UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Garrin David Smith, #11304-171 *aka Garrett Don Smith*, Petitioner, vs. United States, Respondent.	**C/A No. 6:07-1793-GRA-WMC** **Report and Recommendation**

A document captioned "RULE 12(b)(2)(6) WRIT OF HABEAS CORPUS AD SUBJICIENDUM § 2241 RULE 60(b)(1), (2), (3), (4)" that is being treated as a Petition for Writ of Mandamus filed pursuant to 28 U.S.C. § 1651 has been submitted to the Court *pro se* by a federal prison inmate.[1] In September 2004, Petitioner (or someone with a very similar name and alias) pled guilty in this Court to conspiracy to possess with intent to distribute methamphetamine and ecstacy. In April 2005, he was sentenced to 135 months imprisonment, but no direct appeal was immediately taken. *U.S. v. Smith*, Criminal Action No. 6:04-cr-466-GRA. A timely *pro se* § 2255 motion was filed on October 13, 2005 and, on January 18, 2006, a belated direct appeal was granted when this Court vacated and then re-entered the conviction and sentence so as to permit the filing of a timely appeal. *Smith v. USA*, Civil Action No. 6:05-2932-GRA (Entry 6). That decision by this Court –

[1]Pursuant to 28 U.S.C. §636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review all pretrial matters in such *pro se* cases and to submit findings and recommendations to the District Court. *See* 28 U.S.C. § § 1915(e); 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal).

which was based on a claim of ineffective assistance of counsel – was affirmed as modified on October 12, 2006.[2] *U.S. v. Smith*, 205 Fed.Appx. 156 (4th Cir. Oct. 12, 2006)(No. 06-6175). Petitioner's appointed legal counsel filed an *Anders* brief in the Fourth Circuit Court of Appeal, asserting only that there might have been inadequacies in the guilty plea colloquy. None of the other issues presented in the initial § 2255 motion was raised by counsel in the direct appeal. The conviction/sentence was affirmed on October 31, 2006, and the mandate was issued on November 22, 2006. *USA v. Smith*, 204 Fed.Appx. 298 (4th Cir. Oct. 31, 2006)(No. 06-4103).

The crux of the Petition filed in this case is that Petitioner now claims that he is not the person who was convicted because he has a different, though similar, name to the person who was named in the federal indictment. He claims that his appointed counsel was ineffective for failing to discover the identity problem, and that the United States Attorney who prosecuted him committed numerous torts (abuse of process, civil conspiracy, defamation, fraud, malicious prosecution, etc.) against him. This appears to be the first time this claim of improper identity of the criminal defendant has been raised by this prisoner.[3]

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[2]The sentencing issues that Petitioner had raised in his § 2255 motion had been "dismissed" by this Court. The Fourth Circuit directed that said dismissal was "without prejudice" so as to allow Petitioner to raise them in his direct appeal. As previously stated, Petitioner's appointed counsel did not include those points in his *Anders* brief to the Fourth Circuit.

[3]It is noted that a review of the contents of the docket of his criminal and initial § 2255 cases discloses that the plea agreement and some other documents prepared by the Government (US Attorney/Probation) list the current name the Petitioner is using: "Garrin Smith," as an alias. In fact, Petitioner's own *pro se* § 2255 motion has the following name for the "Petitioner" in the caption: "Garrett Smith aka Garrin Smith."

In an attempt to liberally construe Petitioner's *pro se* pleading, the initial pleading filed in this case has been construed as a Petition for Writ of Mandamus. This is an appropriate construction because Petitioner seeks to have this Court decide that he is not the person who was convicted before this Court and to then order the Federal Bureau of Prisons (BOP) to release him from confinement. Additionally, he seeks an order, also apparently to BOP, that "all records containing [Petitioner's] signature, fingerprints, photos, and/or any other form of identification be disclosed or concealed from Public affairs or interest." (Entry 1, Pet. 8). *See Black's Law Dictionary* (8th ed. 2004)(mandamus is defined as "A writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly."). However, another equally reasonable construction of the initial pleading is as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Regardless of which construction is adopted, as shown below, the initial pleading filed in this case is frivolous and subject to summary dismissal without service on Respondent.

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Petition filed in this case. The review was conducted pursuant to the procedural provisions of 28 U.S.C. §§ 1915, 1915A, and the Anti-Terrorism and Effective Death Penalty Act of 1996, and in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979).

This Court is required to construe *pro se* petitions liberally. Such *pro se* petitions are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, __ U.S. __, __ S. Ct. __, __ L.Ed.2d __, 2007 WL 1582936 (2007); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Cruz v. Beto*, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* petition the petitioner's allegations are assumed to be true. *Fine v. City of N.Y.*, 529 F.2d 70, 74 (2d Cir. 1975). The requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Social Servs.*, 901 F.2d 387 (4th Cir. 1990). However, even under this less stringent standard, the Petition submitted in this case is subject to summary dismissal because neither mandamus nor § 2241 is the proper remedy for the problems Petitioner alleges. Moreover, Petitioner has an available and adequate remedy by way of a timely, non-successive motion to vacate his conviction and sentence under 28 U.S.C. § 2255 which he has yet to pursue.

It is well settled that a writ of mandamus is a drastic remedy which is used by courts only in "exceptional circumstances." The writ is infrequently used by federal courts, and its use is usually limited to cases where a federal court is acting in aid of its own jurisdiction. *See* 28 U.S.C. § 1361; *Gurley v. Super. Ct. of Mecklenburg County*, 411 F.2d 586, 587-88 & nn. 2-4 (4th Cir. 1969). The United States Supreme Court has discussed the extraordinary nature of the mandamus writ and the fact that only in exceptional circumstances may it be issued as follows:

> In order to insure that the writ will issue only in extraordinary circumstances this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *ibid.*; *Roche v. Evaporated Milk Assn.*, *supra,* 319 U.S., at 26, 63 S.Ct., at 941, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland*, *supra*, 346 U.S., at 384, 74 S.Ct., at 148, *quoting United States v. Duell*, 172 U.S. 576, 582, 19 S.Ct. 286, 287, 43 L.Ed. 559 (1899). In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, hardly ever!"

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35-36 (1980)(emphasis added).

The Fourth Circuit also emphasizes that the availability of an alternative remedy is central to the consideration of whether the case is exceptional enough to warrant issuance of a writ of mandamus. That court has held that where there is an alternate way for the petitioner to obtain the relief he desires, mandamus will not lie. *See Pet. of Int'l Precious Metals Corp.*, 917 F.2d 792 (4th Cir. 1990); *Chatman-Bey v. Thornburgh*, 864 F.2d 804 (D.C. Cir. 1988)(prisoner dissatisfied with his projected release date not entitled to mandamus; available remedy under 28 U.S.C. § 2241. Furthermore, the duties claimed to be owed by the officer or employee of the United States must be "plainly defined and peremptory" in order for mandamus to issue to compel the performance of such duty. *See U. S. v. Helvering*, 301 U.S. 540 (1937).

Since Petitioner's conviction and sentence did not become final until the date of the issuance of the mandate in the direct appeal: November 22, 2006, *see U.S. v. Prescott*, 221 F.3d 686, 687 (4th Cir. 2000), he is currently still within the one-year limitation period applicable to 28 U.S.C. § 2255. As a result, he can still file a timely, non-successive motion to vacate his conviction and/or sentence should he desire to attack the underlying

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