

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

JAMES ANDREW STARKEY,

Plaintiff,

v.

Case No. 6:16-cv-4-Orl-37DAB

UNITED STATES DEPARTMENT OF
TREASURY; and STATE OF FLORIDA,

Defendants.

ORDER

This cause is before the Court on:

- (1) U.S. Magistrate Judge David A. Baker's Report and Recommendation (Doc. 23), filed July 15, 2016; and
- (2) Plaintiff's Objections to Report and Recommendation of U.S. Magistrate Judge Concerning the Third Amended Complaint of Plaintiff (Doc. 27), filed July 28, 2016.

Pro se Plaintiff James Andrew Starkey initiated this action on January 4, 2016. (Doc. 1.) The Court previously dismissed the first three iterations of Plaintiff's complaint. (Docs. 1, 8, 16; *see also* Docs. 4, 15, 17.) As such, the current operative pleading is the fourth iteration of Plaintiff's complaint (Doc. 20 ("**Fourth Complaint**")), which the Undersigned referred to U.S. Magistrate Judge David A. Baker for frivolity review pursuant to 28 U.S.C. § 1915A (*see* Doc. 22).

On July 15, 2016, Magistrate Judge Baker issued a report: (1) concluding that Plaintiff seeks habeas corpus relief in the Fourth Complaint; and (2) recommending that the Court dismiss the case without prejudice so Plaintiff may seek authorization to file a

successive habeas petition from the U.S. Court of Appeals for the Eleventh Circuit.¹ (Doc. 23 (“**R&R**”).) Plaintiff objects on the ground that: (1) he seeks relief under the Federal Tort Claims Act (“**FTCA**”), not habeas relief; and (2) Magistrate Judge Baker showed “disinterest in Plaintiff’s position and a preference for Plaintiff’s opponents” by failing to consider the claims in the three previously dismissed iterations of the complaint. (Doc. 27 (“**Objections**”).)

When a party objects to a magistrate judge’s findings, the district court must “make a de novo determination of those portions of the report . . . to which objection is made.” 28 U.S.C. § 636(b)(1). The district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” *Id.* The district court must consider the record and factual issues based on the record independent of the magistrate judge’s report. *Ernest S. ex rel. Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 513 (11th Cir. 1990).

Upon consideration of the Fourth Complaint, the Court agrees with Magistrate Judge Baker’s conclusion that Plaintiff seeks habeas relief pursuant to 28 U.S.C. § 2254. (See Doc. 20, pp. 4–6.) Section 2254 provides that a district court “shall entertain an application for writ of habeas corpus . . . on the ground that [a prisoner] is in custody in violation of the [U.S.] Constitution or laws” Plaintiff’s contention that he is unlawfully incarcerated and his request that the Court vacate the criminal judgment and release him from incarceration fall squarely within the bounds of a § 2254 petition; his attempt to couch his allegations as claims for relief pursuant to the FTCA is not well-taken. Moreover,

¹ Plaintiff already unsuccessfully sought habeas relief on two different occasions. See Case Nos. 6:14-cv-1205-41KRS and 6:15-cv-1797-41KRS. As such, he must seek leave from the Eleventh Circuit prior to filing another habeas petition. See 28 U.S.C. § 2244(b)(3)(A).

because the first three iterations of the complaint have been dismissed, Magistrate Judge Baker was not required to consider them; indeed, the Fourth Complaint is the operative complaint.


In any event, to the extent that Plaintiff arguably seeks relief pursuant to the FTCA as maintained in his objections, the Fourth Complaint is due to be dismissed pursuant to 28 U.S.C. § 1915A for failure to state a claim.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

- (1) Plaintiff's Objections to Report and Recommendation of U.S. Magistrate Judge Concerning the Third Amended Complaint of Plaintiff (Doc. 27) are **OVERRULED**.
- (2) U.S. Magistrate Judge David A. Baker's Report and Recommendation (Doc. 23) is **ADOPTED AND CONFIRMED**.
- (3) This case is **DISMISSED WITHOUT PREJUDICE**.
- (4) The Clerk is **DIRECTED** to terminate any pending motions and deadlines and to close the case.
- (5) The Clerk is also **DIRECTED** to send Plaintiff an "Application for Leave to File a Second or Successive Habeas Corpus Petition 28 U.S.C. § 2254 by a Prisoner in State Custody" form in the event that Plaintiff wishes to seek further habeas relief.

DONE AND ORDERED in Chambers in Orlando, Florida, on August 1, 2016.




ROY B. DALTON JR.
United States District Judge

Copies:

Counsel of Record

Pro se Party