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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

WADE KNIGHT,  
Petitioner,  
v.  
PAUL COPENHAVER,  
Respondent.

Case No. 1:14-cv-00951-AWI-SKO-HC

FINDINGS AND RECOMMENDATIONS TO  
DISMISS THE PETITION FOR WRIT OF  
HABEAS CORPUS WITHOUT PREJUDICE  
(DOC. 1) AND DIRECT THE CLERK TO  
CLOSE THE CASE

**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 the petition, which was filed on June 19, 2014.

I. Screening the Petition

The Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule

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

17 Allegations in a petition that are vague, conclusory, patently  
18 frivolous or false, or palpably incredible are subject to summary  
19 dismissal. Hendricks v. Vasquez, 908 F.2d at 491. The Court may  
20 dismiss a petition for writ of habeas corpus either on its own  
21 motion under Habeas Rule 4, pursuant to the respondent's motion to  
22 dismiss, or after an answer to the petition has been filed.  
23  
24 Advisory Committee Notes to Habeas Rule 8, 1976 Adoption; see,  
25 Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

27 A petition for habeas corpus should not be dismissed without  
28 leave to amend unless it appears that no tenable claim for relief

1 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d  
2 13, 14 (9th Cir. 1971).

3 II. Failure to Exhaust Administrative Remedies

4 Petitioner alleges that he is in the custody of the Federal  
5 Bureau of Prisons (BOP) at the United States Penitentiary at  
6 Atwater, California, serving a criminal sentence. He challenges a  
7 disciplinary finding dated on or about April 25, 2013, that he  
8 refused to obey an order. The only claim for relief set forth in  
9 the petition is that in the course of the disciplinary proceedings,  
10 Petitioner was denied his due process right to call witnesses as  
11 recognized in Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974).  
12 Petitioner alleges he administratively appealed from the  
13 disciplinary finding and received a decision at the BP-10 level  
14 denying his claim based on a finding that he did not request  
15 witnesses. Petitioner then submitted his claim on the BP-11 level  
16 on an unknown date with a memorandum from the chairperson of his  
17 unit disciplinary committee stating that Petitioner had indeed  
18 requested staff witnesses. (Pet., doc. 1, 1-7.) Petitioner admits  
19 he has not received a decision at the BP-11 level and that his  
20 administrative appeal is pending. (Id. at 3.)

21 As a "prudential matter," federal prisoners are generally  
22 required to exhaust available administrative remedies before  
23 bringing a habeas petition pursuant to 28 U.S.C. § 2241. Huang v.  
24 Ashcroft, 390 F.3d 1118, 1123 (9th Cir. 2004) (quoting Castro-Cortez  
25 v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001)); Martinez v. Roberts,  
26 804 F.2d 570, 571 (9th Cir. 1986). The exhaustion requirement  
27 applicable to petitions brought pursuant to § 2241 is judicially  
28 created and is not a statutory requirement; thus, a failure to

1 exhaust does not deprive a court of jurisdiction over the  
2 controversy. Brown v. Rison, 895 F.2d 533, 535 (9th Cir. 1990),  
3 overruled on other grounds, Reno v. Koray, 515 U.S. 50, 54-55  
4 (1995). If a petitioner has not properly exhausted his or her  
5 claims, a district court in its discretion may either excuse the  
6 faulty exhaustion and reach the merits, or require the petitioner to  
7 exhaust his administrative remedies before proceeding in court.  
8 Brown v. Rison, 895 F.2d at 535.

9 Factors weighing in favor of requiring exhaustion include  
10 whether 1) agency expertise makes agency consideration necessary to  
11 generate a proper record and reach a proper decision, 2) relaxation  
12 of the requirement would encourage the deliberate bypass of the  
13 administrative scheme, and 3) administrative review is likely to  
14 allow the agency to correct its own mistakes and to preclude the  
15 need for judicial review. Noriega-Lopez v. Ashcroft, 335 F.3d 874,  
16 880-81 (9th Cir. 2003) (citing Montes v. Thornburgh, 919 F.2d 531,  
17 537 (9th Cir. 1990)).

18 Exhaustion may be excused if the administrative remedy is  
19 inadequate, ineffective, or if attempting to exhaust would be futile  
20 or would cause irreparable injury. Fraley v. United States Bureau  
21 of Prisons, 1 F.3d 924, 925 (9th Cir. 1993); United Farm Workers of  
22 America v. Arizona Agr. Emp. Rel. Bd., 669 F.2d 1249, 1253 (9th Cir.  
23 1982). Failure to exhaust administrative remedies may be excused  
24 where an official policy of the BOP requires denial of the claim.  
25 Ward v. Chavez, 678 F.3d 1042, 1045-46 (9th Cir. 2012).

26 Here, it is unclear whether Petitioner's claim relates to the  
27 legality or duration of his confinement because the sanctions  
28 suffered by Petitioner are not set forth in the petition.

1           However, even assuming for the purpose of further analysis that  
2           Petitioner's claim is properly brought in a petition pursuant to 28  
3           U.S.C. § 2241, the petition should be dismissed. Petitioner admits  
4           that his claim, supported by evidence relating to the merits of his  
5           claim, is pending in the later stages of the administrative appeal  
6           process.<sup>1</sup> Agency consideration of Petitioner's appeal will generate  
7           a proper record, and the agency will review the matter and reach a  
8           proper decision, precluding the need for judicial review. Further,  
9           the Court is mindful that relaxation of the exhaustion requirement  
10          would encourage the deliberate bypass of the administrative remedy  
11          scheme. There is also nothing before the Court that indicates that  
12          administrative remedies would be futile or would cause any  
13          irreparable injury, or that administrative exhaustion should be  
14          excused.

15          When a petitioner in a proceeding pursuant to § 2241 does not  
16          exhaust administrative remedies, a district court ordinarily should  
17          either dismiss the petition without prejudice or stay the  
18          proceedings until the petitioner has exhausted remedies, unless  
19          exhaustion is excused. Leonardo v. Crawford, 646 F.3d 1157, 1160  
20          (9th Cir. 2011). Here, the Court will dismiss the petition without  
21          prejudice to refiling after complete exhaustion of administrative  
22          remedies.

23          ///

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25          <sup>1</sup>The BOP has established an administrative remedy program which requires an inmate  
26          to proceed through a four-level review process: 1) an attempt at informal  
27          resolution with institutional staff (BP 8); 2) a formal written administrative  
28          remedy request to the Warden (BP 9); 3) an appeal to the BOP Regional Director (BP  
29          10); and 4) an appeal to the BOP General Counsel (BP 11). 28 C.F.R. §§ 542.13-  
30          542.15. An appeal to the General Counsel is the final administrative remedy. 28  
31          C.F.R. § 542.15(a).

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Accordingly, it is RECOMMENDED that:

- 1) The petition for writ of habeas corpus be DISMISSED for failure to exhaust administrative remedies; and
- 2) The Clerk be DIRECTED to close the case.

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

IT IS SO ORDERED.

Dated: July 1, 2014

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE