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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADRIAN T. MOSQUEDA,

No. C 10-00595 CW (PR)

Petitioner,

ORDER OF DISMISSAL WITH LEAVE
TO AMEND

v.

FRANCISCO JACQUEZ, Warden,

Respondent.

This case was commenced when Petitioner filed a document captioned "Petition For A Writ of Habeas Corpus." Petitioner challenges his indeterminate placement in the Pelican Bay State Prison Security Housing Unit (SHU) based on his validation as a gang member. He seeks declaratory and injunctive relief overturning his validation as a gang member and ordering his release from the SHU. Petitioner has also filed an application to proceed in forma pauperis (IFP).

DISCUSSION

A. Standard of Review

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the

1 petition are vague or conclusory, palpably incredible, or patently
2 frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491
3 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75-76
4 (1977)).

5 B. Petitioner's Claim

6 Petitioner alleges his Fourteenth Amendment rights were
7 violated when he was validated as a gang member and placed in the
8 SHU for an indeterminate period based on alleged gang symbols on a
9 calendar that was found in his cell. As noted, Petitioner seeks
10 declaratory and injunctive relief that would overturn his gang
11 validation and compel his release from the SHU.

12 Petitioner's claims are not cognizable in federal habeas
13 corpus. "Federal law opens two main avenues to relief on
14 complaints related to imprisonment: a petition for habeas corpus,
15 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of
16 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges
17 to the lawfulness of confinement or to particulars affecting its
18 duration are the province of habeas corpus." Hill v. McDonough,
19 547 U.S. 573, 579 (2006) (quotation and citation omitted). "An
20 inmate's challenge to the circumstances of his confinement,
21 however, may be brought under § 1983." Id. While the Supreme
22 Court has not addressed whether a challenge to a condition of
23 confinement may be brought in habeas corpus, see Docken v. Chase,
24 393 F.3d 1024, 1028 (9th Cir. 2004), the Ninth Circuit has held
25 that "habeas jurisdiction is absent, and a § 1983 action proper,
26 where a successful challenge to a prison condition will not
27 necessarily shorten the prisoner's sentence." Ramirez v. Galaza,
28 334 F.3d 850, 859 (9th Cir. 2003). In particular, where, as here,

1 a petitioner's successful challenge to his administrative
2 segregation will not necessarily shorten the prisoner's sentence,
3 habeas jurisdiction does not lie. See id. Accordingly, Petitioner
4 may not proceed with his claim by way of federal habeas corpus and
5 the petition is DISMISSED.

6 Where a prisoner files a habeas petition attacking the
7 conditions of his confinement the district court may construe such
8 petition as a civil rights action under 42 U.S.C. § 1983. See
9 Wilwording v. Swenson, 404 U.S. 249, 251 (1971). The Court will
10 not do so here, however, unless Petitioner affirmatively informs
11 the Court that he wants this case to proceed as a civil rights
12 action. Specifically, because § 1983 cases filed by prisoners are
13 subject to certain statutory requirements of which Petitioner
14 should be aware before deciding to proceed with a § 1983 action,
15 the Court will not construe the petition as a § 1983 action without
16 Petitioner's consent. In particular, § 1983 cases filed by
17 prisoners are subject to a requirement that the claims be
18 administratively exhausted. See 42 U.S.C. § 1997e(a). Further,
19 such cases are subject to a \$350.00 filing fee, rather than the
20 \$5.00 dollar filing fee for habeas cases, see 28 U.S.C. § 1914(a),
21 and the fee must be paid even if IFP status is granted, by way of
22 deductions from the prisoner's trust account until the full \$350.00
23 fee is paid. See 28 U.S.C. § 1915(b). For these reasons,
24 Petitioner might not seek to have the instant action treated as a
25 § 1983 case.

26 Accordingly, this case is DISMISSED with leave to amend to
27 allege a § 1983 action. Should Petitioner fail to do so, the case
28 will be dismissed without prejudice.

CONCLUSION

1
2 For the foregoing reasons, Petitioner's case is DISMISSED with
3 leave to amend. Petitioner must file his complaint no later than
4 thirty (30) days from the date of this Order. Petitioner must
5 write the case number for this action -- Case No. C 10-00595 CW
6 (PR) -- on the form and complete all sections of the form.
7 Petitioner is particularly directed to name as defendants each
8 person who caused a violation of his constitutional rights and
9 explain what each person did to cause the violation. Liability
10 under § 1983 arises only upon a showing of personal participation
11 by the defendant. See Taylor v. List, 880 F.2d 1040, 1045 (9th
12 Cir. 1989). There is no respondeat superior liability under
13 § 1983, i.e. no liability under the theory that a supervisor is
14 responsible for the actions or omissions of his or her subordinate.
15 See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) (liability
16 may be imposed on individual defendant under § 1983 only if
17 plaintiff can show that defendant proximately caused deprivation of
18 federally protected right).

19 Because Petitioner originally filed this case as a habeas
20 corpus action, his IFP application (docket no. 2) is DENIED without
21 prejudice to filing a new application or paying the full filing
22 fee. As mentioned above, the filing fee for a civil rights action
23 is \$350.00. Petitioner must pay the \$350.00 filing fee, or file an
24 application for leave to proceed IFP, before this action can
25 proceed. If Petitioner is a prisoner who alleges that he is unable
26 to pay the full filing fee at the time of filing, he must submit:
27 (1) an affidavit that includes a statement of all assets he
28 possesses, and (2) a certified copy of the trust fund account

1 statement for the prisoner for the six-month period immediately
2 preceding the filing of the action, obtained from the appropriate
3 official of each prison at which the prisoner is or was confined.
4 See 28 U.S.C. § 1915(a)(1), (2). If the district court determines
5 that the prisoner is unable to pay the full filing fee at the time
6 of filing, the prisoner will be granted leave to proceed IFP. This
7 means that the filing fee must be paid by way of an installment
8 plan, according to which the court first will assess and collect a
9 partial filing fee from the prisoner, and then the prisoner will be
10 required to make monthly payments of twenty percent of the
11 preceding month's income credited to the prisoner's account until
12 the full \$350.00 filing fee is paid. Id. § 1915(b)(1). The agency
13 having custody of the prisoner is responsible for forwarding to the
14 court payments from the prisoner's account each time the amount in
15 the account exceeds ten dollars. See id. Accordingly, Petitioner
16 is hereby ORDERED to pay the requisite \$350.00 filing fee in this
17 action no later than thirty (30) days from the date of this Order.
18 He shall include with his payment a clear indication that it is for
19 the above-referenced case number, Case No. C 10-00595 CW (PR). In
20 the event that Petitioner is unable to pay the filing fee, he shall
21 submit an IFP application, trust account statement and certificate
22 of funds no later than thirty (30) days from the date of this
23 Order.

24 Failure to file a completed civil rights form and to pay the
25 filing fee or file the requisite documents within the thirty-day
26 deadline shall result in dismissal of this action without
27 prejudice.

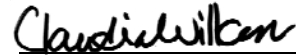
28 The Clerk of the Court shall send Petitioner a blank civil

1 rights form and the Court's prisoner IFP application form along
2 with his copy of this Order.

3 This Order terminates Docket no. 2.

4 IT IS SO ORDERED.

5 Dated: 6/25/2010



6 CLAUDIA WILKEN
7 UNITED STATES DISTRICT JUDGE
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 ADRIAN T. MOSQUEDA,

5 Plaintiff,

6 v.

7 FRANCISCO JAQUEZ, et al.,

8 Defendants.

Case Number: CV10-00595 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on June 25, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) and in a postage paid envelope addressed to the person(s) hereinafter listed, by
13 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
14 delivery receptacle located in the Clerk's office.

**(a blank civil rights form and the Court's prisoner IFP application were mailed along with
the order to:)**

15 Adrian Tamayo Mosqueda E-08547
16 D7-209-SHU
17 Pelican Bay State Prison
18 P.O. Box 7500
19 Crescent City, CA 95532

20 Dated: June 25, 2010

21 Richard W. Wieking, Clerk
22 By: Nikki Riley, Deputy Clerk
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