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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ZANE HUBBARD,

Petitioner,

v.

KERN COUNTY SHERIFF'S OFFICE,

Respondent.

Case No. 1:15-cv-00741 MJS (HC)
**FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS FOR FAILING TO
STATE COGNIZABLE CLAIM**
**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT COURT JUDGE TO
THE PRESENT MATTER**
[Doc. 1]

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus under the authority of 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on May 14, 2015. (Pet., ECF No. 1.) In the petition, Petitioner alleges that Petitioner has suffered harassment and discrimination by employees of Respondent. Further, Petitioner requests that the matter be "extradited"¹ to a venue in the state of New Mexico, and that counsel be appointed to assist with the present petition.

¹ From the context of Petitioner's claims, it is evident that Petitioner is requesting a change of venue for the instant civil lawsuit, rather than to be transported to New Mexico for potential criminal prosecution.

1 **I. DISCUSSION**

2 **A. Procedural Grounds for Summary Dismissal**

3 Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

4 If it plainly appears from the petition and any attached exhibits that
5 the petitioner is not entitled to relief in the district court, the judge must
6 dismiss the petition and direct the clerk to notify the petitioner.

7 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a
8 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the
9 respondent's motion to dismiss, or after an answer to the petition has been filed. A
10 petition for habeas corpus should not be dismissed without leave to amend unless it
11 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis
v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

12 **B. Failure to State Cognizable Claim**

13 The instant petition must be dismissed because it does not challenge the fact or
14 duration of Petitioner's confinement.

15 A federal court may only grant a petition for writ of habeas corpus if the petitioner
16 can show that "he is in custody in violation of the Constitution" 28 U.S.C. §
17 2254(a). A habeas corpus petition is the correct method for a prisoner to challenge the
18 "legality or duration" of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir.
19 1991), quoting, Preiser v. Rodriguez, 411 U.S. 475, 485 (1973); Advisory Committee
20 Notes to Rule 1 of the Rules Governing Section 2254 Cases.

21 In contrast, a civil rights action pursuant to 42 U.S.C. § 1983 is the proper method
22 for a prisoner to challenge the conditions of that confinement. McCarthy v. Bronson, 500
23 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at 574; Advisory
24 Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases.

25 Petitioner's claims do not implicate the fact or duration of his confinement. The
26 Court notes difficulty in determining what Petitioner is claiming. However, it is apparent
27 that Petitioner is not challenging his underlying conviction or the duration of his
28

1 confinement.

2 Petitioner describes in the petition that he has been harassed and discriminated
3 against by Respondent, specifically including claims that employees of Respondent are
4 prohibiting his electronic communication, placing chemicals in his food, denying him
5 relief from claims of sexual harassment, racial discrimination, entrapment, and assault by
6 prison employees. (Pet. at 8.) Petitioner alleges that starting in 2011, Respondent has
7 requested that Petitioner become a "male, bisexual prostitute for law enforcement," and
8 that other officers employed by Respondent have propositioned him for sex. (Pet. at 10.)
9 Petitioner further contends that other officers abused him by ordering multiple
10 unauthorized cavity searches without a doctor present and without probable cause, and
11 posting the details of the cavity searches on the internet. (Id. at 11.) Petitioner provides
12 information regarding further actions of Respondent, none relate to his underlying
13 conviction or involve requests for his earlier release from confinement.

14 Petitioner's claims are not cognizable grounds for federal habeas corpus relief
15 and must be dismissed. Should Petitioner wish to pursue his claims, he must do so by
16 way of a civil rights complaint. The Court expresses no opinion as to the merits of such a
17 civil rights complaint.

18 As it does not appear possible that the deficiencies identified herein can be cured
19 by amending the complaint, Petitioner is not entitled to leave to amend prior to dismissal
20 of the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en
21 banc).

22 In an appropriate case a habeas petition may be construed as a Section 1983
23 complaint. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S. Ct. 407, 30 L. Ed. 2d 418
24 (1971). Although the Court may construe a habeas petition as a civil rights action, it is
25 not required to do so. Since the time when the Wilwording case was decided there have
26 been significant changes in the law. For instance, the filing fee for a habeas petition is
27 five dollars, and if leave to proceed in forma pauperis is granted, the fee is forgiven. For
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1 civil rights cases, however, the fee is now \$400 and under the Prisoner Litigation Reform
2 Act the prisoner is required to pay it, even if granted in forma pauperis status, by way of
3 deductions from income to the prisoner's trust account. See 28 U.S.C. 1915(b)(1). A
4 prisoner who might be willing to file a habeas petition for which he or she would not have
5 to pay a filing fee might feel otherwise about a civil rights complaint for which the \$400
6 fee would be deducted from income to his or her account. Also, a civil rights complaint
7 which is dismissed as malicious, frivolous, or for failure to state a claim would count as a
8 "strike" under 28 U.S.C. § 1915(g), which is not true for habeas cases.

9 In view of these potential pitfalls for Petitioner if the petition were construed as a
10 civil rights complaint, the case is DISMISSED without prejudice to Petitioner to present
11 the claims in a civil rights complaint pursuant to 42 U.S.C. § 1983, rather than a habeas
12 petition, which will be assigned a separate civil number. The Clerk of Court shall send
13 Petitioner a blank civil rights complaint form along with a copy of this Order.

14 **II. CONCLUSION AND RECOMMENDATION**

15 Therefore it is RECOMMENDED that the petition for writ of habeas corpus be
16 DISMISSED without prejudice to Petitioner's right to file a civil rights action pursuant to
17 42 U.S.C. § 1983. The Court further orders that the Clerk of Court to assign a District
18 Court judge to the matter.

19 These findings and recommendations are submitted to the United States District
20 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636
21 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
22 Eastern District of California. Within thirty (30) days after being served with a copy, any
23 party may file written objections with the Court and serve a copy on all parties. Such a
24 document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendations." Replies to the objections shall be served and filed within fourteen
26 (14) days (plus three days if served by mail) after service of the objections. The Court
27 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c).

28 The parties are advised that failure to file objections within the specified time may

1 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,
2 839 (9th Cir. 2014).

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4 IT IS SO ORDERED.

5 Dated: May 21, 2015

/s/ Michael J. Seng
6 UNITED STATES MAGISTRATE JUDGE

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