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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HORACE BELL,)	1:10-cv-00852-LJO-SKO-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS THE PETITION
)	(Doc. 6)
v.)	
)	DEADLINE FOR FILING OBJECTIONS:
KELLY HARRINGTON,)	THIRTY (30) DAYS AFTER SERVICE OF
)	THIS ORDER
Respondent.)	
)	
)	

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition 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 through 304. Pending before the Court is the first amended petition (FAP), filed in this Court on June 28, 2010 (doc. 6).

I. Screening the First Amended 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. Rule 4, Advisory Committee Notes, 1976 Adoption;
11 O’Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
12 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
13 that are vague, conclusory, or palpably incredible are subject to
14 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
15 Cir. 1990).

16 Further, the Court may dismiss a petition for writ of habeas
17 corpus either on its own motion under Habeas Rule 4, pursuant to
18 the respondent's motion to dismiss, or after an answer to the
19 petition has been filed. Advisory Committee Notes to Habeas Rule
20 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
21 (9th Cir. 2001).

22 Petitioner is an inmate of Kern Valley State Prison (KVSP)
23 serving a sentence of fifty-nine (59) years imposed by the Los
24 Angeles Superior Court in 1994 for kidnaping and robbery. (FAP
25 1.) Petitioner raises two grounds in the petition: absence of a
26 further level of administrative remedy within the California
27 Department of Corrections and Rehabilitation (CDCR), and racial
28 discrimination. (FAP 4.) He refers to his state petition for

1 writ of habeas corpus to provide supporting facts.

2 In a state petition for writ of habeas corpus filed in
3 California Supreme Court case no. S182576, Petitioner alleged
4 that his CDC 1824 appeal form was overdue, and no further level
5 of appeal remained in the state prison's internal appeal process.
6 He alleged that on August 9, 2007, he filed a CDC 1824 appeal
7 form and "reasonable modification accommodation," and on August
8 14, 2007, he filed a request for an interview and a staff
9 complaint. (Pet. 11.) He asserts that the warden and appeals
10 coordinator failed to enforce his right to appeal, and he alleges
11 unspecified "racial discrimination" against Petitioner, who is a
12 Black man, in violation of the Fourteenth Amendment. (Pet. 12.)
13 Review of the documentation apparently submitted in connection
14 with the citizen's complaint of August 7, 2007, reveals that
15 Petitioner's complaints concern the failure of Petitioner's
16 wheelchair, which on August 9, 2007, resulted in Petitioner's
17 falling from the wheelchair and suffering pain and delayed
18 accommodation and a refusal of medical treatment; Petitioner's
19 attempt to obtain wheelchair gloves and a seat cushion in 2010;
20 Petitioner's receipt of an allegedly inadequate medical response
21 to sores in 2010; and his suffering inadequate cleaning and
22 abatement response to his having been bitten by a spider in 2009.
23 (FAP 23-24, 40, 43, 48, 51, 62.)

24 II. Conditions of Confinement

25 A federal court may only grant a petition for writ of habeas
26 corpus if the petitioner can show that "he is in custody in
27 violation of the Constitution or laws or treaties of the United
28 States." 28 U.S.C. § 2254(a). A habeas corpus petition is the

1 correct method for a prisoner to challenge the legality or
2 duration of his confinement. Badea v. Cox, 931 F.2d 573, 574
3 (9th Cir. 1991) (quoting Preiser v. Rodriguez, 411 U.S. 475, 485
4 (1973)); Advisory Committee Notes to Rule 1 of the Rules
5 Governing Section 2254 Cases (Habeas Rules), 1976 Adoption.

6 In contrast, a civil rights action pursuant to
7 42 U.S.C. § 1983 is the proper method for a prisoner to challenge
8 the conditions of that confinement. McCarthy v. Bronson, 500
9 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931
10 F.2d at 574; Advisory Committee Notes to Habeas Rule 1, 1976
11 Adoption.

12 In this case, Petitioner alleges that he has been refused
13 medical treatment in prison and has suffered various conditions
14 of confinement. Petitioner's allegations concern his conditions
15 of confinement. Petitioner has not alleged facts that relate to
16 the fact or duration of his confinement. Thus, Petitioner is not
17 entitled to habeas corpus relief, and the petition must be
18 dismissed.

19 Should Petitioner wish to pursue his claims, he must do so
20 by way of a civil rights complaint pursuant to 42 U.S.C. § 1983.
21 The Clerk will be directed to send an appropriate complaint form
22 to Petitioner.

23 III. Certificate of Appealability

24 Unless a circuit justice or judge issues a certificate of
25 appealability, an appeal may not be taken to the court of appeals
26 from the final order in a habeas proceeding in which the
27 detention complained of arises out of process issued by a state
28 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537

1 U.S. 322, 336 (2003). A certificate of appealability may issue
2 only if the applicant makes a substantial showing of the denial
3 of a constitutional right. § 2253(c)(2). Under this standard, a
4 petitioner must show that reasonable jurists could debate whether
5 the petition should have been resolved in a different manner or
6 that the issues presented were adequate to deserve encouragement
7 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
8 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
9 certificate should issue if the Petitioner shows that jurists of
10 reason would find it debatable whether the petition states a
11 valid claim of the denial of a constitutional right and that
12 jurists of reason would find it debatable whether the district
13 court was correct in any procedural ruling. Slack v. McDaniel,
14 529 U.S. 473, 483-84 (2000). In determining this issue, a court
15 conducts an overview of the claims in the habeas petition,
16 generally assesses their merits, and determines whether the
17 resolution was debatable among jurists of reason or wrong. Id.
18 It is necessary for an applicant to show more than an absence of
19 frivolity or the existence of mere good faith; however, it is not
20 necessary for an applicant to show that the appeal will succeed.
21 Miller-El v. Cockrell, 537 U.S. at 338.

22 A district court must issue or deny a certificate of
23 appealability when it enters a final order adverse to the
24 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

25 Here, it does not appear that reasonable jurists could
26 debate whether the petition should have been resolved in a
27 different manner. Petitioner has not made a substantial showing
28 of the denial of a constitutional right. Accordingly, the Court

1 DECLINES to issue a certificate of appealability.

2 IV. Recommendation

3 Accordingly, it is RECOMMENDED that:

4 1) The petition for writ of habeas corpus be DISMISSED; and

5 2) The Clerk Be DIRECTED to close the case; and

6 3) The Court DECLINE to issue a certificate of

7 appealability; and

8 4) The Clerk be DIRECTED to send to Petitioner a civil

9 rights complaint form for a person in custody.

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11 IT IS SO ORDERED.

12 **Dated: December 6, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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