

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL REILLY,

Plaintiff,

v.

Case No: 2:15-cv-487-FtM-29CM

STATE OF FLORIDA,

Defendant.

OPINION AND ORDER

This matter is before the Court on consideration of the Magistrate Judge's Report and Recommendation (Doc. #12), filed July 25, 2016, recommending that plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form) (Doc. #10) be denied and the case be dismissed. Plaintiff filed an Objection to Magistrate Report and Recommendation (Doc. #13) on August 1, 2016.

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); United States v. Powell, 628 F.3d 1254, 1256 (11th Cir. 2010). A 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." 28

U.S.C. § 636(b)(1)(C). See also United States v. Farias-Gonzalez, 556 F.3d 1181, 1184 n.1 (11th Cir. 2009). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." Jeffrey S. v. State Bd. of Educ. of Ga., 896 F.2d 507, 512 (11th Cir. 1990) (quoting H.R. 1609, 94th Cong., § 2 (1976)). The district judge reviews legal conclusions *de novo*, even in the absence of an objection. See Cooper-Houston v. Southern Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994).

The magistrate judge found that plaintiff appeared to meet the indigency requirements of 28 U.S.C. § 1915, but recommended that the Amended Complaint be dismissed as frivolous. The magistrate judge found that plaintiff's assertion that Florida Statute § 843.02 is unconstitutional is contrary to the Fifth Circuit's finding that this specific statute is not unconstitutionally vague on its face, and further found that plaintiff does not have standing to assert that the statute is overbroad because he has suffered no injury in fact and no credible threat of prosecution.

While noting that plaintiff failed to sign the pleading pursuant to Fed. R. Civ. P. 11, in the alternative, the magistrate judge also recommended dismissal of the Amended Complaint because plaintiff failed to adhere to the requirements of Fed. R. Civ. P.

8 and 10, and because he seeks \$2 million in punitive damages despite defendant's Eleventh Amendment immunity from such damages.

Plaintiff objects partly because the State of Florida did not object, however the State of Florida has not yet been served because the Court must first find that plaintiff has a viable pleading before directing service by the U.S. Marshal. Plaintiff also continues to rely on Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) for the proposition that the Florida Statute is overbroad and that it could be retroactively applied at great expense. The Magistrate Judge addressed Broadrick and noted that plaintiff must still establish some injury or threat of specific future harm. A *de novo* review of the Amended Complaint reflects that it is devoid of any factual basis, and simply argues that someone could suffer injury if it is enforced. After a careful and complete review of the findings and recommendations, as well as the record in this case, the Court will accept and adopt the Report and Recommendation of the magistrate judge to dismiss the case, albeit without prejudice, and overrule the objection.


Accordingly, it is now

ORDERED:

1. The Report and Recommendation (Doc. #12) is hereby **ACCEPTED and ADOPTED** and the findings incorporated herein.

2. Plaintiff's Objection to Magistrate Report and Recommendation (Doc. #13) is **overruled**.
3. Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form) is **DENIED**.
4. The Clerk shall enter judgment dismissing the case without prejudice, terminate all pending motions and deadlines, and close the file.

DONE and ORDERED at Fort Myers, Florida, this 11th day of August, 2016.



JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
All Parties of Record