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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
7

8 MICHAEL HORBERT,
9 Plaintiff,

No. C 11-3130 SI (pr)

ORDER OF DISMISSAL

10 v.

11 B. CURRY; et al.,

12 Defendants.
13 _____/

14 **INTRODUCTION**

15 Michael Horbert, an inmate at Salinas Valley State Prison, filed this *pro se* civil rights
16 action under 42 U.S.C. § 1983. His complaint is now before the court for review under 28
17 U.S.C. § 1915.
18

19 **BACKGROUND**

20 In his complaint, Horbert alleges that he was denied due process during disciplinary
21 proceedings against him. A CDC-115 rule violation report was issued to Calhoun charging him
22 with threatening an inmate on September 18, 2008. Complaint, unnumbered exhibits (Docket
23 # 1, p. 23 of 26). A disciplinary hearing was held on the CDC-115 on October 5, 2008 at which
24 Horbert was found guilty of the offense. The discipline imposed included forfeiture of 60 days
25 of time credits. Complaint, p. 3B. Horbert alleges that he was denied his rights to have a
26 witness at his disciplinary hearing and to have an investigative employee appointed. He also
27 challenges the sufficiency of the evidence, based on his numerous allegations that he did not
28 threaten the inmate. Horbert's prayer for relief requests a declaratory judgment and damages.

1 attack the disciplinary decision that affects the duration of his confinement *in* a civil rights action
2 for damages; it must have been successfully attacked *before* the civil rights action for damages
3 is filed. Horbert allegedly was denied a witness who would have testified that he did not commit
4 the offense and allegedly was denied an investigative employee to defend against the charges,
5 as well as being found guilty without sufficient evidence. If he succeeded on his claims for
6 damages, that success would imply the invalidity of the discipline imposed (i.e., loss of time
7 credits). The claims therefore must be dismissed. If Horbert wishes to challenge the decision
8 that resulted in the credit forfeiture, he must do so in a petition for writ of habeas corpus, but not
9 until he has first exhausted his state judicial remedies.

10 Horbert's request for declaratory relief also cannot be considered in this § 1983 civil
11 rights action. A petition for writ of habeas corpus is the exclusive method by which he may
12 challenge the execution of his sentence in this court. *See Preiser v. Rodriguez*, 411 U.S. 475,
13 500 (1973).

14 Plaintiff filed a "motion that plaintiff presented a claim with the Board of Control" in
15 which he states that he presented a claim to the State Board of Control on May 4, 2011, and had
16 not received a response as of June 20, 2011. The motion is DENIED as irrelevant to this action.
17 (Docket # 2.) It simply does not matter to his § 1983 claim whether he presented a claim to the
18 State Board of Control.

19
20 **CONCLUSION**

21 For the foregoing reasons, this action is dismissed. This dismissal is without prejudice
22 to Horbert filing a civil action for damages if the disciplinary decision is ever set aside.

23 The clerk shall close the file.

24 IT IS SO ORDERED.

25 Dated: September 19, 2011

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27 _____
28 SUSAN ILLSTON
United States District Judge