IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appendix A.

No. 18-11599

A True Copy
Certified order issued Sep 05, 2019
Clerk, U.S. Court of Appeals, Fifth Ci

ARTHUR LUTHER MCKINNEY,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; CHARLES SIRINGI, Warden,

Respondents-Appellees

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

O R D E R:

Arthur Luther McKinney, Texas prisoner # 2016392, was convicted in a prison disciplinary proceeding of using vulgar language. He seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 habeas application, arguing that prison officials violated his due process rights at the disciplinary hearing.

To obtain a COA, a movant 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 (2000). "A [movant] satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

While his motion for a COA was pending before the court, McKinney was released from custody. An appeal would therefore be moot and this court would lack jurisdiction, so McKinney has failed to make the requisite showing for issuance of a COA. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Bailey v. Southerland*, 821 F.2d 277, 278-79 (5th Cir. 1987). Accordingly, his motion for a COA is DENIED.

Patrick E Higginbotham

PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Appendix B

ARTHUR LUTHER MCKINNEY,	§	
	§	
Petitioner	§	
	§	
v.	§	Civil No. 4:18-CV-217-Y
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent	§	

ORDER DENYING RELIEF UNDER 28 U.S.C. § 2254

In June 2017, Arthur McKinney was convicted of using vulgar language in prison disciplinary case number 20170301725. (Admin. R. 3, doc. 10-2.) As punishment for the offense, McKinney received a reduction in his class status from S2 to S4. (*Id.*)

In this habeas action, McKinney challenges the validity of his disciplinary conviction and the loss of his S2 status. (Pet., doc. 1.) He claims that the disciplinary charge was retaliatory and that his reduction in class status delayed his release date by two months.[1] (Reply 2, doc. 11.)

Respondent answers that McKinney's petition should be denied because it does not allege a constitutional violation. (Answer 6-8, doc. 9.) The Court agrees.

[1] McKinney also claims that the Luther Unit prison law librarian denied him access to the courts and retaliated against him. (Pet., doc. 1.) But the Court dismissed these claims without prejudice to McKinney's bringing them in a civil-rights action under 42 U.S.C. § 1983. (Order, doc. 17.)

I. Legal Standard

A federal writ of habeas corpus is available to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. *Boyd v. Scott*, 45 F.3d 876, 881 (5th Cir. 1994)(citations omitted); *see* 28 U.S.C. § 2254(a).

Prisoners charged with institutional rules violations are entitled to rights under the Due Process Clause only when the discipline they receive infringes upon a constitutionally protected liberty interest. *See Sandin v. Conner*, 515 U.S. 472 (1995).

II. Analysis

In his reply, McKinney claims that he has a protected liberty interest in his previously earned S2 status. McKinney is wrong.

A reduction in line class or change in custody status does not implicate a liberty interest protected by the Due Process Clause because the effect of those classifications on a prisoner's ultimate release date is too speculative. *See Nathan v. Hancock*, 477 F.App'x 197, 2012 WL 1758573, at *1 (5th Cir. May 17, 2012)(per curiam)(unpublished)(citing *Malchi v. Thaler*, 211 F.3d 953, 958-59 (5th Cir. 2000)); *see also Mohwish v. Yusuff*, 209 F.3d 718 (Table), 2000 WL 283164, at *1 (5th Cir. Feb. 1, 2000)(per curiam)(unpublished table opinion)(citing *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995)).

Because McKinney's punishment does not infringe upon a

protected liberty interest, the Court concludes that there is no due-process violation. The Court therefore concludes that McKinney has failed to state a constitutional claim upon which habeas relief may be grounded.

III. Conclusion

McKinney's 28 U.S.C. § 2254 petition is DENIED. In addition, the Court concludes that McKinney has failed to make a substantial showing of the denial of a constitutional right and DENIES a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2).

SIGNED November 14, 2018.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE