Judge

EXHIBIT "B"

RULING FROM APPEAL COURT

Case: 17-40802 Document: 00514539183 Page 1 Date

Filed 07/03/2018 Case 9:17-cv-00075-RC-KFG

Document 9 Filed 07/03/18 Page 1 of 1 Page ID 108

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40802

D.C. Docket No. 9:17-CV-75

LEWIS-JAY PORTER

Plaintiff-Appellant

v.

STATE OF TEXAS, 101 West Main Street, Suite
250, Nacogdoches, Texas 75861, doing business as
Carrie Gilcrease,

Defendant-Appellee

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

Before DENNIS, SOUTHWICK, and HIGGINSON,
Circuit Judge.

JUDGMENT

This cause was considered on the record of appeal.

It is ordered and adjudged that the appeal is
dismissed for lack of jurisdiction.

Certified as a true copy and issued as the mandate
on July 03, 2018

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Case 17-40802 Document 00514539184 Page 1 Date

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ID#109

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17-40802

LEWIS-JAY PORTER,

Plaintiff-Appellant

v.

STATE OF TEXAS, 101 West Main Street, Suite

250, Nacogdoches, Texas 75861, doing business as

Carrie Gilcrease,

Defendant-Appellee

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

USDC No. 9:17-CV-75

Before DENNIS, SOUTHWICK, and HIGGINSON,
Circuit Judges.

PER CURIAM:¹

Lewis-Jay Porter, Texas prisoner #01865394,
was convicted in Texas state court for aggravated
sexual assault of a child. He has filed what is best
construed as a motion for certificate of appealability
(COA). Porter's arguments appear to be based on his
adherence to the so-called "sovereign citizen"

¹ 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.

ideology. “The sovereign citizen movement is a loose grouping of litigants, commentators, and tax protestors who often take the position that they are not subject to state or federal statutes and proceedings.” *United States v. Weast*, 811 F.3d 743, 746 n.5 (5th Cir.), *cert. denied*, 137 S. Ct. 126 (2016).

This court may issue a COA only if Porter has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this requirement, Porter must demonstrate that reasonable jurists could disagree with the district court’s resolution of his constitutional claims or that the issues presented were adequate to deserve encouragement to proceed further. *See*

Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court did not rule on whether a COA should issue. Because the district court did not do so, we may assume without deciding that we lack jurisdiction. *See Cardenas v. Thaler*, 651 F.3d 442, 443-44 (5th Cir. 2011); Rule 11(a), RULES GOVERNING § 2254 CASES. However, we decline to remand in order for the district court to make the COA determination in the first instance because remand would be futile. *See United States v. Alvarez*, 210 F.3d 309, 310 (5th Cir. 2000). Even if the district court had made the determination in the first instance, we would still deny a COA because Porter

has not made the required showing. *See Slack*, 529 U.S. at 484.

Accordingly, the appeal is DISMISSED for lack of jurisdiction, and Porter's constructive motion for COA is DENIED AS MOOT.

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

Lewis-Jay:Porter®— PETITIONER

Vs.

STATE OF TEXAS

D/B/A: Carrie Gilcrease— RESPONDENT(S)

PROOF OF SERVICE

I, Lewis-Jay:Porter®, do swear or declare that on this date, September 6, 2018, as required by the PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person

required to be served, by depositing an envelope containing the above documents in the United States mail properly address to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addressed of those served are as follow:

Carrie Gilcrease

Nacogdoches County Courthouse

101 W. Main Street

Nacogdoches, Tx [75961]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2018

Lewis-Jay:Porter®
Lewis-Jay:Porter®