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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEPHEN GARCIA,	1:10-cv-00464 MJS (HC)
Petitioner,	ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS FOR FAILING TO STATE COGNIZABLE CLAIM
v.	
	[Doc. 1]
FRESNO DEPARTMENT OF CORRECTIONS,	
Respondent.	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Under 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge. Local Rule 305(b). Petitioner filed the instant petition for writ of habeas corpus on March 15, 2010 (Pet., ECF No. 1.) Petitioner seeks relief based on allegations that a hygiene kit he was issued is unsafe.

I. 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.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the

1 respondent's motion to dismiss, or after an answer to the petition has been filed. A petition
2 for habeas corpus should not be dismissed without leave to amend unless it appears that
3 no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440
4 F.2d 13, 14 (9th Cir. 1971).

5 **B. Failure to State Cognizable Claim**

6 The instant petition must be dismissed because it does not challenge the fact or
7 duration of Petitioner's confinement. A federal court may only grant a petition for writ of
8 habeas corpus if the petitioner can show that "he is in custody in violation of the
9 Constitution" 28 U.S.C. § 2254(a). A habeas corpus petition is the correct method
10 for a prisoner to challenge the "legality or duration" of his confinement. Badea v. Cox, 931
11 F.2d 573, 574 (9th Cir. 1991), *quoting*, Preiser v. Rodriguez, 411 U.S. 475, 485 (1973);
12 Advisory Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases.

13 In contrast, a civil rights action pursuant to 42 U.S.C. § 1983 is the proper method
14 for a prisoner to challenge the conditions of that confinement. McCarthy v. Bronson, 500
15 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at 574; Advisory
16 Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases. "Habeas
17 jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a prison
18 condition will not necessarily shorten the prisoner's sentence." Ramirez v. Galaza, 334
19 F.3d 850, 859 (9th Cir. 2003).

20 Petitioner seeks relief from the use of the hygiene kits administered by Fresno
21 County Department of Corrections. (Pet. 3, ECF No. 1.) Petitioner's claims do not implicate
22 the fact or duration of his confinement. Therefore, Petitioner's claims are not cognizable
23 grounds for federal habeas corpus relief and must be dismissed.

24 **C. Certificate of Appealability**

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

1 provides as follows:

2 (a) In a habeas corpus proceeding or a proceeding under section
3 2255 before a district judge, the final order shall be subject to review, on
4 appeal, by the court of appeals for the circuit in which the proceeding is
5 held.

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

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

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

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

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

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

24 If a court denies a petitioner's petition, the court may only issue a certificate of
25 appealability "if jurists of reason could disagree with the district court's resolution of his
26 constitutional claims or that jurists could conclude the issues presented are adequate to
27 deserve encouragement to proceed further." Miller-El, 123 S.Ct. at 1034; Slack v.
28 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.

In the present case, the Court finds that reasonable jurists would not find debatable
or wrong the Court's determination that Petitioner is not entitled to federal habeas corpus
relief, nor would they find Petitioner deserving of encouragement to proceed further.
Petitioner has not made the required substantial showing of the denial of a constitutional
right. The Court therefore **DECLINES** to issue a certificate of appealability.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

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

IT IS SO ORDERED.

Dated: July 21, 2010

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE