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## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS LUFKIN DIVISION

WILLIS FLOYD WILEY §

v. § CIVIL ACTION NO. 9:08cv156

DIRECTOR, TDCJ-CID §

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

The Petitioner Willis Floyd Wiley, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of prison disciplinary action taken against him. 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.

On September 5, 2008, the Magistrate Judge issued a Report recommending that the petition be dismissed without prejudice for failure to prosecute or to obey an order of the court. Wiley did not file objections to this Report; instead, he asked that his petition be voluntarily dismissed without prejudice. The Court has reviewed the pleadings and has concluded while the Magistrate Judge's Report was correct, the Petitioner's motion for voluntary dismissal of his petition should be granted. this motion be granted and that the lawsuit be dismissed without prejudice. Carter v. United States, 547 F.2d 258, 259 (5th Cir. 1977) (plaintiff has absolute right to dismiss his complaint under Rule 41(a) prior to the filing of an answer or motion for summary judgment); accord, Thomas v. Phillips, 83 Fed.Appx. 661 (5th Cir., December 17, 2003) (not selected for publication in the Federal Reporter) (available on WESTLAW at 2003 WL 22965565) (citing Carter).

The Court has reviewed the pleadings in this cause, including the Petitioner's motion to dismiss, and the Report of the Magistrate Judge. Upon such review, the Court has concluded that while the Report of the Magistrate Judge is correct, the Petitioner's motion for voluntary dismissal

should be granted. It is accordingly

ORDERED that the Petitioner's motion to dismiss (docket no. 8) is GRANTED and that the above-styled civil action be and hereby is DISMISSED without prejudice on the motion of the Petitioner. Finally, it is

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

So ORDERED and SIGNED this 1 day of December, 2008.

Ron Clark, United States District Judge

Pm Clark