

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

WALTER DUANE WHITE,

Plaintiff,

v.

CIVIL ACTION NO. 5:09-cv-00797

DOMINICK MCCLAIN, D.O., et al.,

Defendants.

**MEMORANDUM OPINION AND ORDER ADOPTING PROPOSED FINDINGS AND
RECOMMENDATION**

On this day, the above-styled matter came before the Court for consideration of the Proposed Findings and Recommendation of United States Magistrate Judge R. Clarke VanDervort. By Standing Order entered on July 10, 2009, this action was referred to the Honorable R. Clarke VanDervort, United States Magistrate Judge, for submission to this Court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). (Document No. 7). On December 4, 2009, Magistrate Judge VanDervort submitted Proposed Findings and Recommendation (Document No. 14) wherein it is recommended that this Court: grant Plaintiff's Motion to Withdraw Complaint (Document No. 11) and Plaintiff's Motion to Voluntary Withdraw Claims (Document No. 13); deny Plaintiff's Motion for Preliminary Injunction (Document No. 4) and Motion to Proceed *in forma pauperis* (Document No. 5) and dismiss Plaintiff's Complaint (Document No.1) without prejudice and remove this matter from the Court's docket.

Objections to Magistrate Judge VanDervort's Proposed Findings and Recommendation (PF&R) were due within seventeen (17) days of receipt, pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P.6(d), 72(b)(2). The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and the Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); *see also Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir.1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). Objections to the PF&R in this case were due on December 21, 2009. To date, no objections have been filed.

The Court has reviewed the afore-mentioned motions and Plaintiff's July 10, 2009 Bivens Complaint (Document No. 1), in which Plaintiff alleges, *inter alia*, that the Defendants, in violation of the Eighth Amendment, failed to provide adequate medical care for his various medical ailments.¹ Plaintiff sought, *inter alia*, declaratory and injunctive relief and to be transferred to a facility that could address his medical needs. On August 12, 2009, Plaintiff advised the Court that he was being transferred to a "Federal Medical Center" and moved to withdraw his Complaint. *See* Document No. 11.² At the time of this motion, the Court had not directed Defendants to file a responsive pleading to Plaintiff's Complaint.

¹ Plaintiff brings this cause of action *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court established a cause of action for damages against federal officials who allegedly violate the Constitution of the United States. A *Bivens* claim is analogous to a claim under 42 U.S.C. § 1983; however, 42 U.S.C. § 1983 does not provide a basis for a suit against federal actors.

² Plaintiff confirmed his transfer on November 30, 2009 when he provided the Court with a change of address and moved to voluntarily withdraw claims as moot. *See* Document No. 13.

Accordingly, the Court **ADOPTS** and incorporates herein the findings and recommendation of the Magistrate Judge as contained in the Proposed Findings and Recommendation. The Court does hereby **ORDER** that Plaintiff's Motion to Withdraw Complaint (Document No. 11) and Plaintiff's Motion to Voluntary Withdraw Claims (Document No. 13) be **GRANTED**; Plaintiff's Motion for Preliminary Injunction (Document No. 4) and Motion to Proceed *in forma pauperis* (Document No. 5) be **DENIED AS MOOT** and Plaintiff's Complaint (Document No.1) be **DISMISSED WITHOUT PREJUDICE**, pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure.

The Court **DIRECTS** the Clerk to remove this matter from the Court's docket and to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: April 19, 2010



IRENE C. BERGER, JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA