

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Stefen E. Harris,)	
)	
Petitioner,)	C.A. No. 0:16-858-HMH-PJG
)	
vs.)	OPINION & ORDER
)	
David Dunlap, Warden,)	
)	
Respondent.)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Paige J. Gossett, made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 of the District of South Carolina.¹ Stefen E. Harris (“Harris”) is a state prisoner seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. In her Report and Recommendation, Magistrate Judge Gossett recommends summarily dismissing the petition without prejudice and without requiring the Respondent to file a return, unless Harris files an amended petition under 28 U.S.C. § 2241 within fourteen days of the date of the Report and Recommendation.

On May 31, 2016, Harris filed a motion to amend his petition “pursuant to . . . § 2241 to attack the execution of his sentence.” (Mot. Amend 1, ECF No. 16.) In addition, Harris filed objections to the Report and Recommendation in which he argues that his § 2254 petition is not a second or successive petition. Harris has had a prior § 2254 petition challenging his convictions.

¹ The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. *See Mathews v. Weber*, 423 U.S. 261, 270 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

Harris v. State of S.C., C/A No. 9:01-3994. Therefore, the § 2254 petition is successive and he has not obtained authorization from the United States Court of Appeals for the Fourth Circuit to file a successive petition. 28 U.S.C. § 2244(b); In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997). Thus, Harris's § 2254 petition is subject to dismissal. However, the court grants Harris's motion to amend his petition to file a § 2241 petition and this matter is recommitted to the magistrate judge for further consideration. Further, the court adopts the Report and Recommendation to the extent it is consistent with this order.

It is therefore

ORDERED that Harris's § 2254 claim is dismissed without prejudice and without requiring the Respondent to file a return. It is further

ORDERED that with respect to his § 2254 claim, a certificate of appealability is denied because Harris has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). It is further

ORDERED that Harris's motion to amend, docket number 16, is granted and this matter is recommitted to the magistrate judge for further consideration.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
June 6, 2016