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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN K. TOMLINSON,)	Case No. CV 15-0107-DMG (JEM)
)	
Petitioner,)	
)	ORDER SUMMARILY DISMISSING
v.)	PETITION FOR LACK OF
)	JURISDICTION AND DENYING A
UNITED STATES OF AMERICA,)	CERTIFICATE OF APPEALABILITY
)	
Respondent.)	
_____)	

On January 7, 2015, Brian K. Tomlinson (“Petitioner”), a prisoner in federal custody proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (“Petition”). (Docket No. 1.)

PRIOR PROCEEDINGS

On August 12, 2010, in the case United States v. Tomlinson, 3:06-cr-02222-L (S.D. Cal.), Petitioner pled guilty to various federal criminal charges. (United States v. Tomlinson, 3:06-cr-02222-L (S.D. Cal.), Docket No. 98.) Thereafter, Petitioner was sentenced to a total term of 78 months in the custody of the Bureau of Prisons. (United States v. Tomlinson, 3:06-cr-02222-L (S.D. Cal.), Docket No. 115.) Petitioner is presently incarcerated at the Los Angeles Metropolitan Detention Center pursuant to the judgment of conviction. (Petition at 1.)

1 **DISCUSSION**

2 **I. THE COURT LACKS JURISDICTION OVER PETITIONER’S CLAIMS**
3 **CHALLENGING HIS CRIMINAL CONVICTION AND/OR SENTENCE**

4 Pursuant to Rule 4 of the Rules Governing § 2254 Cases in the United States District
5 Courts, a district court may summarily dismiss a habeas corpus petition, before the
6 respondent files an answer, “[i]f it plainly appears from the face of the petition . . . that the
7 petitioner is not entitled to relief.”¹ The notes to Rule 4 state: “a dismissal may be called for
8 on procedural grounds, which may avoid burdening the respondent with the necessity of
9 filing an answer on the substantive merits of the petition.” See Boyd v. Thompson, 147
10 F.3d 1124, 1127-28 (9th Cir. 1998); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989).
11 Because Petitioner has stated no viable basis for habeas corpus relief over which the Court
12 has jurisdiction, the Petition must be dismissed without prejudice.

13 A federal prisoner who wishes to challenge the validity or constitutionality of his
14 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the
15 sentence under 28 U.S.C. § 2255. Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir. 2006);
16 Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). The motion must be filed in the
17 district where the defendant was sentenced because only the sentencing court has
18 jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000); Tripati, 843 F.2d at
19 1163.

20 Generally, a prisoner may not collaterally attack a federal conviction or sentence by
21 way of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Stephens, 464
22 F.3d at 897; Tripati, 843 F.2d at 1162. Rather, a § 2241 habeas petition is the means by
23 which a prisoner challenges the manner, location, or conditions of that sentence's
24 execution. Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990).

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27 ¹ The Rules Governing Section 2254 Cases may be applied to petitions for writ of
28 habeas corpus other than those brought under § 2254 at the Court's discretion. See Rule 1
of the Rules Governing Section 2254 Cases. Accordingly, the Court will exercise its
discretion in this case and apply the section 2254 rules to the instant habeas petition.

1 A federal prisoner authorized to seek relief under § 2255 may seek relief under §
2 2241 only if he can show the remedy available under § 2255 to be “inadequate or ineffective
3 to test the legality of his detention.” United States v. Pirro, 104 F.3d 297, 299 (9th Cir.
4 1997) (quoting § 2255). This exception is very narrow. Id.; see also Aronson v. May, 85
5 S.Ct. 3, 5 (1964) (denial of a prior § 2255 motion is insufficient to render § 2255
6 inadequate); United States v. Valdez–Pacheco, 237 F.3d 1077, 1080 (9th Cir. 2001)
7 (procedural requirements of § 2255 may not be circumvented by filing a petition for writ of
8 audita querela pursuant to the All Writs Act, 28 U.S.C. § 1651); Lorentsen v. Hood, 223 F.3d
9 950, 953 (9th Cir. 2000) (§ 2255 not inadequate or ineffective merely because court of
10 appeals refuses to certify second or successive motion to vacate); Moore v. Reno, 185 F.3d
11 1054, 1055 (9th Cir. 1999) (dismissal of a successive motion pursuant to § 2255 did not
12 render such motion procedure an ineffective or inadequate remedy so as to authorize a
13 federal prisoner to seek habeas relief); Tripati, 843 F.2d at 1162-63 (petitioner's fears of
14 bias or unequal treatment do not render a § 2255 petition inadequate). A prisoner
15 challenging the validity of his conviction or sentence may invoke this exception in § 2255
16 and bring a petition pursuant to § 2241 only if he: “(1) makes a claim of actual innocence,
17 and (2) has not had an ‘unobstructed procedural shot’ at presenting that claim.” Stephens,
18 464 F.3d at 898 (citations omitted); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.
19 2003).

20 The burden is on the petitioner to show that the § 2255 remedy is inadequate or
21 ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963). If a petitioner
22 proceeding pursuant to § 2241 fails to meet this burden, the § 2241 petition will be
23 dismissed for lack of jurisdiction. Ivy, 328 F.3d at 1061.

24 In the Petition, Petitioner is challenging the validity and constitutionality of his
25 conviction and/or sentence rather than the administration of his sentence.² (See Petition at
26

27 ² To the extent Petitioner purports to challenge his prior habeas corpus proceedings
28 in the District Court for the Southern District of California (Petition, Exhibits at 3-5), this
Court lacks jurisdiction over Petitioner’s claims. Pursuant to 28 U.S.C. § 1331, Congress

1 (challenging Petitioner’s “conviction and sentenc[e]” based on inter alia “prosecutorial
2 misconduct and withholding exculpatory evidence”); see also id. at 2, 4.) There is nothing to
3 indicate that Petitioner’s remedy under § 2255 is inadequate or ineffective. Accordingly, the
4 appropriate procedure would be to file a motion pursuant to § 2255 and not a habeas
5 petition pursuant to § 2241. The Petition should be dismissed for lack of jurisdiction to the
6 extent Petitioner is challenging his underlying criminal conviction and/or sentence.³

7 **III. THE COURT DECLINES TO CONSTRUE THE PETITION AS A SECTION 1983**
8 **COMPLAINT TO THE EXTENT PETITIONER CHALLENGES HIS CONDITIONS OF**
9 **CONFINEMENT**

10 The petition should also be dismissed to the extent that Petitioner is challenging the
11 conditions of his confinement (see, e.g., Petition at 3), and not the legality or duration of
12 Petitioner's confinement.

13 “Traditionally, challenges to prison conditions have been cognizable only via [42
14 U.S.C.] § 1983 while challenges implicating the fact or duration of confinement must be
15 brought through a habeas petition.” Docken v. Chase, 393 F.3d 1024, 1026 (9th Cir. 2004);
16 see also Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) (a civil rights action under § 1983
17 “is a proper remedy for a state prisoner who is making a constitutional challenge to the

18 has vested federal district courts with the power to exercise original, not appellate,
19 jurisdiction over civil actions arising under the Constitution. See Exxon Mobil Corp. v. Saudi
20 Basic Industries Corp., 544 U.S. 280, 284 (2005).

21 ³ Transfer to the sentencing court, i.e., the District Court for the Southern District of
22 California, in lieu of dismissal would not be appropriate. See Cruz-Aguilera v. INS, 245 F.3d
23 1070, 1074 (9th Cir. 2001) (transfer under 28 U.S.C. § 1631 is appropriate if “(1) the
24 transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction
25 at the time the action was filed; and (3) the transfer is in the interest of justice”). Petitioner
26 has already filed several Section 2255 motions in the District Court for the Southern District
27 of California. (See, e.g., United States v. Tomlinson, 3:06-cr-02222-L (S.D. Cal.), Docket
28 Nos. 119, 124, 137, 156.) He cannot bring another Section 2255 motion unless he obtains
certification from the Ninth Circuit to file a “second or successive” motion. United States v.
Washington, 653 F.3d 1057, 1059 (9th Cir. 2011), cert. denied, 132 S. Ct. 1609 (2012).
Since there is no indication that Petitioner has obtained the required certification from the
Ninth Circuit, the District Court for the Southern District of California would also lack
jurisdiction over his Section 2255 motion. See 28 U.S.C. §§ 2244(a), (b)(3), 2255(h); Burton
v. Stewart, 549 U.S. 147, 152-53 (2007) (per curiam); Cooper v. Calderon, 274 F.3d 1270,
1274-75 (9th Cir. 2001).

1 conditions of his prison life, but not to the fact or length of his custody”); Badea v. Cox, 931
2 F.2d 573, 574 (9th Cir. 1991) (prisoner should challenge “legality or duration” of confinement
3 in habeas corpus proceeding and challenge conditions of confinement in civil rights action).
4 A habeas petition may be construed as a Section 1983 civil rights complaint, but a court is
5 not required to do so. Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam),
6 superceded by statute on other grounds as recognized in Woodford v. Ngo, 548 U.S. 81, 84
7 (2006); see, e.g., Zavala v. Copenhaver, 2014 WL 4249627, at *3 (E.D. Cal. 2014).

8 The Court declines to construe the Petition as a civil rights complaint because of
9 various differences in the procedures undertaken in habeas proceedings and civil rights
10 actions. Since the time when the Wilwording case was decided, there have been significant
11 changes in the law. For instance, the filing fee for a habeas petition is five dollars, and if
12 leave to proceed in forma pauperis is granted, the fee is forgiven. However, the fee is now
13 \$350 for civil rights cases and under the Prisoner Litigation Reform Act, the prisoner is
14 required to pay it by way of deductions from income to the prisoner's trust account, even if
15 granted in forma pauperis status. See 28 U.S.C. § 1915(b)(1). A prisoner who might be
16 willing to file a habeas petition for which he or she would not have to pay a filing fee might
17 feel otherwise about a civil rights complaint for which the \$350 fee would be deducted from
18 income to his or her account. In addition, a civil rights complaint which is dismissed as
19 malicious, frivolous, or for failure to state a claim would count as a “strike” under 28 U.S.C. §
20 1915(g), which is not true for habeas cases.

21 In view of these potential pitfalls for Petitioner if the Petition were construed as a civil
22 rights complaint, the case should be dismissed without prejudice. Should Petitioner wish to
23 pursue his claims challenging the conditions of his confinement, he must do so by filing a
24 civil rights complaint pursuant to 42 U.S.C. § 1983.

25 **CERTIFICATE OF APPEALABILITY**

26 Under the AEDPA, a state prisoner seeking to appeal a district court’s final order in a
27 habeas corpus proceeding must obtain a Certificate of Appealability (“COA”) from the district
28 judge or a circuit judge. 28 U.S.C. § 2253(c)(1)(A). A COA may issue “only if the applicant

1 has made a substantial showing of the denial of a constitutional right.” Id. at § 2253(c)(2);
2 accord Williams v. Calderon, 83 F.3d 281, 286 (9th Cir.), cert. denied, 517 U.S. 1183
3 (1996). “A petitioner satisfies this standard by demonstrating that jurists of reason could
4 disagree with the district court’s resolution of his constitutional claims or that jurists could
5 conclude the issues presented are adequate to deserve encouragement to proceed further.”
6 Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also Slack v. McDaniel, 529 U.S. 473,
7 483-84 (2000).

8 When a district court dismisses a petition on procedural grounds, the reviewing court
9 should apply a two-step analysis, and a COA should issue if the petitioner can show both:
10 (1) “that jurists of reason would find it debatable whether the district court was correct in its
11 procedural ruling[;]” and (2) “that jurists of reason would find it debatable whether the
12 petition states a valid claim of the denial of a constitutional right[.]” Slack, 529 U.S. at 478.

13 The Court is dismissing the Petition without prejudice because 28 U.S.C. § 2241 is
14 not the proper avenue for raising Petitioner's claims, and the Court does not have
15 jurisdiction over the Petition pursuant to 28 U.S.C. § 2255 because the sentencing court is
16 the District Court for the Southern District of California. Finally, transfer to the District Court
17 for the Southern District of California in lieu of dismissal would not be appropriate because
18 the Petition is a second or successive motion under Section 2255. In light of the foregoing,
19 Petitioner cannot make the requisite showing “that jurists of reason would find it debatable
20 whether the district court was correct in its procedural ruling.” Slack, 529 U.S. at 478.

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28 **ORDER**

1 Based on the foregoing, IT IS ORDERED THAT:

2 1. The Petition is **dismissed without prejudice** for lack of jurisdiction;

3 2. A Certificate of Appealability is **denied**.

4 DATED: March 26, 2015

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6 DOLLY M. GEE
7 UNITED STATES DISTRICT JUDGE

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