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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

O.Z. MARTIN,

Petitioner,

No. CIV S-09-1929 GGH P

vs.

J. WALKER, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

Petitioner alleges that he was denied due process during a prison disciplinary hearing following which he was found guilty of battery on his cellmate. Petitioner also alleges that the decision by prison officials to house him with a cellmate, when he had previously been single celled, violated the Eighth Amendment.

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1 Petitioner's Eighth Amendment claim does not implicate the validity of his prison
2 disciplinary conviction. In other words, even if the court found that petitioner should not have
3 been single celled, this finding would not necessarily invalidate his prison disciplinary
4 conviction. Because petitioner's Eighth Amendment claim challenges a condition of
5 confinement, it is more properly raised in a civil rights action. For this reason, the court
6 recommends that the Eighth Amendment claim be dismissed without prejudice.

7 Since petitioner may be entitled to relief if the claimed violation of his due
8 process rights is proved, respondents will be directed to file a response to petitioner's habeas
9 petition for this issue only.

10 In accordance with the above, IT IS HEREBY ORDERED that:

11 1. Petitioner's application to proceed in forma pauperis (no. 2) is granted;

12 2. Respondents are directed to file a response to petitioner's habeas petition
13 within sixty days from the date of this order. See Rule 4, Fed. R. Governing § 2254 Cases. An
14 answer shall be accompanied by all transcripts and other documents relevant to the issues
15 presented in the petition. See Rule 5, Fed. R. Governing § 2254 Cases;

16 3. If the response to the habeas petition is an answer, petitioner's reply, if any,
17 shall be filed and served within thirty days after service of the answer;

18 4. If the response to the habeas petition is a motion, petitioner's opposition or
19 statement of non-opposition to the motion shall be filed and served within thirty days after
20 service of the motion, and respondents' reply, if any, shall be filed and served within fifteen days
21 thereafter;

22 5. The Clerk of the Court shall serve a copy of this order, *the*
23 *consent/reassignment form contemplated by Appendix A(k) to the Local Rules of this court*
24 together with a copy of the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on
25 Michael Patrick Farrell, Senior Assistant Attorney General;

26 //

1 IT IS HEREBY RECOMMENDED that petitioner’s Eighth Amendment claim be
2 dismissed without prejudice.

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
5 days after being served with these findings and recommendations, petitioner may file written
6 objections with the court. The document should be captioned “Objections to Magistrate Judge's
7 Findings and Recommendations.” Petitioner is advised that failure to file objections within the
8 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
9 F.2d 1153 (9th Cir. 1991).

10 DATED: July 28, 2009

11 /s/ Gregory G. Hollows

12 UNITED STATES MAGISTRATE JUDGE

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14 mart1929.ord
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