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

MACK A. WEST, JR.,

Petitioner,

No. CIV S-09-3147 FCD DAD P

vs.

KATHLEEN DICKINSON, Warden,

Respondent.

ORDER

_____ /

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

On September 7, 2010, respondent filed a motion to dismiss petitioner’s second amended petition based on petitioner’s purported failure to exhaust his claims in state court. After the court had granted petitioner several extensions of time to oppose respondent’s motion to dismiss, petitioner filed a motion for a stay and abeyance, a renewed motion for a stay and abeyance, and an opposition to respondent’s motion to dismiss. Respondent has not filed a reply to any of petitioner’s recent filings.

In moving to dismiss the petition, respondent argues that petitioner failed to exhaust claims one through five as well as claim eight of his petition. In his responses to respondent’s motion to dismiss, petitioner informs the court that in November or December of

1 2010 he filed a petition for writ of habeas corpus containing his unexhausted claims with the
2 California Supreme Court (Case No. S187901). Petitioner also seeks a stay of this action until
3 the California Supreme Court rules on his exhaustion petition.

4 Upon review of the California Supreme Court docket in Case No. S187901, it
5 appears that the state high court denied petitioner's exhaustion petition on May 18, 2011,
6 rendering respondent's motion to dismiss as well as petitioner's motions for a stay and abeyance
7 moot. Under these circumstances, the court will deny both parties' motions and instruct
8 respondent to file a new response to petitioner's second amended petition.

9 Petitioner has also filed two motions for preliminary injunctive relief, the first
10 alleging that correctional officers have retaliated against him and transferred him to another
11 prison, and the second alleging that medical staff has failed to provide him with adequate
12 medical care for a lower-back injury. Petitioner is advised that a habeas corpus proceeding is the
13 proper mechanism for a prisoner seeking to challenge the fact or duration of his confinement.
14 Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). In contrast, a civil rights action is the proper
15 mechanism for a prisoner seeking to challenge the conditions of his confinement. 42 U.S.C.
16 § 1983; Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991). Petitioner's claims set out in his two
17 motions for preliminary injunctive relief concern his conditions of confinement and therefore
18 should be raised in a separate civil rights action if he wishes to pursue them.

19 Accordingly, IT IS HEREBY ORDERED that:

- 20 1. Respondent's motion to dismiss (Doc. No. 35) is denied as moot;
- 21 2. Petitioner's motion for a stay and abeyance and renewed motion for a stay and
22 abeyance (Doc. Nos. 51 & 52) are denied as moot;
- 23 3. Respondent is directed to file a new response to petitioner's second amended
24 petition within sixty days from the date of this order. See Rule 4, Fed. R. Governing § 2254
25 Cases. Any answer filed shall be accompanied by all transcripts and other documents relevant to
26 the issues presented in the petition. See Rule 5, Fed. R. Governing § 2254 Cases;

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4. If the response is an answer, petitioner’s reply, if any, shall be filed and served within thirty days after service of the answer;

5. If the response is a motion, petitioner’s opposition or statement of non-opposition to the motion shall be filed and served within thirty days after service of the motion, and respondent’s reply, if any, shall be filed and served within fourteen days thereafter; and

6. Petitioner’s motions for preliminary injunctive relief (Doc. Nos. 56 & 57) are denied without prejudice to the filing of a separate civil rights action if petitioner wishes to pursue his retaliation and inadequate medical care claims.

DATED: June 15, 2011.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:9
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