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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JASON ALLEN MARX,)	1:09-cv-00079-SKO-HC
)	
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS (DOC. 13)
)	AND DISMISSING THE ACTION
v.)	WITH PREJUDICE
)	
FEDERAL BUREAU OF PRISONS,)	ORDER DIRECTING THE CLERK TO
)	ENTER JUDGMENT AND CLOSE THE CASE
Respondent.)	
)	
)	

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to the parties' consent,¹ the matter has been referred to the Magistrate Judge for all proceedings, including the entry of final judgment, pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73(b), and Local Rule 73-301. Pending before the Court is Respondent's motion to dismiss the action.

I. Procedural Summary

On January 14, 2009, Petitioner filed a petition for writ of

¹ Petitioner filed a signed, written consent form on January 23, 2009; Respondents Federal Bureau of Prisons, Federal Prison Camp at Atwater, Hector Rios, Jesse Gonzalez, and Unit-Team, FPC filed a written consent form signed by their authorized representative on February 17, 2009.

1 habeas corpus in which he challenged the execution of his
2 sentence pursuant to 28 U.S.C. § 2241. (Pet. p. 1.)² Petitioner
3 alleged that the Bureau of Prisons (BOP) arbitrarily and
4 capriciously denied him individualized consideration for
5 placement at a residential reentry center (RRC) for twelve (12)
6 months, pursuant to the Second Chance Act (SCA) of 2007; violated
7 the Administrative Procedures Act (APA) by improper publication
8 of, or failure to publish, a substantive rule and by failing to
9 publish, post, and make available to the inmate population all
10 changes in the law under the SCA; and failed to invoke the so-
11 called good cause exception pursuant to 5 U.S.C. §§ 706, 533(d).
12 (Pet. pp. 1, 8-9.) Petitioner alleged that the unit team at his
13 institution of confinement limited all RRC placement to no more
14 than six (6) months of an inmate's total sentence. He argues
15 that this was contrary to the SCA's provision for twelve (12)
16 months, and in violation of 18 U.S.C. §§ 3621(b) and 3624(c) and
17 28 C.F.R. §§ 570.20, 570.21. (Id. p. 9, 11-12.)

18 Petitioner relies on the decision in Rodriguez v. Smith, 541
19 F.3d 1180 (9th Cir. 2008), in which the court determined that
20 regulations of the BOP (28 C.F.R. §§ 570.20 and 570.21) that
21 purported categorically to exclude consideration of prisoners for
22 placement in RRC's for more than the last six (6) months of their
23 sentences were contrary to the Congressional intent clearly
24 expressed in 18 U.S.C. § 3621(b), which provided for
25 individualized consideration and exercise of administrative
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27
28 ²References to pages of filed documents are to the page numbers that are
automatically assigned by the Court's electronic filing system and appear in
the upper right-hand corner of the pages of filed documents.

1 discretion based on specified factors. Petitioner here seeks the
2 very same relief as that affirmed by the court in Rodriguez,
3 namely, a writ of habeas corpus ordering the BOP promptly to
4 consider the prisoner for transfer to an RRC pursuant to the
5 criteria set forth in 18 U.S.C. § 3621 and without reference to
6 invalid regulations. 541 F.3d at 1189.

7 In response to the petition, Respondent served by mail on
8 Petitioner and filed on December 8, 2009, a motion to dismiss.
9 Petitioner did not file an opposition to the motion. Respondent
10 seeks dismissal of the petition for lack of subject matter
11 jurisdiction, mootness, failure to exhaust administrative
12 remedies, and lack of standing.

13 II. Factual Background

14 Petitioner is housed at the federal prison camp located in
15 Atwater, California and is serving a sentence of ninety-six (96)
16 months to be followed by period of five (5) years of supervised
17 release pursuant to his conviction after a guilty plea of
18 violating 21 U.S.C. §§ 846 and 841 (conspiracy to possess
19 methamphetamine with intent to distribute). (Pet. pp. 3, 7;
20 Decl. Leticia Ortiz ¶ 2.) He was sentenced in August 2008 and is
21 scheduled to be released on August 7, 2015. (Pet p. 3; Decl.
22 Ortiz ¶ 2.)

23 III. Motion to Dismiss

24 Title 28 U.S.C. § 2241 provides that writs of habeas corpus
25 may be granted by a district court within its jurisdiction only
26 to a prisoner whose custody is within enumerated categories,
27 including but not limited to custody under the authority of the
28 United States and custody in violation of the Constitution, laws,

1 or treaties of the United States. 28 U.S.C. § 2241(a), (c) (1), (3).

2 A district court must award a writ of habeas corpus or issue
3 an order to show cause why it should not be granted unless it
4 appears from the application that the applicant is not entitled
5 thereto. 28 U.S.C. § 2243. Rule 4 of the Rules Governing Section
6 2254 Cases (Rule 4) is applicable to proceedings brought pursuant
7 to § 2241. Rule 1(b) of the Rules Governing Section 2254 Cases.
8 Rule 4 permits the filing of "an answer, motion, or other
9 response" and thus authorizes the filing of a motion in lieu of
10 an answer in response to a petition. Advisory Committee Notes,
11 1976 Adoption and 2004 Amendments. This gives the Court the
12 flexibility and discretion initially to forego an answer in the
13 interest of screening out frivolous applications and eliminating
14 the burden that would be placed on a respondent by ordering an
15 unnecessary answer. Advisory Committee Notes, 1976 Adoption.
16 Rule 4 confers upon the Court broad discretion to take "other
17 action the judge may order," including authorizing a respondent
18 to make a motion to dismiss based upon information furnished by
19 respondent, which may show that a petitioner's claims suffer a
20 procedural or jurisdictional infirmity, such as res judicata,
21 failure to exhaust state remedies, or absence of custody. Rule
22 4, Advisory Committee Notes, 1976 Adoption.

23 The Supreme Court has characterized as erroneous the view
24 that a Rule 12(b)(6) motion is appropriate in a habeas corpus
25 proceeding. See, Browder v. Director, Ill. Dept. of Corrections,
26 434 U.S. 257, 269 n. 14 (1978). However, in light of the broad
27 language of Rule 4, it has been held in this circuit that motions
28 to dismiss are appropriate in cases that proceed pursuant to 28

1 U.S.C. § 2254 and present various procedural issues. O'Bremski
2 v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (a motion to dismiss
3 for failure to raise any issue of federal law, which was based on
4 the insufficiency of the facts as alleged in the petition to
5 justify relief as a matter of law, was evaluated under Rule 4);
6 White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (procedural
7 default in state court was appropriately the subject of a
8 motion); Hillery v. Pulley, 533 F.Supp. 1189, 1194 n. 12
9 (E.D.Cal. 1982) (after the trial court had determined that
10 summary dismissal was unwarranted, a motion to dismiss for
11 failure to exhaust state remedies was appropriately considered
12 after receipt of evidence pursuant to Rule 7(a) to clarify
13 whether or not the possible defect, not apparent on the face of
14 the petition, might preclude a hearing on the merits).

15 Here, the Respondent's filing of the motion to dismiss, and
16 the Court's consideration thereof, are appropriate. Respondent's
17 motion to dismiss is based on lack of subject matter
18 jurisdiction, mootness, failure to exhaust administrative
19 remedies, and lack of standing. A federal court is a court of
20 limited jurisdiction with a continuing duty to determine its own
21 subject matter jurisdiction and to dismiss an action where it
22 appears that the Court lacks jurisdiction. Fed. R. Civ. P.
23 12(h)(3); CSIBI v. Fustos, 670 F.2d 134, 136 n. 3 (9th Cir. 1982)
24 (citing City of Kenosha v. Bruno, 412 U.S. 507, 511-512 (1973));
25 Billingsley v. C.I.R., 868 F.2d 1081, 1085 (9th Cir. 1989).
26 Although Petitioner proceeds pursuant to § 2241, Respondent's
27 motion is similar in procedural posture to a motion to dismiss
28 for failure to exhaust state court remedies or for state

1 procedural default in a proceeding undertaken pursuant to § 2254.
2 Further, the motion before the Court is unopposed, and the facts
3 alleged in the petition and the evidentiary papers supporting the
4 motion are not materially disputed. Finally, Respondent has not
5 yet filed a formal answer.

6 The Court therefore exercises its discretion to review
7 Respondent's motion pursuant to its authority under Rule 4.

8 IV. Subject Matter Jurisdiction

9 Respondent argues that this Court is without subject matter
10 jurisdiction over the controversy because Petitioner challenges
11 not the fact or duration of his confinement, but rather the
12 conditions of his confinement, which Respondent contends are
13 outside the scope of habeas corpus relief.

14 Relief by way of a writ of habeas corpus extends to a
15 prisoner in custody under the authority of the United States who
16 shows that the custody violates the Constitution, laws, or
17 treaties of the United States. 28 U.S.C. § 2241(c)(3). Although
18 a federal prisoner who challenges the validity or
19 constitutionality of his conviction must file a petition for writ
20 of habeas corpus pursuant to 28 U.S.C. § 2255, a federal prisoner
21 challenging the manner, location, or conditions of the execution
22 of a sentence must bring a petition for writ of habeas corpus
23 under 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861,
24 864-65 (9th Cir. 2000).

25 In arguing that Petitioner is challenging not the fact or
26 duration of his confinement, but rather only the conditions of
27 his confinement, Respondent relies in part on the court's
28 characterization of a RRC as a place of incarceration in

1 Rodriguez v. Smith, 541 F.3d 1180, 1184-1186 (9th Cir. 2008).

2 Because of this, Respondent contends that Petitioner's request
3 for relief implicates nothing more than a transfer of the place
4 of confinement as distinct from any phenomenon affecting the fact
5 or duration of the confinement.

6 In Rodriguez v. Smith, however, the court affirmed the
7 district court's grant of the very relief requested here, namely,
8 a writ of habeas corpus directing the BOP to afford the
9 petitioner individualized consideration as provided for by
10 statute. Although the question of subject matter jurisdiction
11 was not expressly raised in Rodriguez, Respondent's
12 jurisdictional assertion is fundamentally inconsistent with the
13 court's decision in that case.

14 Respondent's view of jurisdiction is not required by the
15 wording of the governing statute. Sections 2241(c)(1) and (3)
16 provide that the writ of habeas corpus extends to a prisoner who
17 "is in custody under or by color of" the authority of the United
18 states as well as to a prisoner who "is in custody in violation
19 of the Constitution or laws or treaties of the United States."
20 Unlike § 2255(a), which limits potential applicants to prisoners
21 "claiming the right to be released," § 2241 does not contain any
22 such exclusions or limitations. Petitioner's claim in the instant
23 case challenges the manner of execution of Petitioner's sentence
24 as being in violation of a clear, specific federal statute and
25 thus comes within the express terms of § 2241.

26 The Court in Preiser v. Rodriguez, 411 U.S. 475 (1973) noted
27 that habeas relief was appropriate for federal prisoners who
28 claimed that a federal judge's action was contrary to federal

1 statute and resulted in unlawful confinement in the wrong
2 institution. 411 U.S. at 475 (citing In re Bonner, 151 U.S. 242,
3 involving a federal judge's sentencing of a federal prisoner to
4 time in a state custodial institution in violation of a federal
5 statute that prohibited a sentence to imprisonment in a state
6 penitentiary unless the term was to exceed a year; and Humphrey
7 v. Cady, 405 U.S. 504 (1972), involving a state prisoner's
8 challenge, based on unlawful commitment procedures as well as the
9 conditions of his confinement, to his commitment to a sexual
10 deviate facility for a potentially indefinite period of time).
11 The present case does not involve the functions of the sentencing
12 court, a possibility of immediate release, or any shortening of
13 the duration of confinement; thus it may not lie within the
14 "core" of habeas corpus. See, Preiser, 411 U.S. at 487-88;
15 Ramirez v. Galaza, 334 F.3d 850, 856 (9th Cir. 2003).

16 However, the scope of habeas corpus has not been
17 definitively limited to only the central core function. See,
18 Preiser, 411 U.S. at 499 (declining to describe federal habeas
19 corpus categorically as unavailable to challenge conditions of
20 confinement, and citing Johnson v. Avery, 393 U.S. 483 (1969)
21 [habeas corpus available to control prison conditions that
22 restricted access to federal habeas corpus relief]).

23 Further, in addition to the obvious example of Rodriguez v.
24 Smith, the Court notes that decisions in other cases in this
25 circuit have extended the reach of § 2241 to matters related to
26 the manner of execution of sentence that were alleged to violate
27 federal statutory or Constitutional provisions but did not
28 involve a direct or immediate effect on the fact or duration of

1 confinement. See, Montano-Figueroa v. Crabtree, 162 F.3d 548,
2 549 (9th Cir. 1998) (permitting a federal prisoner to challenge
3 by way of § 2241 the BOP's policies concerning collection of
4 court-ordered fines alleged to violate not only federal statutes
5 entrusting supervision of fine collection to the federal courts
6 but also the separation of powers provided for in Article III of
7 the Constitution); United States v. Lemoine, 546 F.3d 1042, 1046
8 (9th Cir. 2008) (entertaining and resolving on a petition
9 pursuant to § 2241 a prisoner's challenge to the BOP's
10 requirement that a federal prisoner pay restitution at a higher
11 rate than ordered at sentencing pursuant to a federal statute).

12 Respondent relies on cases which have emphasized the
13 appropriateness of considering conditions of confinement in suits
14 brought pursuant to 42 U.S.C. § 1983 (mot. pp. 3-9), and on
15 Ramirez v. Galaza, 334 F.3d 850, 856-59 (9th Cir. 2003), in which
16 it was held that the "favorable termination" rule of Heck v.
17 Humphrey³ applicable to civil rights suits over prison conditions
18 did not apply to a suit alleging a denial of due process in
19 prison disciplinary procedures and administrative appeals thereof
20 where expungement of the disciplinary findings was not likely to
21 have an effect on the overall length of the prisoner's sentence.
22 In light of the distinct purposes and functions served by §§ 2241
23 and 2254, it is significant that the present suit does not

25 ³The reference is to Heck v. Humphrey, 512 U.S. 477 (1994), that held
26 that in order to preserve habeas corpus jurisdiction, a § 1983 claim that
27 would call into question the lawfulness of a plaintiff's conviction or
28 confinement is not cognizable until and unless the plaintiff can prove that
his conviction or sentence has been reversed on direct appeal, expunged by
executive order, declared invalid by a state tribunal authorized to make such
determination, or called into question by a federal court's issuance of a writ
of habeas corpus.

1 implicate the concerns attendant upon the efforts reflected in
2 § 1983 to provide a federal remedy for injuries caused by
3 violations of federal law at the hands of persons acting under
4 color of state law. Here, the petition presents a
5 straightforward question concerning the propriety of a federal
6 authority's action involving the manner of execution of
7 Petitioner's sentence and that is alleged to be contrary to a
8 specific and clear federal statute. Further, the issues asserted
9 by Petitioner on the merits have been considered and determined
10 by the appellate court of this circuit and have been resolved in
11 Petitioner's favor in a proceeding brought pursuant to § 2241.

12 In view of the state of the authorities and the uncertainty
13 concerning the scope of the habeas remedy in circumstances such
14 as the present, the Court concludes that Respondent's contention
15 too narrowly defines the range of cases subject to § 2241 and
16 inflexibly treats two categories of cases, namely, conditions
17 suits and habeas actions concerning the manner of execution of
18 sentence, as necessarily mutually exclusive phenomena. The Court
19 concludes that Petitioner's action is one to which habeas corpus
20 may extend because it concerns his custody under the authority of
21 the United States and an allegation that his custody is in
22 violation of specific federal statutes governing the execution of
23 his sentence.

24 The Court thus concludes that it has subject matter
25 jurisdiction over the action, and Respondent's motion to dismiss
26 for lack of subject matter jurisdiction will be denied.

27 V. Personal Jurisdiction

28 Title 28 U.S.C. § 2241(a) provides that writs of habeas

1 corpus may be granted by the district courts "within their
2 respective jurisdictions." A writ of habeas corpus operates not
3 upon the prisoner, but upon the prisoner's custodian. Braden v.
4 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-495
5 (1973). A petitioner filing a petition for writ of habeas corpus
6 under 28 U.S.C. § 2241 must file the petition in the judicial
7 district of the petitioner's custodian. Brown v. United States,
8 610 F.2d 672, 677 (9th Cir. 1990). The warden of the
9 penitentiary where a prisoner is confined constitutes the
10 custodian who must be named in the petition, and the petition
11 must be filed in the district of confinement. Id.; Rumsfeld v.
12 Padilla, 542 U.S. 426, 446-47 (2004). It is sufficient if the
13 custodian is in the territorial jurisdiction of the Court at the
14 time the petition is filed; transfer of the petitioner thereafter
15 does not defeat personal jurisdiction that has once been properly
16 established. Ahrens v. Clark, 335 U.S. 188, 193 (1948),
17 overruled on other grounds in Braden v. 30th Judicial Circuit
18 Court of Kentucky, 410 U.S. at 193, citing Ex parte Mitsuye Endo,
19 323 U.S. 283, 305 (1944); Francis v. Rison, 894 F.2d 353, 354
20 (9th Cir. 1990). A failure to name and serve the custodian
21 deprives the Court of personal jurisdiction. Johnson v. Reilly,
22 349 F.3d 1149, 1153 (9th Cir. 2003).

23 Here, Petitioner was incarcerated within the district at the
24 time the petition was filed. Further, although Respondent states
25 in the motion to dismiss that Petitioner named the Bureau of
26 Prisons as "the" Respondent (mot. p. 2, l. 8), the Court notes
27 that Petitioner also named Warden Rios as a respondent (pet p.
28 1). In the motion to dismiss, Respondent represents that R. A.

1 Rios is the warden at the United States Penitentiary, Atwater,
2 California, which includes the Federal Prison Camp, and is the
3 proper respondent in this action. (Mot. p. 2.) The Court thus
4 notes that the custodian is within the district.

5 Accordingly, the Court concludes that it has personal
6 jurisdiction over a proper respondent.

7 VI. Mootness

8 Respondent argues that the petition is moot because it is
9 undisputed that Petitioner has received all the relief he could
10 obtain in this petition.

11 Federal courts lack jurisdiction to decide cases that are
12 moot because the courts' constitutional authority extends to only
13 actual cases or controversies. Iron Arrow Honor Society v.
14 Heckler, 464 U.S. 67, 70-71 (1983). Article III requires a case
15 or controversy in which a litigant has a personal stake in the
16 outcome of the suit throughout all stages of federal judicial
17 proceedings and has suffered some actual injury that can be
18 redressed by a favorable judicial decision. Id. A petition for
19 writ of habeas corpus becomes moot when it no longer presents a
20 case or controversy under Article III, § 2 of the Constitution.
21 Wilson v. Terhune, 319 F.3d 477, 479 (9th Cir. 2003). A petition
22 for writ of habeas corpus is moot where a petitioner's claim for
23 relief cannot be redressed by a favorable decision of the court
24 issuing a writ of habeas corpus. Burnett v. Lampert, 432 F.3d
25 996, 1000-01 (9th Cir. 2005) (quoting Spencer v. Kemna, 523 U.S.
26 1, 7 (1998)). Mootness is jurisdictional. Cole v. Oroville
27 Union High School District, 228 F.3d 1092, 1098-99 (9th Cir.
28 2000). Thus, a moot petition must be dismissed because nothing

1 remains before the Court to be remedied. Spencer v. Kemna, 523
2 U.S. 1, 18 (1998).

3 Petitioner deposited his petition in the prison mail on
4 January 12, 2009. (Pet. p. 14.) The uncontested declaration of
5 Petitioner's case manager at the custodial institution
6 establishes that thereafter Petitioner was afforded a progress
7 review meeting with his unit team on April 14, 2009. At the
8 meeting, Petitioner was reviewed for RRC placement with reference
9 to the five criteria required by the pertinent statute, 18 U.S.C.
10 § 3621(b), and in accordance with the Second Chance Act.⁴ (Decl.
11 Leticia Ortiz ¶ 4, att. 2, pp. 12-21.) The result of the review
12 was a determination that pursuant to the pertinent criteria, 180
13 days were determined to be sufficient time for the greatest
14 likelihood of Petitioner's successful reintegration into the
15 community. (Id. p. 19.) Thus, Petitioner was denied immediate
16 placement in a RRC.

17 The factual allegations in the petition concern earlier
18 actions attributable to the BOP; they do not meet or contradict
19 the factual matter submitted by Respondent in support of the
20 motion to dismiss. Respondent's evidence establishes that the
21 consideration sought by Petitioner has been afforded to him in a
22 program review pursuant to the standards established by the
23 pertinent statutes and Rodriguez v. Smith.

24 The Court therefore concludes that the petition is moot.

25 The fact that Petitioner was denied a transfer to a RRC
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27 ⁴ Title 18 U.S.C. § 3261(b) sets forth five (5) factors: the resources of the facility contemplated, the nature
28 and circumstances of the offense, the history and characteristics of the prisoner, any statement by the court that
imposed the sentence, and any pertinent policy statement issued by the Sentencing Commission pursuant to 28
U.S.C. § 994(a)(2).

1 because of the BOP's findings after the required review does not
2 state a claim for habeas corpus relief. The holding of Rodriguez
3 v. Smith was that the BOP was required to afford Petitioner
4 individualized consideration in accordance with the statutes and
5 policies; it did not mandate placement in a RRC. Here, in light
6 of the uncontested evidence supporting its determination, the BOP
7 was not required to exercise its discretion in favor of
8 Petitioner. See, Thomas v. Adler, 2010 WL 962176 *2 (E.D.Cal.
9 March 16, 2010); cf. Superintendent v. Hill, 472 U.S. 445, 447
10 (1985) (upholding a determination of a prison disciplinary board
11 that was not arbitrary or lacking in evidentiary support).

12 In summary, the Court concludes that the petition is moot.
13 Respondent's motion to dismiss will be granted.⁵

14 VII. Disposition

15 Accordingly, it is ORDERED that:

- 16 1) Respondent's motion to dismiss the petition is GRANTED;
17 2) The petition for writ of habeas corpus is DISMISSED WITH
18 PREJUDICE; and
19 3) The Clerk is DIRECTED to enter judgment and close the
20 case.

21
22 IT IS SO ORDERED.

23 **Dated: May 11, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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28 ⁵ In view of the disposition of the motion, the Court will not reach Respondent's additional arguments concerning failure to exhaust administrative remedies, the applicability of the Prison Litigation Reform Act, or standing.