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

HUNG DUONG NGUON,

Petitioner,

No. CIV-S-11-0124 DAD (TEMP) P

vs.

TIM V. VIRGA,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

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

Examination of the request to proceed in forma pauperis reveals petitioner is unable to afford the costs of this action. Accordingly, leave to proceed in forma pauperis is granted. 28 U.S.C. § 1915(a).

Under Rule 4 of the Rules Governing § 2254 Cases, the court must conduct a preliminary review of § 2254 habeas petitions and dismiss any petition where it plainly appears that petitioner is not entitled to relief in this court. A writ of habeas corpus is available if the court finds that petitioner is in custody in violation of federal law. 28 U.S.C. § 2254(a). In his application for a writ of habeas corpus petitioner does not allege that he is in custody in violation of federal law. Rather, he takes issue with his conditions of confinement. If petitioner wishes to

1 challenge conditions of confinement, e.g. he is being subjected to cruel and unusual punishment
2 in violation of the Eighth Amendment, the correct course of action would be to commence an
3 action under 42 U.S.C. § 1983. See Ramirez v. Galaza, 334 F.3d 850, 859 (9th Cir. 2003).
4 Petitioner is forewarned, however, that if he elects to pursue this matter by filing a § 1983 action
5 alleging a violation of his constitutional rights, he will be required to pay the \$350 filing fee,
6 although he will be allowed to pay that filing fee in installments.

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

- 8 1. Petitioner's request for leave to proceed in forma pauperis (#2) is granted; and
- 9 2. The Clerk of the Court is directed to assign a district court judge to this case.

10 IT IS HEREBY RECOMMENDED that petitioner's application for writ of habeas
11 corpus be dismissed.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
14 one days after being served with these findings and recommendations, petitioner may file written
15 objections with the court. The document should be captioned "Objections to Magistrate Judge's
16 Findings and Recommendations." Petitioner is advised that failure to file objections within the
17 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
18 F.2d 1153 (9th Cir. 1991). In his objections, if any, petitioner may address whether a certificate
19 of appealability should issue in the event he elects to file an appeal of the judgment in this case.
20 See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
21 certificate of appealability when it enters a final order adverse to the applicant).

22 DATED: February 2, 2011.

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24 
25 _____
26 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

25 DAD:kc
26 nguo0124.114