

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01709-BNB

SHANE McMILLAN,

Plaintiff,

v.

WILEY,  
FOX,  
JONES,  
JAVERNIK,  
COLLINS,  
FENLON,  
MADISON,  
NALLEY,  
WATTS,  
LAPPIN,  
DAVIS, and  
BUREAU OF PRISONS,

Defendants.

**FILED**  
UNITED STATES DISTRICT COURT  
DENVER, COLORADO

FEB 09 2010

GREGORY C. LANGHAM  
CLERK

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ORDER TO DISMISS IN PART AND TO DRAW CASE  
TO A DISTRICT JUDGE AND TO A MAGISTRATE JUDGE

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Plaintiff, Shane McMillan, is a prisoner in the custody of the United States Bureau of Prisons (BOP) at the United States Penitentiary, Administrative Maximum, in Florence, Colorado. Mr. McMillan has filed a *pro se* Second Amended Prisoner Complaint pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

The Court must construe the Second Amended Prisoner Complaint liberally because Mr. McMillan is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Mr. McMillan asserts two claims in the second amended complaint. First, he alleges that all named Defendants have violated his rights pursuant to the Fifth and Eighth Amendments, because he has been placed in solitary confinement since 2007 without receiving any due process prior to his placement. Second Amended Complaint at 4-6. He alleges that the Defendants have created, or participated in, BOP policies that allow for the placement of inmates in units that are labeled “general population,” but that actually replicate the conditions of the “control unit,” i.e., allow for total isolation and little access to the outdoors or other prison programs. *Id.* at 6-12. Mr. McMillan alleges that inmates placed in the “control unit” receive due process hearings prior to their placement, but that inmates placed in the sham “general population” units do not receive hearings. *Id.* He further alleges that this policy has allowed Defendants to place him in solitary confinement for an indefinite amount of time without any due process protections in place. *Id.* In his second claim, Mr. McMillan asserts that the named Defendants have engaged in a conspiracy to violate his constitutional rights by instituting the BOP policies that have placed him in solitary confinement. *Id.* at 13-15.

Mr. McMillan’s claims raise issues that are not appropriate for summary dismissal. Therefore, this case will be drawn to a district judge and to a magistrate judge.

However, Mr. McMillan may not sue the Federal Bureau of Prisons in a *Bivens* action. The United States, as sovereign, is immune from suit unless it expressly


consents to be sued. **United States v. Testan**, 424 U.S. 392, 399 (1976); **Bivens**, 403 U.S. at 410; **Ascot Dinner Theatre, Ltd. v. Small Business Admin.**, 887 F.2d 1024, 1027 (10th Cir. 1989). Accordingly, the Federal Bureau of Prisons will be dismissed as party to this action. It is

ORDERED that Defendant Bureau of Prisons is dismissed as parties to this action because it is immune from suit. The Clerk of the Court is instructed to remove Defendant Bureau of Prisons as a named party to the suit. It is

FURTHER ORDERED that this case shall be drawn to a district judge and to a magistrate judge.

DATED at Denver, Colorado, this 5<sup>th</sup> day of February, 2010.

BY THE COURT:

Handwritten signature of Philip A. Brimmer in black ink, written over a horizontal line. The signature is cursive and includes the word "for" at the end.

PHILIP A. BRIMMER  
United States District Judge, for  
ZITA LEESON WEINSHIENK, Senior Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

**CERTIFICATE OF MAILING**

Civil Action No. 09-cv-01709-BNB

Shane McMillan  
Reg. No. 07580-091  
ADX – Florence  
PO Box 8500  
Florence, CO 81226

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 2/9/10

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk