

1 of request or complaint filed by inmates. Petitioner acknowledges that he has never filed any type of
2 request for relief other than the instant petition on the issue of his missing “IFPs.” (Doc. 1, p. 5).
3 However, Petitioner contends, without further elaboration, that exhaustion is “not available” to him.
4 (Doc. 1, p. 6). Petitioner explains only that, “I’m constantly in court fighting lawsuits and I believe a
5 writ of habeas corpus will get this penitentiary to do the right thing or the Court will continue to get
6 undone or IFPs that are not complete. The court should force this place to give me my IFPs to keep
7 the wheels of justice turning.” (Doc. 1, p. 16).

8 DISCUSSION

9 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of
10 each petition for writ of habeas corpus. The Court must dismiss a petition “[i]f it plainly appears from
11 the face of the petition . . . that the petitioner is not entitled to relief.” Rule 4 of the Rules Governing
12 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). A federal court may only
13 grant a petition for writ of habeas corpus if the petitioner can show that “he is in custody in violation of
14 the Constitution” 28 U.S.C. § 2254(a). A habeas corpus petition is the correct method for a
15 prisoner to challenge the “legality or duration” of his confinement. Badea v. Cox, 931 F.2d 573, 574
16 (9th Cir. 1991), *quoting*, Preiser v. Rodriguez, 411 U.S. 475, 485, 93 S. Ct. 1827 (1973); Ramirez v.
17 Galaza, 334 F.3d 850, 859 (9th Cir. 2003)(“[H]abeas jurisdiction is absent, and a § 1983 action proper,
18 where a successful challenge to a prison condition will not necessarily shorten the prisoner’s
19 sentence”); Advisory Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases.

20 The Ninth Circuit has also held that “[h]abeas corpus jurisdiction also exists when a petitioner
21 seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the
22 prisoner’s eligibility for parole.” Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989); see also
23 Docken v. Chase, 393 F. 3d 1024, 1031 (9th Cir. 2004)(“[W]e understand Bostic’s use of the term
24 ‘likely’ to identify claims with a sufficient nexus to the length of imprisonment so as to implicate, but
25 not fall squarely within, the ‘core’ challenges identified by the Preiser Court.”)

26 In contrast to a habeas corpus challenge to the length or duration of confinement, a civil rights
27 action pursuant to 42 U.S.C. § 1983 is the proper method for a prisoner to challenge the conditions of
28 confinement. McCarthy v. Bronson, 500 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea,

1 931 F.2d at 574; Advisory Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases.

2 In this case, as mentioned, Petitioner alleges Respondent is, either intentionally or through
3 negligence, failing to process and return his “IFPs” and that he has no other avenue of relief except to
4 file this petition. Petitioner is mistaken. Petitioner is clearly challenging the conditions of his
5 confinement, not the fact or duration of that confinement. No relief requested by Petitioner in his
6 petition, i.e., “forcing” Respondent to “give [Petitioner] [his] IFPs,” would affect the fact or duration
7 of Petitioner’s sentence. Therefore, Petitioner is not entitled to habeas corpus relief, and this petition
8 must be dismissed. Should Petitioner wish to pursue his claims, Petitioner must do so by way of a
9 civil rights complaint pursuant to 42 U.S.C. § 1983.

10 Moreover, the sole claim in this petition is entirely unexhausted. Petitioner candidly concedes
11 that he has never presented this in any state court, let alone the California Supreme Court. A petitioner
12 who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of
13 habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine
14 is based on comity to the state court and gives the state court the initial opportunity to correct the
15 state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
16 Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

17 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
18 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
19 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
20 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full
21 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
22 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
23 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

24 Additionally, the petitioner must have specifically told the state court that he was
25 raising a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
26 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.
27 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). Where none of a petitioner’s claims has
28 been presented to the highest state court as required by the exhaustion doctrine, the Court must dismiss

1 the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
2 481 (9th Cir. 2001). The authority of a court to hold a mixed petition in abeyance pending exhaustion
3 of the unexhausted claims has not been extended to petitions that contain no exhausted claims.
4 Raspberry, 448 F.3d at 1154.

5 Based on the foregoing, it is clear that Petitioner’s claim raises only “conditions” issues, and
6 does not implicate either the fact or duration of his confinement. Moreover, it is obvious that the
7 claim is entirely unexhausted. Should Petitioner wish to proceed, he must do so by way of § 1983 and
8 must first exhaust his claim in state court.

9 **ORDER**

10 Accordingly, the Clerk of the Court is HEREBY DIRECTED to assign a United States District
11 Judge to this case.

12 **RECOMMENDATION**

13 Accordingly, the Court HEREBY RECOMMENDS that the habeas corpus petition be
14 DISMISSED for Petitioner’s failure to state any cognizable federal habeas claims and for lack of
15 exhaustion.

16 This Findings and Recommendation is submitted to the United States District Court Judge
17 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
18 Local Rules of Practice for the United States District Court, Eastern District of California. Within 21
19 days after being served with a copy, any party may file written objections with the court and serve a
20 copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings
21 and Recommendation.” Replies to the objections shall be served and filed within ten court days after
22 service of the objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28
23 U.S.C. § 636 (b)(1)(C).

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