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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 CESAR ESPINOZA MORA,) 1:10-cv-00033-JLT HC
12)
13 Petitioner,) FINDINGS AND RECOMMENDATION RE:
14) THE PETITION (Doc. 13)
15 v.)
16 B. WAGNER,) ORDER DIRECTING OBJECTIONS TO BE
17) FILED WITHIN TWENTY DAYS
18)
19 Respondent.) ORDER DIRECTING CLERK OF COURT
20) TO ASSIGN CASE TO UNITED STATES
21) DISTRICT JUDGE
22)
23) ORDER DIRECTING CLERK OF COURT
24) TO SEND FUTURE CORRESPONDENCE
25) TO PETITIONER'S NEW PLACE OF
26) INCARCERATION
27)
28)

21 **PROCEDURAL HISTORY**

22 Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus
23 pursuant to 28 U.S.C. § 2241. The instant federal petition for writ of habeas corpus, styled by
24 Petitioner, as a motion for miscellaneous relief, was filed on December 22, 2009, in the United States
25 District Court for the Middle District of Florida. (Doc. 1). The petition alleges that Respondent
26 United States Bureau of Prisons ("BOP") has improperly calculated Petitioner's credits and thus is
27 incorrectly computing his release date.

28 On January 7, 2010, that district court transferred the case to this Court. (Doc. 4). Although

1 Petitioner filed his written consent to the jurisdiction of the United States Magistrate Judge,
2 Respondent, despite being sent three separate orders requiring Respondent to file either a refusal or
3 acceptance of consent to jurisdiction, has failed to submit such a consent.

4 On April 2, 2010, Respondent filed the instant motion to dismiss, contending that the petition
5 contained unexhausted claims and that the Court lacked personal jurisdiction because Petitioner had
6 been transferred to the Eden Correctional Institution, Eden, Texas, which lies within the jurisdiction
7 of the United States District Court for the Northern District of Texas. (Doc. 15). Petitioner has not
8 filed an opposition to Respondent's motion to dismiss.

9 DISCUSSION

10 A. Procedural Grounds for Motion to Dismiss

11 As mentioned, Respondent has filed a Motion to Dismiss the petition as being filed outside
12 the one year limitations period prescribed by Title 28 U.S.C. § 2244(d)(1). Rule 4 of the Rules
13 Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from
14 the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the
15 district court" Rule 4 of the Rules Governing Section 2254 Cases.

16 The Ninth Circuit has allowed Respondent's to file a Motion to Dismiss in lieu of an Answer
17 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
18 state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule
19 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874
20 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for
21 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).
22 Thus, a Respondent can file a Motion to Dismiss after the court orders a response, and the Court
23 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

24 In this case, Respondent's motion to dismiss is based on a failure to exhaust administrative
25 remedies and a lack of personal jurisdiction. Because Respondent's motion to dismiss is similar in
26 procedural standing to a motion to dismiss for failure to exhaust state remedies or for state
27 procedural default and Respondent has not yet filed a formal answer, the Court will review
28 Respondent's motion to dismiss pursuant to its authority under Rule 4.

1 B. Lack of Jurisdiction.

2 Respondent contends that because Petitioner has been moved to a federal prison outside this
3 Court's boundaries, the Court lacks jurisdiction to proceed. Respondent is mistaken.

4 Writ of habeas corpus relief extends to a person in custody under the authority of the United
5 States. See 28 U.S.C. § 2241. Writ of habeas corpus relief is available if a federal prisoner can show
6 he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
7 § 2241(c)(3). Although Petitioner is now in the custody of the Eden Detention Center, Eden, Texas,
8 at the time he filed the instant petition he was incarcerated at the California City Correctional Center,
9 California City, California, which lies within the jurisdiction of this Court. (Doc. 15, p. 2). 28
10 U.S.C. § 2241(a); Malone v. Calderon, 165 F.3d 1234, 1237 (9th Cir. 1999)(citing § 2241 for the
11 proposition that federal courts have authority to grant writs of habeas corpus "within their respective
12 jurisdictions."). The Ninth Circuit, however, has held repeatedly that when a federal prisoner files a
13 habeas corpus petition in the correct jurisdiction, that jurisdiction will not be defeated by a
14 subsequent transfer of the prisoner to a facility in another jurisdiction. "[J]urisdiction attaches on the
15 initial filing for habeas corpus relief and it is not destroyed by a transfer of the petition and the
16 accompanying custodial charge." Francis v. Rison, 894 F.2d 353, 354 (9th Cir. 1990), *quoting*
17 Santillanes v. United States Parole Comm'n, 754 F.2d 887, 888 (10th Cir. 1985); *see* Mujahid v.
18 Daniels, 413 F.3d 991, 994 (9th Cir. 2005); *accord* Smith v. Campbell, 450 F.2d 829, 834 (9th Cir.
19 1971). Accordingly, the fact that, after the petition was filed, Petitioner was transferred by the BOP
20 to Eden Correctional Institution, Eden, Texas, does not deprive this Court of personal jurisdiction,
21 and Warden Wagner remains the proper respondent.¹

22 C. Lack of Exhaustion.

23 Respondent also contends that the petition should be dismissed because it contains
24 unexhausted claims. The Court agrees.

26 ¹Respondent cites several decisions of this Court finding a lack of jurisdiction because of a petitioner's subsequent
27 transfer. (Doc. 13, p. 9). For a short period of time, the Court adopted the minority view that habeas jurisdiction was
28 transferred along with a petitioner. However, the clear majority view in the Eastern District, and the view now followed by
this Court, is consistent with the Ninth Circuit's holding in Francis. E.g., Stansbury v. Rios, 2010 WL 1797109 *1 (E.D. Cal.
May 3, 2010); Dyson v. Rios, 2010 WL 3516358 *1 (E.D. Cal. Sept. 2, 2010); Marks v. Wrigley, 2009 WL 1211381 *2 (E.D.
Cal. April 30, 2009).

1 Before filing a petition for writ of habeas corpus, a federal prisoner challenging any
2 circumstance of imprisonment must first exhaust all administrative remedies. Martinez v. Roberts,
3 804 F.2d 570, 571 (9th Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir.
4 1984); Ruviwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983). The requirement that federal prisoners
5 exhaust administrative remedies before filing a habeas corpus petition was judicially created; it is not
6 a statutory requirement. Brown v. Rison, 895 F.2d 533, 535 (9th Cir. 1990). Thus, “because
7 exhaustion is not required by statute, it is not jurisdictional.” Id. If Petitioner has not properly
8 exhausted his claims, the district court, in its discretion, may either “excuse the faulty exhaustion and
9 reach the merits or require the petitioner to exhaust his administrative remedies before proceeding in
10 court.”

11 If the petitioner did not properly exhaust his administrative remedies, and such remedies are
12 no longer available, he may have procedurally defaulted on his claims. See Francis v. Rison, 894 at
13 354-55 (applying procedural default rules to administrative appeals); see generally Murray v. Carrier,
14 477 U.S. 478, 485 (1986); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Tacho v. Martinez, 862
15 F.2d 1376, 1378 (9th Cir.1988). If a claim is procedurally defaulted, the court may require the
16 petitioner to demonstrate cause for the procedural default and actual prejudice from the alleged
17 constitutional violation. See Francis, 894 F.2d at 355 (suggesting that the cause and prejudice test is
18 the appropriate test); Murray, 477 U.S. at 492 (cause and prejudice test applied to procedural defaults
19 on appeal); Hughes v. Idaho State Bd. of Corr., 800 F.2d 905, 906-08 (9th Cir.1986) (cause and
20 prejudice test applied to pro se litigants).

21 The BOP has established an administrative remedy procedure governing prisoner complaints.
22 The procedure is set forth at 28 C.F.R. § 542.10 et seq. First, an inmate must attempt to resolve the
23 issue informally by presenting it to staff before submitting a Request for Administrative Remedy. 28
24 C.F.R. § 542.13 (1999). If dissatisfied with the response, the prisoner may proceed with the formal
25 filing of an Administrative Remedy Request. 28 C.F.R. § 542.14 (1999). Upon denial by the
26 institution, the prisoner may appeal the decision by filing a complaint with the Regional Director of
27 the BOP. 28 C.F.R. § 542.15 (1999). The Regional Director’s decision may be appealed to the
28 General Counsel in Washington, D.C. Id. Appeal to the General Counsel is the final step in the

1 administrative remedy process. Id.

2 The record indicates that on September 14, 2009, Petitioner submitted an Informal Resolution
3 form to the California City Correctional Center, in which he sought clarification about how his
4 federal sentence was to be computed vis-a-vis a sentence imposed as the result of a separate
5 conviction in the Southern District of New York, that, according to Petitioner, had been ordered to
6 run concurrently with his conviction in the instant case. (Doc. 1, Ex. 2). The record does not
7 indicate what response, if any, Petitioner received from his Informal Resolution request.

8 The record indicates also that on November 9, 2009, Petitioner submitted an Inmate Request
9 to Staff, directed to the prison's Records Department, arguing that the prison was not calculating his
10 sentence correctly with the New York conviction. (Doc. 1, Ex. 4). Again, the record does not
11 indicate what response, if any, Petitioner received from the prison.

12 The record does not contain any further evidence of efforts by Petitioner to exhaust the
13 administrative remedies outlined above. There is no evidence that Petitioner filed an Administrative
14 Remedy Request with the prison, or that he appealed that decision to the Regional Director, or that
15 he sought review from the BOP's General Counsel. Although Petitioner has had ample opportunity
16 to provide additional evidence of his efforts to exhaust his claim by filing an opposition to the
17 motion to dismiss, Petitioner has not done so. Accordingly, the Court finds that Petitioner has not
18 exhausted his claim through the administrative procedures provided by federal regulations.

19 While it is not clear whether Petitioner could continue to exhaust his particular round of
20 administrative remedies that were commenced on September 14, 2009, the nature of Petitioner's
21 claim, i.e., failure by the BOP to properly credit him for the two concurrent sentences, if true, is a
22 continuing wrong that could be exhausted in the future by following the exhaustion procedures
23 outlined above. Accordingly, in the Court's view, Petitioner is not procedurally defaulted in his
24 efforts to obtain habeas relief for this claim at some future time, should he desire to do so.
25 Therefore, the proper avenue under these circumstances is to grant Respondent's motion to dismiss
26 for lack of exhaustion and to dismiss the petition. Should Petitioner wish to raise this issue in a
27 habeas proceedings in the federal courts in the future, he may do so by first fully exhausting those
28 administrative remedies that are available to him.

1 **ORDER**

2 It is HEREBY ORDERED as follows:

- 3] 1. The Clerk of the Court is DIRECTED to assign this case to a United States District
4 Judge; and,
5 2. The Clerk of the Court is DIRECTED to send all future correspondence with
6 Petitioner to his new place of incarceration: **CI Eden Correctional Institution, P.O.**
7 **Box 605, Eden, TX 76837.**

8 **RECOMMENDATION**

9 Accordingly, the Court HEREBY RECOMMENDS as follows:

- 10 1. Respondent's motion to dismiss for lack of personal jurisdiction (Doc. 13), should be
11 **DENIED**; and,
12 2. Respondent's motion to dismiss for lack of exhaustion (Doc. 13), should be
13 **GRANTED.**

14 This Findings and Recommendations is submitted to the United States District Court Judge
15 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of
16 the Local Rules of Practice for the United States District Court, Eastern District of California.
17 Within twenty (20) days after being served with a copy, any party may file written objections with
18 the court and serve a copy on all parties. Such a document should be captioned "Objections to
19 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and
20 filed within fourteen (14) court days (plus three days if served by mail) after service of the
21 objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
22 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive
23 the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24
25 IT IS SO ORDERED.

26 Dated: November 9, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE