UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION NO. 5:09CV-P191-R

CECIL ROARK, II,
        PLAINTIFF,

v.

CRITTENDEN COUNTY DETENTION CENTER,
        DEFENDANT.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Amend, Alter or Vacate (DN 10).

It is well known that *pro se* litigants are to be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, a court should not "deliberately . . . override the *pro se* litigant's choice of procedural vehicle for his claim." *Castro v. United States*, 540 U.S. 375, 385 (2003) (Scalia, J., concurring). A court should not reconstruct a pleading in any situation "where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention." *Id.* In this case, Roark clearly stated that "[he plans] a [§ 1983 claim] if [he] can make it out of here to where I can use a legal library." *Complaint*, 5:09-cv-191, DN 1, pg. 5. This evidenced a deliberate procedural choice to file a complaint at some later time. By recharacterizing the letter as a complaint, considerable harm has been done to the Plaintiff, as the government is now arguing for *res judicata*. Such is exactly the situation that Justice Scalia feared when he wrote his concurrence in *Castro*, and this situation demands the equitable relief of changing the prior dismissal to one without prejudice.

Additionally, there has always been a preference to resolve disputes on the merits rather

than procedural shortcomings. *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990). If a dismissal with prejudice is granted, Plaintiff will have *res judicata* applied to his claim despite the fact that the claim was never addressed on the merits. Such an inequity, especially when propagated by this Court, cannot stand. Accordingly, the Motion to Amend, Alter, or Vacate is DENIED. The previous order dismissing this case WITHOUT PREJUDICE will stand.

IT IS SO ORDERED.