

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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Cecilio Benitez,

Plaintiff,

vs.

Office Hollowell, et. al.,

Defendants.

Civil Action No. 2:10-cv-00066-RMG-P 2:43

ORDER

Plaintiff filed this *pro se* 1983 action alleging that Defendants violated his civil rights in connection with his conviction. Plaintiff is an inmate at the MacDougall Correctional Institution. Plaintiff is proceeding *in forma pauperis* pursuant to 28 U.S.C. § 1915. The Magistrate recommended dismissing Plaintiff's claims without prejudice and without service of process. (Dkt. No. 14). Plaintiff has not objected to the R&R. As shown herein, this Court has reviewed the Record for any errors of law and agrees with the Magistrate's report and adopts it as the order of this Court.

Law/Analysis


The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report and Recommendation of the Magistrate Judge to which a 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 to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

As addressed in the R&R, there are legal barriers to Plaintiff's claims. Since Plaintiff is challenging criminal proceedings that resulted in his conviction, his case is subject to summary dismissal because a right of action has not accrued. *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, until Plaintiff's conviction is set aside, any civil rights action based on the proceedings, conviction, and/or sentence is barred as the limitation period for any action will not run until the action accrues. Further, Defendant Assistant Solicitor McDonald is entitled to dismissal as she protected by prosecutorial immunity and has absolute immunity from suit arising in connection with her duties. See *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009).

Conclusion

Accordingly, the Complaint is **dismissed** without prejudice and without issuance of service of process.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

January Y, 2011
Charleston, South Carolina