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10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF CALIFORNIA

12 CURTIS EPPERSON, JR. ) 1:09-CV-01991 MJS HC  
13 Petitioner, ) ORDER DISMISSING PETITION FOR WRIT  
14 ) OF HABEAS CORPUS  
15 v. ) ORDER DIRECTING CLERK OF COURT  
16 JAMES D. HARTLEY, Warden, ) TO ENTER JUDGMENT  
17 Respondent. ) ORDER DECLINING ISSUANCE OF  
18 ) CERTIFICATE OF APPEALABILITY

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19 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus  
20 pursuant to 28 U.S.C. § 2254.

21 On November 13, 2009, Petitioner filed the instant petition for writ of habeas corpus. He  
22 consented to exercise of Magistrate Judge jurisdiction on November 20, 2009. (Court Docs. 1, 3.)  
23 Petitioner's claims arise out of a California Department of Corrections decision to deny petitioner  
24 visitation privileges with his ex-wife. (Id. at 5.)

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## DISCUSSION

#### A. Procedural Grounds for Summary Dismissal

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

6 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
7 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to  
8 dismiss, or after an answer to the petition has been filed. A petition for habeas corpus should not be  
9 dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded  
10 were such leave granted. *Jarvis v. Nelson*, 440 F.2d 13, 14 (9th Cir. 1971).

## B. Failure to State a Cognizable Federal Claim

12 The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241 of  
13 Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner unless  
14 he is “in custody in violation of the Constitution.” 28 U.S.C. § 2254(a) states:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a 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.*

18 (emphasis added). See also, Rule 1 to the Rules Governing Section 2254 Cases in the United States  
19 District Court. The Supreme Court has held that “the essence of habeas corpus is an attack by a  
20 person in custody upon the legality of that custody . . .” Preiser v. Rodriguez, 411 U.S. 475, 484, 93  
21 S. Ct. 1827, 36 L. Ed. 2d 439 (1973).

22 Petitioner challenges a California Department of Corrections decision to deny him visitation  
23 privileges with his ex-wife. (Court. Doc. 1, p. 5.) A writ of habeas corpus is not a proper vehicle to  
24 challenge conditions of confinement unrelated to the very fact or duration of confinement. See  
25 Ramirez v. Galaza, 334 F.3d 850, 855 (9th Cir. 2003) (quoting Preiser, 411 U.S. at 500). A § 1983  
26 action is the proper remedy for a state prisoner to constitutionally challenge the *conditions* of his  
27 prison life, rather than the fact or length of his custody. Ramirez, 334 F.3d at 855 (quoting Preiser,  
28 411 U.S. at 499). In the present case, Petitioner is not challenging the fact or duration of his

1 confinement. His challenge to visitation rights is a challenge to a condition of confinement. See  
2 Kentucky Dept. of Corr. v. Thompson, 490 U.S. 454, 460-461, 109 S. Ct. 1904, 36 L. Ed. 2d 506  
3 (1989) (“The denial of prison access to a particular visitor is well within the terms of confinement  
4 ordinarily contemplated in a prison sentence, and therefore is not independently protected by the Due  
5 Process Clause.” (citation omitted.)). Such challenges are cognizable in a civil rights action rather  
6 than a habeas corpus action. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) (challenges to  
7 conditions of confinement by state prisoners should be presented in a 42 U.S.C. § 1983 civil rights  
8 action rather than a habeas corpus petition).

9 C. Conclusion

10 Petitioner is not entitled to habeas corpus relief. His petition must be dismissed. If he  
11 wishes to pursue the claims raised here, he should do so by way of a civil rights complaint.

12 D. Certificate of Appealability

13 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
14 district court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-  
15 El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue  
16 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

17 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
18 district judge, the final order shall be subject to review, on appeal, by the court  
of appeals for the circuit in which the proceeding is held.

19 (b) There shall be no right of appeal from a final order in a proceeding to test the  
20 validity of a warrant to remove to another district or place for commitment or trial  
a person charged with a criminal offense against the United States, or to test the  
21 validity of such person’s detention pending removal proceedings.

22 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an  
appeal may not be taken to the court of appeals from—

23 (A) the final order in a habeas corpus proceeding in which the  
24 detention complained of arises out of process issued by a State  
court; or

25 (B) the final order in a proceeding under section 2255.

26 (2) A certificate of appealability may issue under paragraph (1) only if the  
27 applicant has made a substantial showing of the denial of a constitutional right.

28 (3) The certificate of appealability under paragraph (1) shall indicate which  
specific issue or issues satisfy the showing required by paragraph (2).

If a court denies a petitioner’s petition, the court may only issue a certificate of appealability “if jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate “something more than the absence of frivolity or the existence of mere good faith on his . . . part.” Miller-El, 123 S.Ct. at 1040.

8        In the present case, reasonable jurists would not find debatable or wrong the Court's  
9 determination that Petitioner is not entitled to federal habeas corpus relief nor would they find  
10 Petitioner deserving of encouragement to proceed further. Petitioner has not made the required  
11 substantial showing of the denial of a constitutional right. Accordingly, the Court declines to issue a  
12 certificate of appealability.

## ORDER

14 || Accordingly, IT IS HEREBY ORDERED that:

- 15       1. The Petition for Writ of Habeas Corpus is DISMISSED with prejudice;  
16       2. The Clerk of Court is DIRECTED to enter judgment; and  
17       3. The Court DECLINES to issue a certificate of appealability.

21 | IT IS SO ORDERED.

22 || Dated: June 14, 2010

/s/ *Michael J. Song*  
UNITED STATES MAGISTRATE JUDGE