

Phillip A. Hansen, #192632,) Civil Action No. 6:13-1059-RMG
)
Petitioner,)
)
vs.) **ORDER**
)
Hansen v. Warden Wateree River Correctional Institution)
Warden, Wateree River Correctional)
Institution,)
)
Respondent.)
)

Doc. 12

This matter is before the Court on the Report and Recommendation (“R&R”) of the Magistrate Judge recommending that this Court deny Petitioner’s petition for a writ of mandamus. (Dkt. No. 8). For the reasons set forth below, the Court agrees with and adopts the R&R as the order of the Court.

Background

Petitioner is currently an inmate at the Wateree River Correctional Institution of the South Carolina Department of Corrections serving a fifteen-year sentence following his conviction for first-degree burglary. Petitioner previously filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In that matter, the Court ultimately adopted the R&R of the Magistrate Judge granting summary judgment to the Respondent and denying a certificate of appealability. (Dkt. No. 42 in C.A. No. 6:11-2670-RMG). Petitioner subsequently filed this *pro se* petition for writ of mandamus with respect to his prior § 2254 petition to include an additional ground relating to the search warrant that was issued in his criminal case. (Dkt. No. 1). In his prayer for relief, Petitioner is seeking a hearing in his closed habeas action and an order “to free” Petitioner from “his unconstitutional confinement.” (Dkt. No. 1 at 3). In accordance with 28 U.S.C.

§ 636(b) and Local Civil Rule 73.02(B)(2) DSC, this matter was referred to a Magistrate Judge for all pretrial proceedings. The Magistrate Judge then issued an R&R recommending the Court dismiss the present action without prejudice. (Dkt. No. 8). Petitioner has not filed any objections to the R&R.

Legal Standard

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a de novo determination of those portions of the R&R to which specific objection is made. Additionally, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate judge with instructions.” *Id.*

Under 28 U.S.C. § 1915(e)(2)(B), the court shall dismiss a prisoner’s action if it determines that the action: “(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.”

In reviewing these pleadings, the Court is mindful of Plaintiff’s *pro se* status. This Court is charged with liberally construing the pleadings of a *pro se* litigant. *See, e.g., De’Lonta v. Angelone*, 330 F.3d 630, 633 (4th Cir. 2003). The requirement of a liberal construction does not mean, however, that the Court can ignore a plaintiff’s clear failure to allege facts that set forth a cognizable claim, or that a court must assume the existence of a genuine issue of material fact where none exists. *See United States v. Wilson*, 699 F.3d 789, 797 (4th Cir. 2012).

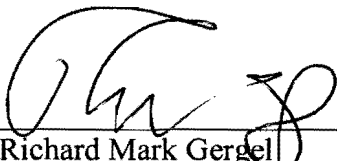
Law/Analysis

After review of the record and R&R, the Court finds the Magistrate Judge applied sound legal principles to the facts of this case and therefore agrees with and wholly adopts the R&R as the order of the Court. (Dkt. No. 8). The Magistrate Judge properly found that the Court cannot issue a writ of mandamus against a state official, *Gurley v. Superior Court of Mecklenburg Cnty.*, 411 F.2d 586, 587-88 (4th Cir. 1969), and that a petition for a writ of mandamus directed at a district court must be filed with a higher federal court, *Rochester v. Roberts*, C.A. No. 6:12-586-RBH-KFM, 2012 WL 2803754, at *3 (D.S.C. Apr. 2, 2012), *recommendation adopted by* 2012 WL 2808205. Finally, the Court agrees that before Petitioner may file a second or successive application for relief under § 2254, he must first obtain authorization by a panel of the Fourth Circuit Court of Appeals. 28 U.S.C. § 2244.

Conclusion

For the reasons set forth above, the Court agrees with and adopts the Magistrate Judge's R&R as the order of the Court. (Dkt. No. 8). Accordingly, Petitioner's mandamus petition (Dkt. No. 1) is **DISMISSED** without prejudice and without requiring Respondent to file an answer or other response.

AND IT IS SO ORDERED.


Richard Mark Gergel
United States District Court Judge

May 20, 2013
Charleston, South Carolina