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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK D. KELLEY, JR.,)	1:11-cv-00870-SKO-HC
)	
Petitioner,)	ORDER DISMISSING PETITION FOR
)	WRIT OF HABEAS CORPUS
)	
v.)	ORDER DECLINING TO ISSUE A
)	CERTIFICATE OF APPEALABILITY
CDCR, WASCO STATE PRISON,)	
)	ORDER DIRECTING THE CLERK TO
Respondent.)	CLOSE THE CASE AND TO MAIL A
)	CIVIL RIGHTS FORM TO PETITIONER
)	

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on June 7, 2011 (doc. 5). Pending before the Court is the petition, which was filed on May 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

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

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

21 II. Conditions of Confinement

22 Because the petition was filed after April 24, 1996, the
23 effective date of the Antiterrorism and Effective Death Penalty
24 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
25 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
26 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

27 A district court may entertain a petition for a writ of
28 habeas corpus by a person in custody pursuant to the judgment of

1 a state court only on the ground that the custody is in violation
2 of the Constitution, laws, or treaties of the United States. 28
3 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
4 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13,
5 16 (2010) (per curiam). A habeas corpus petition is the correct
6 method for a prisoner to challenge the legality or duration of
7 his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991)
8 (quoting Preiser v. Rodriguez, 411 U.S. 475, 485 (1973));
9 Advisory Committee Notes to Habeas Rule 1, 1976 Adoption.

10 In contrast, a civil rights action pursuant to 42 U.S.C. §
11 1983 is the proper method for a prisoner to challenge the
12 conditions of that confinement. McCarthy v. Bronson, 500 U.S.
13 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at
14 574; Advisory Committee Notes to Habeas Rule 1, 1976 Adoption.

15 In this case, Petitioner alleges that he is an inmate of the
16 Wasco State Prison at Wasco, California. Petitioner's claim
17 concerns his housing assignment, which he contests because due to
18 previous murders of homosexual inmates, he does not feel safe
19 unless he is housed with another inmate who shares an alternative
20 lifestyle.

21 Petitioner's allegations concern only the conditions of his
22 confinement. Petitioner does not allege facts that point to a
23 real possibility of constitutional error that affects the
24 legality or duration of his confinement. Thus, Petitioner is not
25 entitled to habeas corpus relief, and this petition must be
26 dismissed.

27 Should Petitioner wish to pursue his claims, he must do so
28 by way of a civil rights complaint pursuant to 42 U.S.C. § 1983.

1 The Clerk will be directed to send an appropriate form complaint
2 to Petitioner.

3 III. Certificate of Appealability

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

23 In determining this issue, a court conducts an overview of
24 the claims in the habeas petition, generally assesses their
25 merits, and determines whether the resolution was debatable among
26 jurists of reason or wrong. Id. It is necessary for an
27 applicant to show more than an absence of frivolity or the
28 existence of mere good faith; however, it is not necessary for an

1 applicant to show that the appeal will succeed. Miller-El v.
2 Cockrell, 537 U.S. at 338.

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

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

12 IV. Disposition

13 Accordingly, it is ORDERED that:

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

17 2) The Clerk of Court is DIRECTED to close the case because
18 this order terminates the action in its entirety; and

19 3) The Court DECLINES to issue a certificate of
20 appealability; and

21 4) The Clerk is DIRECTED to mail to Petitioner a form for
22 filing a civil rights complaint pursuant to 42 U.S.C. § 1983 by a
23 person in custody.

24
25 IT IS SO ORDERED.

26 **Dated: June 22, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE