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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JULIUS ROSENTHAL,)	1:11-cv-00164-OWW-SKO-HC
)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS THE PETITION FOR WRIT OF
v.	)	HABEAS CORPUS FOR FAILURE TO
	)	STATE A COGNIZABLE CLAIM (DOC 1.)
F. GONZALEZ, Warden,	)	AND TO DECLINE TO ISSUE A
	)	CERTIFICATE OF APPEALABILITY
Respondent.	)	FINDINGS AND RECOMMENDATIONS TO
	)	DIRECT THE CLERK TO MAIL A CIVIL
	)	RIGHTS FORM TO PETITIONER AND TO
	)	CLOSE THE CASE

Petitioner is a state prisoner who is proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on January 31, 2011.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly

1 appears from the petition and any attached exhibits that the
2 petitioner is not entitled to relief in the district court....”
3 Habeas Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
4 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
5 1990). Habeas Rule 2(c) requires that a petition 1) specify all
6 grounds of relief available to the Petitioner; 2) state the facts
7 supporting each ground; and 3) state the relief requested.
8 Notice pleading is not sufficient; rather, the petition must
9 state facts that point to a real possibility of constitutional
10 error. Habeas Rule 4, Adv. Comm. Notes, 1976 Adoption; O’Bremski
11 v. Maass, 915 F.2d at 420 (quoting Blackledge v. Allison, 431
12 U.S. 63, 75 n. 7 (1977)).

13 Further, the Court may dismiss a petition for writ of habeas
14 corpus either on its own motion under Rule 4, pursuant to the
15 respondent's motion to dismiss, or after an answer to the
16 petition has been filed. Advisory Committee Notes to Habeas Rule
17 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
18 (9th Cir. 2001).

19 II. Conditions of Confinement

20 Because the petition was filed after April 24, 1996, the
21 effective date of the Antiterrorism and Effective Death Penalty
22 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
23 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
24 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

25 A district court may entertain a petition for a writ of
26 habeas corpus by a person in custody pursuant to the judgment of
27 a state court only on the ground that the custody is in violation
28 of the Constitution, laws, or treaties of the United States. 28

1 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
2 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13,
3 16 (2010) (per curiam).

4 A habeas corpus petition is the correct method for a prisoner
5 to challenge the legality or duration of his confinement. Badea
6 v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) (quoting Preiser v.
7 Rodriguez, 411 U.S. 475, 485 (1973)); Advisory Committee Notes to
8 Habeas Rule 1, 1976 Adoption.

9 In contrast, a civil rights action pursuant to 42 U.S.C.
10 § 1983 is the proper method for a prisoner to challenge the
11 conditions of that confinement. McCarthy v. Bronson, 500 U.S.
12 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at
13 574; Advisory Committee Notes to Habeas Rule 1, 1976 Adoption.

14 Petitioner, presently an inmate of the California
15 Correctional Institution at Techachapi, California (CCI), alleges
16 that he suffered violations of his constitutional rights in
17 connection with gang validation procedures in prison occurring on
18 January 16, 2008, that resulted in a finding that Petitioner was
19 associated with the Mexican Mafia Prison Gang and placement of
20 Petitioner in the security housing unit (SHU) for an indefinite
21 period of time. (Pet. 1-4.) Petitioner alleges eleven causes of
22 action. (Pet. 47-54.) He alleges that the California Department
23 of Corrections and Rehabilitation (CDCR) violated his right to
24 due process of law guaranteed by the Fourteenth Amendment because
25 prison staff failed to establish 1) a direct link between
26 Petitioner and a gang associate or member, 2) Petitioner's
27 current gang activity, and 3) gang activity between Petitioner
28 and a gang associate. (Pet. 4-5.) Petitioner challenges the

1 sufficiency of the evidence that he alleges was relied upon to
2 validate his gang status. (Pet. 4-5, 8) Petitioner alleges
3 violations of his liberty interests without the support of "some
4 evidence," his protection against vague and overbroad
5 regulations, his right to equal protection of the laws, his First
6 Amendment right to associate with members of one's own racial
7 group and to engage in legitimate activities without retaliation,
8 and his Eighth Amendment protection against cruel and unusual
9 punishments. (Pet. 5, 8-9, 54, 36-40.) He also relies on
10 inconsistency with state regulatory law, the CDCR's Department of
11 Operations Manual, and a settlement agreement in another case.
12 (Pet. 9, 12, 14-29.) Petitioner complains of the reduction in
13 privileges in the SHU, poor food, and negative effects on his
14 mental health. (Pet. 41-44.) Petitioner seeks the reversal of
15 the gang validation, expungement of references to it in the
16 prison's central file, and return of Petitioner to the general
17 prison population. (Pet. 10, 56-57.) Petitioner alleges that he
18 was prevented from exhausting his administrative remedies within
19 the prison by specified prison staff members, who incorrectly
20 rejected his appeal because of untimeliness. (Pet. 30-36.)

21 In this case, Petitioner alleges that he has been housed in
22 the security housing unit as a result of a gang validation
23 finding which Petitioner alleges was unsupported by reliable
24 evidence and was the result of numerous constitutional
25 violations. However, Petitioner's allegations concern only the
26 conditions of his confinement. Petitioner does not allege facts
27 that point to a real possibility of constitutional error that
28 affected the legality or duration of his confinement. Thus,

1 Petitioner is not entitled to habeas corpus relief. It will
2 therefore be recommended that the petition be dismissed.

3 Should Petitioner wish to pursue his claims, he must do so
4 by way of a civil rights complaint pursuant to 42 U.S.C. § 1983.
5 Thus, it will be recommended that the Clerk be directed to send
6 an appropriate form complaint to Petitioner.

7 III. Certificate of Appealability

8 Unless a circuit justice or judge issues a certificate of
9 appealability, an appeal may not be taken to the court of appeals
10 from the final order in a habeas proceeding in which the
11 detention complained of arises out of process issued by a state
12 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537
13 U.S. 322, 336 (2003). A certificate of appealability may issue
14 only if the applicant makes a substantial showing of the denial
15 of a constitutional right. § 2253(c)(2). Under this standard, a
16 petitioner must show that reasonable jurists could debate whether
17 the petition should have been resolved in a different manner or
18 that the issues presented were adequate to deserve encouragement
19 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
20 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
21 certificate should issue if the Petitioner shows that jurists of
22 reason would find it debatable whether the petition states a
23 valid claim of the denial of a constitutional right or that
24 jurists of reason would find it debatable whether the district
25 court was correct in any procedural ruling. Slack v. McDaniel,
26 529 U.S. 473, 483-84 (2000). In determining this issue, a court
27 conducts an overview of the claims in the habeas petition,
28 generally assesses their merits, and determines whether the

1 resolution was debatable among jurists of reason or wrong. Id.
2 It is necessary for an applicant to show more than an absence of
3 frivolity or the existence of mere good faith; however, it is not
4 necessary for an applicant to show that the appeal will succeed.
5 Miller-El v. Cockrell, 537 U.S. at 338.

6 A district court must issue or deny a certificate of
7 appealability when it enters a final order adverse to the
8 applicant. Habeas Rule 11(a).

9 Here, because Petitioner's claims relate only to conditions
10 of confinement, jurists of reason would not find it debatable
11 whether the Court was correct in its ruling. Accordingly,
12 Petitioner has not made a substantial showing of the denial of a
13 constitutional right, and the Court should decline to issue a
14 certificate of appealability.

15 IV. Recommendations

16 Accordingly, it is RECOMMENDED that:

17 1) The petition for writ of habeas corpus be DISMISSED
18 without prejudice to Petitioner's right to file a civil rights
19 action pursuant to 28 U.S.C. § 1983; and

20 2) The Clerk of Court be DIRECTED to close the case because
21 this order terminates the action in its entirety; and

22 3) The Court DECLINE to issue a certificate of
23 appealability; and

24 4) The Clerk be DIRECTED to mail to Petitioner a form for
25 filing a civil rights complaint pursuant to 42 U.S.C. § 1983 by a
26 person in custody.

27 These findings and recommendations are submitted to the
28 United States District Court Judge assigned to the case, pursuant

1 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
2 the Local Rules of Practice for the United States District Court,
3 Eastern District of California. Within thirty (30) days after
4 being served with a copy, any party may file written objections
5 with the Court and serve a copy on all parties. Such a document
6 should be captioned "Objections to Magistrate Judge's Findings
7 and Recommendations." Replies to the objections shall be served
8 and filed within fourteen (14) days (plus three (3) days if
9 served by mail) after service of the objections. The Court will
10 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
11 636 (b) (1) (C). The parties are advised that failure to file
12 objections within the specified time may waive the right to
13 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
14 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: February 23, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE