

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

ROBERT FOSTER §
v. § CIVIL ACTION NO. 2:08cv162
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Robert Foster, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

After review of the pleadings, the Magistrate Judge issued a Report on June 23, 2008, recommending that the application for the writ of habeas corpus be dismissed. The Magistrate Judge observed that this is the fourth habeas corpus petition which Foster has filed concerning this same conviction, and that Foster has not shown that he has received permission from the Fifth Circuit to file a successive petition, as required by 28 U.S.C. §2244(b)(3); on the contrary, the Magistrate Judge said, leave to file a successive petition was denied to Foster by the Fifth Circuit on June 8, 2005. The Magistrate Judge therefore recommended that Foster's petition be dismissed without prejudice, with refiling conditioned upon his receipt of permission from the Fifth Circuit Court of Appeals to file a successive petition. The Magistrate Judge also recommended that Foster be denied a certificate of appealability as to the dismissal of this case, but that such denial of a certificate of appealability have no effect upon Foster's right to seek permission from the Fifth Circuit to file a successive petition.

Foster received a copy of the Magistrate Judge's Report on June 25, 2008, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Magistrate Judge's Report is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus is DISMISSED without prejudice, with refiling conditioned upon Foster's receiving permission from the Fifth Circuit Court of Appeals to file a successive petition. He may not refile this petition, or any other habeas corpus application challenging the conviction at issue in this case, until he obtains permission from the Fifth Circuit to file a successive petition. It is further

ORDERED that the Petitioner Robert Foster is hereby DENIED a certificate of appealability *sua sponte*. The denial of the certificate of appealability refers solely to an appeal of the decision in this case and shall have no effect upon Foster's right to seek permission from the Fifth Circuit Court of Appeals to file a second or successive petition. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

SIGNED this 9th day of February, 2009.



DAVID FOLSOM
UNITED STATES DISTRICT JUDGE