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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSE RODRIGUEZ GARCIA,

1:10-cv-01309-LJO-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING RESPONDENT’S MOTION TO
DISMISS PETITION AND PETITIONER’S
MOTION FOR AN EVIDENTIARY HEARING

v.

RAUL LOPEZ, Warden

[Docs. 15, 17]

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation. In the instant petition, Petitioner challenges a June 10, 2008, prison rule violation for battery on an inmate with a weapon.

Respondent filed the instant motion to dismiss for lack of jurisdiction on September 28, 2010. Petitioner filed an opposition on October 21, 2010, and Respondent filed a reply on November 19, 2010.

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1 DISCUSSION

2 A. Procedural Grounds for Motion to Dismiss

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
4 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
5 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.

6 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer
7 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of
8 the state’s procedural rules. See e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990)
9 (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White
10 v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review
11 motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12
12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a
13 response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F.
14 Supp. at 1194 & n. 12.

15 In this case, Respondent's motion to dismiss is based on the lack of jurisdiction under 28
16 U.S.C. § 2254. Therefore, the Court will review Respondent’s motion to dismiss pursuant to its
17 authority under Rule 4.

18 B. Lack of Jurisdiction

19 Federal habeas corpus jurisdiction exists only if a state prisoner is in custody in violation
20 of federal laws. 28 U.S.C. § 2254(a). The challenged action must affect the fact or duration of
21 the inmate’s custody. Preiser v. Rodriguez, 411 U.S. 475, 487 (1973). In this case, although
22 Petitioner was initially assessed a 90-day credit loss, it was subsequently restored through the
23 inmate appeals process. During the appeal process, it was discovered that the disciplinary action
24 should have been classified as a Division A1 offense, rather than a Division D, rule violation.
25 The error was corrected and as a result the 90-day credit loss was restored to Petitioner. Thus,
26 any challenge to the disciplinary action has not lengthened or otherwise affected the duration of
27 Petitioner’s custody, and relief under section 2254 is foreclosed.

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1 Moreover, Respondent has submitted evidence that Petitioner remains in the SHU, not
2 because of the rule violation, but because his safety is in danger and he refuses to accept
3 alternative housing. (Reply, Ex. 1, Housing Assignment Chrono; Ex. 2, Memo Regarding
4 Housing for Garcia.) Petitioner was assessed a SHU term for the rule violation, the term ended
5 on December 10, 2009. (Ex. 1.) However, Petitioner cannot be released to the general
6 population because other inmates are targeting him for assault because of his commitment
7 offense. (Ex. 1; Ex. 2.) Petitioner was offered an alternative housing unit in the special needs
8 yard (SNY)-a facility with the same conditions as the general inmate population facility and
9 which houses other inmates targeted for assault because of their commitment offenses or prior-
10 gang drop out status. (Id.) Petitioner refused housing in the SNY, and the only other alternative
11 housing that does not comprise his safety is in the SHU. (Id.) Accordingly, it is clear that the
12 2008 rule violation has not affected the duration of Petitioner’s custody because he lost no credits
13 and it is not the basis for his continued confinement in the SHU. Thus, Respondent’s motion to
14 dismiss the instant petition should be granted.

15 C. Motion for Evidentiary Hearing

16 Petitioner requests the Court conduct an evidentiary hearing to resolve the merits of his
17 underlying claim. In Schiro v. Landrigan, 127 S.Ct. 1933 (2007), Supreme Court held that “(1)
18 in deciding whether to grant an evidentiary hearing, a federal court must consider whether such a
19 hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would
20 entitle the applicant to federal habeas relief; (2) because the deferential standards prescribed by
21 28 U.S.C. § 2254 control whether to grant habeas relief, a federal court must take into account
22 those standards in deciding whether an evidentiary hearing is appropriate; and (3) if the record
23 refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is
24 not required to hold an evidentiary hearing.” Because the instant petition fails to state a
25 cognizable claim under section 2254, there is simply no basis for an evidentiary hearing.

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1 RECOMMENDATION

2 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 3 1. Respondent’s motion to dismiss the petition for lack of jurisdiction be
4 GRANTED;
- 5 2 The Clerk of Court be directed to terminate this action; and
- 6 3. The court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c);
7 Slack v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a COA,
8 petitioner must show: (1) that jurists of reason would find it debatable whether the
9 petition stated a valid claim of a denial of a constitutional right; and (2) that jurists
10 of reason would find it debatable whether the district court was correct in its
11 procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In the present
12 case, the Court does not find that jurists of reason would not find it debatable
13 whether the petition was properly dismissed for lack of jurisdiction under 28
14 U.S.C. § 2254(a). Petitioner has not made the required substantial showing of the
15 denial of a constitutional right.

16 IT IS SO ORDERED.

17 **Dated: November 23, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE