UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LEE ROY J. STANSBERRY, Petitioner, vs. ALASKA COURT SYSTEM, et al Defendant.	A05-027 CV (JKS) **RECOMMENDATION REGARDING SUMMARY DISMISSAL and MOTION TO VACATE BRIEFING SCHEDULE** (Docket No. 26, 27)

This cause comes before the court for consideration of Petitioner's *Anders*[1] Brief and the respondent's motion to rule that the petitioner has not filed any non frivolous habeas claims in his petition. *See* Appointed Counsel's Anders Brief, Docket No. 23 and Respondent's reply at Docket No. 26. Having reviewed the

[1] Anders v. California, 386 U.S. 738 (1967).

record, the magistrate judge recommends that the habeas action be dismissed without prejudice.

Background

Pursuant to an Order permitting amending the habeas petition, Docket No. 2, Petitioner Lee Roy Stansberry filed pro se on March 22, 2005, a Petition for Writ of Habeas Corpus. Docket No. 3. Thereafter the court directed service and response from the respondent and granted Stansberry's application for appointment of counsel. Docket No. 7. Mary Geddes, Assistant Federal Public Defender entered an appearance as counsel for petitioner. Docket No. 8.

Ms. Geddes requested additional time to file an amended petition. Docket No. 10. In a status report Ms. Geddes indicated that Stansberry's complaint concerned either or both a case which was the subject of a State court appeal or a case which was a pretrial criminal matter. In light of that she requested additional time to confer with Mr. Stansberry about his interest in pursuing an action under 28 U.S.C. § 2254. *See* Docket No. 10. Ms. Geddes also filed a motion to convert the petition under 28 U.S.C. § 2254 to a petition under 28 U.S.C. § 2241. Docket No. 12. She then filed a motion to withdraw that application and a motion to withdraw from representation. Docket No. 13.

Mr. Mark D. Osterman was appointed to represent petitioner. *See* Notice of Appearance, Docket No. 16. The court set a scheduling conference but

Mr. Stansberry declined to participate telephonically. *See* Minutes of Proceedings, Docket No. 19. Petitioner was granted until July 15, 2005 to file an amended petition. Mr. Stansberry filed his own affidavit addressing in part the right to be heard as well as other unrelated matters (such as a disciplinary hearing). His document appears to be a copy of original documents and is in part illegible and/or unintelligible.

Following the Minute Order that addressed that motion Mr. Stansberry filed a motion requesting the court to sanction and fine "the attorneys and their law offices" for violation of his constitutional rights. *See* Docket No. 22. The motion requested the court to appoint Stansberry an attorney "that specializes in civil cases."

Mr. Osterman, Stansberry's court-appointed attorney filed a pleading styled "Appointed Counsels *Anders* Brief." Docket No. 23. The "*Anders* Brief" describes a number of issues Mr. Osterman discussed with Stansberry and concludes that the issues alleged by Stansberry are frivolous. The brief includes case authority and a discussion concluding that no issues are presently ripe for adjudication and that under the present circumstances the court should dismiss the claim without prejudice to allow Mr. Stansberry to exhaust his claims in State Court. The respondent submitted a response to the *Anders* brief concluding that the federal

court lacks jurisdiction to hear any claim outlined by Mr. Osterman in his *Anders* Brief. *See* Docket No. 26.

Discussion

Under 28 U.S.C. § 2243 the court has a duty to screen out frivolous applications and eliminate the burden that would be placed on a respondent by ordering an unnecessary answer. Allen v. Perini, 424 F.2d 134, 141 (6th Cir. 1970). By the same token the court has a similar duty not to require unnecessary briefing by a respondent. Rule 4 of the Federal Rules Governing Section 2254 cases in the U.S. District Courts authorizes the judge to "take such other action as the judge deems appropriate." In addition to screening out frivolous cases the court has flexibility in a case where summary dismissal is warranted.

Mr. Stansberry's complaints appear to assert matters belonging either in State Court post-conviction criminal proceedings, or in a non-habeas civil action. Each of his allegations have been adequately addressed in his attorney's brief. With respect to his claims being considered for habeas review, the amended petition fails to state a non-frivolous claim that has not been appropriately exhausted in the State Courts as required by 28 U.S.C. § 2254(b)(1). Accordingly, the briefing scheduled issued pursuant to Docket No. 19 is hereby vacated and the magistrate judge recommends that the Petition be dismissed without prejudice.

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DATED this 9th day of November, 2005, at Anchorage, Alaska.

/s/
JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to D.Ak.L.M.R. 6(a), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than **NOON, Monday, November 21, 2005**, to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation United States v. Howell, 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **NOON, Monday, November 28, 2005**. The parties shall otherwise comply with provisions of D.Ak.L.M.R. 6(a).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).