FILED: October 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7176
(6:19-cv-00750-DCN)

KEVIN HERRIOTT

Plaintiff - Appellant

v.

PARRISH, Major in Individual and Official Capacity; DUNN, Officer in Individual and Official Capacity; MALNADO, Officer in Individual and Official Capacity; NFN MATA, Officer in Individual and Official Capacity; NFN LEVELS, Sergeant in Individual and Official Capacity; NFN VELA, Lieutenant in Individual and Official Capacity; NFN COXUM, Individual and Official Capacity

Defendants - Appellees

and

MICHAEL STEPHEN, Warden for Broad River in individual and official capacity; JOHN DOE 1, In individual and official capacity; NFN CARTER, Captain in Individual and Official Capacity; NFN WILL, Lieutenant in Individual and Official Capacity; NFN MITCHELL, Mailroom Official in his Individual and Official Capacity; NFN WASHINGTON, Associate Warden in Individual and Official Capacity; NFN ROBINSON, Sergeant in Individual and Official Capacity; NFN CAMPBELL, Officer in Individual and Official Capacity; JOHN DOE 2, Individual and Official Capacity

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Diaz, Judge Quattlebaum, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7176

KEVIN HERRIOTT,

Plaintiff - Appellant,

v.

PARRISH, Major in Individual and Official Capacity; DUNN, Officer in Individual and Official Capacity; MALNADO, Officer in Individual and Official Capacity; NFN MATA, Officer in Individual and Official Capacity; NFN LEVELS, Sergeant in Individual and Official Capacity; NFN VELA, Lieutenant in Individual and Official Capacity; NFN COXUM, Individual and Official Capacity,

Defendants - Appellees,

and

MICHAEL STEPHEN, Warden for Broad River in individual and official capacity; JOHN DOE 1, In individual and official capacity; NFN CARTER, Captain in Individual and Official Capacity; NFN WILL, Lieutenant in Individual and Official Capacity; NFN MITCHELL, Mailroom Official in his Individual and Official Capacity; NFN WASHINGTON, Associate Warden in Individual and Official Capacity; NFN ROBINSON, Sergeant in Individual and Official Capacity; NFN CAMPBELL, Officer in Individual and Official Capacity; JOHN DOE 2, Individual and Official Capacity,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Greenville. David C. Norton, District Judge. (6:19-cv-00750-DCN)

Submitted: June 14, 2021 Decided: August 30, 2021

Before DIAZ and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Kevin Herriott, Appellant Pro Se. Andrew Lindemann, LINDEMANN & DAVIS, P.A., Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin Herriott appeals the district court's order denying relief on his 42 U.S.C. § 1983 complaint. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge recommended dismissing Herriott's claims for mail tampering, denial of access to the courts, seizure of legal materials, and denial of recreation under 28 U.S.C. § 1915A(b). The magistrate judge further recommended that claims for excessive force and deliberate indifference be allowed to proceed to discovery. Conducting a *de novo* review of the dismissed claims, the district court adopted the magistrate judge's recommendation, and we affirm for the reasons stated by the district court. *Herriott v. Stephen*, No. 6:19-cv-00750-DCN (D.S.C. June 24, 2019).

Following discovery on the remaining claims, the magistrate judge recommended granting Defendants' motion for summary judgment. The district court accepted that recommendation and granted summary judgment to Defendants. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Herriott v. Stephen*, No. 6:19-cv-00750-DCN (D.S.C. filed July 14, 2020 & entered July 15, 2020). We deny Herriott's motions for a preliminary injunction and a physical examination.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

KEVIN HERRIOTT, Plaintiff, vs. NFN PARRISH, NFN DUNN, NFN MALNADO, NFN MATA, NFN LEVELS, NFN VELA, and NFN COXUM, Defendants.	)	No. 6:19-cv-00750-DCN **ORDER**

This matter is before the court on United States Magistrate Judge Kevin McDonald's order and report and recommendation ("R&R") denying plaintiff Kevin Herriott's ("Herriott") motion to produce and motion for sanctions and recommending that the court deny Herriott's motion for default judgment and that the court grant defendants Major Parrish, Officer Dunn, Officer Maldonado, Officer Mata, Lieutenant Level, Captain Vela, and Sergeant Coaxum's[1] (collectively, "defendants") motion for summary judgment., ECF No. 132. For the reasons set forth below, the court adopts the R&R, denies Herriott's motion for default judgment, and grants defendants' motion for summary judgment.

I. BACKGROUND

Herriott is an inmate within the South Carolina Department of Corrections ("SCDC"). In this action, Herriott alleges that while he was housed in Broad River Correctional Institution's Restricted Housing Unit, defendants violated his Eighth and

[1] The court leaves the original spelling of defendants' names in the caption but uses the correct spelling of the names in the remainder of the order.

Fourteenth Amendment rights by using excessive force against him and acting indifferently to his resulting injuries and medical needs. Herriott's allegations arise from three different incidents that occurred on September 6, 2018; September 18, 2018; and September 19, 2018, respectively. The R&R recounts the evidence related to those incidents in detail.

Herriott filed his complaint in this action on March 22, 2019. On February 10, 2020, Herriott filed a motion to produce, ECF No. 101, and defendants responded on February 24, 2020, ECF No. 107. Defendants filed a motion for summary judgment on March 6, 2020, ECF No. 114, and Herriott filed a response on March 18, 2020, ECF No. 119. Defendants replied on April 15, 2020. ECF No. 129. Herriott then filed a motion for default judgment on March 11, 2020. ECF No. 118. Defendants responded on March 25, 2020, ECF No. 124, and Herriott replied on April 3, 2020, ECF No. 128. Finally, Herriott filed a motion for sanctions on April 3, 2020, ECF No. 127, to which defendants responded on April 17, 2020, ECF No. 130.

The magistrate judge issued an order denying Herriott's motions to produce and for sanctions and an R&R recommending that the court grant defendants' motion for summary judgment and deny Herriott's motion for default judgment. ECF No. 132. Herriott filed objections on June 5, 2020. ECF No. 135. Defendants filed a motion for extension of time to file their reply, which the court granted; however, the new deadline to file the reply was June 26, 2020, and defendants never filed a reply. Therefore, the objections are ripe for review.

II. STANDARD

A. Magistrate Judge Order Review

Magistrate judges have "the authority to hear and determine any pretrial matter pending before the court" except for dispositive motions. United States v. Benton, 523 F.3d 424, 430 (4th Cir. 2008). A party may object to a magistrate judge's order on a nondispositive matter within 14 days of service of the order. Fed. R. Civ. P. 72(a). The district court reviews such orders for clear error. 28 U.S.C. § 636(b)(1)(A); Springs v. Ally Fin. Inc., 657 F. App'x 148, 152 (4th Cir. 2016).

B. R&R Review

When reviewing dispositive motions, the magistrate judge makes only a recommendation to the court. Mathews v. Weber, 423 U.S. 261, 270 (1976). The recommendation carries no presumptive weight, and the responsibility to make a final determination remains with the court. Id. at 270-71. The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge . . . or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1). The court is charged with making a de novo determination of any portion of the R&R to which a specific objection is made. Id. However, de novo review is unnecessary when a party makes general and conclusory objections without directing a court's attention to a specific error in the magistrate judge's proposed findings. Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982).

III. DISCUSSION

The court first considers Herriott's two motions on which the magistrate judge issued an order: the motion to produce and the motion for sanctions. The court then turns

its attention to Herriott's objections to the R&R's recommendation that the court deny Herriott's motion for default judgment and grant defendants' motion for summary judgment.

A. Motions to Produce and for Sanctions

Herriott objects to the magistrate judge's denial of his motion to produce and motion for sanctions. In Herriott's motion to produce, he asked the court to order defendants to produce SCDC's excessive force policy. ECF No. 101. He attached to his motion a "law book request" that Herriott submitted to the SCDC Office of the General Counsel in which he requested the excessive force policy. ECF No. 101-1. The document shows that the request was not filled because access to the policy is restricted. Herriott now argues in his objections that he "asked for production to offer proof" that he only filed two grievances at Broad River, as attested in an affidavit submitted by defendants, and that his medical record was not produced to him in its entirety. ECF No. 135 at 2. He also appears to argue that he is entitled to evidence about "investigative calls" use to report complaints about correctional staff and to his "mailing records of ledgers." Id. at 3. However, none of these requests were included in Herriott's motion to produce. Instead, his motion only focused on the SCDC's excessive force policy.* As such, they are irrelevant to whether the magistrate judge committed clear error in denying Herriott's motion to produce the excessive force policy, and the court finds no such error.

Next, Herriott objects to the magistrate judge's denial of his motion for sanctions, contending that "Honorable McDonald has abused his discretion by failing to cite legal citations and controlling authority when **defects** of the erroneous ruling on sanctions and default judgment show clearly that the defendants were 'personally responsible' for the

default." ECF No. 135 at 4 (emphasis in original). Herriott requested sanctions due to defendants' failure to "answer and respond to discoveries, interrogatories," ECF No. 127 at 1. Herriott's objection appears to apply to the R&R's recommendation on his motion for default judgment, not his motion for sanctions, as it contains no mention of any failure to respond to discovery requests. Therefore, the court finds no clear error in the magistrate judge's order denying Herriott's motion for sanctions.

B. Motions for Default Judgment and for Summary Judgment

Next, Herriott objects to the R&R's recommendation that the court deny his motion for default judgment and grant defendants' motion for summary judgment.

a. Motion for Default Judgment

Herriott filed an "affidavit of default," which was entered on the docket as a motion for default judgment, arguing that because defendants have failed to file an answer, dispositive motions, and/or produce discovery, defendants are in default. The R&R found that defendants fulfilled their discovery obligations and recommended denying the motion. In his objections, Herriott faults the magistrate judge for failing to cite to any legal authority supporting his recommendation and argues that defendants have failed to offer an excuse for their alleged default. Herriott also argues that defendants have made no effort to set aside the clerk's entry of default. Finally, Herriott argues that he "has a right to a ruling from the Court whereas in the position of the Plaintiff's standing when the court errs in excluding and admitting evidence is reversible

error because it has denied the Plaintiff a substantial right," citing Federal Rule of Evidence 103. ECF No. 135 at 4.

Pursuant to Rule 55 of the Federal Rules of Civil Procedure, the clerk must enter a party's default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." Fed. R. Civ. P. 55(a). Here, defendants filed an answer to Herriott's complaint, ECF No. 42, and filed a motion for summary judgment, ECF No. 114. Therefore, they have clearly filed an appropriate pleading and continue to defend the case. Moreover, as the R&R found, defendants have complied with the court orders related to Herriott's discovery requests. Because default judgment is not warranted, defendants were not obligated to offer any excuse for their non-existent default. In a similar vein, defendants did not need to file a motion to set aside default because the clerk never entered default in this case. As to Herriott's final objection regarding the exclusion and admission of evidence, the Federal Rules of Evidence govern the admissibility of evidence. There have been no rulings in this case on the admissibility of evidence, making the Federal Rules of Evidence irrelevant to the matters before the court. In sum, the court agrees with the R&R and denies Herriott's motion for default judgment.

b. Motion for Summary Judgment

The court now turns to the R&R's recommendation that the court grant defendants' motion for summary judgment. The R&R recommends summary judgment in favor of defendants because: (1) Herriott failed to exhaust his administrative remedies; (2) the evidence before the court fails to demonstrate that defendants acted with a sufficiently culpable state of mind or treated Herriott with medical indifference; and (3)

defendants are entitled to qualified immunity. Herriott objects to all three; however, the court only considers the second and third arguments because even assuming Herriott did exhaust his administrative remedies, summary judgment in favor of defendants is still warranted.

Herriott first argues that the court must deny summary judgment when the non-moving party has not had the opportunity to discover information that is essential to its opposition, citing Federal Rule of Civil Procedure 56(f) and "28 U.S.C.A.". Herriott is mistaken. Federal Rule of Civil Procedure 56(d) provides that a court may deny summary judgment when "a nonmovant show by affidavit or declaration that, for specific reasons, it cannot present facts essential to justify its opposition." Herriott appears to argue in his motion for sanctions that defendants' motion for summary judgment should be stricken due to defendants' failure to produce discovery, suggesting that Herriott cannot present the facts he needs for his opposition. However, he did not submit an affidavit or declaration as required by the law, and as the R&R discussed, defendants have complied with their discovery obligations. Herriott also filed a response to defendants' motion for summary judgment, to which he attached various exhibits and in which he failed to argue that summary judgment was inappropriate due to the need for additional discovery. Therefore, the court overrules this objection.

Next, Herriott argues that the R&R misapplied the summary judgment standard of review. He contends that his "evidence of material fact demonstrates that there was no need for the application of force in neither the three occurrences of the use of excessive force." ECF No. 135 at 5. Herriott primarily disputes the R&R's finding that any use of force by defendants was in response to Herriott's confrontational and aggressive

behavior, arguing that reasonable minds could question whether defendants applied force "maliciously and sadistically to cause harm" as opposed to being "a good-faith effort to maintain or restore discipline." See Parker v. Stevenson, 625 F. App'x 196, 198 (4th Cir. 2015). Herriott contends that this is particularly true considering the environment of prison. As the R&R explained, an excessive force claim requires "inquiry as to whether the prison official acted with a sufficiently culpable state of mind (subjective component) and whether the deprivation suffered or injury inflicted on the inmate was sufficiently serious (objective component)." Iko v. Shreve, 535 F.3d 225, 238 (4th Cir. 2008). "[T]he core judicial inquiry regarding the subjective component of an excessive force claim is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Parker, 625 F. App'x at 198. The R&R found that, based on sworn testimony and incident reports, all of defendants' use of force was in response to Herriott's own use of force or hostile acts and used to maintain order. The court considers each incident in turn.

In the first incident, on September 6, 2018, Herriott alleges that Officers Maldonado, Dunn, and Mata slammed his arm in the food flap on Herriott's cell door. ECF No. 20 at 11. Officer Maldonado submitted an affidavit in which he attested that Heriott refused to step away from his food flap and bit Officer Maldonado, causing Officer Maldonado to pull his arm back and close the food flap. Herriott claimed that the officers slammed the food flap on his arm, causing bruising and swelling, but admits to refusing to step away from the food flap and to biting Officer Maldonado.[2] In his

[2] Despite Herriott's allegation that all three officers participated in this conduct, the evidence shows that Officer Maldonado was the only officer who closed the food flap.

objections, Herriott explains the reason why he was staying at his food flap—because he wanted to talk to someone about his concern that his mail was being interfered with. He also argues that there was no perceived threat that required the use of force because he was locked inside of his cell, meaning any use of force against him was unreasonable.

Based on the evidence presented by both parties, there is no dispute that Herriott refused to step away from the food flap and that Herriott bit Officer Maldonado. All that remains is the question of Officer Maldonado's state of mind, and even construing all inferences in favor of Herriott, the evidence shows that Officer Maldonado slammed the food flap in "a good-faith effort to maintain or restore discipline" because Herriott bit him. According to Officer Maldonado, he "pulled [his] arm back and then closed the food flap" in response to Herriott biting him. ECF No. 114-5 at 2. He also explains that he did not intend to harm Herriott. Herriott claims that he posed no threat to Officer Maldonado, meaning that Officer Maldonado must have intended to harm him, because Herriott was locked in his cell. However, that claim is clearly contradicted by the fact that Herriott was able to harm Officer Maldonado while locked in his cell by biting his arm and that an open food flap allowed opportunity for more harm. There is no dispute that Herriott bit Officer Maldonado, and there is no evidence to suggest that Officer Maldonado closed the food flap for any reason other than to prevent Herriott from causing further harm. As such, summary judgment is appropriate on Herriott's excessive force claim based on the September 6 incident.

As for the medical indifference claim arising from this incident, the R&R found the evidence does not show that Herriott received medical attention for his claimed bruising and swelling on his arm but that he did receive medical attention a few days later

when he staged a suicide, meaning defendants were not medically indifferent to Herriott. In his objections, Herriott only discusses his medical indifference claim arising from the September 18 incident. As such, the court adopts the R&R's recommendation that summary judgment in favor of defendants be granted for Herriott's medical indifference claim arising out of the September 6 incident.

The second incident at issue here occurred on September 18, 2018. Herriott alleges that on this date, Major Parrish, Lieutenant Level, and Captain Vela assaulted him in Major Parrish's office. The R&R found that summary judgment was warranted on this claim because the evidence showed that defendants' force was used in response to Herriott's resistance to restraints and Herriott spitting on the officers, meaning they were simply attempting to restore discipline and order. In his objections, Herriott explains that he was trying to talk to someone to be placed in protective custody and to express his complaints about a variety of issues, which is presumably how he ended up in Major Parrish's office. However, Herriott does not deny that he was resisting defendants nor does he explain why defendants' use of force was not a "good-faith effort to maintain or restore discipline." As such, Herriott's objections do not convince the court to reject the R&R's conclusion, and the court finds that summary judgment in favor of defendants is warranted for Herriott's excessive force claim arising from the September 18 incident. As for his medical indifference claim, the R&R found that Herriott saw a nurse the day after this incident, meaning that he received the appropriate medical treatment. In his objections, Herriott contends that he suffered a bone spur for more than 13 months while he was waiting for an x-ray to be properly treated for the injury he sustained on September 18. Herriott attached various documents to his response to the motion for

summary judgment that reflect his repeated requests for an ankle x-ray. However, all but one of those requests took place at various other institutions after Herriott had been transferred from Broad River. ECF No. 119-6 at 2–13. There is evidence of one form for a sick call that appears to summarize the sick calls that Herriott submitted while at Broad River, in which he states that he placed a sick call for an x-ray of his ankle on September 20, 2018. Id. at 14. Defendants attached to their motion for summary judgment an administrative note that a nurse saw Herriott the day after the September 18 incident. That note reflects that Herriott complained that his right elbow "popped out" three times, that his left scapula area was sore, and that he was experiencing back pain. ECF No. 114-3 at 7. There is no mention of ankle pain or a request for an x-ray, and the administrative note concludes by stating "[n]o other complaints." Id.

To establish a deliberate indifference to medical needs claim, "[t]he plaintiff must show that he had serious medical needs, which is an objective inquiry, and that the defendant acted with deliberate indifference to those needs, which is a subjective inquiry." Heyer v. United States Bureau of Prisons, 849 F.3d 202, 209–10 (4th Cir. 2017). "The necessary showing of deliberate indifference can be manifested by prison officials in responding to a prisoner's medical needs in various ways, including intentionally denying or delaying medical care, or intentionally interfering with prescribed medical care." Formica v. Aylor, 739 F. App'x 745, 754 (4th Cir. 2018). Herriott alleges that he sustained his ankle injury on September 18, and he was transferred from Broad River to Kershaw Correctional Institution on November 13, 2018, ECF No. 114-2 at 3. The only evidence in the record that Herriott requested an ankle x-ray during this two-month time period is the sick call form in which Herriott states that he

requested an ankle x-ray on September 20. There is no indication on this form that the form was ever received by any staff member at Broad River. Nevertheless, even viewing this evidence in the light most favorable to Herriott and concluding that Herriott did request an x-ray on September 20, there is no evidence that defendants intentionally delayed an x-ray or intentionally interfered with Herriott's medical care during the final two months Herriott was housed at Broad River. The fact that Herriott received medical attention on September 19 suggests just the opposite. Therefore, the court agrees with the R&R that summary judgment is warranted on this medical indifference claim.

In the third incident at issue, Herriott alleges that Sergeant Coaxum sprayed him with an excessive amount of chemical munitions on September 19, 2018. The R&R found that this incident did not rise to unconstitutional excessive force because the uncontroverted evidence showed that Herriott acted in a hostile manner when being returned to his cell, refused to cooperate, and punched Officer Maldonado in the stomach. Herriott does not present any objections to the R&R's recommendation on his excessive for claim related to this incident. As such, the court reviews the R&R for clear error and finds none, meaning that summary judgment is warranted on this claim. As for his medical indifference claim, Herriott argues in his objection that he "was not properly or adequately treated after being maced in the facial area, not afforded a shower, nor decontaminated." ECF No. 135 at 10. However, Sergeant Coaxum attested that Herriott was instructed to use running water to wash the chemical munitions from his face and that Herriott was seen by a nurse after the incident. ECF No. 114-6 at 2. The incident report also shows that Herriott received medical attention. Id. at 14. Herriott presents no evidence to contradict this account, meaning there is nothing to suggest that Herriott was

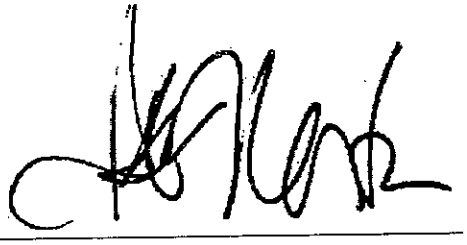
deprived of medical attention. As such, the court finds summary judgment to be warranted on this medical indifference claim.

Finally, Herriott objects to the R&R's finding that defendants are entitled to qualified immunity, arguing that his "evidence demonstrates that the defendants are not entitle [sic] to qualified immunity when the defendants have made considered decisions not only to engaged [sic] in unlawful criminal activity, but to fabricate and cover up their actions before this tribunal is unethical and no respect to the law in which they-defendants [sic] represent." ECF No. 135 at 11.* However, Herriott cites to no evidence to support this proposition, and this argument is unrelated to the two-prong inquiry of qualified immunity—whether a constitutional violation occurred and whether the constitutional right violated was clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). Therefore, the court overrules Herriott's objection.

IV. CONCLUSION

For the foregoing reasons the court **ADOPTS** the R&R, **DENIES** Herriott's motion for default judgment, and **GRANTS** defendants' motion for summary judgment.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

July 14, 2020
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Kevin Herriott, Plaintiff, vs. Michael Stephen, Associate Warden Washing, Major Parrish, Captain Carter, Lieutenant Will, Officer Dunn, Officer Malnado, Mailroom Official Mitchell, Officer Mata, Sergeant Levels, Lieutenant Vela, Sergeant Robinson, Officer Campbell, Officer John Doe 1, and Officer John Doe 2, Defendants.	C/A No.: 6:19-cv-0750 DCN **ORDER**

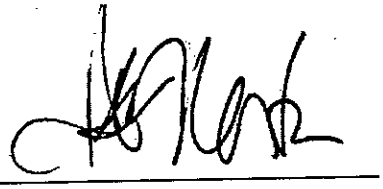
The above referenced case is before this court upon the magistrate judge's recommendation that the case go forward with respect the excessive force/medical indifference claims against defendants Major Parrish, Sergeant Levels, Lieutenant Vela, and Officers Mata, Malnado, Dunn and Coxum. It was recommended that the remaining claims against defendants Parrish, Levels, Vela, Mata, Malnado, Dunn and Coxum, as well as any and all claims against defendants Warden Stephen, Captain Carter, Lieutenant Will, Mailroom Official Mitchell, Associate Warden Washington, Sergeant Robinson, Officer Campbell, John Doe 1 and John Doe 2 be dismissed with prejudice and without issuance and service of process because plaintiff's amended complaint has not cured the deficiencies identified in the order issued April 9, 2019..

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend

for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).[1] **Objections to the Magistrate Judge's Report and Recommendation were timely filed on June 13, 2019 by plaintiff.**

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's Report and Recommendation is **AFFIRMED,** the case shall proceed with respect to the excessive force/medical indifference claims against defendants Parrish, Levels, Vela, Mata, Malnado, Dunn and Coxum. The remaining claims against defendants Parrish, Levels, Vela, Mata, Malnado, Dunn, Coxum, Stephen, Carter, Will, Mitchell, Washington, Robinson, Campbell, John Doe 1 and John Doe 2 are **DISMISSED** with prejudice and without issuance and service of process.

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

June 24, 2019
Charleston, South Carolina

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[1]In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice must be 'sufficiently understandable to one in appellant's circumstances fairly to appraise him of what is required.'" Id. at 846. Plaintiff was advised in a clear manner that his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Kevin Herriott,

Plaintiff,

vs.

Michael Stephen, Associate Warden Washington, Major Parrish, Captain Carter, Lieutenant Will, Officer Dunn, Officer Malnado, Mailroom Official Mitchell, Officer Mata, Sergeant Levels, Lieutenant Vela, Sergeant Robinson, Officer Campbell, Officer John Doe 1, Officer John Doe 2,

Defendants.

C/A No. 6:19-750-DCN-KFM

REPORT OF MAGISTRATE JUDGE

The plaintiff, a state prisoner, proceeding *pro se* and *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights. Pursuant to the provisions of 28 U.S.C. § 636(b), and Local Civil Rule 73.02(B)(2)(d), D.S.C., this magistrate judge is authorized to review all pretrial matters in cases filed under 42 U.S.C. § 1983 and submit findings and recommendations to the district court.

The instant matter was opened on March 12, 2019, pursuant to an order to sever (doc. 1). The plaintiff's complaint was entered on the docket on March 22, 2019 (doc. 4). On May 1, 2019, the undersigned issued an order informing the plaintiff that his claims were subject to dismissal as drafted with respect to defendants Warden Stephen, Captain Carter, Lieutenant Will, Mailroom Official Mitchell, Associate Warden Washington, Sergeant Robinson, Officer Campbell, John Doe 1, and John Doe 2 and providing the plaintiff with fourteen days to file an amended complaint with respect to his claims against those defendants (doc. 17). That same order informed the plaintiff that his excessive force/medical indifference claims were sufficient to survive screening, and service would be recommended as to Maj. Parrish, Sgt. Levels, Lt. Vela, and Officers Mata, Malnado,

Dunn, and Coxum on only these claims (*id.*). On May 6, 2019, the plaintiff filed a motion to amend/supplement his complaint (doc. 19). The court found the plaintiff's motion moot in light of the order instructing him to amend, and the plaintiff's amended complaint, which was entered on the docket on May 17, 2019 (doc. 24).

BACKGROUND[1]

The plaintiff, in his amended complaint, makes various claims of constitutional violations against many employees at Broad River Correctional Institution ("Broad River"), where he was previously confined (doc. 20). The plaintiff alleges that from August 2018 through November 2018, he was denied outdoor recreation, exercise, fresh air, and sunlight by defendants Warden Stephen, Associate Warden Washington, Major Parrish, Captain Carter, and Lieutenant Will (*id.* at 9). The plaintiff contends that from October 2018 to November 2018, the restricted housing unit ("RHU") cages were inoperable and that defendants Warden Stephen, Associate Warden Washington, Major Parrish, Captain Carter, and Lieutenant Will violated his rights because it did not repair the cages and as a result the plaintiff was exposed to toxic fumes and smoke due to fires set by other inmates in the RHU (*id.* at 9–10).

The plaintiff also alleges that Officers Malnado and Mitchell, on September 6, 2018, completed hand-to-hand transfers of the plaintiff's mail, interfering with a book the plaintiff wrote called "Prophet Unforsaken In The Wilderness" and lawyer mail correspondence of the plaintiff's mail (*id.* at 10). He contends that these actions denied him access to the court, denied him the ability to practice his religion, loss of mail, loss of book he authored, loss of sleep, stress, and depression, among other things (*id.*). The plaintiff also contends that Officer Dunn and Mailroom Official Mitchell, on August 23, 2018,

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[1] The facts set forth in this section come from the plaintiff's amended complaint (doc. 20). In the amended complaint, the plaintiff refers to prior versions of his complaint and attempts to "incorporate" their contents into the amended pleading (*see* doc. 20). The plaintiff was warned by the court that an amended pleading replaces the original and renders the original of no legal effect (doc. 17 at 8–9). As such, the claims evaluated herein are those contained in the amended pleading only.

exchanged his mail in a hand-to-hand transaction and stole the plaintiff's testimony of a statement about a riot at Lee Correctional (*id.*). The plaintiff also alleges that from August 2018 to November 2018, Officers Malnado and Dunn passed out copies and legal supplies purchased by the plaintiff to other RHU inmates (*id.* at 11).

He also contends that Officers Mata, Malnado, and Dunn physically assaulted him by slamming his arms in the "food flap" of his door on September 6, 2018 (*id.*). He also contends that he was denied medical attention for his bruised and swollen arms by Officers Mata, Malnado, and Dunn after their assault (*id.*). On September 21, 2018, the plaintiff contends that Sergeant Levels, Lieutenant Vela, and Major Parrish assaulted him by punching him repeatedly and slamming him to the ground, and twisting his ankle while in the Major's office (*id.*). He contends that after their assault he was again denied medical treatment and his ankle swells often and pops in-and-out of socket (*id.*). He also alleges that Officer Coxum used excessive chemical munitions against him on or before September 25, 2018 (*id.* at 11–12).

The plaintiff also alleges that from July 2018 through August 2018, Sergeant Robinson, Officer Campbell, John Doe 1 ("JD1"), and John Doe 2 ("JD2") illegally seized the plaintiff's duffle bag (*id.* at 12). He claims that the seizing of his property kept him from practicing his religion (*id.*). For his relief, the plaintiff requests money damages along with injunctive relief (*id.*).

STANDARD OF REVIEW

The plaintiff filed this action pursuant to 28 U.S.C. § 1915, the *in forma pauperis* statute. This statute authorizes the District Court to dismiss a case if it is satisfied that the action "fails to state a claim on which relief may be granted," is "frivolous or malicious," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Further, the plaintiff is a prisoner under the definition of 28 U.S.C. § 1915A(c), and "seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Thus, even if the plaintiff had prepaid the full filing fee, this Court is charged with screening the plaintiff's lawsuit to identify cognizable

claims or to dismiss the complaint if (1) it is frivolous, malicious, or fails to state a claim upon which relief may be granted, or (2) seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

As a *pro se* litigant, the plaintiff's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*). The requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

This complaint is filed pursuant to 42 U.S.C. § 1983, which "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). A civil action under § 1983 "creates a private right of action to vindicate violations of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

DISCUSSION

As noted above, the plaintiff's excessive force/medical indifference claims are sufficient to survive screening, and service will be recommended as to Maj. Parrish, Sgt. Levels, Lt. Vela, and Officers Mata, Malnado, Dunn, and Coxum on only these claims. As addressed below, the plaintiff has failed to correct the pleading deficiencies identified by the court; thus, the court recommends that defendants Warden Stephen, Captain Carter, Lieutenant Will, Mailroom Official Mitchell, Associate Warden Washington, Sergeant Robinson, Officer Campbell, John Doe 1, and John Doe 2 be dismissed from the case.

Conditions of Confinement Claims

The Eighth Amendment expressly prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. To succeed on an Eighth Amendment claim for cruel and unusual punishment regarding the conditions of his confinement, a prisoner must prove that he was deprived of a basic human need and that prison officials were deliberately indifferent to that deprivation. *See Strickler v. Waters*, 989 F.2d 1375, 1379 (4th Cir. 1993). The first prong of the *Strickler* analysis requires an objective showing that the deprivation was sufficiently serious, such that significant physical or emotional injury resulted from it, while the second prong is a subjective test requiring evidence that prison officials acted with a sufficiently culpable state of mind. *Id.* (*citing Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

The plaintiff alleges that Warden Stephen, Assoc. Warden Washington, Maj. Parrish, Capt. Carter, and Lt. Will have deprived him of access to outdoor recreation and exercise, fresh air, and sunlight while in lockup at Broad River and that they failed to repair the RHU cages (doc. 20 at 9). These conclusory allegations, however, fail to plausibly state a claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (*citing Twombly v. Bell Atl. Corp.*, 550 U.S. 544, 556–57 (2007)). Further, the plaintiff has failed to allege facts showing that these defendants were personally involved in the purported deprivations. *See Iqbal*, 556 U.S. at 676 ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the constitution."); *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1997) (holding that an official must be personally involved in the alleged deprivation before liability may be imposed).

As recognized by the Supreme Court, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* Further, the plausibility standard requires more than "'an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Griffith v. State Farm Fire and Cas. Co.*, C.A. No. 2:12-

239-DCN, 2012 WL 2048200, at *1 (D.S.C. June 6, 2012) (*quoting Iqbal*, 556 U.S. at 678). As such, even liberally construed, the plaintiff's lone conclusory allegation that Warden Stephen, Associate Warden Washington, Major Parrish, Captain Carter, and Lieutenant Will denied him access to recreation and exercise does not contain sufficient factual allegations; thus, it "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted) (noting that it is not enough to plead facts that are "merely consistent" with a defendant's liability).

Further, to the extent the plaintiff seeks to hold these defendants liable in their supervisory capacities at Broad River, the plaintiff's claims are subject to summary dismissal because the doctrines of vicarious liability and *respondeat superior* are generally not applicable to § 1983 suits. *Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (noting that "Section 1983 will not support a claim based on a *respondeat superior* theory of liability" (emphasis in original)). Indeed, to allege a plausible claim requires a showing that the supervisor (1) had actual or constructive knowledge that his/her subordinates engaged in conduct posing a pervasive or unreasonable risk of constitutional injury; (2) the supervisor's response to the knowledge was "so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices;" and (3) an affirmative causal link between the inaction by the supervisor and the particular constitutional injury suffered by the plaintiff. *Green v. Beck*, 539 F. App'x 78, 80 (4th Cir. 2013). The plaintiff has not alleged how each of the above defendants were responsible for his lack of exercise and recreation, nor has he indicated that he challenges an institutional policy. As such, these claims are not cognizable against these defendants in their supervisory capacities under § 1983. *See Ford v. Stirling*, C.A. No. 2:17-2390-MGL, 2017 WL 4803648, at *2 (D.S.C. Oct. 25, 2017); *London v. Maier*, C.A. No. 0:10-434-RBH, 2010 WL 1428832, at *2 (D.S.C. Apr. 7, 2010). Thus, the plaintiff's conditions of confinement claims are subject to summary dismissal.

Interference with Mail Claims

The plaintiff also alleges that his Constitutional rights were violated because Officers Malnado and Mitchell completed hand-to-hand transfers of the plaintiff's mail on August 23, 2018, and September 6, 2018 (doc. 20 at 10).[2] Inmates enjoy a First Amendment right to send and receive mail. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). As such, interference with an inmate's mail *may* state a cognizable claim under § 1983. *Id.*; *see Corey v. Reich*, C.A. No. 0:02-2801-12, 2004 WL 3090234, at *10 (D.S.C. Mar. 9, 2004) (internal citation omitted). Nevertheless, the Supreme Court has recognized that prisoners only retain First Amendment rights not "inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (internal citation omitted) (alteration in original).

Here, the plaintiff's allegations as to Officers Malnado and Mitchell fail because they provide no factual detail regarding the alleged mail interference. Indeed, although the plaintiff conclusorily asserts that Officers Malnado and Mitchell engaged in "hand-to-hand" transfers of his religious and legal mail, his pleadings do not present a constitutional injury due to a hand-to-hand transfer of his mail. As noted, the plaintiff's vague and conclusory allegations include no cognizable harm in connection with his claim that Officers Malnado and Mitchell interfered with his mail.[3]

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[2] The plaintiff, in passing, conclusorily asserts that these actions interfered with his access to the courts. Nevertheless, the analysis focuses on his allegation that his Constitutional right to send and receive mail was violated by Mitchell and Malnado and his denial of access to the courts claim—to the extent one can be liberally construed—will be addressed separately, *infra*. The same applies to the plaintiff's claim that these actions violated his First Amendment rights.

[3] The plaintiff does contend that he experienced injuries; nevertheless, the injuries are not cognizable under § 1983 (*see* doc. 20 at 10–11 (injuries detailed including loss of sleep, loss of book, depression)).

The plaintiff's claim also fails to the extent it can be liberally asserted that the criminal nature of Malnado and Mitchell's actions provided the basis for his Constitutional violation under § 1983. There are two federal statutes that criminalize the obstruction of mail. *See* 18 U.S.C. §§ 1701–02 (noting the criminal penalties for "knowingly and wilfully obstruct[ing] . . . the passage of the mail" as well as for removing mail from the post office/authorized depository/mail carrier, etc. before "it has been delivered to the person to whom it was directed, with design to obstruct the correspondence"). These criminal statutes, however, do not support civil causes of action, such as the instant § 1983 action. *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 103 (2d Cir. 1981) (holding that trial court properly dismissed such claims because those statutes do not provide any private cause of action); *see also Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987) (same). As such, based upon the foregoing, the plaintiff has failed to state a claim for relief with respect to his interference with mail claim.

Property Claim

The plaintiff contends that Sergeant Robinson, Officer Campbell, JD1, and JD2 violated his rights when they confiscated his duffle bag and other personal items (doc. 20 at 12). Liberally construed, the plaintiff also contends that Officers Malnado and Dunn violated his property rights by interfering/confiscating his mail as well as by passing out copies and legal supplies purchased by the plaintiff to other RHU inmates (*id.* at 11). The United States Supreme Court has explicitly recognized that deprivations of an inmate's personal property do not rise to the level of a constitutional violation. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Mora v. City of Gaithersburg*, 519 F.3d 216, 230–31 (4th Cir. 2008) (holding that deprivations of personal property by corrections officials are not constitutional violations so long as there are post-deprivation remedies). South Carolina has such remedial procedures in place. *See* S.C. Code Ann. § 15-78-10 *et seq*. As such, the plaintiff cannot pursue his deprivation of property claim in this court.

Additionally, to the extent the plaintiff alleges a first amendment violation by the withholding or seizing of his religious property, his claims are still subject to summary

dismissal as drafted. While a prisoner retains his federal constitutional right to freedom of religion and afforded a reasonable opportunity to practice it, prison officials must be afforded "latitude in the administration of prison affairs." *Cruz*, 405 U.S. at 321–22. Further, limitations or restrictions upon inmates' constitutional rights are permissible if they are "reasonably related to legitimate penological interests." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). Further, there are several factors to consider in evaluating a constitutional challenge to prison regulations. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350–53 (1987). The plaintiff alleges that the confiscation of the religious book he authored interfered with his ability to practice his religion; however, this vague allegations by the plaintiff fail to state a viable claim for relief.

Denial of Access to the Courts Claims

Lastly, liberally construed, the plaintiff contends that Officers Malnado and Mitchell denied him access to the courts by interfering with the plaintiff's legal mail (doc. 20 at 10–11). A claim for denial of access to the courts must be pled with specificity. *Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir. 1996). Further, in order to state a constitutional claim for denial of access to the courts, a prisoner must show actual injury. *Id.; see Lewis v. Casey*, 518 U.S. 343, 349 (1996). The actual injury requirement can be satisfied by demonstrating that a non-frivolous legal claim was frustrated or impeded by some actual deprivation of access to the court. *Lewis*, 518 U.S. at 352–53. Here, the plaintiff's conclusory allegations that the defendants denied him access to the courts, fails to state a claim for relief and includes no allegation of actual injury. Further, the filings in this case—and in four others filed within this district—belie the plaintiff's claim that he lacks access to the court. *See Herriott v. Stirling, et al.*, C.A. No. 6:19-804-DCN-KFM (D.S.C.); *Herriott v. McCabe*, C.A. No. 6:19-803-DCN-KFM (D.S.C.); *Herriott v. Ford, et al.*, C.A. No. 6:19-751-DCN-KFM (D.S.C.); *Herriott v. Joyner et al.*, C.A. No. 6:19-626-DCN-KFM (D.S.C.). As such, the plaintiff's denial of access to the courts claim is subject to summary dismissal.

RECOMMENDATION

As noted above, the plaintiff's case will go forward with respect to his excessive force/medical indifference claims against defendants Maj. Parrish, Sgt. Levels, Lt. Vela, and Officers Mata, Malnado, Dunn, and Coxum. Nevertheless, with respect to the remaining claims against defendants Maj. Parrish, Sgt. Levels, Lt. Vela, and Officers Mata, Malnado, Dunn, and Coxum as well as any and all claims against defendants Warden Stephen, Captain Carter, Lieutenant Will, Mailroom Official Mitchell, Associate Warden Washington, Sergeant Robinson, Officer Campbell, John Doe 1, and John Doe 2 the undersigned recommends they be dismissed *with prejudice* and without issuance and service of process because the plaintiff's amended complaint has not cured the deficiencies identified in the order issued April 9, 2019.[4] *See Workman v. Morrison Healthcare*, 724 F. App'x 280, 281 (4th Cir. 2018) (in a case where the district court had already afforded the plaintiff an opportunity to amend, the district court was directed on remand to "in its discretion, either afford [the plaintiff] another opportunity to file an amended complaint or dismiss the complaint with prejudice, thereby rendering the dismissal order a final, appealable order") (citing *Goode v. Cent. Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 630 (4th Cir. 2015)).

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

May 31, 2019
Greenville, South Carolina

The plaintiff's attention is directed to the important notice on the next page.

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[4] That order warned the plaintiff that if he failed to file an amended complaint or failed to cure the deficiencies identified therein, the undersigned would recommend to the district court that those claims be dismissed *with prejudice* and without leave for further amendment (doc. 17 at 8–9). Despite the warning, as noted herein, the plaintiff's amended complaint did not cure any of the noted pleading deficiencies.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street, Room 239
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).