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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COREY BURGESS,
Petitioner,
v.
HECTOR ALFONZO RIOS,
Respondent.

Case No. 1:12-cv-00777-AWI-SKO-HC
FINDINGS AND RECOMMENDATIONS TO
DENY PETITIONER'S MOTION FOR LEAVE
TO FILE AN AMENDED PETITION
(DOC. 44)
OBJECTIONS DEADLINE:
THIRTY (30) DAYS

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is a motion filed by Petitioner on February 18, 2014, in which Petitioner seeks leave to amend his "complaint," which the Court understands to be a motion for leave to file an amended petition. Respondent filed opposition to the motion on June 5, 2014. Although the fourteen-day period for filing a reply has passed, no reply has been filed.

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1 I. Background

2 In the petition filed on May 11, 2012, Petitioner challenged
3 the Federal Bureau of Prison's (BOP's) calculation of his release
4 date based on specific elements of the calculated release date. He
5 also challenged the BOP's failure to grant his request to be placed
6 in a residential re-entry center (RRC) or community correctional
7 center (CCC) instead of a federal prison. (Doc. 1.)

8 On August 30, 2012, Respondent filed an answer addressing the
9 merits of the petition with respect to Petitioner's specific
10 sentence computations. Respondent argued that Petitioner's claim(s)
11 regarding his placement should be dismissed for failure to exhaust
12 administrative remedies and because this Court would lack subject
13 matter jurisdiction to review the BOP's discretionary placement of
14 Petitioner a federal prison.

15 Petitioner filed a traverse on the merits on September 29,
16 2012.

17 II. Motion to Amend the Petition

18 Petitioner seeks to amend the petition to allege that the BOP
19 has incorrectly applied the law concerning Petitioner's good conduct
20 credit and RRC or CCC placement, transferred Petitioner in a
21 retaliatory manner, unfairly placed Petitioner in special management
22 unit housing status and thereby impeded RRC or CCC placement, and
23 obstructed Petitioner's attempt to exhaust his administrative
24 remedies concerning these issues. (Doc. 47.) Petitioner seeks
25 monetary damages of \$50,000.00 as a punitive settlement for
26 allegedly unconstitutional conditions of confinement. (Id. at 55-
27 59, 68.)

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1 A petition for a writ of habeas corpus may be amended or
2 supplemented as provided in the rules of procedure applicable to
3 civil actions to the extent that the civil rules are not
4 inconsistent with any statutory provisions or the rules governing
5 section 2254 cases. 28 U.S.C. § 2242; Rule 12 of the Rules
6 Governing Section 2254 Cases in the United States District Courts
7 (Habeas Rules). Fed. R. Civ. P. 15(a) may be used to permit the
8 petitioner to amend the petition. Withrow v. Williams, 507 U.S.
9 680, 696 n.7 (1993). Fed. R. Civ. P. 15(a) provides that a party
10 may amend its pleading once as a matter of course within twenty-one
11 days after service of the pleading, a required responsive pleading,
12 or a motion under Rule 12(b), (e), or (f), whichever is earlier; in
13 all other cases, a party may amend its pleading only with the
14 opposing party's written consent or the Court's leave. Further, the
15 Court should freely give leave when justice so requires.

16 Factors to be considered when ruling on a motion to amend a
17 habeas corpus petition include bad faith, undue delay, prejudice to
18 the opposing party, futility of the amendment, and whether or not
19 the party has previously amended his pleadings. Bonin v. Calderon,
20 59 F.3d 815, 845 (9th Cir. 1995). Amendment may be disallowed if
21 the amendment would be futile, such as where the amended matter is
22 duplicative or patently frivolous, or where the pleading presents no
23 new facts but only new theories and provides no satisfactory
24 explanation for failure to fully develop the contentions. Ibid.
25 Amendment may be prohibited to avoid a court's having to entertain
26 piecemeal litigation or collateral proceedings advanced with a
27 purpose to vex, harass, or delay. Franklin v. Murphy, 745 F.2d
28 1221, 1235-1236 (9th Cir. 1984).

1 A petition for habeas corpus should not be dismissed without
2 leave to amend unless it appears that no tenable claim for relief
3 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d
4 13, 14 (9th Cir. 1971).

5 Here, Respondent opposes the motion, and the Court's leave is
6 required.

7 A. Conditions of Confinement

8 Petitioner's proposed first amended petition is a lengthy,
9 narrative document with generalized assertions concerning the
10 impropriety of his release date. (Doc. 47, lodged on March 18,
11 2014.) However, review of his allegations and the attached
12 documentation of Petitioner's attempts to exhaust his administrative
13 remedies within the BOP shows that Petitioner seeks to add claims
14 concerning Petitioner's conditions of confinement, including but not
15 limited to allegedly retaliatory, discriminatory, or vindictive
16 treatment with respect to the prison's administrative appeal
17 process, Petitioner's placement in a security management unit, and
18 the failure to place Petitioner in a CCC or RRC.

19 A federal court may not entertain an action over which it has
20 no jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir.
21 2000).

22 Relief by way of a writ of habeas corpus extends to a person in
23 custody under the authority of the United States if the petitioner
24 can show that he is "in custody in violation of the Constitution or
25 laws or treaties of the United States." 28 U.S.C. § 2241(c)(1) &
26 (3). A habeas corpus action is the proper mechanism for challenging
27 the fact or duration of a prisoner's confinement. Preiser v.
28 Rodriguez, 411 U.S. 475, 485 (1973); Tucker v. Carlson, 925 F.2d

1 330, 332 (9th Cir. 1990) (Bivens¹ action that a claim that time spent
2 serving a state sentence should have been credited against a federal
3 sentence concerned the fact or duration of confinement and should
4 have been construed as a petition for writ of habeas corpus pursuant
5 to § 28 U.S.C. § 2241, but to the extent the complaint sought damages
6 for civil rights violations, it should be construed as a Bivens
7 action); Crawford v. Bell, 599 F.2d 890, 891-892 (9th Cir. 1979)
8 (upholding dismissal of a petition challenging conditions of
9 confinement and noting that writ of habeas corpus has traditionally
10 been limited to attacks upon the legality or duration of
11 confinement); see, Greenhill v. Lappin, 376 Fed. Appx. 757, 757-58
12 (9th Cir. 2010) (unpublished) (appropriate remedy for a federal
13 prisoner's claim that relates to the conditions of his confinement
14 is a civil rights action under Bivens; but see, Bostic v. Carlson,
15 884 F.2d 1267, 1269 (9th Cir. 1989) (habeas corpus is available
16 pursuant to § 2241 for claims concerning denial of good time credits
17 from subjection to greater restrictions of liberty, such as
18 disciplinary segregation, without due process of law); Cardenas v.
19 Adler, 2010 WL 2180378 (No.1:09-cv-00831-AWI-JLT-HC, May 28, 2010)
20 (petitioner's challenge to constitutionality of sanction of
21 disciplinary segregation and his claim that disciplinary proceedings
22 were the product of retaliation by prison staff were cognizable in a
23 habeas proceeding pursuant to § 2241).

24 Claims concerning various prison conditions brought pursuant to
25 § 2241 have been dismissed in this district for lack of subject
26 matter jurisdiction with indications that an action pursuant to

27 _____
28 ¹ The reference is to Bivens v. Six Unknown Named Agents of Federal Bureau of
Narcotics, 403 U.S. 388 (1971).

1 Bivens is appropriate. See, e.g., Dyson v. Rios, 2010 WL 3516358,
2 *3 (E.D.Cal. Sept. 2, 2010) (a claim challenging placement in a
3 special management housing unit in connection with a disciplinary
4 violation); Burnette v. Smith, 2009 WL 667199 at *1 (E.D.Cal. Mar.
5 13, 2009) (a petition seeking a transfer and prevention of
6 retaliation by prison staff); Evans v. U.S. Penitentiary, 2007 WL
7 4212339 at *1 (E.D.Cal. Nov. 27, 2007) (claims brought pursuant to
8 § 2241 regarding a transfer and inadequate medical care).

9 To the extent Petitioner attempts to add claims based on BOP
10 actions in custodial institutions in other districts, Petitioner
11 appears to have undertaken administrative appeals regarding those
12 actions in other institutions and has access to relief by way of
13 § 2241 in the districts where Petitioner is confined and where the
14 conduct of which Petitioner complains has occurred.

15 Insofar as Petitioner seeks to add to this ongoing habeas
16 proceeding claims concerning conditions of confinement, those claims
17 do not relate to the legality or duration of his confinement.
18 Petitioner seeks monetary and punitive damage for conditions of
19 confinement that he alleged he endured in the course of his attempts
20 to exhaust administrative remedies as to the BOP's discretionary
21 placement decision. Because these claims relate solely to the
22 conditions of his confinement, they are properly raised in a Bivens
23 action and lie without the core of habeas jurisdiction pursuant to §
24 2241.

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1 B. Absence of Subject Matter Jurisdiction to Review
2 Discretionary Placement Decisions of BOP

3 At the core of the new claims are the BOP's decision or
4 decisions concerning Petitioner's placement in custodial
5 institutions and programs.

6 Congress has mandated that the BOP, under the direction of the
7 Attorney General, shall manage and regulate all federal penal and
8 correctional institutions. 18 U.S.C. § 4042(a)(1). Congress has
9 also delegated to the BOP the authority to designate the institution
10 of confinement. Title 18 U.S.C. § 3621(b) provides in pertinent
11 part as follows:

12 (b) The Bureau of Prisons shall designate the place of
13 the prisoner's imprisonment. The Bureau may designate
14 any available penal or correctional facility that meets
15 minimum standards of health and habitability established
16 by the Bureau, whether maintained by the Federal
17 Government or otherwise and whether within or without
18 the judicial district in which the person was convicted,
19 that the Bureau determines to be appropriate and
20 suitable, considering-

- 18 1) the resources of the facility contemplated;
19 2) the nature and circumstances of the offense;
20 3) the history and characteristics of the prisoner;
21 4) any statement by the court that imposed sentence-

22 A) concerning the purposes for which the
23 sentence to imprisonment was determined to be
24 warranted; or

25 B) recommending a type of penal or correctional
26 facility as appropriate; and

- 27 5) any pertinent policy statement issued by the
28 Sentencing Commission pursuant to section 994(a)(2)
of title 28.

1 In designating the place of imprisonment or making
2 transfers under this subsection, there shall be no
3 favoritism given to prisoners of high social or economic
4 status. The Bureau may at any time, having regard for the
same matters, direct the transfer of a prisoner from one
penal or correctional facility to another.

5 18 U.S.C. § 3621(b).

6 In Reeb v. Thomas, 636 F.3d 1224 (9th Cir. 2010), a federal
7 prisoner brought a claim pursuant to 28 U.S.C. § 2241 alleging BOP
8 had abused its discretion in expelling him from a residential drug
9 abuse program (RDAP). The Petitioner sought re-admission into the
10 RDAP and a twelve-month reduction in sentence upon successful
11 completion of the program. The court held that 18 U.S.C. § 3625
12 precludes judicial review of discretionary, individualized RDAP
13 determinations made by the BOP pursuant to 18 U.S.C. § 3621, which
14 provide BOP discretion to determine RDAP eligibility and entitlement
15 to sentence reductions for program participation. The court based
16 its decision on provisions of the Administrative Procedure Act (APA)
17 that provided a cause of action for persons suffering legal wrong or
18 adverse effect from agency action, but which withdrew the cause of
19 action to the extent that the pertinent statute "preclude[s]
20 judicial review" or "the agency action is committed to agency
21 discretion by law." Reeb v. Thomas, 636 F.3d at 1226; 5 U.S.C. §§
22 702, 701(a). The court also relied on 18 U.S.C. § 3625, which
23 stated in pertinent part that the provisions of 5 U.S.C. §§ 701
24 through 706 "do not apply to the making of any determination,
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1 decision, or order under this subchapter." Reeb, 636 F.3d at 1226
2 (quoting 18 U.S.C. § 3625). The court stated as follows:

3 There is no ambiguity in the meaning of 18 U.S.C. § 3625.
4 The plain language of this statute specifies that the
5 judicial review provisions of the APA, 5 U.S.C. §§ 701-
6 706, do not apply to "any determination, decision, or
7 order" made pursuant to 18 U.S.C. §§ 3621-3624. The BOP
8 has authority to manage inmate drug treatment programs,
9 including RDAP, by virtue of 18 U.S.C. § 3621. To find
10 that prisoners can bring habeas petitions under 28 U.S.C.
11 § 2241 to challenge the BOP's discretionary determinations
12 made pursuant to 18 U.S.C. § 3621 would be inconsistent
13 with the language of 18 U.S.C. § 3625. Accordingly, any
substantive decision by the BOP to admit a particular
prisoner into RDAP, or to grant or deny a sentence
reduction for completion of the program, is not reviewable
by the district court. The BOP's substantive decisions to
remove particular inmates from the RDAP program are
likewise not subject to judicial review.

14 Id. at 1227. The court emphasized that the RDAP decisions
15 challenged in that case were matters properly left to the BOP's
16 discretion. Id.

17 This case is analogous with Reeb. Pursuant to § 3621(b), the
18 designation of an institution of confinement, including placement in
19 a security management unit, is a matter within the discretion of the
20 BOP. This Court lacks subject matter jurisdiction to review the
21 BOP's discretionary, individualized decisions concerning
22 Petitioner's placement in a prison, Petitioner's placement in a
23 security management unit, and the failure to place Petitioner in a
24 CCC or RRC. Accordingly, it would be futile to permit amendment of
25 the petition to allege such claims because they relate to conditions
26 of confinement and discretionary determinations that are beyond the
27 scope of review in a proceeding pursuant to § 2241.

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1 Denial of Petitioner's motion to amend would constitute a
2 determination that there was no federal forum in habeas corpus for
3 Petitioner's additional claims. Therefore, the undersigned will
4 proceed by way of findings and recommendations, and it will be
5 recommended that Petitioner's motion to amend the petition be
6 denied.

7 III. Recommendations

8 In accordance with the foregoing, it is RECOMMENDED that
9 Petitioner's motion to amend the petition be DENIED.

10 These findings and recommendations are submitted to the United
11 States District Court Judge assigned to the case, pursuant to the
12 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local
13 Rules of Practice for the United States District Court, Eastern
14 District of California. Within thirty (30) days after being served
15 with a copy, any party may file written objections with the Court
16 and serve a copy on all parties. Such a document should be
17 captioned "Objections to Magistrate Judge's Findings and
18 Recommendations." Replies to the objections shall be served and
19 filed within fourteen (14) days (plus three (3) days if served by
20 mail) after service of the objections. The Court will then review
21 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).
22 The parties are advised that failure to file objections within the
23 specified time may waive the right to appeal the District Court's
24 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25
26 IT IS SO ORDERED.

27 Dated: August 1, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE