

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

PHILLIP RAY HARKLESS :  
(AIS #266580) :  
 :  
Plaintiff, :  
vs. : CIVIL ACTION 11-00570-CB-M  
 :  
DEBORAH TONEY, et al., :  
 :  
Defendants.

ORDER

This matter is before the Court on Plaintiff's "Statement of Objection and Request for Leave to Amend the Complaint." (Doc. 19.) Plaintiff objects to the Magistrate Judge's recommendation (Doc. 11) that this action be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(b).<sup>1</sup> Plaintiff's objection addresses only his deliberate indifference/denial of medical care claim, one of several claims subject to dismissal. As the Magistrate Judge pointed out, the facts asserted by Plaintiff's deliberate indifference/denial of medical care claim is negated by Plaintiff's own allegations. Plaintiff received medical care, just not the treatment he desired in the time frame he believed to be appropriate. Plaintiff's objection does not alter this fact. Plaintiff also seeks leave to amend his complaint but has failed to file a proposed amended complaint as specifically directed by the Magistrate Judge.

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<sup>1</sup>Plaintiff's objection is based, in part, on the Defendants' failure to serve him with a motion to dismiss. That argument is without merit because no motion to dismiss was filed. Section 1915(e)(2)(B) specifically permits dismissal of a complaint on frivolity grounds prior to service and without a motion to dismiss.

Moreover, because nothing in Plaintiff's objection cures the deficiencies pointed out in the Report and Recommendation, amendment would be futile.

Therefore, after due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, the Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636 (b)(1)(B) is **ADOPTED** as the opinion of this Court. It is **ORDERED** that Plaintiff's complaint be and is hereby **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted.

The Clerk is DIRECTED to send to the Commissioner of the Alabama Department of Corrections a copy of the Report and Recommendation recommending the dismissal of this action, of this Order adopting the Report and Recommendation, and of the Judgment dismissing this action.

**DONE** this 29<sup>th</sup> day of May, 2012.

s/Charles R. Butler, Jr.  
SENIOR UNITED STATES DISTRICT JUDGE

