

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARMANDO HERRERA.

No. 2:15-cv-2536 KJN P

Plaintiff,

ORDER

GALLEGOS, et al.,

Defendants.

Plaintiff is a state prisoner, proceeding pro se. On January 14, 2016, plaintiff filed an affidavit bearing case number 2:14-cv-2939 KJM AC, his case seeking habeas corpus relief, as well as the instant case number. Plaintiff noted that he broke his right leg, and that surgery was required to put a screw in his hip and leg, and that plaintiff would require 90 days of physical therapy in order to learn to walk again. (ECF No. 6.) Plaintiff used the term “petitioner” throughout his filing, and specifically stated he wanted to drop the instant case, 15-cv-2536. (Id.) Because plaintiff’s affidavit was unclear, plaintiff was ordered to submit a completed application to proceed in forma pauperis, or a notice of voluntary dismissal of this action. (ECF No. 7.)

25 On February 3, 2016, plaintiff filed a completed request to proceed in forma pauperis.
26 However, on February 18, 2016, plaintiff filed another affidavit in which plaintiff again states that
27 he must drop this case. (ECF No. 9.) Plaintiff states that one of the reasons he must drop the case
28 is that if he continues with this case until it is over, the “CDC staff will send me to another prison

1 where my enemies are at, and they will kill me, see attached page.” (ECF No. 9 at 1.) Plaintiff
2 provides the first page of an order issued in Herrera v. Gardner, 2:10-cv-1744 GEB EFB, in
3 which the court recounted plaintiff’s claim that

4 in 1990-81, his family member dropped out of the Mexican Mafia
5 gang in Old Folsom Prison, and the CDC staff placed him in
6 protective custody. He states that the defendants know this, but
have classified him as an associate to the gang so that they can
house him with gang members, who will kill him.

7 (ECF No. 9 at 3.) Plaintiff’s civil rights case was dismissed based on plaintiff’s failure to first
8 exhaust his administrative remedies. Id.

9 First, the court has reviewed the instant complaint. Plaintiff seeks release from prison
10 “because [he has] been in prison 35 years now, on manslaughter and second degree murder.”
11 (ECF No. 1 at 3.) Release from prison is a remedy that must be sought through a petition for writ
12 of habeas corpus, not by filing a civil rights action. Because plaintiff seeks inappropriate relief in
13 this action, it must be dismissed. In addition, plaintiff is already pursuing a petition for writ of
14 habeas corpus in this court, Case No. 2:14-cv-2939 KJM AC, including similar claims
15 challenging actions by the 2012 parole board. Plaintiff must pursue all claims related to the same
16 board hearing in the same habeas action. For these reasons, the court will not construe plaintiff’s
17 filing as a petition for writ of habeas corpus.

18 Second, plaintiff broke his leg on January 3, 2016, and subsequently required surgery.
19 (ECF No. 6.) Plaintiff confirms that he is facing 90 days of physical therapy in order to learn to
20 walk again after surgery. Plaintiff is presently housed in the California Health Care Facility in
21 Stockton, and court records reflect he has been housed there since at least April 12, 2015. Case
22 No. 2:14-cv-2939 KJM AC (ECF No. 17). Thus, at present, any threats to transfer plaintiff are
23 speculative, because he confirms he is in the process of receiving 90 days of physical therapy.

24 Third, plaintiff concedes he is unable to pursue litigation while he recovers from surgery
25 and completes physical therapy. (ECF No. 6.)

26 For all of these reasons, the court accepts plaintiff’s request to voluntarily dismiss this
27 action. Pursuant to Fed. R. Civ. P. 41(a), plaintiff’s request shall be honored. This action will be
28 dismissed without prejudice.

1 Accordingly, IT IS HEREBY ORDERED that this action is dismissed without prejudice.
2 Fed. R. Civ. P. 41(a).
3 Dated: February 25, 2016

Kendall J. Newman
KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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