

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

LUFKIN DIVISION

RODERRETTE DEWRAYNE MCCLURE §
VS. § CIVIL ACTION NO. 9:14cv57
UNITED STATES OF AMERICA §

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND
PARTIALLY ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Roderrette Dewrayne McClure, an inmate confined at the Upshur County Jail, proceeding *pro se*, brought this Emergency Petition for Writ of Habeas Corpus seeking specific performance of a prior plea agreement.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends the petition be dismissed.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record and pleadings. Petitioner filed objections to the Magistrate Judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

After careful consideration, the court concludes petitioner's objections should be overruled. As the magistrate judge concluded, a breach of the plea agreement has not occurred and the relief sought by petitioner, specific performance, is not available. Accordingly, petitioner's motion is unauthorized and should be denied for lack of jurisdiction. Additionally, the petition lacks merit for the reasons set forth in the Report.

However, petitioner now requests the court to vacate the judgment in his underlying conviction, *United States v. McClure*, Criminal Action No. 9:11cr38. Applying the principles of liberal construction, petitioner should be allowed to proceed with this issue as a ground for relief in a motion to vacate, set aside or correct sentence.

A motion to vacate sentence, however, is ordinarily presented to the judge who presided at the original conviction and imposed the sentence. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977); 28 U.S.C. § 2255. Accordingly, this action should be assigned to the Honorable Ron Clark, Chief District Judge, for the purpose of determining the sole remaining issue of whether petitioner's plea of guilty was involuntary based on counsel's alleged ineffective assistance.

ORDER

Accordingly, petitioner's objections are **OVERRULED** in part. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ADOPTED** to the extent it recommended dismissal of petitioner's claims for specific performance presented in this petition. As set forth above, petitioner's claim that his plea of guilty was involuntary based on the alleged ineffective assistance of counsel will proceed before the judge presiding at the original criminal proceeding.

SIGNED this the 30 day of September, 2015.



Thad Heartfield
United States District Judge