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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

CHARLES ELMER DUNN, JR.,
Petitioner,
v.
KERN COUNTY SHERIFF et al.,
Respondents.

Case No. 1:15-cv-00318-SKO-HC
ORDER DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS FOR FAILURE TO STATE FACTS WARRANTING HABEAS RELIEF (DOC. 1)
ORDER DECLINING TO ISSUE A CERTIFICATE OF APPELABILITY AND DIRECTING THE CLERK TO CLOSE THE CASE

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. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting Petitioner's consent in a writing signed by Petitioner and filed by Petitioner on March 16, 2015 (doc. 5). Pending before the Court is the petition, which was filed on March 4, 2015

I. Screening the Petition

The Rules Governing Section 2254 Cases in the United States

1 District Courts (Habeas Rules) are appropriately applied to
2 proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule
3 1(b). Habeas Rule 4 requires the Court to make a preliminary review
4 of each petition for writ of habeas corpus. The Court must
5 summarily dismiss a petition "[i]f it plainly appears from the
6 petition and any attached exhibits that the petitioner is not
7 entitled to relief in the district court...." Habeas Rule 4;
8 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also
9 Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule
10 2(c) requires that a petition 1) specify all grounds of relief
11 available to the Petitioner; 2) state the facts supporting each
12 ground; and 3) state the relief requested. Notice pleading is not
13 sufficient; the petition must state facts that point to a real
14 possibility of constitutional error. Rule 4, Advisory Committee
15 Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting
16 Blackledge v. Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in
17 a petition that are vague, conclusory, or palpably incredible are
18 subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at
19 491.

20 The Court may dismiss a petition for writ of habeas corpus
21 either on its own motion under Habeas Rule 4, pursuant to the
22 respondent's motion to dismiss, or after an answer to the petition
23 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976
24 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.
25 2001). A petition for habeas corpus should not be dismissed without
26 leave to amend unless it appears that no tenable claim for relief
27 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d
28

1 13, 14 (9th Cir. 1971).

2 Petitioner alleges he is an inmate of the Kern County Jail at
3 Lerdo pursuant to a federal judgment concerning a federal
4 supervision violation that is pending adjudication. (Pet., doc. 1,
5 1.) Petitioner challenges the custodian's failure to pay for
6 treatment for Petitioner's hepatitis, failure to provide him with
7 eyeglasses to allow him to see, and placement of Petitioner in
8 housing that lacks fire sprinklers or smoke alarms. (Id. at 2.)
9 Petitioner alleges the following claims in the petition: 1) the
10 failure to provide treatment for his hepatitis constitutes cruel and
11 unusual punishment and a violation of his right to the equal
12 protection of the laws; 2) denial of eyeglasses is a denial of equal
13 protection and results in Petitioner's not being able to see well or
14 drive; and 3) the absence of fire sprinklers and smoke alarms in the
15 jail constitutes cruel and unusual punishment and a denial of equal
16 protection. (Id. at 6-7.) Petitioner seeks medical treatment and to
17 bring the jail into compliance with building codes and applicable
18 fire and safety laws. (Id. at 8.)

19 II. Conditions of Confinement

20 A federal court may not entertain an action over which it has
21 no jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir.
22 2000).

23
24 Relief by way of a writ of habeas corpus extends to a person in
25 custody under the authority of the United States if the petitioner
26 can show that he is "in custody in violation of the Constitution or
27 laws or treaties of the United States." 28 U.S.C. § 2241(c)(1) &
28 (3). A habeas corpus action is the proper mechanism for a prisoner

1 to challenge the fact or duration of his confinement. Preiser v.
2 Rodriguez, 411 U.S. 475, 485 (1973); Tucker v. Carlson, 925 F.2d
3 330, 332 (9th Cir. 1990) (holding in a Bivens¹ action that a claim
4 that time spent serving a state sentence should have been credited
5 against a federal sentence concerned the fact or duration of
6 confinement and should have been construed as a petition for writ of
7 habeas corpus pursuant to § 28 U.S.C. § 2241, but to the extent the
8 complaint sought damages for civil rights violations, it should be
9 construed as a Bivens action); Crawford v. Bell, 599 F.2d 890,
10 891-892 (9th Cir. 1979) (upholding dismissal of a petition
11 challenging conditions of confinement and noting that the writ of
12 habeas corpus has traditionally been limited to attacks upon the
13 legality or duration of confinement); see, Greenhill v. Lappin, 376
14 Fed. Appx. 757, 757-58 (9th Cir. 2010) (unpublished) (appropriate
15 remedy for a federal prisoner's claim that relates to the conditions
16 of his confinement is a civil rights action under Bivens; but see,
17 Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989) (habeas
18 corpus is available pursuant to § 2241 for claims concerning denial
19 of good time credits from subjection to greater restrictions of
20 liberty, such as disciplinary segregation, without due process of
21 law); Cardenas v. Adler, 2010 WL 2180378 (No.1:09-cv-00831-AWI-JLT-
22 HC, May 28, 2010) (a petitioner's challenge to the constitutionality
23 of the sanction of disciplinary segregation and his claim that the
24 disciplinary proceedings were the product of retaliation by prison
25 staff were cognizable in a habeas proceeding pursuant to § 2241).

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

1 In this district, claims concerning various prison conditions
2 brought pursuant to § 2241 have been dismissed for lack of subject
3 matter jurisdiction with indications that an action pursuant to
4 Bivens is appropriate. See, e.g., Dyson v. Rios, 2010 WL 3516358,
5 *3 (E.D.Cal. Sept. 2, 2010) (claim challenging placement in a
6 special management housing unit in connection with a disciplinary
7 violation); Burnette v. Smith, 2009 WL 667199 at *1 (E.D.Cal. Mar.
8 13, 2009) (petition seeking a transfer and prevention of retaliation
9 by prison staff); Evans v. U.S. Penitentiary, 2007 WL 4212339 at *1
10 (E.D.Cal. Nov. 27, 2007) (claims brought pursuant to § 2241
11 regarding a transfer and inadequate medical care).

12 Here, Petitioner's claims concern conditions of confinement
13 that do not bear on the legality or duration of his confinement.
14 Because these claims relate solely to the conditions of his
15 confinement, Petitioner has not stated facts that would warrant
16 habeas relief in this proceeding, and the Court lacks habeas corpus
17 jurisdiction over Petitioner's claims pursuant to § 2241.

18 III. Remedy

19 Although the Court lacks habeas corpus jurisdiction over the
20 claims concerning conditions of confinement, the Court could
21 construe Petitioner's claims as a civil rights complaint brought
22 pursuant to Bivens. See, Wilwording v. Swenson, 404 U.S. 249, 251
23 (1971). However, the Court declines to construe the petition as a
24 civil rights complaint because of differences in the procedures
25 undertaken in habeas proceedings and civil rights actions.

26 First, if the petition were converted to a civil rights
27 complaint, Petitioner would be obligated to pay the \$350 filing fee
28 for a civil action, whether in full or through withdrawals from his

1 prison trust account in accordance with the availability of funds.
2 28 U.S.C. §§ 1914, 1915(b). The dismissal of this action at the
3 pleading stage would not terminate Petitioner's duty to pay the \$350
4 filing fee. Here, the petition was not accompanied by the \$350
5 filing fee or an authorization by Petitioner to have the \$350 filing
6 fee deducted from his trust account pursuant to 28 U.S.C. § 1915(b).

7 Further, 42 U.S.C. § 1997e(a) provides, "No action shall be
8 brought with respect to prison conditions under section 1983 of this
9 title, or any other Federal law, by a prisoner confined in any jail,
10 prison, or other correctional facility until such administrative
11 remedies as are available are exhausted." This provision requires
12 exhaustion "irrespective of the forms of relief sought and offered
13 through administrative avenues." Booth v. Churner, 532 U.S. 731, 741
14 n.6 (2001). Here, it is unclear whether Petitioner has exhausted
15 any administrative remedies.

16 Petitioner has also failed to identify the capacity in which
17 the named respondent would be sued for purposes of a civil rights
18 claim, which is critical to the issue of sovereign immunity. In
19 addition, if the petition were converted to a civil rights
20 complaint, the Court would be obligated to screen it pursuant to the
21 screening provisions of the Prisoner Litigation Reform Act of 1995.
22 28 U.S.C. § 1915A(b); 42 U.S.C. § 1997e(c)(1). It is not clear that
23 all of Petitioner's allegations state civil rights claims. If the
24 pleading ultimately were dismissed for failure to state a claim upon
25 which relief may be granted, such a dismissal could count as a
26 "strike" against Petitioner for purposes of 28 U.S.C. § 1915(g) and
27 any future civil rights action he might bring.

28

1 Based on the foregoing, the petition will be dismissed without
2 prejudice so Petitioner may determine whether or not he wishes to
3 raise his present claims through a properly submitted civil rights
4 complaint.

5 IV. Certificate of Appealability

6 In an abundance of caution, the Court will consider whether
7 Petitioner is entitled to a certificate of appealability.

8 Unless a circuit justice or judge issues a certificate of
9 appealability, an appeal may not be taken to the Court of Appeals
10 from the final order in a habeas proceeding in which the detention
11 complained of arises out of process issued by a state court. 28
12 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336
13 (2003). A district court must issue or deny a certificate of
14 appealability when it enters a final order adverse to the applicant.
15 Habeas Rule 11(a).

16 A certificate of appealability may issue only if the applicant
17 makes a substantial showing of the denial of a constitutional right.
18 § 2253(c)(2). Under this standard, a petitioner must show that
19 reasonable jurists could debate whether the petition should have
20 been resolved in a different manner or that the issues presented
21 were adequate to deserve encouragement to proceed further. Miller-
22 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.
23 473, 484 (2000)). A certificate should issue if the Petitioner
24 shows that jurists of reason would find it debatable whether: (1)
25 the petition states a valid claim of the denial of a constitutional
26 right, and (2) the district court was correct in any procedural
27 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

1 In determining this issue, a court conducts an overview of the
2 claims in the habeas petition, generally assesses their merits, and
3 determines whether the resolution was debatable among jurists of
4 reason or wrong. Id. An applicant must show more than an absence
5 of frivolity or the existence of mere good faith; however, the
6 applicant need not show that the appeal will succeed. Miller-El v.
7 Cockrell, 537 U.S. at 338.

8 Here, it does not appear that reasonable jurists could debate
9 whether the petition should have been resolved in a different
10 manner. Petitioner has not made a substantial showing of the denial
11 of a constitutional right. Accordingly, the Court will decline to
12 issue a certificate of appealability.

13 V. Order

14 Based on the foregoing, it is ORDERED that:

15 1) The petition for writ of habeas corpus is DISMISSED without
16 prejudice for Petitioner's failure to state facts entitling him to
17 habeas corpus relief;

18 2) The Court DECLINES to issue a certificate of appealability;
19 and

20 3) The Clerk is DIRECTED to close the action because the
21 dismissal terminates it in its entirety.

22
23 IT IS SO ORDERED.

24 Dated: April 8, 2015

/s/ Sheila K. Oberto
25 UNITED STATES MAGISTRATE JUDGE