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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DARNELL MCGARY,

Plaintiff,

v.

KELLY CUNNINGHAM, et al.,

Defendants.

No. C10-5440BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 3) and Plaintiff's ("McGary") objection to Report and Recommendation (Dkt. 4). The Court has considered the Report and Recommendation, McGary's objection, and the remaining record, and hereby adopts the Report and Recommendation.

**I. DISCUSSION**

This matter arises out of McGary's 42 U.S.C. §1983 challenge to his continued confinement at the Special Commitment Center (SCC). *See* Dkt. 1 at 1.

**A. Plaintiff Must File a Writ of Habeas Corpus**

On June 20, 2010, McGary filed his complaint against Defendants contending that Defendants violated his due process rights when they allegedly recorded erroneous information in McGary's file at the SCC. *See* Dkt. 1 at 1. Because McGary's complaint and objections implicitly challenge his confinement (Dkts. 1, 4), he cannot proceed under § 1983 "until and unless his confinement has been overturned by way of habeas corpus." Dkt. 3 at 2; *see also Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997) (when "the court

1 concludes that the challenge would necessarily *imply the invalidity* of the . . . continuing  
2 confinement, then the challenge must be brought as a petition for a writ of habeas corpus,  
3 not under § 1983.”). Therefore, the Court agrees with the Magistrate Judge’s Report and  
4 Recommendation that McGary’s claims must be dismissed as pleaded. Plaintiff can still  
5 bring a petition for a writ of habeas corpus.

6 **B. Procedural Issues Raised on Objection**

7 Additionally, McGary argues in his objection that the Magistrate Judge improperly  
8 dismissed this action before following the proper procedural requirements of a § 1983 suit.  
9 However, the procedural requirements referenced by McGary are only required in a civil  
10 rights suit (Dkt. 4 at 4), which the Magistrate Judge properly deemed not to be actionable by  
11 McGary absent a grant of writ of habeas corpus (Dkt. 3).


12 **C. In Forma Pauperis**

13 Because McGary is barred from bringing his § 1983 claim at this time, his request to  
14 proceed in forma pauperis is **DENIED**.

15 **II. CONCLUSION**

16 Therefore, the Court **ADOPTS** the report and recommendation for the reasons stated  
17 herein.

18 DATED this 1<sup>st</sup> day of September, 2010.

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21 BENJAMIN H. SETTLE  
22 United States District Judge  
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