

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CHAD AARON GEPHART,

Cause No. CV-07-167-BLG-RFC-CSO

Plaintiff,

vs.

GEORGIA BRESTER (Head Jailer) and
UNKNOWN OFFICER (Police),

**FINDINGS AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE TO DISMISS COMPLAINT**

Defendants.

This matter is before the Court on Plaintiff Chad Aaron Gephart's Complaint filed pursuant to [42 U.S.C. § 1983](#). Plaintiff was a prisoner at the time he filed his Complaint. According to the Department of Corrections website, Plaintiff is now on probation and under the supervision of the Sidney Probation and Parole Office. Plaintiff was granted leave to proceed in forma pauperis.

On August 28, 2008, the Court permitted Plaintiff to file an Amended Complaint on or before September 30, 2008. Plaintiff was advised that if he failed to file an Amended Complaint, the Court would recommend that his initial Complaint be dismissed for failure to state a claim.

The Court's Order was returned in the mail on September 10, 2008. On September 16, 2008, the Court again sent the Order to Amend to Plaintiff in care of the

Sidney Probation and Parole. That document was not returned. However, Plaintiff has failed to file an Amended Complaint.

For the reasons set forth in the Court's August 28, 2008, Order (Court's Doc. No. 6), Plaintiff's Complaint fails to state a claim upon which relief may be granted. The Court previously provided plaintiff with an opportunity to amend along with the applicable legal standards, but plaintiff declined to do so. Accordingly, the Court will recommend that this matter be dismissed.

The Prison Litigation Reform Act prohibits prisoners from bringing *forma pauperis* civil actions if the prisoner has brought three or more actions in federal court that were dismissed for frivolousness, maliciousness, or for failure to state a claim. [28 U.S.C. § 1915\(g\)](#). As Plaintiff's allegations fail to state a claim, the Court designates this case as a "strike" under this provision. For this same reason, the Court will certify that any appeal of this matter would not be taken in good faith. That is, the issues raised in this matter are frivolous as set forth against the named Defendants.

Accordingly, the Court issues the following:

RECOMMENDATION

1. Plaintiff's Complaint (Court's Doc. No. 2) should be **DISMISSED WITH PREJUDICE.**
2. The Clerk of Court should be directed to have the docket reflect that this dismissal counts as a strike pursuant to [28 U.S.C. § 1915\(g\)](#) since Plaintiff's allegations fail to state a claim upon which relief may be granted.

3. The Clerk of Court should be directed to have the docket reflect that the Court certifies pursuant to Rule 24(3)(1) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith. Plaintiff's claims are so frivolous that no reasonable person could suppose that an appeal would have merit.

4. The Clerk of Court is directed to serve a copy of this document upon Plaintiff at the address listed on the docket and to Plaintiff in care of the Sidney Probation and Parole Office, 107 2nd Street, SW, PO Box 132, Sidney, MT 59270.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), Plaintiff may serve and file written objections to this Findings and Recommendations within ten (10) business days of the date entered as indicated on the Notice of Electronic Filing. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations."

A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and may waive the right to appeal the District Court's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

DATED this 3rd day of November, 2008.

/s/ Carolyn S. Ostby
Carolyn S. Ostby
United States Magistrate Judge