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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8
9 ELBERT A. MERRITT, 1:11-cv-00404-SMS (HC)

10 Petitioner,

11 v.

12 JAMES D. HARTLEY,

13 Respondent.

14 ORDER DISMISSING PETITION FOR WRIT
15 OF HABEAS CORPUS FOR FAILURE TO
16 STATE A COGNIZABLE CLAIM,
17 DIRECTING CLERK OF COURT TO
18 TERMINATE ACTION, AND DECLINING TO
19 ISSUE A CERTIFICATE OF APPEALABILITY

[Doc. 1]

20 Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28
21 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction
22 of the United States Magistrate Judge. Local Rule 305(b).

23 Petitioner filed the instant petition for writ of habeas corpus on March 9, 2011.

24 DISCUSSION25 A. Procedural Grounds for Summary Dismissal

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

27 If it plainly appears from the petition and any attached exhibits that the petitioner is not
28 entitled to relief in the district court, the judge must dismiss the petition and direct the
clerk to notify the petitioner.29 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ
30 of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to
31 dismiss, or after an answer to the petition has been filed. A petition for habeas corpus should not
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1 be dismissed without leave to amend unless it appears that no tenable claim for relief can be
2 pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

3 **B. Failure to State a Cognizable Claim**

4 In the instant petition, Petitioner raises the single claim that he was denied his right to
5 counsel during the presentence probation officer's interview.

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

9 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall
10 entertain an application for a writ of habeas corpus in behalf of a person in
11 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.
12 (emphasis added). See also, Rule 1 to the Rules Governing Section 2254 Cases in the United
13 States District Court. The Supreme Court has held that "the essence of habeas corpus is an attack
14 by a person in custody upon the legality of that custody . . ." Preiser v. Rodriguez, 411 U.S. 475,
15 484 (1973).

16 Furthermore, in order to succeed in a petition pursuant to 28 U.S.C. § 2254, Petitioner
17 must demonstrate that the adjudication of his claim in state court

18 resulted in a decision that was contrary to, or involved an unreasonable application
19 of, clearly established Federal law, as determined by the Supreme Court of the
20 United States; or resulted in a decision that was based on an unreasonable
21 determination of the facts in light of the evidence presented in the State court
22 proceeding.

23 28 U.S.C. § 2254(d)(1),(2).

24 The Sixth Amendment right to counsel guarantees a defendant assistance of counsel when
25 confronted by "prosecutorial forces." Therefore, a defendant is only guaranteed counsel during
26 adversarial and critical stages of the proceedings. United States v. Johnson, 935 F.2d 47, 50 (4th
27 Cir. 1991); United States v. Benlian, 63 F.3d 824, 827 (9th Cir. 1995). A probation officer is not
28 an agent of the prosecution, but is a neutral, information-gathering agent or arm of the court. See
United States v. Herrera-Figueroa, 918 F.2d 1430, 1434 (9th Cir. 1990). Thus, there is no Sixth
Amendment right to counsel during the presentence interview by a probation officer. See

1 Hoffman v. Arave, 236 F.3d 523, 537-538 (9th Cir. 2001) (routine presentence interview does
2 not involve a critical stage of the adversary proceedings to invoke right to counsel).

3 ORDER

4 Based on the foregoing, it is HEREBY ORDERED that:

- 5 1. The instant petition for writ of habeas corpus is DISMISSED for failure to state a
6 cognizable federal claim;
- 7 2. The Clerk of Court is directed to terminate this action; and
- 8 3. The court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c);
9 Slack v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a COA,
10 petitioner must show: (1) that jurists of reason would find it debatable whether the
11 petition stated a valid claim of a denial of a constitutional right; and (2) that jurists
12 of reason would find it debatable whether the district court was correct in its
13 procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In the present
14 case, the Court does not find that jurists of reason would not find it debatable
15 whether the petition was properly for failure to state a cognizable claim under 28
16 U.S.C. § 2244(d). Petitioner has not made the required substantial showing of
17 the denial of a constitutional right.

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20 IT IS SO ORDERED.

21 Dated: March 25, 2011

22 /s/ Sandra M. Snyder
23 UNITED STATES MAGISTRATE JUDGE
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