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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOAQUIN LUGO,	)	1:12-cv-01773-LJO-SKO-HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS THE PETITION WITHOUT
v.	)	PREJUDICE (DOC. 1) AND TO DIRECT
	)	THE CLERK TO CLOSE THE ACTION
A. GILL, Warden,	)	
	)	<b><u>OBJECTIONS DEADLINE:</u></b>
Respondent.	)	<b><u>THIRTY (30) DAYS</u></b>
	)	
_____	)	

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on October 30, 2012.

I. Screening the Petition

The Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court

1 must summarily dismiss a petition "[i]f it plainly appears from  
2 the petition and any attached exhibits that the petitioner is not  
3 entitled to relief in the district court...." Habeas Rule 4;  
4 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also  
5 Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule  
6 2(c) requires that a petition 1) specify all grounds of relief  
7 available to the Petitioner; 2) state the facts supporting each  
8 ground; and 3) state the relief requested. Notice pleading is  
9 not sufficient; the petition must state facts that point to a  
10 real possibility of constitutional error. Rule 4, Advisory  
11 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at  
12 420 (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)).  
13 Allegations in a petition that are vague, conclusory, or palpably  
14 incredible are subject to summary dismissal. Hendricks v.  
15 Vasquez, 908 F.2d at 491.

16 The Court may dismiss a petition for writ of habeas corpus  
17 either on its own motion under Habeas Rule 4, pursuant to the  
18 respondent's motion to dismiss, or after an answer to the  
19 petition has been filed. Advisory Committee Notes to Habeas Rule  
20 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
21 (9th Cir. 2001). A petition for habeas corpus should not be  
22 dismissed without leave to amend unless it appears that no  
23 tenable claim for relief can be pleaded were such leave granted.  
24 Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

25 Here, Petitioner alleges that he is an inmate of the Federal  
26 Correctional Institution at Mendota, California (FCIM), serving  
27 an unspecified federal sentence. Petitioner alleges that after  
28 he was assaulted by a fellow inmate in May 2012 at the Federal

1 Correctional Institution at Atwater, California, he attempted to  
2 file an informal resolution concerning the incident and to obtain  
3 all institutional and medical reports concerning the incident.  
4 Petitioner alleges that he has not received the reports, and that  
5 prison staff have not returned the paper that Petitioner filed -  
6 which is necessary for Petitioner to proceed to grieve the  
7 incident. (Pet., doc. 1, 2-3.)

## 8 II. Conditions of Confinement

9 A federal court may not entertain an action over which it  
10 has no jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 865  
11 (9th Cir. 2000).

12 Relief by way of a writ of habeas corpus extends to a person  
13 in custody under the authority of the United States if the  
14 petitioner can show that he is "in custody in violation of the  
15 Constitution or laws or treaties of the United States." 28  
16 U.S.C. § 2241(c) (1) & (3). A habeas corpus action is the proper  
17 mechanism for a prisoner to challenge the fact or duration of his  
18 confinement. Preiser v. Rodriguez, 411 U.S. 475, 485 (1973);  
19 Tucker v. Carlson, 925 F.2d 330, 332 (9th Cir. 1990) (holding in  
20 a Bivens<sup>1</sup> action that a claim that time spent serving a state  
21 sentence should have been credited against a federal sentence  
22 concerned the fact or duration of confinement and thus should  
23 have been construed as a petition for writ of habeas corpus  
24 pursuant to § 28 U.S.C. § 2241; however, to the extent the  
25 complaint sought damages for civil rights violations, it should  
26 be construed as a Bivens action); Crawford v. Bell, 599 F.2d 890,

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28 <sup>1</sup> The reference is to Bivens v. Six Unknown Named Agents of Federal  
Bureau of Narcotics, 403 U.S. 388 (1971).

1 891-892 (9th Cir. 1979) (upholding dismissal of a petition  
2 challenging conditions of confinement and noting that writ of  
3 habeas corpus has traditionally been limited to attacks upon the  
4 legality or duration of confinement); see, Greenhill v. Lappin,  
5 376 Fed. Appx. 757, 757-58 (9th Cir. 2010) (holding that the  
6 appropriate remedy for a federal prisoner's claim that relates to  
7 the conditions of his confinement is a civil rights action under  
8 Bivens; but see, Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir.  
9 1989) (holding that habeas corpus is available pursuant to § 2241  
10 for claims concerning denial of good time credits or subjection  
11 to greater restrictions on his liberty, such as disciplinary  
12 segregation, without due process of law); Cardenas v. Adler, 2010  
13 WL 2180378 (No.1:09-cv-00831-AWI-JLT-HC, May 28, 2010) (holding  
14 that petitioner's challenge to constitutionality of sanction of  
15 disciplinary segregation and his claim that disciplinary  
16 proceedings were the product of retaliation by prison staff were  
17 cognizable in a habeas proceeding pursuant to § 2241).

18 Claims concerning various prison conditions that have been  
19 brought pursuant to § 2241 have been dismissed in this district  
20 for lack of subject matter jurisdiction with indications that an  
21 action pursuant to Bivens is appropriate. See, e.g., Dyson v.  
22 Rios, 2010 WL 3516358, \*3 (No. 1:10-cv-00382-DLB (HC), E.D.Cal.  
23 Sept. 2, 2010) (a claim challenging placement in a special  
24 management housing unit in connection with a disciplinary  
25 violation); Burnette v. Smith, 2009 WL 667199 at \*1 (No. 08-2178-  
26 DAD-P, E.D.Cal. Mar. 13, 2009) (a petition seeking a transfer and  
27 prevention of retaliation by prison staff); Evans v. U.S.  
28 Pentitentiary, 2007 WL 4212339 at \*1 (No. 1:07-cv-1611-OWW-GSA-

1 HC, E.D.Cal. Nov. 27, 2007) (claims brought pursuant to  
2 § 2241 regarding a transfer and inadequate medical care).

3 Here, Petitioner's claim or claims concern conditions of  
4 confinement that do not bear a relationship to the legality or  
5 duration of his confinement. Because these claims relate solely  
6 to the conditions of his confinement, it is concluded that the  
7 Court lacks habeas corpus jurisdiction over the claims pursuant  
8 to § 2241.

9 III. Remedy

10 Although the Court lacks habeas corpus jurisdiction over the  
11 claims concerning conditions of confinement, the Court could  
12 construe Petitioner's claims as a civil rights complaint brought  
13 pursuant to Bivens. See, Wilwording v. Swenson, 404 U.S. 249,  
14 251 (1971).

15 However, the Court declines to construe the petition as a  
16 civil rights complaint because of various differences in the  
17 procedures undertaken in habeas proceedings on the one hand, and  
18 civil rights actions on the other.

19 First, if the petition were converted to a civil rights  
20 complaint, Petitioner would be obligated to pay the \$350 filing  
21 fee for a civil action, whether in full or through withdrawals  
22 from his prison trust account in accordance with the availability  
23 of funds. 28 U.S.C. §§ 1914, 1915(b). The dismissal of this  
24 action at the pleading stage would not terminate Petitioner's  
25 duty to pay the \$350 filing fee. Here, the petition was not  
26 accompanied by the \$350 filing fee or an authorization by  
27 Petitioner to have the \$350 filing fee deducted from his trust  
28 account pursuant to 28 U.S.C. § 1915(b).

1 Further, 42 U.S.C. § 1997e(a) provides, "No action shall be  
2 brought with respect to prison conditions under section 1983 of  
3 this title, or any other Federal law, by a prisoner confined in  
4 any jail, prison, or other correctional facility until such  
5 administrative remedies as are available are exhausted." Section  
6 1997e(a) requires exhaustion "irrespective of the forms of relief  
7 sought and offered through administrative avenues." Booth v.  
8 Churner, 532 U.S. 731, 741 n.6 (2001). It is possible that  
9 administrative remedies are still available to Petitioner.

10 Another omission from the petition that affects the Court's  
11 decision not to consider it as a civil rights complaint is the  
12 Petitioner's failure to identify the capacity in which the named  
13 respondent would be sued for purposes of a civil rights claim,  
14 which is critical to the issue of sovereign immunity.  
15 Additionally, if the petition were converted to a civil rights  
16 complaint, the Court would be obligated to screen it pursuant to  
17 the screening provisions of the Prisoner Litigation Reform Act of  
18 1995. 28 U.S.C. § 1915A(b); 42 U.S.C. § 1997e(c)(1). It is not  
19 clear that all of Petitioner's disparate allegations state civil  
20 rights claims. If the pleading ultimately were dismissed for  
21 failure to state a claim upon which relief may be granted, such a  
22 dismissal could count as a "strike" against Petitioner for  
23 purposes of 28 U.S.C. § 1915(g) and any future civil rights  
24 action he might bring.

25 Based on the foregoing analysis, the Court concludes that it  
26 is appropriate to dismiss the petition without prejudice so  
27 Petitioner himself may determine whether or not he wishes to  
28 raise his present claims through a properly submitted civil

1 rights complaint.<sup>2</sup>

2 IV. Recommendations

3 Accordingly, it is RECOMMENDED that:

4 1) The petition for writ of habeas corpus be DISMISSED  
5 without prejudice for lack of subject matter jurisdiction; and

6 2) The Clerk be DIRECTED to close the action because the  
7 dismissal terminates it in its entirety.

8 These findings and recommendations are submitted to the  
9 United States District Court Judge assigned to the case, pursuant  
10 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of  
11 the Local Rules of Practice for the United States District Court,  
12 Eastern District of California. Within thirty (30) days after  
13 being served with a copy, any party may file written objections  
14 with the Court and serve a copy on all parties. Such a document  
15 should be captioned "Objections to Magistrate Judge's Findings  
16 and Recommendations." Replies to the objections shall be served  
17 and filed within fourteen (14) days (plus three (3) days if  
18 served by mail) after service of the objections. The Court will  
19 then review the Magistrate Judge's ruling pursuant to 28 U.S.C.  
20 § 636 (b) (1) (C). The parties are advised that failure to file  
21 objections within the specified time may waive the right to  
22 appeal the District Court's order. Martinez v. Ylst, 951 F.2d

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26 <sup>2</sup> Issuance of a certificate of appealability is not addressed in this  
27 order because a certificate of appealability is not required to appeal the  
28 denial of a petition under § 2241. Forde v. United States Parole Commission,  
114 F.3d 878, 879 (9th Cir. 1997). This is because the plain language of  
§ 2253(c) (1) does not require a certificate with respect to an order that is  
not a final order in a habeas proceeding in which the detention complained of  
arises out of process issued by a state court. Id.

1 1153 (9th Cir. 1991).

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3 IT IS SO ORDERED.

4 **Dated:** November 13, 2012

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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