

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

KENNETH MIKOLON,

Plaintiff,

v.

Civil Action No. 5:11CV20
(STAMP)

UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Background

On February 8, 2011, the pro se¹ petitioner initiated this habeas corpus action pursuant to 28 U.S.C. § 2241, which challenges a detainer lodged against him by the United States Marshals Service. The detainer stems from charges filed against the petitioner in the United States District Court for the District of New Mexico.

Pursuant to Local Rule of Prisoner Litigation Procedure 2, United States Magistrate Judge John S. Kaull made a preliminary review of the petition and ordered the respondent to show cause why the writ should not be granted. On March 31, 2011, the United States filed a motion for an enlargement of time to respond to the plaintiff's § 2241 application, which the magistrate judge granted. Subsequently, the petitioner filed a response to the respondent's

¹Pro se describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1341 (9th ed. 2009).

motion for enlargement of time and motion for summary judgment. In support of this motion, the petitioner contends that the United States has failed to show good cause for extending the time to respond and requests that the motion be denied. Moreover, he argues that because the United States has failed to show good cause for an extension of time, he has proven that the respondent does not have the necessary facts to support the issuance of the detainer; therefore, he is entitled to summary judgment.

Magistrate Judge Kaull submitted a report and recommendation on the petitioner's motion for summary judgment on April 8, 2011. The magistrate judge advised the parties that, pursuant to 28 U.S.C. § 636(b)(1)(C), any party may file written objections to his proposed findings and recommendations within fourteen (14) days after being served with a copy of the magistrate judge's recommendation. Neither the petitioner nor the respondent filed objections. For the reasons set forth below, this Court finds that the report and recommendation of the magistrate judge should be affirmed and adopted in its entirety.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. However, failure to file objections to the magistrate judge's proposed findings and recommendations permits the district court to review the recommendation under the standards that the district court believes

are appropriate and, under these circumstances, the parties' right to de novo review is waived. See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Accordingly, this Court reviews the report and recommendation of the magistrate judge for clear error.

III. Discussion

The petitioner's response to the respondent's motion for enlargement of time and motion for summary judgment, filed the same day as the magistrate judge's order granting the motion for an enlargement of time, requests that the court deny the motion because the United States has not demonstrated excusable neglect nor shown good cause for granting the motion. However, this Court finds no clear error in the magistrate judge's ruling that the petitioner's response provides no information that undermines the assessment and order regarding the motion for an enlargement of time.

The petitioner also asks the court to grant summary judgment, despite the fact that the government has not yet filed a response to the § 2241 petition.² Because the United States has yet to file a response, the magistrate judge appropriately concluded that at this time, it is not clear whether there are any genuine issues of material fact with respect to the petitioner's claims. See Fed. R. Civ. P. 56(c). This Court agrees that a response to the petition is necessary to determine the merits of the petitioner's claims and

²The government's response is due on June 1, 2011.

that the petitioner's motion for summary judgment is premature and must be denied.

IV. Conclusion

Because the parties have not objected to the report and recommendation of the magistrate judge, and because this Court finds that the magistrate judge's recommendation is not clearly erroneous, the ruling of the magistrate judge is hereby ADOPTED and AFFIRMED in its entirety. Accordingly, for the reasons set forth above, the petitioner's motion for summary judgment is DENIED WITHOUT PREJUDICE as premature.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to counsel of record herein.

DATED: April 29, 2011

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE