

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

MICHAEL DAVIS	§	
v.	§	CIVIL ACTION NO. 6:17cv454
DIRECTOR, TDCJ-CID	§	

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

The Petitioner Michael Davis, 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 matter 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.

I. Background

Davis was convicted of possession of a controlled substance on December 7, 2015, receiving a sentence of 20 years in prison. His conviction was affirmed on August 10, 2016, by the Twelfth Judicial District Court of Appeals. *Davis v. State*, slip op. no. 12-15-00315-CR, 2016 WL 4208136 (Tex.App.-Tyler, August 10, 2016, no pet.). Davis did not file a petition for discretionary review.

Instead, Davis previously filed another federal habeas corpus petition challenging this same conviction. *Davis v. Director, TDCJ-CID*, civil action no. 6:16cv232 (E.D. Tex.). An answer has been ordered in that case and the state court records have been filed. That petition remains pending.

II. The Report of the Magistrate Judge and the Petitioner's Objections

After review of the pleadings, the Magistrate Judge issued a Report recommending that Davis' petition for habeas corpus relief be dismissed without prejudice because it duplicates pending litigation. Davis filed objections stating he had been informed that cause no. 6:16cv232 was being

dismissed. He also complains that he cannot get his state appellate attorney to tell him if his appeal is still pending, although he believes that the appeal was affirmed as of August 10, 2016. Davis states that he wants to appeal his case and complains that he was set up so all of his possessions could be sold by a girl whom he thought was good but was the devil, but the court still did not find him innocent.

III. Discussion

As the Magistrate Judge stated, cause no. 6:16cv232 is still pending. No ruling has been made, nor has a Report issued recommending disposition of the case. The Magistrate Judge correctly determined that the present case simply duplicates pending litigation and should be dismissed on that basis. *See Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir. 1993).

Davis is correct that his direct appeal was affirmed on August 10, 2016. The [on-line records of the Texas Court of Criminal Appeals](#) show that Davis did not seek discretionary review of this affirmance, nor has he sought state habeas corpus relief. He has not shown any basis for filing a second habeas corpus petition when he already has one pending. Davis' objections are without merit.

IV. Conclusion

The Court has conducted a careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Petitioner objected. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.") Upon such *de novo* review, the Court has determined that the Report of the Magistrate Judge is correct and the Petitioner's objections are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and the Report of the Magistrate Judge (docket no. 5) 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**. It is further

ORDERED that the Petitioner Michael Davis is **DENIED** a certificate of appealability *sua sponte*. The denial of a certificate of appealability relates only to the dismissal of this case and shall not affect Davis' right to pursue his claims in cause no. 6:16cv232, or to seek relief in the courts of the State of Texas. Finally, it is

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

So **ORDERED** and **SIGNED** this **22** day of **September, 2017**.



Ron Clark, United States District Judge