

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

JODY FORD MCCREARY, #1694118 §
VS. § CIVIL ACTION NO. 6:15cv839
DIRECTOR, TDCJ-CID §

ORDER OF DISMISSAL

Petitioner Jody Ford McCreary, an inmate confined in the Texas prison system, proceeding *pro se*, filed the above-styled and numbered petition for a writ of habeas corpus challenging his Smith County conviction for tampering with physical evidence. The petition was referred to United States Magistrate Judge K. Nicole Mitchell, who issued a Report and Recommendation concluding that the petition should be dismissed for lack of subject matter jurisdiction because Petitioner had not received permission from the Fifth Circuit to file a successive petition. Petitioner has filed objections.

Petitioner has filed two petitions for a writ of habeas corpus challenging his conviction in this Court. His last petition was dismissed as successive, and the Fifth Circuit denied his request for a certificate of appealability. Magistrate Judge Mitchell correctly concluded that the present petition should be dismissed for lack of subject matter jurisdiction. Petitioner argues that his petition should be considered because he is actually innocent of the crime. His distinction, however, lacks merit because he still must obtain permission from the Fifth Circuit to file a successive petition. The Fifth Circuit has specifically rejected the type of argument that Petitioner presents in his objections. *Williams v. Thaler*, 602 F.3d 291, 305 (5th Cir. 2010) (“[T]he district court did not have jurisdiction to consider [petitioner’s] claim of actual innocence.”).

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having

made a *de novo* review of the objections raised by Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of Petitioner are without merit. Therefore the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly


ORDERED that the Report and Recommendation (docket entry #7) is **ADOPTED**. It is further

ORDERED that the petition for a writ of habeas corpus is **DISMISSED** without prejudice for lack of subject matter jurisdiction. A certificate of appealability is **DENIED**. All motions not previously ruled on are hereby **DENIED**. It is finally

ORDERED that the Clerk of Court shall return unfiled any new petitions for a writ of habeas corpus submitted by Petitioner regarding his conviction unless he shows that he received permission from the Fifth Circuit to file it.

It is SO ORDERED.

SIGNED this 9th day of October, 2015.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE