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

THOMAS JOHN HEILMAN,

Petitioner,

No. CIV S-11-0043 MCE EFB P

vs.

C. CHERNISS, et al.,

Respondents.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Petitioner seeks leave to proceed *in forma pauperis*. *See* 28 U.S.C. § 1915(a). Examination of the *in forma pauperis* affidavit reveals that petitioner is unable to afford the costs of suit.

In his petition, petitioner states that he has also filed a civil rights complaint pursuant to 42 U.S.C. § 1983. The court has compared that civil rights complaint with the pending habeas petition, and finds that they contain virtually identical allegations against the same parties.¹ *See Heilman v. Cherniss*, No. 2:11-cv-0042 JAM EFB. Although one action is a civil rights action

¹ A court may take judicial notice of court records. *See MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 and the other is a habeas action, petitioner raises the same claims, which relate solely to his
2 conditions of confinement, in both actions.

3 A federal court may only grant a petition for writ of habeas corpus if the petitioner can
4 show that “he is in custody in violation of the Constitution” 28 U.S.C. § 2254(a). A habeas
5 corpus petition is the correct method for a prisoner to challenge the “legality or duration” of his
6 confinement. *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (quoting *Preiser v. Rodriguez*,
7 411 U.S. 475, 484 (1973)); Advisory Committee Notes to Rule 1 of the Rules Governing § 2254
8 Cases. Because petitioner’s claim does not challenge his custody, it is not appropriate for a
9 § 2254 action.

10 Moreover, this action is duplicative of the pending civil rights action. A suit is
11 duplicative if the “claims, parties, and available relief do not significantly differ between the two
12 actions.” *Barapind v. Reno*, 72 F. Supp.2d 1132, 1145 (E.D. Cal. 1999) (quoting *Ridge Gold*
13 *Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 572 F. Supp. 1210, 1213 (N.D. Ill.
14 1983)). “When a complaint involving the same parties and issues has already been filed in
15 another federal district court, the court has discretion to abate or dismiss the second action. *Id.* at
16 1144 (citation omitted). “Federal comity and judicial economy give rise to rules which allow a
17 district court to transfer, stay, or dismiss an action when a similar complaint has already been
18 filed in another federal court.” *Id.* at 1145 (citation omitted). “[I]ncreasing calendar congestion
19 in the federal courts makes it imperative to avoid concurrent litigation in more than one forum
20 whenever consistent with the right of the parties.” *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir.
21 1979).

22 In light of the above, the court finds that this action should be dismissed and petitioner
23 should proceed on his earlier filed civil rights action. *See* Rule 4, Rules Governing § 2254
24 Cases.

25 Accordingly, IT IS HEREBY ORDERED that petitioner’s request to proceed in forma
26 pauperis is granted.

1 Further, IT IS HEREBY RECOMMENDED that this action be dismissed.

2 These findings and recommendations are submitted to the United States District Judge
3 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after
4 being served with these findings and recommendations, any party may file written objections
5 with the court and serve a copy on all parties. Such a document should be captioned "Objections
6 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the
7 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158
8 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

9 Dated: February 22, 2011.

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11 EDMUND F. BRENNAN
12 UNITED STATES MAGISTRATE JUDGE
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