

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

DELONTE SMITH,

Petitioner,

v.

Civil Action No. 2:09cv54

WAYNE KUMA J. DEBOO, Warden,

Respondent.

ORDER

It will be recalled that on September 21, 2009, Magistrate Judge James E. Seibert filed his Report and Recommendation, wherein the parties were directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within ten (10) days after being served with a copy of the Report and Recommendation. On September 24, 2009, Petitioner filed Petitioner's Response to Respondent's Report and Recommendation, which the Court will consider as objections to the Report and Recommendation.

Upon examination of the report from the Magistrate Judge, it appears to the Court that the Petition, filed pursuant to 28 U.S.C. §2241, wherein Petitioner is challenging the calculation of his sentence, and the issues raised by Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, were thoroughly considered by Magistrate Judge Seibert in his Report and Recommendation. As set forth in the Magistrate's Report and Recommendation, the Petitioner has failed to exhaust his administrative remedies.

Upon review of the Petitioner's objections, the Court finds that the Petitioner is not contesting the merits of those findings made by Magistrate Judge Seibert, but is instead

seeking to voluntarily dismiss this civil action. It appears that the Petitioner is concerned that the dismissal of this civil action on the basis of Respondent's Motion for Summary Judgment will prevent him from seeking further review of this matter. However, the Magistrate Judge has recommended that the civil action be dismissed without prejudice to refiling. Accordingly, the Petitioner's concern is without merit as the mechanism for dismissal will have no ultimate impact on the Petitioner. The Court, upon an independent de novo consideration of all matters now before it, is of the opinion that the Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in this action. Therefore, it is

ORDERED that Magistrate Judge Seibert's Report and Recommendation be, and the same hereby is, accepted in whole and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is

ORDERED that Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment shall be, and the same hereby is, **GRANTED**. It is further

ORDERED that the Petitioner's Application for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 shall be, and the same hereby is, **DENIED** and **DISMISSED WITHOUT PREJUDICE**. It is further

ORDERED that the above-styled action shall be **STRICKEN** from the docket of this Court. It is further

ORDERED that the Clerk shall enter judgment for the Respondent. It is further

ORDERED that, if a party should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00

docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, Petitioner may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate Procedure, seek leave to proceed in forma pauperis from the United States Court of Appeals for the Fourth Circuit.

ENTER: March 15, 2010.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE