

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

DEMETRIUS KELLUM §
v. § CIVIL ACTION NO. 6:16cv1294
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND DENYING MOTION FOR RELIEF FROM JUDGMENT

The Petitioner Demetrius Kellum, 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 and records, including the answer from the Respondent, the Magistrate Judge issued a Report recommending that the petition be dismissed without prejudice for failure to exhaust state remedies. In response to the Report, Kellum filed a motion asking that his petition be voluntarily dismissed. This motion was granted and the petition was dismissed on Kellum's motion on August 24, 2017.

On October 2, 2017, Kellum filed a motion for relief from judgment under Fed. R. Civ. P. 60(b). This motion contended that the Magistrate Judge incorrectly set out the facts of the underlying case and challenged various alleged findings of the Magistrate Judge with respect to the merits of his case; however, the Report was not adopted as the opinion of the district court, but rather the petition was dismissed on Kellum's own motion, and Kellum showed no basis upon which to set aside the dismissal which he had requested. The Magistrate Judge therefore recommended that Kellum's motion for relief from judgment be denied.

Kellum received a copy of the Report recommending denial of his motion for relief from judgment on November 8, 2017, 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 Report of the Magistrate Judge is correct. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918, 109 S.Ct. 3243 (1989) (where no objections to a Magistrate Judge's Report are filed, the standard of review is "clearly erroneous, abuse of discretion and contrary to law"). It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 21) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the Plaintiff's motion for relief from judgment (docket no. 20) is **DENIED**. Because Kellum's petition was dismissed without prejudice, the denial of his motion for relief from judgment does not preclude him from re-filing his habeas corpus petition at such time as his state remedies are exhausted.

So Ordered and Signed

Jan 10, 2018



Ron Clark, United States District Judge