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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAIME GAYTAN,)	1:13-cv-00293-LJO-SKO-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS THE PETITION WITHOUT
v.)	PREJUDICE (DOC. 1) AND
)	TO DIRECT THE CLERK TO CLOSE
NORRIS HOGANS,)	THE ACTION
)	
Respondent.)	<u>OBJECTIONS DEADLINE:</u>
)	<u>THIRTY (30) DAYS</u>
)	

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 and 304. Pending before the Court is the petition, which was filed on February 28, 2013.

I. Screening the Petition

The Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) are appropriately applied to

1 proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule
2 1(b). Habeas Rule 4 requires the Court to make a preliminary
3 review of each petition for writ of habeas corpus. The Court
4 must summarily dismiss a petition "[i]f it plainly appears from
5 the petition and any attached exhibits that the petitioner is not
6 entitled to relief in the district court...." Habeas Rule 4;
7 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also
8 Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule
9 2(c) requires that a petition 1) specify all grounds of relief
10 available to the Petitioner; 2) state the facts supporting each
11 ground; and 3) state the relief requested. Notice pleading is
12 not sufficient; the petition must state facts that point to a
13 real possibility of constitutional error. Rule 4, Advisory
14 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at
15 420 (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)).
16 Allegations in a petition that are vague, conclusory, or palpably
17 incredible are subject to summary dismissal. Hendricks v.
18 Vasquez, 908 F.2d at 491.

19 The Court may dismiss a petition for writ of habeas corpus
20 either on its own motion under Habeas Rule 4, pursuant to the
21 respondent's motion to dismiss, or after an answer to the
22 petition has been filed. Advisory Committee Notes to Habeas Rule
23 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
24 (9th Cir. 2001). A petition for habeas corpus should not be
25 dismissed without leave to amend unless it appears that no
26 tenable claim for relief can be pleaded were such leave granted.
27 Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

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1 Here, Petitioner alleges that he is an inmate of the Taft
2 Correctional Institution (TCI) serving a sentence of 240 months
3 imposed on June 21, 2005, in the United States District Court for
4 the Central District of California for having violated 21 U.S.C.
5 §§ 841(b)(1)(A) and 846. His projected release date is July 28,
6 2021. Petitioner challenges actions of prison staff undertaken
7 in December 2012 and January 2013, alleging that the rejection
8 and return of publications in Petitioner's incoming mail violated
9 due process of law established by 28 C.F.R. § 540.71 and Federal
10 Bureau of Prisons (BOP) policy statement 5266.11(2)(d), and
11 Petitioner's First Amendment rights.

12 II. Conditions of Confinement

13 A federal court may not entertain an action over which it
14 has no jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 865
15 (9th Cir. 2000).

16 Relief by way of a writ of habeas corpus extends to a person
17 in custody under the authority of the United States if the
18 petitioner can show that he is "in custody in violation of the
19 Constitution or laws or treaties of the United States." 28
20 U.S.C. § 2241(c)(1) & (3). A habeas corpus action is the proper
21 mechanism for a prisoner to challenge the fact or duration of his
22 confinement. Preiser v. Rodriguez, 411 U.S. 475, 485 (1973);
23 Tucker v. Carlson, 925 F.2d 330, 332 (9th Cir. 1990) (holding in
24 a Bivens¹ action that a claim that time spent serving a state
25 sentence should have been credited against a federal sentence
26 concerned the fact or duration of confinement and should have

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

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

22 Here, Petitioner's claims concern conditions of confinement
23 that do not bear a relationship to the legality or duration of
24 his confinement. Because these claims relate solely to the
25 conditions of his confinement, the Court lacks habeas corpus
26 jurisdiction over the claims pursuant to § 2241.

27 III. Remedy

28 Although the Court lacks habeas corpus jurisdiction over the

1 claims concerning conditions of confinement, the Court could
2 construe Petitioner's claims as a civil rights complaint brought
3 pursuant to Bivens. See, Wilwording v. Swenson, 404 U.S. 249,
4 251 (1971). However, the Court declines to construe the petition
5 as a civil rights complaint because of differences in the
6 procedures undertaken in habeas proceedings and civil rights
7 actions.

8 First, if the petition were converted to a civil rights
9 complaint, Petitioner would be obligated to pay the \$350 filing
10 fee for a civil action, whether in full or through withdrawals
11 from his prison trust account in accordance with the availability
12 of funds. 28 U.S.C. §§ 1914, 1915(b). The dismissal of this
13 action at the pleading stage would not terminate Petitioner's
14 duty to pay the \$350 filing fee. Here, the petition was not
15 accompanied by the \$350 filing fee or an authorization by
16 Petitioner to have the \$350 filing fee deducted from his trust
17 account pursuant to 28 U.S.C. § 1915(b).

18 Further, 42 U.S.C. § 1997e(a) provides, "No action shall be
19 brought with respect to prison conditions under section 1983 of
20 this title, or any other Federal law, by a prisoner confined in
21 any jail, prison, or other correctional facility until such
22 administrative remedies as are available are exhausted." Section
23 1997e(a) requires exhaustion "irrespective of the forms of relief
24 sought and offered through administrative avenues." Booth v.
25 Churner, 532 U.S. 731, 741 n.6 (2001). Here, it is possible that
26 administrative remedies are still available to Petitioner.

27 Additionally, Petitioner has failed to identify the capacity
28 in which the named respondent would be sued for purposes of a

1 civil rights claim - which is critical to the issue of sovereign
2 immunity. Finally, if the petition were converted to a civil
3 rights complaint, the Court would be obligated to screen it
4 pursuant to the screening provisions of the Prisoner Litigation
5 Reform Act of 1995. 28 U.S.C. § 1915A(b); 42 U.S.C.
6 § 1997e(c)(1). It is not clear that all of Petitioner's
7 disparate allegations state civil rights claims. If the pleading
8 ultimately were dismissed for failure to state a claim upon which
9 relief may be granted, such a dismissal could count as a "strike"
10 against Petitioner for purposes of 28 U.S.C. § 1915(g) and any
11 future civil rights action he might bring.

12 Based on the foregoing, the court concludes that it is
13 appropriate to dismiss the petition without prejudice so that
14 Petitioner may determine whether or not he wishes to raise his
15 present claims through a properly submitted civil rights
16 complaint.²

17 IV. Recommendations

18 Accordingly, it is RECOMMENDED that:

- 19 1) The petition for writ of habeas corpus be DISMISSED
20 without prejudice for lack of subject matter jurisdiction; and
21 2) The Clerk be DIRECTED to close the action because the
22 dismissal terminates it in its entirety.

23 These findings and recommendations are submitted to the
24 United States District Court Judge assigned to the case, pursuant

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26 ² Issuance of a certificate of appealability is not addressed in this
27 order because a certificate of appealability is not required to appeal the
28 denial of a petition under § 2241. Forde v. United States Parole Commission,
114 F.3d 878, 879 (9th Cir. 1997). This is because the plain language of
§ 2253(c)(1) does not require a certificate with respect to an order that is
not a final order in a habeas proceeding in which the detention complained of
arises out of process issued by a state court. Id.

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

15
16 IT IS SO ORDERED.

17 **Dated: March 13, 2013**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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