

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

DERIC LAVELLE MAY, #209534 :  
**Plaintiff,** :  
vs. : **CIVIL ACTION 13-0237-CB-C**  
**PAMELA BARBER, et al.,** :  
**Defendants.** :

**ORDER**

Plaintiff has filed an objection (Doc. 9) to the Magistrate Judge's Report and Recommendation (Doc. 6) recommending that this action be dismissed as malicious pursuant to 28 U.S.C. §§ 1915A(b)(1) & 1915(e)(2)(B)(i). The Magistrate Judge found the action to be malicious because Plaintiff failed to list at least two prior lawsuits dealing with the same or similar facts from the information portion his complaint. Plaintiff argues that the action should not be dismissed for two reasons. First, he contends that he should have been given an opportunity to amend his complaint. However, § 1915(e)(2)(B)(i) states that "the court *shall* dismiss the case at any time if the court determines that the action ... is frivolous or malicious." The statute's failure to provide an opportunity to amend has been upheld against constitutional challenges. *See Vanderberg v. Donaldson*, 259 F.3d 1321 (11<sup>th</sup> Cir. 2001) (rejecting equal protection and due process challenges). Plaintiff also argues that dismissal should not be permitted because he is in imminent danger of serious physical injury due to his medical condition. The "imminent physical danger" exception only applies to actions subject to dismissal under §1915(g), commonly known as the "three strikes" provision. The Magistrate Judge did not invoke § 1915(g) or the three strikes provision as a basis for dismissal. Consequently, the "imminent physical danger" exception does not apply.

Therefore, after due and proper consideration of all the issues raised, and a *de novo* determination of those portions of the recommendation to which objection is made, the recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) and dated June 19, 2013 is ADOPTED as the opinion of this Court.

**DONE this 22nd day of July, 2013.**

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