IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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| LEONARD PELTIER, | : | CIVIL ACTION NO. **3:CV-07-0416** |
| | : | |
| Plaintiff | : | (Judge Kosik) |
| | : | |
| v. | : | (Magistrate Judge Blewitt) |
| | : | |
| U.S. BUREAU OF PRISONS, et al., | : | |
| | : | |
| Defendants | : | |

**REPORT AND RECOMMENDATION**

**I. Background.**

The Plaintiff, Leonard Peltier, an inmate at USP-Lewisburg ("USP-Lewisburg"), Lewisburg Pennsylvania, filed, through counsel, this civil rights action pursuant to 28 U.S.C. § 1331[1], on March

[1]Plaintiff indicates that jurisdiction is vested with this Court under 28 U.S.C. § 1331. (Doc. 1, p. 2, ¶ 4.). Under 28 U.S.C. § 1331, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." (Emphasis added).

This is not a *Bivens* action, as Plaintiff does not indicate he seeks monetary damages from federal officials for alleged violations of his Constitutional rights. (Doc. 1, pp. 5-6). As this Court noted in *Oriakhi v. Wood*, 2006 WL 859543, * 1, n. 1. (M.D. Pa.), "[i]n *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court recognized a private cause of action to recover damages against a federal agent for violations of constitutional rights."

Nor does Plaintiff challenge any conditions of his present confinement at USP-Lewisburg. We agree with Defendants (Doc. 13, p. 3) that, insofar as Plaintiff cites to 28 U.S.C. §1331as a jurisdictional basis to support his claims against the federal agency Defendants, and to the extent that he seeks a recalculation of his mandatory release date and a shorter term of incarceration (*i.e.* from 2040 to 2007, Doc. 1, p. 5), he is incorrect. (*Id.*). However, Plaintiff, as a federal inmate, also asserts Constitutional claims against federal agencies, alleging that his procedural and substantive due process rights were violated by Defendants' incorrect calculation of his mandatory release date. (*Id.*, pp. 1-2, 6). Plaintiff also claims that Defendants' stated action violated the *Ex Post Facto* Clause. (*Id.*, p. 6). Plaintiff does not seek monetary damages with respect to his due process and *ex post facto* claims; rather, he seeks Defendant BOP to correct his mandatory release date. (*Id.*).

5, 2007, in the United States District for the Middle District of Pennsylvania. (Doc. 1).[2] Plaintiff paid the full filing fee for a civil rights action. (Doc. 1).

Plaintiff names as Defendants two federal agencies, namely the U.S. Bureau of Prison ("BOP") and the U.S. Parole Commission ("USPC"). (Doc. 1,pp. 1-2). Plaintiff does not name any individual federal official of either agency as a Defendant. (Doc. 1, pp. 1-2). Plaintiff cannot maintain a *Bivens* action against the BOP or the USPC.[3] As stated, since Plaintiff does not seek to

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[2]Inmate Peltier, despite being a frequent litigator in federal court over the years (See Doc. 13, Ex. 1, PACER database printout, this case is Plaintiff's nineteenth federal court action) has not filed a petition for writ of habeas corpus pursuant 28 U.S.C. § 2241 with this Court, claiming that the BOP was confining him in excess of his proper release date based on its alleged incorrect calculation of his mandatory release date ("MRD"). It seems that Plaintiff is challenging the BOP's refusal to properly calculate his mandatory release date to be sometime in 2007 instead of 2040. Doc. 1, p. 5.

[3]As this Court stated in *Arrington v. Inch*, 2006 WL 860961, * 4 (M.D. Pa.):

> "The doctrine of sovereign immunity precludes a plaintiff from bringing a *Bivens* action against a federal agency, *See FDIC v. Meyer,* 510 U.S. 471, 484-86 114, --- S.Ct. ----, ---- - ---- ----, --- L.Ed.2d ----, ---- - ---- ----(1994). Suits brought against federal officials in their official capacities are to be treated as suits against the employing government agency. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (cited with approval in *Christy v. Pa. Turnpike Comm'n,* 54 F.3d 1140, 1143 n. 3 (3d Cir.1995)). As a result, a *Bivens* suit brought against an individual federal official acting in his official capacity is barred by the doctrine of sovereign immunity, *See also Chinchello v. Fenton,* 805 F.2d 126, 130 n. 4 (3d Cir.1986) (affirming district court's conclusion that sovereign immunity barred an official-capacity *Bivens* claim), and the court lacks jurisdiction to hear the claim. *See Kabakjian v. United States,* 267 F.3d 208, 211 (3d Cir.2001) (holding that district courts lack jurisdiction to hear claims brought against the United States unless Congress has explicitly waived sovereign immunity)."

recover damages against a federal official, this case is not a *Bivens* action.

As relief, Plaintiff does not seek compensatory damages from Defendants. Rather, he only seeks this Court "To order Defendants to correct Plaintiff's Mandatory Release Date to be 31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6).

Plaintiff paid the filing fee and the Clerk of Court erroneously issued the Summons in this case and sent it to Plaintiff's counsel for service without first forwarding the case to the undesigned for mandatory screening under the PLRA. Notwithstanding Plaintiff's payment of his filing fee, the Court was required to preliminarily screen the Complaint.[4] In fact, this Court has advised the Clerk of Court's Office in the past that all prisoner complaints must be forward to the Court for mandatory screening regardless of whether the filing fee was paid.

**II. PLRA.**

Notwithstanding Plaintiff's payment of the filing fee, the Prison Litigation Reform Act of 1995 (the "PLRA")[5] obligated the Court to engage in a screening process.[6] Specifically, even though Plaintiff paid the filing fee for a civil rights action, the Court must still screen his Complaint pursuant to 28 U.S.C. §1915A. *See Vega v. Kyler*, C.A. No. 03-1936 (3d Cir. 2004) 2004 WL 229073 (Non-precedential) (If prisoner pays filing fee, civil rights complaint is subject to review under 28 U.S.C.

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[4]The Clerk of Court's Office is again directed to forward all future prisoner cases to the Court for screening under the PLRA regardless of whether the inmate pays the filing fee or files a request to proceed *in forma pauperis*.

[5]Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996).

[6]As stated above, Plaintiff paid the required filing fee. (Doc. 1).

§ 1915A(b) and not 28 U.S.C. § 1915(e)(2)(B)).

Section 1915A provides:

> **(a) Screening**.- The court shall review, before docketing if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
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> **(b) Grounds for dismissal**.- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-
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> > **(1)** is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
> >
> > **(2)** seeks monetary relief against a defendant who is immune from such relief.

Due to the error by the Clerk of Court's Office, this Court was prevented from reviewing the Complaint under 28 U.S.C. §1915A(b), as it was required to do. If we had screened the Complaint, we would have determined that Plaintiff's §1331 action was predominantly a petition for writ of habeas corpus under § 2241. We would have also made sure that service of process was properly completed in this case. It is agreed by Plaintiff and Defendants that Plaintiff did not make proper service of process under Fed. R. Civ p. 4. Consequently, Defendants had to file a Motion to Dismiss, wherein Defendants request, in part, that the instant Complaint be dismissed without prejudice or that service be quashed and Plaintiff be required to effect proper service. (Doc. 13, pp. 3, 7 and Doc. 17, p. 9). Plaintiff requests, out of time, leave of Court to give him an additional 20 days to perfect service rather than quashing service and requiring him to begin service anew. (Doc. 17, p. 9). In short, if we were correctly referred this case by the Clerk of Court's Office upon filing, we would have alleviated the need for Defendants to have filed a Motion to Dismiss, and we

would have saved this Court and the parties both time and resources.

**III. Allegations of Complaint.**

Plaintiff's six-page, typed, counseled Complaint consists of 28 numbered paragraphs (really 29 since there are two ¶'s 27.). (Doc. 1). Plaintiff does not include copies of the BOP's Sentence Computation Sheets calculating his Mandatory Release Date, but he indicates that the BOP has "erroneously calculated Plaintiff's Mandatory Release Date to be 2040." (*Id*., p. 5, ¶ 20.). Plaintiff seeks this Court to direct Defendants to conduct a recalculation of his mandatory release date to specifically be 31 years and 285 days, less further good time from February 6, 1976, instead of a 2040 MRD. (Doc. 1, p. 6).

In addition to claiming that Defendants have incorrectly calculated his Mandatory Release Date, and requesting that the Court order Defendants to correct his mandatory release date, Plaintiff also claims that the refusal of Defendants to "act on Plaintiff's Mandatory Release Date" violates his substantive and procedural due process rights. (*Id*., pp. 1-3, 6). Specifically, Plaintiff avers that Defendants have arbitrarily and capriciously refused to correct the erroneous calculation of his MRD "under 28 (sic) U.S.C. § 4206(d)"[7], and that as a result, he has suffered harm. Plaintiff specifically alleges: "The arbitrary and capricious refusal to correct Plaintiff's Mandatory Release Date by the Defendants without notice or opportunity to be heard, taking away from him the date properly established by 42 (sic) U.S.C. § 4206(d) violates both substantive and/or procedural due

[7]As Defendants note (Doc. 13, p. 3, n. 3), Plaintiff erroneously cites to 28 U.S.C. and to 42 U.S.C., when the correct cite is 18 U.S.C. §4206(d). (Doc. 1, ¶'s 23., 24. and 27.).

process of law." (Doc. 1, ¶'s 23., 24. and 27.).[8]

In a second numbered ¶27. of the Complaint, Plaintiff also avers, without further specificity, that "Defendants[']actions also violate the Ex Post Facto (sic) provisions of the United States Constitution." (Doc. 1, p. 6, second ¶27.).

As stated, Plaintiff does not seek any monetary relief. Rather, he only seeks the Court to direct Defendants to recalculate his MRD to be "31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6). Thus, since Defendants have determined Plaintiff's MRD to be 2040, Plaintiff seeks the Court to require Defendants to release him from his current confinement much sooner than they have determined his release date to be. Hence, Plaintiff is seeking sole relief which clearly effects the duration of his confinement.

Plaintiff avers that he utilized the BOP Administrative remedy process with respect to his claim that his MRD was not correctly calculated. (Doc. 1, p. 5, ¶ 21.). Thus, Plaintiff's Complaint states that he exhausted the grievance process available at the prison with respect to his claim that his MRD was not correctly calculated. Plaintiff does not state if he exhausted his BOP Administrative remedies with respect to his due process claims and his *ex post facto* claim. (Doc. 1, p. 5 ¶ 21. ).[9]

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[8]As stated above, Plaintiff's Complaint erroneously contains two ¶'s 27. , Doc. 1, p. 6.

[9]It is well-settled that the Plaintiff must exhaust all of his available administrative remedies regarding all of his claims prior to filing a civil rights suit . In *Porter v. Nussle*, 534 U.S. 516, 532 (2002), the Supreme Court reiterated that the exhaustion requirement under § 1997e(a) applies to all actions regarding prisons conditions, including § 1983 actions or actions brought pursuant to any other federal law. The *Porter* Court held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other

To date, as stated, there is no dispute that Defendants have not been properly served under Rule 4. (Doc. 13, pp. 3, 7 and Doc. 17, p. 9). Defendants, although not yet properly served, filed a Motion to Dismiss the Complaint on July 17, 2007 **(Doc. 12),** and filed their support Brief with attachments on July 31, 2007. (Doc. 13). Defendants move to dismiss under both Fed. R. Civ. P. 12(b)(5) and 12(b)(6). Plaintiff, after being granted an extension of time, filed his opposition Brief on August 28, 2007. (Doc. 17). Defendants filed their Reply Brief on September 17, 2007. (Doc. 18). Defendants' Motion to Dismiss is now ripe for disposition.[10]

We find that Plaintiff improperly filed his action, seeking a speedier release from confinement, under 28 U.S.C. §1331 (Doc. 1, p. 2, ¶4.), and that this aspect of his case should be filed as a petition for writ of habeas corpus under 28 U.S.C. § 2241. We find that Plaintiff's action regarding his procedural due process claim as against both Defendants should be dismissed since Plaintiff has not implicated a property or liberty interest with respect to being granted an earlier

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wrong." *Id.; Woodford v. Ngo,* 126 S Ct. 2378 (2006); *Fortune v. Bitner*, 2006 WL 2769158, *7 (M.D. Pa.)("The PLRA mandates that inmates 'properly' exhaust administrative remedies before filing suit in federal court.")(citation omitted).

An inmate must also exhaust his available Administrative remedies with respect to a habeas corpus petition filed under §2241. Plaintiff must exhaust his BOP administrative remedies with respect to the claim presented in his instant Complaint regarding his challenge to the BOP's computation of the MRD with respect to his federal sentence. *See Moscato v. Federal Bureau of Prisons*, 98 F.3d 757 (3d Cir. 1996) (It is well-settled that before a prisoner can bring a habeas petition under 28 U.S.C. § 2241, administrative remedies must be exhausted).

However, the Defendants have the burden to plead and prove failure of exhaustion as an affirmative defense. *See Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002); *Fortune v. Bitner*, 2006 WL 2769158, *7; *Jones v. Bock*, 127 S. Ct. 910 (2007). At this time, we make no finding as to if Plaintiff completed the available BOP administrative relief process with respect to all of his present claims.

[10]The undersigned has been assigned this case for pre-trial matters pursuant to 28 U.S.C. §636(b).

MRD. Thus, we find that Plaintiff's civil rights action, based on the face of his pleading, fails to state a Fourteenth Amendment procedural due process claim. We find that Plaintiff has failed to state an ex *post facto* claim. *See Richardson v. PA Bd. of Prob. and Parole*, 423 F.3d 282, 288 (3d Cir. 2005). As this Court stated in *Phillips v. Nish*, Civil No. 06-0073, M.D. Pa., 9-26-07 Order, p. 2 (J. Rambo):

> The Third Circuit Court of Appeals has stated there are two prongs to a successful ex *post facto* claim: a petitioner must s how (1) that there has been a change in law or policy which has been given retrospective effect; (20 that its retrospective application to the petitioner created a real risk of increasing the measure of his punishment. *Richardson v. Pennsylvania Bd. of Prob. and Parole*, 423 F.3d 282, 288 (3d Cir. 2005).

Plaintiff has not sufficiently claimed that the Defendants used new standards, retroactively applied, in calculating his MRD. Thus, we will recommend that Plaintiff's ex *post facto* claim be dismissed for failure to state a claim.

Finally, we find that while Plaintiff may have stated a substantive due process Constitutional claim, namely, that Defendants calculated his MRD using ineligible criteria (Doc. 1, p. 6, ¶ 26.), this § 1331 claim should be dismissed without prejudice, since Plaintiff has not properly served Defendants, and he has not shown good cause under Rule 4 for his failure to do so.

**IV. Motion to Dismiss Standard.**

In considering whether a pleading states an actionable claim, the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts

in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957); *Ransom v. Marrazzo,* 848 F.2d 398, 401 (3d Cir. 1988). A complaint that sets out facts which affirmatively demonstrate that the plaintiff has no right to recover is properly dismissed without leave to amend. *Estelle v. Gamble*, 429 U.S. 97, 107-108 (1976).

**V. Discussion.**

Defendants argue that since Plaintiff admittedly did not complete proper service and since his main claim and his relief request must be raised *via* a habeas corpus petition, the instant Complaint should be dismissed. (Doc. 13, p. 5). We agree.[11]

*A. Rule 12(b)(5) Improper Service of Process*

As stated, Defendants assert that Plaintiff has failed to properly serve them as required by Fed. R. Civ. P. 4(i). It is undisputed that Plaintiff's counsel only served the BOP in Washington, D.C. and the USPC in Silver Springs, Maryland. (Doc. 10). Plaintiff has failed to serve the United States Attorney's Office for the Middle District of Pennsylvania and the United States Attorney General as required. (Doc. 13, pp. 6-7). Plaintiff concedes that he has not made proper service on Defendants. (Doc. 17, p. 9). Plaintiff seeks an untimely leave of Court, since the 120-day time limit for proper service has expired over two months ago (*i.e.* July 5, 2007), to extend the time for completing service by 20 days. (*Id*.).

[11]We do not find that Plaintiff's present claims have been litigated and decided on the merits in his other federal actions identified by Defendants (Doc. 13, attached opinions of cases in other Districts in which Plaintiff was a party), *i.e.* we do not find applicable the doctrine of claims preclusion or *res judicata* based on the Plaintiff's prior cases upon which Defendants have relied.

Rule 4(m) provides, in part, as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if **the plaintiff shows good cause for the failure**, the court shall extend the time for service for a appropriate period.

(Emphasis added).

As the Court stated in *Thompson v. Sears, Roebuck & Co.*, 2006 WL 573796, *2 (E.D. Pa. 2006):

> F.R. Civ. P. 12(b)(5) states the following defenses may at the option of the pleader be made by motion ... (5) insufficiency of service of process. A defendant may object to the plaintiff's failure to comply with the procedural requirements for proper service of the summons and complaint as set forth in or incorporated by F.R. Civ. P. 4(m). *See* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1353 (3d ed.2004). Under F.R. Civ. P. 4(m) a plaintiff has 120 days from the date of filing the original complaint to serve defendant with the summons and complaint. In resolving a motion under Rule 12(b)(5), the party making the service has the burden of demonstrating its validity when an objection to service is made. *Reed v. Weeks Marine, Inc.*, 166 F.Supp.2d 1052, 1054 (E.D.Pa.2001) (citing *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir.1993)).

The *Thompson* Court also stated:

> The Third Circuit has required courts to extend time for service under Rule 4(m) where the plaintiff demonstrates good cause. *McCurdy v. Am. Bd. of Plastic Surgery*, 157 F.3d 191, 196 (3d. Cir.1998). Good cause" has been equated with the concept of excusable neglect, as defined in F.R. Civ. P. 6(b)(2), which requires a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules. *MCI Telecoms. Corp. v. Teleconcepts,* 71 F.3d 1086, 1097

> (3d. Cir.1995) (citing *Petrucelli v. Bohringer & Ratzinger,* 46 F.3d 1298, 1312 (3d Cir.1995) (Becker, J., concurring in part and dissenting in part)). If good cause exists, the extension must be granted. *Boley v. Kaymark,* 123 F.3d 756, 758 (3d Cir.1997); *see also* F.R. Civ. P. 4(m). Courts have considered three factors in determining the existence of good cause: (1) the reasonableness of plaintiff's efforts to serve; (2) whether the defendant is prejudiced by the lack of timely service; and (3) whether the plaintiff moved for an enlargement of time to serve. *See MCI*, 71 F.3d at 1097. However, the *MCI* Court noted that "absence of prejudice alone can never constitute good cause to excuse late service." *Id*.

*Id*.

Further, the *Thompson* Court stated that:

> "[e]xtension of time under Rule 4(m), however, requires a two-step inquiry, and even if good cause does not exist, the district court must consider whether to grant a discretionary extension of time. *See Petrucelli,* 46 F.3d at 1307-08 (noting that under Rule 4(m) "the district court *must* consider whether any other factors warrant extending time even though good cause was not shown" (emphasis added)).

Plaintiff has made absolutely no showing of good cause for his admitted failure to properly serve Defendants within the required 120 days. Plaintiff merely states that he "concedes that service was improper and apologies to the court and counsel for his oversight." (Doc. 17, p. 9). This Court issued an Order on May 16, 2007, and required Plaintiff to file a status report regarding the service of his Complaint since no executed return of service was filed by Plaintiff and over two months had lapsed since the Complaint was filed. (Doc. 8). Clearly the Court's Status Report Order should have alerted Plaintiff, who is represented by counsel and is not *pro se*, to his failure to properly serve Defendants, and he should have taken appropriate action at that time to perfect service upon Defendants. The record is devoid of any indication that Plaintiff made any attempt to properly serve Defendants after this Court issued the Status Report Order. In fact, Plaintiff did nothing to perfect service on Defendants until he filed his opposition Brief to Defendants' Motion

to Dismiss. Plaintiff offers no reason as to why he did not accomplish proper service after the Court's Order, nor does he offer any basis for the delay in properly serving Defendants.

Thus, despite the Court's Order, which was meant to put Plaintiff on notice that proper service of his Complaint had not yet been accomplished, Plaintiff still failed to properly serve the Defendants. Rather than complete proper service at the time of the May 16, 2007 Order, Plaintiff waited until he filed his August 28, 2007 opposition Brief to request the Court to give him an extension of time to complete proper service. Plaintiff has not shown good cause for his failure to properly serve Defendants, even after the Court noticed him of his deficiency in May 2007.

Under the second phase of the Rule 4(m) inquiry, we do not find that the Court should exercise its discretion to grant Plaintiff an extension of time to perfect service on Defendants. We find, as Defendants state (Doc. 18, p. 6), that it would be futile to afford Plaintiff additional time to complete service in this case, since his Complaint is not primarily a civil rights action and since it seeks relief which must be pursued through a § 2241 habeas petition. Further, Plaintiff is not proceeding *pro se* in this case, and his counsel is well aware of the rules of service. Thus, we do not find that Plaintiff is entitled to a discretionary extension of time to perfect service on Defendants in this case.

Thus, we find that Plaintiff is not entitled to an extension of time to perfect service, due to Plaintiff's failure to show good cause and since Plaintiff is not entitled to a discretionary extension of time, and we shall recommend that his Complaint be dismissed under Rule 12(b)(5) without prejudice for this reason.

*B. Nature of the Action*.

Defendants next argue that Plaintiff's Complaint and his claim that Defendants must recalculate his MRD are not properly raised in this civil rights action. (Doc. 13, p. 9). We concur. Since Plaintiff claims that his confinement at USP-Lewisburg will be too long in duration due to his allegation that Defendants have improperly calculated his MRD to be 2040 instead of to be "31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6), and he avers that he has earned 565 days good time credit to date (*i.e.* as of March 2007), and he seeks this Court to order Defendants to correct his MRD, he is clearly requesting relief which will quite considerably shorten the duration of his confinement. In fact, if Plaintiff was granted the relief he seeks, by our estimation, he would be entitled to release from confinement sometime in 2007, as opposed to 2040. That is, Plaintiff's MRD would be February 2007 plus about 280 days (565 GCT days - 285 days of sentence), which would require his release approximately 9 months after February 2007, or in November 2007. Plaintiff's argument that his requested release is not tantamount to "immediate release" (Doc. 17, p. 2) is simply incorrect since he is essentially requesting that Defendants be directed to re-calculate his MRD to require his release in about two months. We can hardly conceive of any relief that is more akin to immediate release than Plaintiff's claim. Thus, Plaintiff's attempt to distinguish his case from *Preiser* by stating that he is merely seeking "prospective injunctive relief" requiring some "future decision-making" by Defendants to properly calculate his MRD (Doc. 17, p. 2), is plainly not persuasive. In any event, even if Plaintiff is not seeking immediate release, he is certainly seeking relief which would give him a much speedier release from confinement than he currently faces, *i.e.* by about 33 years (2040 - 2007).

Plaintiff argues (Doc. 17, p. 3) that even if the Court grants him the relief he seeks, it is not all certain that such re-calculation would result in his immediate release from custody. However, it is certain that granting Plaintiff his requested relief in this case would significantly alter the duration of his confinement and result, under any circumstances, in a much speedier release from confinement than he currently faces, *i.e.* 2040.

Nor do we agree with Plaintiff that if he succeeds on the merits of his claim, it only might increase the chance of his early release. (*Id.*, pp 4-5). We find that it would definitely lead to a much speedier release from confinement than Plaintiff currently faces and not merely "might increase the chance for early release." (*Id.*). We also agree with Defendants (Doc. 18, p. 4) in their reply brief that while Plaintiff only focuses on the need to seek immediate release from confinement as the test with respect to the nature of his action, he does not address the full text of the *Preiser* case. It is only required that the inmate seek a speedier release from confinement and not an immediate release.[12]

In any event, we agree entirely with Defendants that Plaintiff is clearly seeking a speedier release from confinement, regardless of whether it amounts to his immediate release, and we find that Plaintiff is seeking a significantly speedier release, *i.e.,* over three decades speedier. Further, we find that inasmuch as Plaintiff is challenging the BOP's computation of his sentence regarding

[12]Plaintiff's counsel has failed to disclose in his Brief the full context of the *Preiser* case (Doc. 17, p. 2), and he implies that the test to determine the gist of the action is only whether the inmate is seeking immediate release. Further, we agree with Defendants that Plaintiff's counsel, in his Brief, has mischaracterized the relief Plaintiff is clearly requesting in this action, *i.e.* for the Court to direct Defendants to set his MRD to be a specific date that he claims it should be as opposed to being in 2040. (*Id.* & Doc. 18, pp. 4-5). *See* Doc. 1, p. 6 ("31 years and 285 days, less further good time from February 6, 1976 ... . ").

his MRD, he should proceed in a §2241 habeas petition. *See Chambers v. Holland*, 920 F. Supp. 618, 620 (M.D. Pa. 1996), *aff'd*. 100 F. 3d 946 (3d Cir. 1996) (Table).

As Defendants argue (Doc. 13, p. 9), Plaintiff's claim for a significantly speedier release from confinement is not properly brought in a § 1331 civil rights action. Rather, this claim, which challenges Plaintiff's duration of his confinement and in which he seeks his MRD to be re-calculated to be "31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6), must be asserted *via* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Thus, Plaintiff has improperly brought his claim affecting the length of his confinement in this § 1331 action. While Plaintiff's opposition Brief refers to his present action as a *Bivens* action (Doc. 17, p. 1), we do not find that this is a *Bivens*[13] action. In this case, Plaintiff does not seek monetary damages against any federal officials. Rather, Plaintiff incorrectly attempted to file his action seeking a speedier release from confinement as a civil rights action under 28 U.S.C. §1331, as stated above, and not under *Bivens*.

Plaintiff must assert his claim attacking Defendants' calculation of his MRD, which will undoubtedly result in a much speedier release from confinement, in a habeas petition. *See Nelson v. Campbell*, 124 S. Ct. 2117, 2124 (2004); *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005).

In his Complaint, Plaintiff is challenging Defendants' calculation of his MRD to be 2040, when he claims it should be "31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6). Thus, Plaintiff's stated claim sounds more like a § 2241 habeas petition and

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[13]As noted above, in *Oriakhi v. Wood*, 2006 WL 859543, * 1, n. 1. (M.D. Pa.), this Court stated that in *Bivens* "the Supreme Court recognized a private cause of action to recover damages against a federal agent for violations of constitutional rights."

not a civil rights action under § 1331.

The Supreme Court has held that a civil rights action is a proper remedy for a prisoner who claims that his conditions of confinement violate the constitution, but is not challenging the fact or length of his custody. *Preiser v. Rodriguez*, 411 U.S. 475, 499, 93 S. Ct. 1827 (1973). Plaintiff, in the present case, insofar as he is attacking Defendants' calculation o f his MRD, is clearly implicating relief that would significantly alter the term of his confinement in prison, and he has incorrectly attempted to raise this challenge affecting the duration of his sentence as a §1331 civil rights action. Thus, Plaintiff's claim in this case is properly construed as a petition for habeas corpus relief pursuant to 28 U.S.C. § 2241 and not as a § 1331 civil rights action. *See Muhammad v. Close*, 124 S.Ct. 1303, 1304 (2004) (*Per Curiam*). Therefore, to the extent that Plaintiff is challenging the calculation of his sentence and the duration of his confinement, and he seeks an Order directing Defendants to correct his MRD to be "31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6), this is a habeas claim and should be dismissed without prejudice.

The Third Circuit in *Leamer v. Fauver*, 288 F. 3d 532, 542 (3d Cir. 2002), stated:

> whenever the challenge ultimately attacks the 'core of habeas' -- the validity of the continued conviction or the fact or length of the sentence -- a challenge, however denominated and regardless of the relief sought, must be brought by way of a habeas corpus petition. Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction, an action under § 1983 is appropriate. (Emphasis added).

Thus, since Plaintiff is challenging the duration of his confinement at USP-Lewisburg, and since he is seeking relief that would necessary result in a much speedier release from confinement than 2040, we do not construe this claim as a civil rights action, but as a habeas corpus petition.

A ruling in the Plaintiff's favor on this claim would certainly alter his confinement (*i.e.*, cause a much speedier release from incarceration), and it would alter the length of his sentence by over three decades.

In the case of *Mansfield v. Beeler*, 2007 WL 1732566, *1 (3d Cir. 2007)(*Per Curiam*), (Non-Precedential) Petitioner, a federal inmate convicted of murder by an Air Force Court Martial and sentenced to life imprisonment, filed, in another District (Eastern District of North Carolina), a §2241 habeas petition which, after his transfer to USP-Lewisburg, was transferred to the Middle District of Pennsylvania. Petitioner claimed that "he was entitled to an earlier release because he had been denied good time credit and the [USPC] had failed to set a mandatory parole date." The Middle District of Pennsylvania District Court denied Mansfield's habeas petition and "found that his claim regarding the Commission's [USPC] failure to set a mandatory parole date was premature because under 18 U.S.C. § 4206(d) (repealed), his mandatory parole date would occur in 2014 . . . ." *Id.* Our case is similar to *Mansfield* in that Plaintiff Peltier claims that the USPC has unlawfully calculated his MRD which has resulted in requiring him to serve a substantially longer period of incarceration (to 2040) than he claims he should have to serve.

As discussed above, we will recommend that, to the extent that Plaintiff is claiming that the Defendants have improperly calculated his MRD to be 2040 and he requests that Defendants be directed to correct his MRD to be "31 years and 285 days, less further good time from February 6, 1976 ... . " (Doc. 1, p. 6), this claim should be dismissed without prejudice to Plaintiff to file it in

a habeas petition after he exhausts his BOP remedies, if he has not done so.[14]

*C. Claim Preclusion*

While we agree with Defendants that, in some of his previous 18 federal court actions, Plaintiff has tried, in some fashion, to have his sentence re-calculated and failed (Doc. 18, p. 5), we do not find that, based on the cases submitted by Defendants (Doc. 13, attached cases) Plaintiff has raised his exact MRD claim that he is raising in this case. Defendants have attached to their support Brief copies of Memoranda and Orders entered in three prior actions which our Plaintiff has filed in other Districts. (Doc. 13).

In Plaintiff's case filed in the United States District Court for the District of Kansas, No. 04-3418, Plaintiff Peltier, in a §2241 habeas petition claimed, in part, that the *Ex Post Facto*

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[14]As Defendants state (Doc. 18, pp. 2-3), in *Heck v. Humphrey*, 512 U.S. 477, 486-487 (1994), the Court adopted the so-called favorable termination rule, which provides that if the success of a civil rights damages suit "would necessarily imply the invalidity of his conviction or sentence," then the Plaintiff-prisoner's claim is cognizable only if he can prove that his conviction or sentence was reversed, invalidated, or called into question by a grant of federal habeas corpus relief. In our case, Plaintiff has not claimed that the length of his current sentence has been invalidated by the grant of federal habeas corpus relief, and thus he is precluded from seeking any damages for harm caused by actions would which render the length of his confinement as invalid.

If *Heck's* favorable termination rule applied in this case, Plaintiff would have to first establish that the BOP's determination of the length of his sentence and its determination that his MRD is 2040 was found unlawful by a grant of federal habeas corpus relief. *See Nelson v. Campbell*, ___ U.S. ____, 124 S.Ct. 2117, 2124 (2004). *But see Muhammad v. Close*, ___ U.S. ___, 124 S.Ct. 1303 (2004) (civil rights action not *Heck* barred where inmate did not seek to expunge misconduct charge since it could not be construed as seeking a judgment at odds with inmate's conviction or calculation of time to be served on underlying sentence). In our case, it is clear that Plaintiff is seeking to have the BOP's calculation of time he must serve on his criminal sentences to be significantly altered which will necessarily result in a much speedier release from confinement.

Clause was violated since the government tried to hold him in custody under the Sentencing Reform Act of 1984 and its amendments which applied to offenses after the date of their enactment in December 1987. Plaintiff was sentenced in 1977 to two consecutive life sentences for killing two FBI agents in June 1975. (Doc. 1, p. 2, ¶ 6.). Plaintiff states that he was also sentenced in 1979 to 5 years and 2 years consecutively for escape charges from a federal prison. (*Id*., ¶ 7.). Plaintiff sought an earlier release from prison and pursued his claims in a habeas petition. Thus, Plaintiff should have been aware that his present claim seeking a re-calculated MRD is properly brought in a §2241 habeas petition and not a civil rights action. The Kansas District Court found no *ex post facto* violation, and issued an Order in August 2006 denying Plaintiff all the relief he requested.[15]

Plaintiff, in October of 2004. filed a *Bivens* action against the USPC in the United States District Court for the District of Columbia claiming that the 1987 amendment to the Comprehensive Crime Control Act of 1984 was unlawfully applied to him. The Court stated that Plaintiff's action was a habeas petition, and even if it was a *Bivens* action, it would be *Heck*-barred. *See* Memorandum and Order, No. 04-1529, United States District Court for the District of Columbia, attached to Doc. 13. The D.C. District Court transferred Plaintiff's action, construed as a habeas petition, to the District Court in Kansas since Plaintiff was incarcerated there.

Plaintiff filed a habeas petition when he was confined at USP-Leavenworth, Kansas, in the Kansas District Court, Case No. 99-3194. (*See* Doc. 13 attached 9-26-02 Memorandum and Order). Plaintiff sought release on parole. Plaintiff raised, in part, an *ex post facto* claim under

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[15]Since we have found Plaintiff's *ex post facto* claim in our case to be vague (Doc. 1, p. 6, ¶ 27. (second)), we cannot determine if it would be precluded under the doctrine of *res judicata*.

18 U.S.C. §4201, *et seq*. *See* Case No. 99-3194, Doc. 13 attached 9-26-02 Memorandum and Order, pp. 10-14. The Kansas District Court dismissed Plaintiff's habeas petition by Order dated September 26, 2002. (*Id*., p. 15).

We agree with Plaintiff (Doc. 17, p. 7), that Defendants have not established the applicability of the doctrine of claim preclusion under the standard set in *Selkridge v. United of Omaha Life Ins. Co.*, 360 F. 3d 155, 172 (3d Cir. 2004).[16]

We do not find that claims in Plaintiff's stated prior cases attached to Defendants' Brief (Doc. 13) to be the same as his instant MRD claim.[17] Nonetheless, we find that Plaintiff's MRD claim is not properly brought in a civil rights action as discussed above.

*D. Due Process Claims*

In our case, Plaintiff claims that the refusal of the USPC to act on his MRD, *i.e*. to recalculate his MRD to be about 33 years prior to his present MRD of 2040, violates his substantive and procedural due process rights. (Doc. 1, pp. 1-2). He states that Defendants have arbitrarily and capriciously refused to correct the calculation of his MRD under 18 U.S.C. § 4206(d). (*Id*., p. 5).

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[16]The Court in *Selkridge*, 360 F. 3d at 172, stated, "[f]or claim preclusion to apply, there must have been "[1] a final judgment on the merits in [2] a prior suit involving the same parties or their privies, and [3] a subsequent suit based on the same cause of action." *General Elec. Co. v. Deutz Ag,* 270 F.3d 144, 158 (3d Cir.2001). "If these three factors are present, a claim that was or could have been raised previously must be dismissed as precluded." *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 194 (3d Cir.1999).

[17]Plaintiff's present vague *ex post facto* claim (Doc. 1, p. 6, ¶'s 27. (second ¶ 27.)) to the extent that it is based on 18 U.S.C. §4201, *et seq*., may be precluded. *See* Case No. 99-3194, Doc. 13, attached September 26, 2006 Memorandum and Order, pp. 10-14.

In Count II, Plaintiff states that by arbitrarily and capriciously refusing to correct the calculation of his MRD under 18 USC § 4206(d), Defendants violated his due process rights. (*Id*., p. 6, ¶27.). As stated, Plaintiff also vaguely alleges that the stated conduct by Defendants violated the *Ex Post Facto* Clause. (*Id*., second ¶ 27.). As relief in Count II, Plaintiff requests that the Court order Defendants to correct his MRD to "be 31 years and 285 days, less further good time from February 6, 1976... ." (*Id*.).

*i. Procedural Due Process Claim*

As this Court in *Porter v. Grace*, 2006 WL 680820, *2 (M.D. Pa.), stated with respect to a due process claim related to the denial of parole:

> With regard to the Petitioner's due process claim, there is no constitutionally created liberty interest in parole. *See, e.g. Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

In fact, in Plaintiff's Case No. 04-3418, U.S. District Court for the District of Kansas, the Court cited *Greenhotlz* with respect to Plaintiff's habeas claim made in that case. *See* August 28, 2006 Memorandum and Order, Case No. 04-3418, U.S. District Court for the District of Kansas, p. 11, attached to Doc. 13. In any event, Plaintiff's present claim seeking a re-calculation of his MRD and his requested relief in Count II is properly a habeas claim and must be presented in a habeas corpus petition. *See Mansfield, supra*.

Therefore, we will recommend that Plaintiff's procedural due process claim be dismissed.

*ii. Substantive Due Process Claim*

Plaintiff may have stated a substantive due process claim with respect to his averment that the USPC arbitrarily and capriciously refused to re-calculate his MRD under §4206, but regardless, Plaintiff must proceed *via* a §2241 habeas petition and not a civil rights action with respect to this claim in this case since he is clearly requesting relief which would affect the duration of his confinement, as discussed above. Plaintiff's claim is not in any way a "challenge to a continuing condition of his confinement" as he contends. (Doc. 17, p. 3). As stated, Plaintiff's request as relief in Count II of his Complaint is specifically that the Court order Defendants to correct his MRD to "be 31 years and 285 days, less further good time form February 6, 1976... ." (Doc. 1, p. 6). We find that Plaintiff is challenging the BOP's calculation of his MRD to be 2040, and he seeks a much earlier release from confinement based on a court-ordered recalculation of his MRD. Plaintiff's claim is properly a habeas claim and must be presented in a habeas corpus petition. *See Queen v. Chambers*, 2006 WL 898175, * 2 (M.D. Pa. 2006) ("the only proper was for [USP-Lewisburg inmate] to challenge the computation of his federal sentence is *via* a properly filed habeas corpus petition."); *Knight v. Kaminski*, 2006 WL 618443, * 5 (M.D. Pa. 2006).[18]

As the Court in *Ledwith v. Brooks*, 2007 WL 804189, * 5 (W.D. Pa.) stated:

> The constitutional right to "substantive due process"protects individuals against arbitrary governmental action, regardless of the fairness of the procedures used to implement them. [FN6] Several courts, including the Court of Appeals for the Third Circuit, recognize that, even though an inmate has no

[18]This Court in *Knight* stated that *Heck* also applies to challenges of inmates to parole decisions and that *Heck* is applicable to inmate's claim that his sentence was improperly increased by prison officials. 2006 WL 618443, * 6 (citation omitted).

> protectable liberty interest in parole that implicates procedural due process, his substantive due process rights may be violated if parole is denied by arbitrary government action. [FN7] In this regard, courts have determined that decisions to grant or deny parole may violate a prisoner's right to substantive due process if such decisions are based on arbitrary and capricious factors. The Supreme Court has declined to set forth a precise rule that defines the scope of impermissible "arbitrary" conduct for purposes of applying the substantive component of the Due Process Claus. Nonetheless, the Court recently clarified that governmental conduct does not violate a person's substantive due process rights unless it amounts to an abuse of official power that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). (Footnotes omitted).

*Id*.

While Plaintiff alleges that Defendants' refusal to correct his MRD violates his due process rights, the relief he seeks clearly would affect the duration of his confinement and result in a much speedier release from confinement. Plaintiff does not request any monetary damages in this case. Success on Plaintiff's present claim would necessarily imply the invalidity of the duration of his confinement to 2040. If Plaintiff wishes to challenge the factors Defendants used in making their MRD calculation, Plaintiff can file a civil rights action. However, as stated, if he seeks monetary damages, his claim may be *Heck*-barred.

Thus, we shall recommend that Plaintiff's substantive due process claim be dismissed without prejudice to file it in a civil rights action. *See Wilkinson v. Dotson*, ___ U.S. ___, 125 S. Ct. 1242, 161 L.Ed.2d 253 (2005)(claims that state parole procedures are unconstitutional may be

brought under § 1983).[19]

While Plaintiff challenges the eligibility factors which the BOP has used with respect to its calculating policy in his case (Doc. 1, p. 6, ¶ 26.), he may have stated a cognizable substantive due process claim against Defendants. However, based on his sole relief request, a successful challenge to the Defendants' MRD calculation would unquestionably lead to a much speedier release from confinement for him than he currently faces.

Thus, we find that Plaintiff, insofar as he may have stated a substantive due process claim against Defendants, can re-file this claim in a civil rights action in order to challenge the calculation of his MRD by BOP staff due to their alleged use of improper eligibility factors in making their MRD determination.[20]

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[19] As the Court noted in *Perry v. Vaughn*, 2005 WL 736633, * 3 , n. 4 (E.D. Pa.):

> We note that on March 7, 2005, the United States Supreme Court held that inmates may bring a § 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures, so long as a successful challenge "*would not necessarily* spell immediate or speedier release for the prisoner." *Wilkinson v. Dotson,* --- U.S. ----, ----, 125 S.Ct. 1242, 1247, --- L.Ed.2d ----, ---- (2005).

[20] Since as discussed above, no proper service has been made on Defendants in the present case and Plaintiff has failed to show good cause justifying a *nunc pro tunc* request for leave for more time to perfect service, we recommend that Plaintiff's substantive due process claim be dismissed without prejudice rather than recommending that Plaintiff be permitted leave to amend his present Complaint. Further, based on the *Mansfield* case, it may be futile to allow Plaintiff leave to amend his present Complaint with respect to his substantive due process claim.

In *Mansfield*, the Court stated:

> Under 18 U.S.C. § 4206(d) (repealed), a federal prisoner will be released on mandatory parole unless the Parole Commission "determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State or local crime. "For an inmate serving a life sentence or greater than 45 years, the mandatory parole date comes after serving two-thirds of this sentence, or 30 years, whichever is earlier. [FN5]. Because Mansfield's sentence is 97 years, his mandatory parole comes after 30 years. Mansfield was sentenced on April 24, 1987, and credited with 1,216 days of jail time credit after his overturned conviction. Thus, Mansfield's mandatory parole date will occur in July 2014.
>
> > FN5. § 4206(d) states "Any prisoner . . . shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier; Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime."

2007 WL 1732566, *3.

The *Mansfield* Court also stated:

> Mansfield claims that, rather than using his statutory release date – the day upon which he will have served his entire sentence minus the good time credit he has earned – the BOP was required to apply his mandatory parole date in its calculation of his length of sentence public safety factor. Mansfield provides no reason or authority for this claim, and it is contradicted by BOP's policies. According to regular BOP policy, sentence length is usually calculated based on sentencing documents or statutory release dates, not anticipated parole. *See* BOP Program Statement, *Sentence Computation Manual/Old Law/*

Therefore, we will recommend that Defendants' Motion to Dismiss be granted under Rule 4 for failure of Plaintiff to properly serve Defendants within the allotted time period, and for his failure to show good cause why he should be given an extension of time to do so. We will recommend that Plaintiff's claim that Defendants incorrectly calculated his MRD and his request that Defendants be ordered to recalculate his MRD to "be 31 years and 285 days, less further good time from February 6, 1976..., " be dismissed without prejudice to re-file it in a habeas corpus petition. We will recommend that Plaintiff be permitted to re-file his substantive due process claim in a §1331 action.

*E. Ex Post Facto Claim*.

Since we have stated above why we do not find that Plaintiff has sufficiently stated an *ex post facto* claim, we shall not repeat it. *See Richardson, supra*. Thus, we shall recommend that Plaintiff's *ex post facto* claim be dismissed.

**VII. Recommendation.**

Based on the foregoing, we respectfully recommend that Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(5) **(Doc. 12)** be granted for failure of Plaintiff to properly serve Defendants, and for his failure to show good cause why he should be given an extension of time to do so. We alternatively recommend that Defendants' Motion to Dismiss

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> *Pre CCA 1984*, No. 5880.30 VII 1-3 (1999). BOP followed this standard procedure when assigning Mansfield to a maximum security prison, and including his mandatory parole date in his sentence computation would have led to no change in the result.

*Id*., *4.

pursuant to Fed.R.Civ.P. 12(b)(6) be granted, and that Plaintiff's claim that Defendants incorrectly calculated his MRD and his request that Defendants be ordered to recalculate it to "be 31 years and 285 days, less further good time from February 6, 1976... .," be dismissed without prejudice to re-file it in a §2241 habeas corpus petition. We further recommend, in the alternative, that Plaintiff be permitted to re-file, in a §1331 action, his substantive due process claim that the BOP staff used impermissible factors to determine his MRD.

**s/ Thomas M. Blewitt**
**THOMAS M. BLEWITT**
**United States Magistrate Judge**

**Dated: October 12, 2007**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| LEONARD PELTIER, | : | CIVIL ACTION NO. **3:CV-07-0416** |
| | : | |
| Plaintiff | : | (Judge Kosik) |
| | : | |
| v. | : | (Magistrate Judge Blewitt) |
| | : | |
| U.S. BUREAU OF PRISONS, et al., | : | |
| | : | |
| Defendants | : | |

**NOTICE**

**NOTICE IS HEREBY GIVEN** that the undersigned has entered the foregoing **Report and Recommendation** dated **October 12, 2007.**

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

**s/ Thomas M. Blewitt**
**THOMAS M. BLEWITT**
**United States Magistrate Judge**

**Dated: October 12, 2007**