

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SHERMAN WALKER,

Plaintiff,

v.

**9:08-CV-406
(FJS/DRH)**

**JOHN J. DONELLI; L. JUBERT, DSS;
E. JOCK; D. HOLFORD; and S. LECLAIR,**

Defendants.

APPEARANCES

OF COUNSEL

SHERMAN WALKER

92-A-7141

Bare Hill Correctional Facility

Caller Box 20

Malone, New York 12953

Plaintiff *pro se*

**OFFICE OF THE NEW YORK
STATE ATTORNEY GENERAL**

The Capitol

Albany, New York 12224

Attorneys for Defendants

ADRIENNE J. KERWIN, AAG

SCULLIN, Senior Judge

ORDER

In a Report-Recommendation and Order dated November 21, 2008, Magistrate Judge Homer recommended that this Court grant Defendants' motion to dismiss. *See* Dkt. No. 20. Plaintiff objects to Magistrate Judge Homer's Report-Recommendation and Order on the grounds that he has pled an Eighth Amendment violation and a Fourteenth Amendment Due Process

violation and that Magistrate Judge Homer erred in alternatively finding that Defendants were entitled to qualified immunity. *See* Dkt. No. 21 at 3-6.¹

With respect to Plaintiff's objections regarding his Eighth Amendment and Due Process claims, the Court concludes that Magistrate Judge Homer correctly applied the appropriate law and that Plaintiff's objections regarding these issues are without merit for the reasons stated in the Report-Recommendation and Order.² Therefore, the Court finds that it need not address qualified immunity.

Accordingly, after carefully considering Magistrate Judge Homer's Report-Recommendation and Order, Plaintiff's objections thereto, as well as the applicable law, and for the reasons stated herein and in Magistrate Judge Homer's Report-Recommendation and Order, the Court hereby

ORDERS that Magistrate Judge Homer's November 21, 2008 Report-Recommendation and Order is **ADOPTED** in its entirety; and the Court further

¹ Plaintiff also discusses Magistrate Judge Homer's dismissal of his claims against Defendants in their official capacities pursuant to the Eleventh Amendment. Plaintiff states that he did not intend to sue Defendants in their official capacities and that the Eleventh Amendment does not bar his action. The Court finds that Plaintiff does not actually object to the dismissal of the official capacity claims and has arguably voluntarily withdrawn them in his objections. Accordingly, the Court will dismiss the official capacity claims.

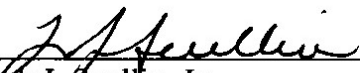
² With respect to Plaintiff's Eighth Amendment claim, the Court notes that *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), provides an additional ground to dismiss this § 1983 claim (in addition to *Heck's* application to Plaintiff's due process claim discussed in the Report-Recommendation and Order) because it implicates the validity of Plaintiff's sentence.

ORDERS that Defendants' motion to dismiss is **GRANTED** and Plaintiff's Complaint is **DISMISSED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment for Defendants and close this case.

IT IS SO ORDERED.

Dated: April 9, 2009
Syracuse, New York



Frederick J. Scullin, Jr.
Senior United States District Court Judge