

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN JOHNSON,

Petitioner,

v.

Civil Action No. 5:19CV154
(STAMP)

R. KEYES, Acting Warden,

Respondent.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE
AND OVERRULING PETITIONER'S OBJECTIONS

I. Background

The pro se¹ petitioner filed his petition under § 2241. ECF No. 1. In his petition, the petitioner states that the Federal Bureau of Prisons ("BOP") is trying to carry out a death sentence "the Court did not give [him]." Id. at 6.

United States Magistrate James P. Mazzone entered a report and recommendation. ECF No. 5. In that report and recommendation, the magistrate judge recommends that the petitioner's petition (ECF No. 1) be dismissed without prejudice Id. at 2.

Following that report and recommendation, the petitioner filed a motion titled "Motion for Clarification." ECF No. 8. This Court will construe this motion as objections to the magistrate judge's report and recommendation. In his motion (ECF No. 8), the

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1416 (10th ed. 2014).

petitioner indicates that he has a tenth grade education, and that he has been trying to address his concerns by filing grievances. Id. at 1. He states that the BOP is trying to kill him, by not providing medical attention, and that the staff will not allow him to exhaust his administrative remedies. Id. He further contends that he is being denied a First Amendment right. Id. at 2. Petitioner indicates that he does not understand why he cannot use this instant petition to challenge his conditions of confinement. Id.

For the reasons set forth below, the report and recommendation of the magistrate judge (ECF No. 5) is affirmed and adopted, the petitioner's objections (ECF No. 8) are overruled.

II. Applicable Law

Under 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which an objection is timely made. Because the petitioner filed objections to the report and recommendation, the magistrate judge's recommendation will be reviewed de novo as to those findings to which the petitioner objected. As to those findings to which objections were not filed, all findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). As the Supreme Court of the United States stated in United States v. United States Gypsum Co., "a finding is 'clearly erroneous' when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. 364, 395 (1948). Because the petitioner filed objections to the report and recommendation, the magistrate judge's recommendation will be reviewed de novo.

III. Discussion

A petition filed pursuant to 28 U.S.C. § 2241, is used to attack the manner in which a sentence is executed, and is appropriate where a prisoner challenges the fact or duration of his confinement rather than the conditions of that confinement. The magistrate judge correctly stated that petitioner's petition pertains to his conditions of confinement, which is "not an attack on, nor . . . related in any way to, the execution of his sentence." Id. The magistrate judge properly indicated that petitioner's claim should have been raised in a civil rights complaint. Id.

IV. Conclusion

For the reasons discussed above, the report and recommendation of the magistrate judge (ECF No. 5) is AFFIRMED and ADOPTED, and the petitioner's objections (ECF No. 8) are overruled. It is further ORDERED that this civil action be DISMISSED WITHOUT PREJUDICE and STRICKEN from the active docket of this Court.²

²Petitioner has since filed an action based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) that addresses his medical complaints. See Civil Action No.

Also, petitioner's motion for leave to proceed in forma pauperis (ECF No. 2) is DENIED AS MOOT.

Should the petitioner choose to appeal the judgment of this Court to the United States Court of Appeals for the Fourth Circuit on the issues to which objection was made, he is ADVISED that he must file a notice of appeal with the Clerk of this Court within 60 days after the date of the entry of this order.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: June 27, 2019

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

5:19CV167. Therefore, petitioner's petition (ECF No. 1) may also be DENIED AS MOOT.