

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-40814



Certified as a true copy and issued
as the mandate on Apr 02, 2019

Attest: *John W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

MUAMAR A. SAYYED, also known as Muamar Sayyed-Asad,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

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

O R D E R:

Muamar A. Sayyed, Texas prisoner # 01524927, was convicted of theft in 2008 and was sentenced to 15 years of imprisonment. His 28 U.S.C. § 2254 petition challenging that conviction was dismissed as successive in 2012, and although he appealed that dismissal, his appeal was dismissed for failure to prosecute in 2014. In February 2018, Sayyed filed a motion pursuant to FED. R. CIV. P. 60(b)(6), seeking to reopen his § 2254 proceedings, which motion was denied by the district court. He now moves this court for a certificate of appealability (COA) to appeal that denial.

To obtain a COA, Sayyed must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “[R]elief under Rule 60(b)(6) is available only in

No. 18-40814

extraordinary circumstances.” *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (internal quotation marks and citation omitted). This court reviews the denial of a motion for relief under Rule 60(b)(6) for an abuse of discretion. *Id.* at 777. To obtain a COA to appeal the denial of his Rule 60(b) motion, Sayyed must show that reasonable jurists could debate whether the district court abused its discretion in declining to reopen the judgment. *See id.*

Sayyed contends that the district court’s denial of his Rule 60(b) motion was an abuse of discretion because his underlying habeas petition was incorrectly dismissed as successive. As he did below, Sayyed urges that the purportedly erroneous procedural ruling has prevented consideration of the merits of his constitutional claims, resulting in a manifest miscarriage of justice.

Sayyed has failed to make the required showing. *See Buck*, 137 S. Ct. at 777; *Slack*, 529 U.S. at 483-84; *see also Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); *Raby v. Davis*, 907 F.3d 880, 885 (5th Cir. 2018), *petition for cert. filed* (Feb. 28, 2019) (No. 18-8214); *Crone v. Cockrell*, 324 F.3d 833, 835-37 (5th Cir. 2003); *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002); FED. R. CIV. P. 60(c)(1). Accordingly, the motion for a COA is DENIED. The motion for leave to proceed IFP is likewise DENIED.

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STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MUAMAR A. SAYYED, #01524927

§

VS.

§

CIVIL ACTION NO. 4:12cv9

DIRECTOR, TDCJ-CID

§

MEMORANDUM OPINION AND ORDER

Petitioner Muamar A. Sayyed, a former Texas prison inmate, proceeding *pro se*, filed a motion for reconsideration (docket entry #17) in this case. To succeed on a motion for reconsideration pursuant to Rule 59 of the Federal Rules of Civil Procedure, a party must “clearly establish either a manifest error of law or fact or must present newly discovered evidence.” *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005). A Rule 59 motion should not be used to rehash evidence, legal theories, or arguments that could have been raised or were raised before entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

Petitioner asserts that he is entitled to relief because his prior habeas proceeding (Cause Number 4:11cv229) was dismissed without prejudice for failure to exhaust, yet the present case was dismissed as successive. He states that he has now exhausted his state court remedies, and asks the

court to reconsider and reinstate his petition.

Under Fifth Circuit precedent, “a later petition is successive when it: (1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ.” *Crone v. Cockrell*, 325 F.3d 833, 836-37 (5th Cir. 2003); accord *United States v. Orozco-Ramirez*, 211 F.3d 862, 867 (5th Cir. 2000).¹ A petition that is literally second or successive, however, is not a second or successive application for purposes of AEDPA if the prior dismissal is based on prematurity or lack of exhaustion. See *Slack v. McDaniel*, 529 U.S. 473, 487, 120 S. Ct. 1595, 1605, 146 L. Ed.2d 542 (2000) (declining to construe an application as second or successive when it followed a previous dismissal due to a failure to exhaust state remedies). To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.

A review of the three relevant cases filed by Petitioner shows that in his first habeas petition, Cause Number 4:10cv148, the case was dismissed with prejudice. In that case, Petitioner’s petition was not dismissed because of prematurity. It was dismissed with prejudice because the issues he raised were without merit. Under *Crone* and *Orozco-Ramirez*, Petitioner was required at that time to present all available claims in his first federal petition. “The requirement that all available claims

¹ Although the Court of Appeals for the Fifth Circuit decided *Orozco-Ramirez* in the context of a motion to vacate under 28 U.S.C. § 2255, it also found it appropriate to rely upon cases decided under 28 U.S.C. § 2254 in reaching its decision. See 211 F.3d at 864 n.4. In the present context, this court also finds it appropriate to make no distinction between cases decided under § 2255 and those under § 2254.

be presented in a prisoner's first habeas petition is consistent not only with the spirit of AEDPA's restrictions on second and successive habeas petitions, but also with the preexisting abuse of the writ principle." *Orozco-Ramirez*, 211 F.3d at 870. "The requirement serves the singularly salutary purpose of forcing federal habeas petitioners to think through all potential post-conviction claims and to consolidate them for a unitary presentation to the district court." *Id.* at 870-71 (quoting *Pratt v. United States*, 129 F.3d 54, 61 (1st Cir. 1997)).

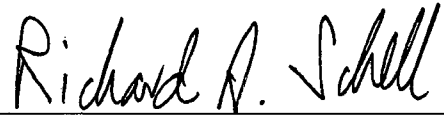
In Petitioner's second federal habeas proceeding, Cause Number 4:11cv229, the court improvidently dismissed the case based on Petitioner's failure to exhaust state remedies on the issues raised. As noted above, however, Petitioner should have brought all claims in his first habeas petition. Accordingly, in his third federal habeas proceeding (the present case), Cause Number 4:12cv9, the petition was properly dismissed as successive. For these reasons, this court did not have subject matter jurisdiction to consider Petitioner's petition unless he first received permission from the Fifth Circuit. Petitioner may not file a successive petition in this court without the permission of the Fifth Circuit. 28 U.S.C. § 2244(3)(A). He has not shown that he received permission from the Fifth Circuit to file the present petition. If he obtains permission from the Fifth Circuit, he may file a successive petition for this court's consideration.

In sum, Petitioner does not provide the court with any grounds to alter or amend the judgment. He has failed to clearly establish either a manifest error of law or fact or newly discovered evidence. *Ross*, 426 F.3d at 763. His opportunity to bring all of his complaints was available to him in his first federal habeas petition, Cause Number 4:10cv148. To raise additional claims, he must first obtain permission from the Court of Appeals for the Fifth Circuit to file a successive petition. Therefore, in the absence of any new arguments or evidence that could not have been raised in

Petitioner's first proceeding, the court denies Petitioner's motion for reconsideration as he has failed to state any grounds sufficient to reopen or revisit the case. Fed. R. Civ. P. 59(a). It is accordingly

ORDERED that Petitioner's motion for reconsideration (docket entry #17) is **DENIED**.

SIGNED this the 11th day of September, 2013.

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RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MUAMAR A. SAYYED, #01524927

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VS.

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CIVIL ACTION NO. 4:12cv9

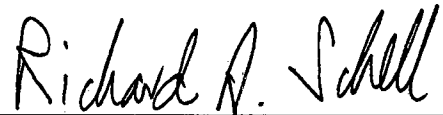
DIRECTOR, TDCJ-CID

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FINAL JUDGMENT

The court has considered Petitioner's case and rendered its decision by opinion issued this same date. It is hereby **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED** without prejudice.

SIGNED this the 28th day of September, 2012.

A handwritten signature in black ink, reading "Richard A. Schell". The signature is written in a cursive style with a horizontal line underneath.

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
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CIVIL ACTION NO. 4:12cv9

DIRECTOR, TDCJ-CID


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MEMORANDUM OPINION AND ORDER

Petitioner filed a motion for certificate of appealability and a motion to proceed *in forma pauperis* on appeal after this court dismissed his petition for writ of habeas corpus, which was filed pursuant to 28 U.S.C. § 2254. Petitioner's § 2254 petition was dismissed without prejudice because the motion was successive. Dismissal for lack of jurisdiction was proper due to Petitioner's failure to obtain permission from the Court of Appeals for the Fifth Circuit to file a successive petition. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). This court instructed Petitioner that he may seek permission to file a successive § 2254 motion with the Fifth Circuit. If Petitioner wishes to seek permission to file a successive motion, a motion for certificate of appealability is not necessary. 28 U.S.C. § 2244 (b)(3)(A). Because Petitioner's petition is successive, and he has not shown that he has sought authorization from the Fifth Circuit to file it, he is not entitled to a COA. It is

ORDERED that the motion for certificate of appealability and motion for leave to appeal *in forma pauperis* (docket entries #21, #22) are **DENIED**.

SIGNED this the 12th day of February, 2014.



RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE