

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20283
Conference Calendar

ROGELIO DELABRA,

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
USDC No. H-98-CV-1614

October 19, 1999

Before JONES, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

Rogelio Delabra, Texas prisoner # 641276, seeks a certificate of appealability (COA) to appeal the denial of his application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has also filed a motion to proceed in forma pauperis (IFP) on appeal.

We must examine the basis of our jurisdiction, *sua sponte*, if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

1987). Delabra filed a notice of appeal after the magistrate judge issued her memorandum and opinion and order of dismissal, but before the district court had the opportunity to issue an order adopting the magistrate judge's recommended action and a final judgment. The magistrate judge's memorandum was never presented to the district court for adoption or rejection. The district court referred the matter to the magistrate judge for a recommendation only. The magistrate judge did not have the authority to dismiss this matter or to deny a COA. Jones v. Johnson, 134 F.3d 309, 309-12 (5th Cir. 1998); 28 U.S.C. § 636(b)(1)(A-C). The magistrate judge's order of dismissal is not an appealable judgment. Trufant v. Autocon, Inc., 729 F.2d 308, 309 (5th Cir. 1984).

We are without jurisdiction to consider this case. Accordingly, the motions for COA and IFP are DENIED, and the appeal is dismissed for lack of jurisdiction.

MOTIONS DENIED; APPEAL DISMISSED FOR LACK OF JURISDICTION.