STOKES v. WETZEL et al Doc. 6 Att. 1

Not Reported in F.Supp.2d, 2009 WL 62175 (M.D.Pa.)

(Cite as: 2009 WL 62175 (M.D.Pa.))

C

Only the Westlaw citation is currently available.
United States District Court,

M.D. Pennsylvania.
Benjamin SMITH, Petitioner,
v.
D. Scott DODRILL, et al., Respondents.
No. 4:07–cv–2295.

Jan. 8, 2009.

West KeySummary **Constitutional Law 92 4826**

92 Constitutional Law

92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents Thereof
92k4826 k. Segregation. Most Cited Cases

Prisons 310 275

310 Prisons

310II Prisoners and Inmates
310II(H) Proceedings
310k271 Nature and Necessity of Proceedings; Right to Notice and Hearing
310k275 k. Placement and Classification. Most Cited Cases
(Formerly 310k13(7.1))

An inmate's liberty interests were not violated by his placement in a disciplinary segregated housing program (DSP) without notice, a hearing, detention order, or review. Neither the fact nor term of the inmate's imprisonment would have been altered by a declaration that his placement in the DSP was unconstitutional. While the inmate was not at fault in an incident that led to his segregated confinement, the investigation of the incident revealed that the inmate's return to the general population would pose a threat to the safe, secure, and orderly operation of the prison. Thus, his confinement was not atypical for inmates determined to pose security risks. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2241.

Benjamin Smith, Cumberland, MD, pro se.

Dennis Pfannenschmidt, U.S. Attorney's Office, Harrisburg, PA, for Respondents.

MEMORANDUM

JOHN E. JONES III, District Judge.

***1** This matter is before the Court on the Report and Recommendation ("R & R") of Magistrate Judge Thomas M. Blewitt, which recommends that the petition of Benjamin Smith ("Smith" or "Petitioner"), a *pro se* inmate at the Federal Correctional Institution in Cumberland, Maryland ("FCI–Cumberland"),[FN1] for writ of habeas corpus pursuant to 28 U.S.C. § 2241 be denied. (Rec.Doc. 4). Petitioner filed objections to the R & R (Rec.Doc. 10),[FN2] but the Respondents have not filed any documentation in opposition to these objections. Nonetheless, the issue is ripe for disposition.[FN3] For the reasons set forth below, the Court will deny the objections and adopt the R & R in its entirety.

FN1. Although Petitioner is currently an inmate at FCI–Cumberland, the instant matter concerns alleged deprivations of federal rights endured while Petitioner was incarcerated at the United States Penitentiary–Canaan in Waymart, Pennsylvania ("USP–Canaan").

FN2. Also before this Court is Petitioner's Motion for Extension of Time in Which to File Objections to the R & R (Rec.Doc. 9). Since the Petitioner has already filed objections, we shall deny this motion as moot.

FN3. Also before this Court, and ripe for disposition, is Petitioner's Motion to Proceed in Forma Pauperis (Rec.Doc. 3).

I. STANDARD OF REVIEW

When objections are filed to the report of a magistrate

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

Dockets.Justia.com

judge, the district court makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objections are made. 28 U.S.C. § 636(b) (1); *United States v. Raddatz,* 447 U.S. 667, 674–75, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). The court may accept, reject, or modify, in whole or in part, the magistrate judge's findings or recommendations. *Id.* Although the standard of review is *de novo,* 28 U.S.C. § 636(b)(1) permits whatever reliance the district court, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. *Raddatz,* 447 U.S. at 674–75; *see also Mathews v. Weber,* 423 U.S. 261, 275, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976); *Goney v. Clark,* 749 F.2d 5, 7 (3d Cir.1984).

II. STATEMENT OF FACTS

Smith filed the instant § 2241 petition [FN4] against the named Respondents [FN5] on December 20, 2007 (the "Petition"). (Rec.Doc.1). In said Petition, Smith alleges that on June 20, 2005, while incarcerated at USP–Canaan, he was assaulted by a fellow inmate, subsequently quarantined in a special housing unit ("SHU") pending investigation into the incident, and ultimately released from SHU on June 30, 2005 after being cleared of any wrongdoing. (*Id.* at 5). On August 8, 2005, Warden Lindsay submitted to Respondent Dodrill a recommendation that Petitioner be transferred from USP–Canaan. (*Id.*). Pursuant to a memorandum authored by John M. Vanyur (the "Vanyur Memo"), the Assistant Director of the Bureau of Prisons, Dodrill denied transfer until Petitioner was placed in a 10–month disciplinary segregated housing program [FN6] ("DSP") and maintained a clear record during that time. (*Id.*).

FN4. 28 U.S.C. § 2241 provides that a writ of habeas corpus may issue to anyone whose custody violates the federal Constitution, laws, or treaties. *See Zadvydas v. Davis,* 533 U.S. 678, 687, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

FN5. Smith specifically names as Respondents D. Scott Dodrill ("Dodrill"), the Regional Director of the Bureau of Prisoners; Cameron Lindsay ("Lindsay"), Warden at USP–Canaan; Frank Karam ("Karam"), Associate Warden at USP–Canaan; and Frank Lara ("Lara"), Captain of the Guard at USP–Canaan (collectively, "Respondents").

FN6. According to Petitioner, the DSP involved readmittance into the SHU and confinement in a cell for 23 hours per day. (Rec. Doc. 1 at 4).

Smith contends that his placement in the DSP was unwarranted because the Vanyur Memo was intended to prevent inmates from manipulating transfers for their own purposes, whereas his transfer was requested by Warden Lindsay as a result of the assault he sustained.[FN7] (*Id.*). Accordingly, the instant Petition requests habeas relief to the extent that we reverse the judgment of Respondent Dodrill and find that the placement of Petitioner in a 10 month DSP violated due process [FN8] because he was never given notice, an administrative detention order,[FN9] a hearing, or proper review regarding such placement. (*Id.*). In addition to this declaratory relief, Petition requests that $30,000 in monetary damages be awarded.

FN7. While Smith contends this was the purpose of the Vanyur Memo, he has not attached a copy of same, nor can we locate same through a search of the Bureau of Prison's website. Therefore, we cannot verify the contents or identify the purpose of the Vanyur Memo. However, Smith's complaint to Vanyur regarding the inapplicability of the Vanyur Memorandum, accompanied by the subsequent repeal of the dictates of that memorandum, may indicate that Petitioner has correctly identified its purpose.

FN8. We note that the instant Petition contains due process allegations identical to those found in a complaint filed by Petitioner on June 15, 2007. *See* July 15, 2007 Complaint, No. 4:07–1079, Rec. Doc. 1. Pursuant to our Order of December 3, 2007, we adopted the Magistrate Judge's R & R to the extent that it recommended that Petitioner's due process claims be dismissed. December 3, 2007 Memorandum and Order, No. 4:07–1079, Rec. Doc. 14, pp. 13–14. We did so without prejudice, so that Petitioner could incorporate such allegations into a habeas corpus petition after exhausting administrative remedies. *Id.* at p. 14 n. 12. By incorporating his due

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

process claims as the foundation for the instant Petition he has done just that. Since Petitioner mentions his 23 hour per day confinement as a condition of the DSP, we construe his due process claim to allege a deprivation of liberty.

FN9. Smith insinuates that his overtures requesting a detention order, made on or about October 2, 2005, were ignored until approximately December 6, 2005. (*Id.*). He claims to have been discharged from the DSP in January 2006. (*Id.*).

B. THE REPORT AND RECOMMENDATION

***2** Initially, we note that Petitioner's previous Fifth Amendment Due Process claim was made pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971),[FN10] and was dismissed because it did not implicate a liberty interest. However, we elected to dismiss without prejudice not so that the Petitioner could reassert the *Bivens* claim in a habeas corpus motion, but so that the Petitioner could incorporate the averments as the *basis* for the habeas corpus motion. Nonetheless, it appears to us, as it evidently did to Magistrate Judge Blewitt, that Smith used the instant Petition to advance both theories. [FN11] Thus, Magistrate Judge Blewitt's February 13, 2008 R & R recommends that both the habeas petition and the due process claim be dismissed. We will address these requests in turn, beginning with the habeas petition.

FN10. Generally, a plaintiff may bring a *Bivens* claim in federal court when he or she experiences a deprivation of federal constitutional rights at the hands of a federal officer. *See generally Bivens,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619.

FN11. Since the document styled "Petition for Habeas Corpus," (Rec.Doc. 10), in fact contains a petition for habeas corpus and an apparent due process claim, to distinguish between the document as a whole and the specific petition for habeas relief contained therein, we will refer to the former as the "Petition" and to the latter as the "habeas petition."

In quoting Third Circuit precedent, Magistrate Judge Blewitt noted that when an inmate's complaint is to "a condition of confinement such that a finding in [the inmate's] favor would not alter his sentence or undo his conviction," that circumstance cannot support a petition for habeas corpus. *See Leamer v. Fauver,* 288 F.3d 532, 542 (3d Cir.2002).[FN12] Since a ruling in the Petitioner's favor would not alter his sentence or undo his conviction, [FN13] and since the Magistrate Judge concluded that the Petition was not challenging a disciplinary punishment or seeking expungement of his prison record as to his placement in DSP, he determined that the Petition was not a proper habeas petition and therefore recommended its dismissal.

FN12. Rather, the *Leamer* Court noted that a habeas petition would be supported by attacking "the validity of the continued conviction or the fact or length of the sentence." *Leamer,* 288 F.3d at 542.

FN13. Indeed, a ruling in Petitioner's favor would not result in a reduction of his prison sentence, nor would it result in his discharge from the DSP, which already occurred in January 2006.

Further, the Magistrate Judge opined that the Petitioner's averments could not meet the standards of a due process liberty claim. Quoting United States Supreme Court precedent, he noted, "The Due Process clause protects a prisoner's right to freedom from restraint [when said restraint] ... imposes atypical and significant hardship in relation to the ordinary incidents of prison life." [FN14] (Rec. Doc. 4, p. 15 (quoting *Sandin v. Conner,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)). The Magistrate Judge proceeded to cite *Sandin* for the proposition that "discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by the court of law." *Id.* at 486. Indeed, Magistrate Judge Blewitt acknowledged that inmates who are considered security risks are often removed from the general prison population and placed in a more restrictive custodial environment. *See Fraise v. Terhune,* 283 F.2d 506 (3d Cir.2002).

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

Cognizant that Petitioner had been in the DSP for approximately seven months, the Magistrate Judge noted that transfers of prisoners from the general population into administrative or disciplinary segregation units for as long as fifteen months were not uncommon when the inmate was deemed a security risk. *See* *Griffin v. Vaughn,* 112 F.3d 703, 706 (3d Cir.1997).

> FN14. The Magistrate Judge contrasted conditions of administrative custody that were found to be violative of the Due Process Clause with those that were constitutional. For example, administrative custody violates the Due Process Clause when, *inter alia,* it virtually eliminates all human contact, requires the lights be on 24 hours a day, and is indefinite in duration. *Wilkinson v. Austin,* 545 U.S. 209, 125 S.Ct. 2384, 2393, 162 L.Ed.2d 174 (2005). Conversely, administrative custody is constitutional where, *inter alia,* it promotes prosocial behavior, *Francis v. Dodrill,* 2005 WL 2216582 * 5 (M.D.Pa.2005), or requires the inmate to live under restricted conditions for a fixed duration without behavioral incidents prior to being reintroduced to the general prison population, *see generally Fraise v. Terhune,* 283 F.2d 506 (3d Cir.2002).

Since the Petitioner's conditions of confinement were more akin to the conditions in *Francis* and *Fraise* than those in *Wilkinson,* and since the term of confinement in the DSP was less than that in *Griffin,* the Magistrate Judge concluded that the Petitioner's liberty interests were not violated by his placement in DSP without a hearing, detention order, or the like. Accordingly, Magistrate Judge Blewitt determined not only that Petitioner could not maintain a due process claim, but also that Petitioner's due process assertions could not form the basis of a habeas petition. Rather, instead of supporting a *Bivens* claim or a habeas corpus petition, the Magistrate Judge noted that Petitioner's allegations might better support a cause of action under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.* [FN15] Thus, the Magistrate Judge recommends dismissal of Petitioner's habeas petition and due process claim without prejudice to file an FTCA action after the Petitioner has exhausted his administrative remedies.

> FN15. The FTCA permits private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States. *See generally* 28 U.S.C. § 2671, *et seq.* In this instance, Magistrate Judge Blewitt observed that Petitioner's claim that the Vanyur Memo was erronesouly applied to him could constitute a negligence claim cognizable under the FTCA.

III. DISCUSSION

***3** On April 14, 2008, Petitioner filed objections to the R & R, (Rec.Doc.10), which we will address and analyze below.

Petitioner appears to assert that the Magistrate Judge based his dismissal of the habeas petition solely on the assumption that the Petition did not challenge a disciplinary punishment in the DSP/SHU or seek expungement of his prison record relating to his participation in the DSP and attendant confinement in the SHU. (Rec. Doc. 10, p. 4 (citing Rec. Doc. 4, p. 5)). Smith then proceeds to assert that the Petition *does* challenge the disciplinary punishment in the DSP/SHU, which would necessarily result in an expungement of his prison record in that regard. (Rec.Doc. 10, p. 4). Therefore, Petitioner asserts that the R & R in incorrect and that he is entitled to habeas relief. However, Petitioner conflates the Magistrate Judge's reasoning.

As noted in our summary of the R & R, and in contravention to Petitioner's point of view, Magistrate Judge Blewitt's decision to dismiss the habeas petition does not rest exclusively on the assumption that Petitioner was not challenging his confinement nor seeking expungement of his record. In fact, considering that that statement encompasses half a paragraph in a twenty page R & R, it seems like a mere afterthought rather than the crux of the Magistrate Judge's reasoning. Indeed, noting that the habeas petition challenged the conditions of confinement, rather than the validity or execution of the Petitioner's sentence, the bulk of the Magistrate Judge's discussion of the habeas petition focuses on the *Leamer* case, referenced above. To recapitulate, *Leamer* held that when a challenge to the conditions of confinement would

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

not, if successful, alter the petitioner's sentence or undo his conviction, the challenge must be brought pursuant to either § 1983 or *Bivens,* not through a habeas petition. *Leamer,* 288 F.3d at 542. Indeed, the Third Circuit Court of Appeals followed its *Leamer* decision with its decision in *Bronson v. Demming,* 56 Fed. Appx. 551 (3d Cir.2002). The *Bronson* Court concluded that where a petitioner desired to be released from one type of confinement to another (in that case from a restricted housing unit to the general population) habeas relief was unavailable because neither the fact nor length of petitioner's incarceration would be altered by granting the petition. *Id.* at 553.

As was the case in *Bronson,* Petitioner in the instant matter complains of confinement in a restrictive housing unit, asserting that he should have been housed with the general prison population. Similar to *Bronson,* neither the fact nor term of Petitioner's imprisonment would be altered in the instant matter by a declaration that his placement in the DSP/SHU was unconstitutional or the expungement of his prison record in that regard. Thus, pursuant to the dictates of *Leamer* and *Bronson,* we agree with the Magistrate Judge's conclusion that Smith's petition for habeas corpus relief is improper and must be dismissed.

***4** Even if, assuming *arguendo,* Smith's habeas petition was proper, he would not be successful in obtaining relief on the same because his confinement did not violate the Constitution, laws, or treaties of the United States. Petitioner's position is that his confinement in the SHU violated the liberty interests secured by the Due Process Clause of the Fifth Amendment. In his objections, he opines that the authority cited by the Magistrate Judge in the R & R is inapposite in the instant matter because his case is factually distinguishable. Namely, he posits that the cases cited by Magistrate Judge Blewitt involved the "control of problematic prisoners or the proper discipline of prisoners who committed ... misconducts," and are therefore inapplicable to the instant matter since his confinement in SHU was spawned not by any misconduct on his part, but by the assault he sustained at the hands of a fellow inmate. (Rec.Doc. 10, p. 2). While this statement is not altogether incorrect, Petitioner fails to take cognizance of certain facts that make the instant matter analogous to the authority cited by the Magistrate Judge.

To quickly restate that authority, *Sandin* stands for the proposition that an inmate's liberty interest is infringed only by an "atypical and significant hardship in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484. Moreover, the Third Circuit has held that transfers of prisoners from the general population into administrative or disciplinary segregation units for as long as fifteen months were not uncommon when the inmate was deemed a security risk. *See Griffin,* 112 F.3d at 706. While the Petitioner is correct that an investigation into the assault that led to his confinement in SHU revealed that he was not at fault in that particular incident, the investigation also discovered that "his return to the general population at [USP–Canaan] would pose a threat to the safe, secure, and orderly operation of the prison." (Rec.Doc.1, Ex. 2).[FN16] Accordingly, since the Petitioner was determined to pose a security risk, the dictates of *Sandin* and *Griffin* lead us to believe that his confinement in a segregated housing unit was not violative of the liberty interest secured by the Fifth Amendment. Indeed, such confinement is not at all atypical for inmates determined to pose threats to the security and operation of a prison. *See e.g., Sandin,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418; *Fraise,* 283 F.2d 506; *Griffin,* 112 F.3d 703; *Francis,* 2005 WL 2216582.

> FN16. This statement was contained in a document sent to Petitioner by Harrell Watts, the Adminsitrator of National Inmate Appeals, in response to Petitioner's complaint that his confinement in the SHU violated his rights. Notably, the Supreme Court of the United States has held that deference should be given to the determinations of prison officials who, in "fine-tuning ... the ordinary incidents of prison life," must necessarily be afforded the ability to appropriately control prison conditions in order to manage a volatile environment. *See Sandin,* 515 U.S. 482–83. Thus, we pay special deference to the determination that Petitioner's release into the general prison population posed a security threat.

Since Petitioner's claims are not sufficient in supporting either a due process claim or a habeas corpus

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

petition, these actions must be dismissed. However, like the Magistrate Judge, we perceive that Petitioner's allegations may state a viable claim for relief under the FTCA. Thus, we believe that the habeas petition and due process claim should be dismissed without prejudice to file an FTCA claim after the exhaustion of administrative remedies. We therefore adopt the R & R in this extent.[FN17]

> FN17. Magistrate Judge Blewitt explicitly recommends that the four Respondents be dismissed from this action. We find it unnecessary to expressly do so, since our dismissal of Petitioner's claims for relief in their entirety implies that those individuals are no longer respondents in this action.

***5** Finally, the Magistrate Judge has recommended that Petitioner's Motion to Proceed in Forma Pauperis be granted with respect to the filing of the Petition. Since the Petitioner has a mere $49.94 in his personal account, the *de minimus* nature of his assets militates in favor of the Magistrate Judge's determination. Therefore, we will adopt the Magistrate Judge's R & R in this regard.

IV. CONCLUSION

For the foregoing reasons, the Court will adopt the recommendation of the Magistrate Judge to dismiss Petitioner's habeas petition and due process claim without prejudice to file an FTCA claim after administrative remedies have been exhausted. The Court will also adopt Magistrate Judge Blewitt's recommendation that Petitioner's Motion to Proceed in Forma Pauperis be granted as it relates to this case. An appropriate order in accordance with this memorandum will be entered.

REPORT AND RECOMMENDATION

THOMAS M. BLEWITT, United States Magistrate Judge.

I. Background.

Petitioner, Benjamin Smith, formerly an inmate at the USP–Canaan, and now confined at FCI–Cumberland, Maryland [FN1], filed another action with this Court, this time a writ of habeas corpus pursuant to 28 U.S.C. § 2241, on December 20, 2007. (Doc. 1). Further, Petitioner attached Exhibits 1–3 to his habeas petition.[FN2]

> FN1. Petitioner has filed previous civil rights action with this Court. *See* Civil Nos. 05–2663 and 07–1079, M.D. Pa. For the most part, Petitioner's claims in his present habeas petition are that his Fifth Amendment due process rights were violated due to his 10–month placement in the USP–Canaan Disciplinary Segregated Housing Unit ("SHU") from June 20, 2005 through January 2006. Petitioner seeks declaratory relief, as well as compensatory damages.
>
> In Petitioner's pending civil rights case # 07–1079, M.D. Pa., he raised the same due process claim as he presently raises regarding his challenge to his placement in the SHU on June 20, 2005 at USP–Canaan. The District Court, finding that Petitioner's placement in the SHU did not implicate a liberty interest, dismissed this due process claim raised in Petitioner's No. 07–1079, M.D. Pa., *Bivens* action without prejudice to assert it in a habeas petition after he exhausted his BOP Administrative remedies. December 3, 2007 Memorandum and Order, No. 07–1079, M.D. Pa., Doc. 14, pp. 13–14, n. 12.

> FN2. Petitioner's Exhibits 1–3 in this case, are Dodrill's, Watts' and Lindsay's responses to his grievances about the decision to place him in the SHU and DSP Program at USP–Canaan prior to his transfer.

Petitioner names as Defendants D. Scott Dodrill, BOP Regional Director; Cameron Lindsay, Warden at USP–Canaan; Frank Karam, Associate Warden; and Frank Lara, Captain of the Guard. (Doc. 1, p. 1). In a habeas petition, the only proper Respondent is the person who has custody over Petitioner. *See* 28 U.S.C. § 2242 and § 2243.[FN3] Petitioner does not challenge either the validity or the execution of his sentence.

> FN3. We note that the Warden at FCI–Cumberland is the proper Respondent with custody over Petitioner since Petitioner is confined at this prison. Petitioner is no longer an inmate at USP–Canaan located in the M.D. Pa., and thus, this Court does not have jurisdiction

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

over his Petition. *See* *Rumsfeld v. Padilla,* 542 U.S. 426, 124 S.Ct. 2711, 2718, 2722, 159 L.Ed.2d 513 (2004) (habeas jurisdiction rests in the district of confinement). We also note, as discussed below, that this case sounds more like an FTCA action.

Petitioner is no longer in the custody of Warden Lindsay since he is confined at FCICumberland. If this was a proper habeas petition, then Petitioner has not named any proper Respondent. Petitioner has also filed a motion for leave to proceed *in forma pauperis* with respect to his habeas petition, in which it is certified that Petitioner has $49.94 in his prison account. (Doc. 3).[FN4]

FN4. If this Report and Recommendation is not adopted and this case is construed as a habeas corpus petition, we recommend that Petitioner's *in forma pauperis* application be denied, and that he should be required to pay the full $5.00 habeas filing fee.

II. Claims of Habeas Petition.

In the present case, Petitioner states that on August 17, 2005, Defendant Dodrill denied his request for a transfer after he was assaulted by another inmate and placed him in a 10–month Disciplinary Segregated Housing Program ("DSP"), where he was confined in the SHU and he was locked down in his cell for 23 hours per day. (Doc. 1, p. 3–4). According to Petitioner's claim (Doc. 1, p. 4) and his Exhibits, Ex. 3, in June 2005, he was assaulted by another inmate and was then placed in the SHU pending an investigation. In August 2005, Defendant Lindsay requested a transfer for Petitioner due to the assault, and Defendant Dodrill denied the request pursuant to a Memorandum of Assistant Bureau of Prisons ("BOP") Director Vanyur. Consequently, Petitioner was made to adhere to the stated Memorandum and was placed into the 10–month DSP program, which was designed to make the inmate sustain a clear conduct record to ensure that inmate transfer requests were legitimate.

***6** Petitioner avers, and his Exhibits show, that Lindsay made the first transfer request for Petitioner in August 2005, and it was denied by Dodrill until Petitioner was placed in a 10–month DSP program and sustained a clear record prior to a transfer. Petitioner's placement in the DSP was in accordance with a Memorandum of BOP Assistant Director Vanyur which was aimed at preventing inmates from manipulating transfers for their own purposes. Exhibit 3 is a December 6, 2005 letter from Defendant Lindsay to Petitioner. It states:

> On June 20, 2005, you were assaulted and subsequently placed in the Special Housing Unit pending the completion of an investigation. On August 8, 2005, a transfer request was submitted to the Northeast Regional Office for review. On August 17, 2005, the transfer request was denied pending a sustained period of clear conduct in accordance with Assistant Director J. Vanyur's memorandum.
>
> However, according to Assistant Director J. Vanyur's memorandum, dated November 23, 2005, titled "309/323 Transfer Procedures", the procedures previously issued through his May 11, 2005 memorandum are canceled. Therefore, your unit team will resubmit a transfer request to the Northeast Regional Office for review.
>
> (Doc. 1, Ex. 3).

It appears as though the Vanyur Memorandum and its stated requirement of placing an inmate in the 10–month DSP program prior to granting a transfer request may have been erroneously applied to Petitioner since the request for his transfer was due to the assault on him by another inmate in June 2005, and it was not initiated by Smith for any purpose of his own. (Doc. 1, Ex. 3).

Petitioner claims that after he was placed in the DSP program and housed in the SHU, he addressed Respondents Lindsay, Karam and Lara during their weekly rounds to the SHU about the error of placing him in the SHU since he did not commit any disciplinary infraction that warranted being kept "in the hole." (*Id.,* p. 5). Petitioner states that on September 5, 2005, Respondent Karam responded to his request for release and stated that he could not do anything for him. Petitioner states that in October 2005, he requested a detention order from Respondent Lara to explain why he was in the SHU, and his request was ignored until December 2005, when he

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

was given a SHU placement review. At this time, Petitioner was offered a return to general population or he was told he would be resubmitted for a transfer. (*Id.*). Petitioner's Exhibit 3 indicates that he was resubmitted for a transfer and he was approved for a transfer in December 2005.

As indicated above, Petitioner's initial August 2005 transfer request made by Lindsay was denied pursuant to Assistant Director Vanyur's Memorandum and Petitioner claims the guidelines required by the Memorandum did not apply to him since he was not trying to manipulate a transfer, but was the victim of an assault. Petitioner states that he wrote a letter to Vanyur in November 2005, and that after this letter, he was discharged from the DSP program in January 2006. Petitioner concludes that he was denied due process before placement into the SHU and DSP program since he was not given notice, an administrative detention order, and a hearing or proper reviews. (*Id.*).

***7** As relief, Petitioner requests:

> I would like the Court to reverse the judgment of Mr. D. Scott Dodrill and find that the 10 month disciplinary placement of petitioner in the Disciplinary Segregated Housing Program [DSP] was done in violation of Due Process and established process for prison disciplinary proceedings. If damages may be awarded petitioner requests monetary damages of $30,000.

Insofar as Petitioner seeks this Court to retroactively reverse the August 2005 decision of Respondent Dodrill and to find that his 10–month placement into the DSP violated his due process rights, Petitioner seeks declaratory relief that this was unconstitutional. Petitioner also seeks monetary damages for his 10–month placement in the DSP.

Petitioner states that he was directed to amend a civil rights action he filed in June of 2007, Civil No. 07–1079, M.D. Pa., and that he was instructed to file a habeas corpus petition. (Doc. 1, p. 3).

As noted, the District Court dismissed without prejudice Smith's due process claim regarding his placement in the SHU at USP–Canaan raised in his Case No. 07–1079, to re-assert it in a habeas corpus petition. However, based on Smith's present Petition, it is clear that he is not challenging a disciplinary punishment in the SHU or seeking expungement of his prison record as to his confinement in the SHU. Rather, Smith is seeking money damages for his past placement in the SHU and DSP program as a result of alleged negligence by BOP officials, who may have erroneously applied the Vanyur Memorandum to Smith's case and to the transfer request made by Lindsay for Smith. It appears as though Smith may have been erroneously placed in the 10–month DSP program as required by the Memorandum, when the Memorandum may not have applied to him. We find that this claim is a tort action against the BOP, and not a proper habeas corpus claim.[FN5]

> FN5. In Smith's 07–1079 Complaint, his due process claim was not fully stated as it is in his Habeas Corpus Petition.

Thus, Petitioner states that prior to his placement in the SHU and the 10–month disciplinary housing program ("DSP"), he was not given any disciplinary report or Administrative detention order, and that he was not given any hearing, or allowed to present evidence as to why he should not have been placed in the SHU for 10 months. (Doc. 1, p. 4). Petitioner states that being a victim of an assault was not a basis to place him in the SHU and the DSP program.

Petitioner's claims in present habeas petition are that his Fifth Amendment due process rights were violated due to his previous 10–month placement in the USP–Canaan Disciplinary Segregated Housing Program from June 20, 2005 through January 2006. Petitioner seeks declaratory relief as well as compensatory damages. Petitioner does not request any relief that would necessarily imply that his duration in prison would be lessened or that he should be released from prison. Nor does Petitioner seek release from the SHU and the DSP, since this occurred over two years ago. Further, Petitioner does not challenge the execution of his sentence.

III. Discussion.

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

***8** Petitioner essentially claims that his due process rights were violated with respect to his transfer from general population into the SHU after he claimed to have been assaulted by another inmate and with respect to his subsequent placement into the DSP Program for 10 months.[FN6]

FN6. Petitioner's present case thus challenges, for the most part, his past placement in the DSP Program and his past confinement in the SHU. As discussed below, we find Petitioner's claim is a tort claim against the BOP for negligent application of the Vanyur Memorandum and its requirements to him.

Initially, we find Petitioner's due process claim should be dismissed. Further, to the extent that Petitioner is deemed as claiming that his original transfer requested by Lindsay was erroneously denied in August 2005 by Dodrill, and that he was erroneously made to comply with Vanyur's Memorandum requiring a sustained period of clear conduct prior to a transfer, since he was not trying to manipulate a transfer, and he required a transfer due to the alleged assault on him, this amounts to a tort claim against federal officials that must be filed *via* a Federal Tort Claim Act ("FTCA") action. Indeed, Dodrill advised Petitioner of this tort claim in his January 11, 2006 Response to Petitioner, Doc. 1, Ex. 1.

The law is clear that negligence is not a basis for a civil rights action. It is well-settled that mere negligence is not an actionable civil rights claim. *See* *Davidsen v. O'Lone,* 752 F.2d 817 (3d Cir.1984); *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 677, 88 L.Ed.2d 662 (1986). Thus, insofar as Petitioner claims that his August 2005 transfer request was erroneously denied and that he was erroneously placed in the 10–month DSP Program to show sustained good conduct prior to being granted a transfer, Petitioner must file an FTCA action.

The FTCA, and not a *Bivens* action, is for negligence claims against employees of the United States. *See* Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 and § 2680. *See also* *Roberts v. Banks,* slip op. p. 6, n. 4 [FN7] , 2007 WL 3096585 (3d Cir.2007) (Non–Precedential). Further, Petitioner must exhaust his Administrative remedies with the BOP by filing a tort claim (SF–95) prior to filing an FTCA action in District Court.[FN8] *Id.,* slip op. p. 5, 2007 WL 3096585, * 2. Thus, we shall recommend that Petitioner's Habeas Corpus Petition be dismissed without prejudice to file his claim for negligence against BOP staff in an FTCA action after he exhausts his administrative remedies. We also find that the erroneous placement of Petitioner in the DSP program does not amount to a due process claim and does not rise to the level of a Constitutional violation.

FN7. The *Banks* Court noted, "The District Court correctly construed Banks' negligence claim under the FTCA, noting that it could not consider his negligence claim under *Bivens,* because negligence is not the basis of a constitutional claim. *See* *Bivens,* 403 U.S. at 392 (recognizing an implied private action for damages against federal officers alleged to have violated a citizen's *constitutional* rights)." 2007 WL 3096585, * 2, n. 4.

FN8. The provisions of the FTCA govern all claims against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. 28 U.S.C. § 2675(a). Petitioner here is seeking damages for his 7 month erroneous placement in the DSP program. Thus, Petitioner is seeking to sue the United States for negligent conduct of federal employees occurring during his incarceration in federal prison. With respect to any FTCA claim, the only proper party Defendant is the United States, and not the individually named employees of the BOP. *See* 28 U.S.C. § 2679(b) and (d)(1). Thus, no individual employee of the BOP can be included in an FTCA action, and only the United States can be named as Defendant. *See Banks, supra,* slip op. p. 6, 2007 WL 3096586, * 2.

To the extent that Petitioner is seeking money damages for his alleged erroneous placement into the DSP for 10 months and claims that it violated his due process rights, this claim sounds more like a civil rights action

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

rather than a habeas petition, since the grant of relief will not shorten Petitioner's term of confinement. Nor will Petitioner's success on his claim cause him to be released from SHU confinement since he was released from the SHU in January 2006. (*Id.,* p. 5). Insofar as Petitioner is raising a due process claim, as discussed below, we find that it should be dismissed.

***9** To the extent that Petitioner is challenging his prior erroneous placement into the DSP Program and seeks money damages for this negligent conduct, this is an FTCA claim. Petitioner is not challenging the duration of his confinement in prison, and he does not seek an order directing the BOP to release him from prison or from the SHU. (Doc. 1, p. 4). Thus, Petitioner is not raising a habeas claim, and his petition should be dismissed without prejudice to file his negligence claim *via* an FTCA action.[FN9]

> FN9. Of course, Smith must exhaust his Administrative remedies with the BOP by filing an SF–95 tort claim as Dodrill directed him to do in January 2006. (Doc. 1, Ex. 1).

The Third Circuit in *Leamer v. Fauver,* 288 F.3d 532, 542 (3d Cir.2002), stated:

> whenever the challenge ultimately attacks the 'core of habeas'—the validity of the continued conviction or the fact or length of the sentence—a challenge, however denominated and *regardless of the relief sought,* must be brought by way of a habeas corpus petition. Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction, an action under § 1983 is appropriate. (Emphasis added).

Thus, Petitioner's challenge to the duration of his past confinement in the SHU and erroneous placement into the DSP program, and his request for money damages, would not result in a release from confinement. This is not a claim to be raised a habeas corpus petition. Nor does it amount to a due process Constitutional claim to be raised in a civil rights action since no liberty interest of Petitioner was implicated. Rather, it must be raised in an FTCA action. A ruling in the Petitioner's favor on this claim would certainly not alter his confinement, *i.e.,* would not cause his immediate release from incarceration. Nor would it cause his release from the SHU since he was discharged from the DSP program in January 2006.

Further, as in our Report and Recommendation screening Smith's 07–1079 Complaint, we again do not find that Petitioner has stated a viable due process claim with respect to his 10–month placement in the DSP.

Petitioner states that on August 6, 2005, Lindsay directed that he be transferred from USP–Canaan after the assault on Petitioner, and that Dodrill denied this request on August 17, 2005. Petitioner states that he was then placed in the 10–month DSP pursuant to Vanyur's Memorandum. Petitioner claims that his 10–month placement into the DSP without receiving written notice of the reasons, a hearing, an opportunity to present evidence, a written decision, and an opportunity to appeal the decision to place him in the program violated his due process rights and he seeks compensatory damages for this disciplinary confinement. Petitioner was released from the program in January 2006, and subsequently transferred out of USP–Canaan.

Petitioner claims that the three USP–Canaan Respondents, Lindsay, Karam, and Lara, are liable since they failed to address the error of his placement in the DSP program when he told them about it. Petitioner states that then in November 2005, he wrote Vanyur and explained to him why Vanyur's Memorandum did not apply to him, and how he was erroneously placed in the 10–month DSP program prior to granting him a transfer. Petitioner states that Vanyur then rescinded his placement in the 10–month DSP program. Petitioner claims that prior to his placement in the 10–month DSP program he was denied due process. (*Id.,* p. 5).

***10** Since we again find no Constitutional due process claim is stated by Petitioner with respect to his 10–month DSP program placement, we shall recommend that the stated due process claim against the four Respondents be dismissed. *See Meekins v. Beard,* 2007 WL 675358 (M.D.Pa.). Further, Petitioner had no Constitutional right with respect to any particular custody classification in prison, *i.e.* general population as opposed to SHU

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

confinement while he was placed in the DSP program. *See Wilson v. Horn,* 971 F.Supp. 943, 947 (E.D.Pa.1997).

It is now well-settled by this Court that a prisoner's placement into a program similar to the DSP program, namely, the SMU program, without procedural due process safeguards does not state a Constitutional claim. As this Court recently stated in *Meekins, supra* at * 3:

> "This court has repeatedly found no liberty interest with respect to claims that due process rights have been violated by not giving an inmate a hearing prior to placement in the SMU upon transfer to SCI–Camp Hill. *See Spencer v. Kelchner,* Civ. No. 3:06–1099, 2007 WL 88084 slip op. at * 10–* 12 (M.D.Pa. Jan. 9, 2007) (Kosik, J.); *Francis v. Dodrill,* 2005 WL 2216582 (M.D.Pa., Sept.12, 2005); *Stotts v. Dodrill,* Civil No. 04–0043 (M.D.Pa., Feb. 7, 2005). In these cases, the court has found that an inmate's placement in the SMU does not implicate his due process rights. In their motion to dismiss, Defendants also argue that Plaintiff's due process rights were not implicated as his confinement in the SMU does not constitute an atypical and significant hardship."

Petitioner describes the restrictive conditions in the SHU he had to endure, *i.e.* 23 hour per day lock down. (Doc. 1, p. 4). Petitioner claims that the process in which he was placed into the DSP program violated his Fifth Amendment due process rights. As discussed below, we again find no Fifth Amendment due process claim is stated.

Specifically, Petitioner alleges that his transfer from general population and 7–month placement (from June 20, 2005 through January 2006) by Respondents into the DSP program violated his Fifth Amendment due process rights because he did not receive advance written notice, a Administrative order, did not receive a hearing, was not allowed to present evidence, and had no appeal rights to challenge this restrictive confinement. Petitioner seeks monetary damages (*i.e.,* compensatory) of $30,000 for his placement in the DSP program. As his request for injunctive relief, Petitioner seeks the Court to retroactively reverse Dodrill's August 2005 decision regarding his placement in the DSP program. (*Id.,* p. 4).[FN10] Again, we fail to see how this case is a habeas case since even if the court granted Petitioner's relief request to retroactively reverse Dodrill's August 2005 decision regarding his placement in the DSP program, Petitioner would not be released from prison any sooner, he would not be released from the SHU, and his term of confinement would not be shortened. Further, there is no disciplinary hearing decision to reverse or expungement of any disciplinary sentence requested.

> FN10. We again note that the decision to place Petitioner in the DSP program seems to have been in error. Thus, the appropriate action is an FTCA suit.

***11** We give preliminary consideration to the Petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. foll. § 2254 (1977) (applicable to § 2241 petitions under Rule 1(b)). *See Patton v. Fenton,* 491 F.Supp. 156, 158–59 (M.D.Pa.1979).[FN11]

> FN11. Rule 4 provides in relevant part: "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified."

Specifically, we find that Petitioner's Fifth Amendment Due Process claim fails to state a cognizable § 1331 claim. We also find that, insofar as Petitioner claims that he was negligently placed in the DSP program by erroneous application of the Vanyur Memorandum to him and his situation as an assault victim, Petitioner must file an Administrative remedy SF–95 with the BOP, and then an FTCA action.

As discussed, we do not find any Constitutional due process claim that the Petitioner has asserted against the Respondents. Simply because these Respondents were alleged to be involved in Petitioner's transfer and placement into the SHU and DSP program, and they ignored his requests to be released from it does not state a due process violation, since Petitioner had no liberty interest implicated with respect to his DSP placement.

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

As discussed, we do not find any cognizable Fifth Amendment Due Process Constitutional claims asserted against any of the Respondents. This Court has recently decided two very similar cases to Petitioner's. As stated, *Meekins,* 2007 WL 675358, is one such case. *Spencer v. Ravana,* 2007 WL 88084 (M.D.Pa.), is the other.

Petitioner alleges that Respondents, through their various positions with the prison and the BOP, were responsible for his transfer to the SHU and placement in the DSP program, and that they were involved in ignoring his requests for discharge from his placement in the DSP program. Petitioner alleges that his placement into the DSP program occurred without affording his due process rights. Further, to the extent that Petitioner claims that Respondents violated his due process rights by not giving him notice and a hearing prior to transferring him to the DSP program when he was at USP–Canaan, and their approval or acquiescence in placing him in the DSP, we find that this Court has repeatedly found no liberty interest with respect to such claims.

We conclude that, based on this Court's stated recent cases, as well as *Francis v. Dodrill,* 2005 WL 2216582 (M.D.Pa.) and *Stotts v. Dodrill,* Civil No. 04–0043 (M.D.Pa.), Petitioner's placement in the DSP did not implicate a protected liberty interest and his due process rights. Therefore, we shall recommend that Petitioner's Fifth Amendment Due Process claim be dismissed as against all Respondents.

Petitioner alleges that the stated Respondents violated his due process rights by placing him in the DSP without first being given notice, a hearing, and the right to appeal. This Court has consistently held that placement in a Special Management Unit does not give rise to atypical and significant hardships, and that it does not implicate due process of law. Thus, placement in the DSP program likewise does not implicate due process of law.

***12** Petitioner claims that he has been made to suffer atypical hardship without due process due to his immediate placement in the DSP program after his transfer directed by Lindsay was denied in August 2005, and that he was deprived of his liberty in the DSP without a hearing. Petitioner claims that the Vanyur Memorandum was erroneously applied to him which required his 10–month placement in the DSP program to show he could remain infraction free prior to his transfer request being considered. Petitioner claims that the Memorandum was erroneously applied to him since his transfer was requested by Lindsay due to the assault on him by another inmate, and not due to any attempt by him to manipulate the BOP's transfer rules. Petitioner seems to claim that the procedural safeguards of *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), were not followed in his case. Petitioner claims that his placement in the DSP constitutes an atypical and significant hardship and implicates his due process rights.

We find that this Court, in the stated cases, has considered similar claims and has found that an inmate's placement in the similar SMU program did not implicate an inmate's due process rights. *See Francis, supra* at * 3.

Based on this Court's decisions in *Francis v. Dodrill,* 2005 WL 2216582 (M.D.Pa.), and *Stotts v. Dodrill,* Civ. No. 04–0043, M.D. Pa.,[FN12] as well as *Meekins, supra,* and *Spencer, supra,* we find that our Petitioner's placement in the DSP does not implicate his due process rights.

> FN12. In *Stotts,* this Court found that federal inmates' placement in the SMU following a riot incident did not violate their due process rights, that inmates' placement in the SMU was not punitive in nature, and that inmates were not entitled to the procedural safeguards.

As this Court in *Francis* stated:

> The defendants also argue that Francis' placement in the SMU does not implicate his due process rights. We agree. A due process liberty interest "in avoiding particular conditions of confinement may arise from state policies or regulations." *Wilkinson v. Austin,* 545 U.S. 209, ——, 125 S.Ct. 2384, 2393, 162 L.Ed.2d 174 (2005). The Due Process Clause protects a prisoner's right to "freedom from restraint, which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

significant hardship in relation to the ordinary incidents of prison life." *Id.* at 2394 (quoting *Sandin v. Connor,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)).

The proper focus for determining whether prison conditions give rise to a due process liberty interest is the nature of the conditions, not mandatory language in prison regulations. *Sandin,* 515 U.S. at 484. In *Sandin,* an inmate was charged with violating prison regulations. *Id.* at 475. At a hearing, the hearing committee refused the inmate's request to present witnesses. *Id.* The committee found the inmate guilty and sentenced him to disciplinary segregation. *Id.* The inmate sought review, and a deputy administrator found some of the charges unfounded and expunged his disciplinary record. *Id.* at 476. Thereafter, the inmate filed suit pursuant to 42 U.S.C. § 1983 for a deprivation of procedural due process during the disciplinary hearing. *Id.* The Tenth Circuit found that he had a protected liberty interest because it interpreted the prison regulations to require that the committee find substantial evidence of misconduct before imposing segregation. *Id.* at 477. The Supreme Court reversed, finding no liberty interest. *Id.* at 484. In doing so, it rejected an approach that focused on whether the prison regulations "went beyond issuing mere procedural guidelines and has used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.' " *Id.* at 480 (quoting *Hewitt v. Helms,* 459 U.S. 460, 471–72, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983)). The Court found this approach undesirable because it created a disincentive for prison administrators to codify prison management procedures and because it "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.* at 482. Thus, the Court held liberty interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In applying this test, the Court observed, "[discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.* at 485. The Court then found that the inmate's disciplinary segregation "did not present a dramatic departure from the basic conditions of Conner's indeterminate sentence" because the conditions of disciplinary segregation were similar to those faced in administrative and protective custody. *Id.* at 486.

***13** In *Wilkinson v. Austin,* 545 U.S. 209, ——, 125 S.Ct. 2384, 2393, 162 L.Ed.2d 174,

162 L.Ed.2d 174 (2005), the Court applied the *Sandin* test and found that the plaintiff's due process rights were implicated when he was placed in a program where: almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room ... [P]lacement ... is indefinite and, after an initial 30 day review, is reviewed just annually.... [P]lacement disqualifies an otherwise eligible inmate for parole consideration.

Id. at 2394–95.

The court found that these harsh conditions "give rise to a liberty interest in their avoidance."

Id. at 2395.

Fraise v. Terhune, 283 F.2d 506 (3d Cir.2002) applied the Sandin test and found that avoiding placement in the Security Threat Group Management Unit (STGMU) in the New Jersey prison system is not a protected liberty interest. Inmates who the prison deemed members of groups that posed a security threat were placed in the STGMU. *Id.* at 509. "An inmate assigned to the STGMU remains in maximum custody until the inmate successfully completes a three-phase behavior modification program." *Id.* at 511. The Court found that despite the additional restrictions, prisoners have no liberty interest in avoiding placement in the STGMU. *Id.; see also Griffin v. Vaughn,* 112 F.3d 703, 706 (3d Cir.1997) (finding that additional restrictions in administrative custody for a period of fifteen months

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

> does not deprive prisoners of protected liberty interests).
>
> We find that the conditions in the [USP–Lewisburg] SMU do not remotely approach the severity of the conditions *Wilkinson* found to give rise to a protected liberty interest, and are comparable to the conditions in cases such as *Sandin, Fraise,* and *Griffin,* which found no protected liberty interest.
>
> *Id.,* pp. *3–*4.

The *Francis* Court concluded that the restrictions in the SMU in federal prison were no greater than the restrictions placed on the inmate in *Griffin. Id.* * 5. In our case, Petitioner Smith does not allege any greater restrictions in the DSP program at USP–Canaan than were placed on the inmates in *Francis.*

The *Francis* Court then stated:

> Inmates have no due process right to a facility of their choosing. *Young v. Quinlan,* 960 F.2d 351, 358 n. 16 (3d Cir.1992). The Bureau of Prisons retains sole discretion over where to place an inmate. 18 U.S.C. § 3621. Inmates do, however, have a liberty interest in avoiding transfer to facilities where the conditions impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484. This is not such a transfer. We find that these conditions and the conditions overall in the SMU are reasonable and proportionate to those in other prisons in the federal system and across the country and do not impose an atypical and significant hardship in relation to the ordinary incidents of prison life. Using restrictions to promote prosocial behavior falls within the parameters of a sentence imposed by a court of law. While Francis clearly would prefer not to be housed in the SMU, his preference is not a liberty interest protected by the Due Process Clause.
>
> ***14** *Id.*

Further, the Court in *Griffin v. Vaughn,* 112 F.3d 703, 706 (3d Cir.1997), stated:

> Applying the precepts of *Sandin* to the circumstances before us, we conclude that the conditions experienced by Griffin in administrative custody did not impose on him "atypical and significant hardship," that he was thus deprived of no state created liberty interest, and that he failure to give him a hearing prior to his transfer to administrative custody was not a violation of the procedural due process guaranteed by the United States Constitution.

The *Griffin* Court concluded that, considering the reasons to transfer inmates from general population to administrative custody, such as inmates deemed to be security risks, stays in administrative custody for many months (*i.e.* as long as 15 months) are not uncommon. *Id.* at p. 708. Thus, the *Griffin* Court held that the inmate Griffin's transfer to and confinement in administrative custody "did not deprive him of a liberty interest, and that he was not entitled to procedural due process protection." *Id.*

Moreover, this Court in *Francis, supra at* * 2, stated that "A violation of the Due Process Clause involves the following three elements: '1) the claimant must be 'deprived of a protectable interest; 2) that deprivation must be due to some governmental action; and 3) the deprivation must be without due process.' " (citation omitted). The *Francis* Court, as stated, found that placement of its Plaintiff, a federal inmate at USP–Lewisburg, in the SMU did not implicate his due process rights. *Id.* * 3. Based on *Griffin* and *Francis,* as well as *Meekins* and *Spencer,* Petitioner Smith's placement in the SHU and DSP program from June 2005 through January 2006, about 7 months, does not give rise to a protected liberty interest. *See Keys v. Commonwealth of Pennsylvania Department of Corrections, et al.,* 3:CV–07–0338, M.D. Pa. Therefore, we will recommend that Petitioner Smith's Fifth Amendment Due Process claim be dismissed as against all Respondents.

Thus, we shall recommend that the stated four Respondents be dismissed. We shall recommend that Petitioner's Habeas Corpus Petition be dismissed without prejudice to re-file his negligence claim in an FTCA action after Petitioner exhausts his BOP administrative remedies. Additionally, we will recommend that

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

Petitioner's Fifth Amendment Due Process claim be dismissed.[FN13]

> FN13. Notwithstanding Smith's *pro se* status, we do not recommend that he be permitted to amend his Complaint regarding his due process claim for which we recommend dismissal, since we find that, based on well-settled case law, he fails to state such a claim. Thus, we find futility of any amendment of this claim, and we shall not recommend Petitioner be granted leave to amend his action with respect to the due process claim that is found subject to dismissal. *See Forman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1982); *Shane v. Fauver,* 213 F.3d 113, 115 (3d Cir.2000) (The futility exception means that a complaint, as amended, would fail to state a claim upon which relief can be granted); *Alston v. Parker,* 363 F.3d 229, 236 (3d Cir.2004).

IV. Recommendation.

Based on the foregoing, it is respectfully recommended that Smith's Habeas Corpus Petition be dismissed and that the stated four Respondents be dismissed. It is also recommended that Petitioner's negligence claim raised in his Habeas Corpus Petition be dismissed without prejudice to file it in an FTCA action after Petitioner exhausts his Administrative remedies. Additionally, it is recommended that Petitioner's Fifth Amendment Due Process claim be dismissed. Further, we recommend that Petitioner's *in forma pauperis* motion be granted solely with respect to the filing of this action.
M.D.Pa.,2009.

Smith v. Dodrill
Not Reported in F.Supp.2d, 2009 WL 62175 (M.D.Pa.)
END OF DOCUMENT

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.