

1 Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990). A
2 petition for habeas corpus should not be dismissed without leave to amend unless it appears that no
3 tenable claim for relief can be pleaded were such leave to be granted. *Jarvis v. Nelson*, 440 F.2d
4 13, 14 (9th Cir. 1971).

5 **II. Failure to State a Federal Habeas Claim**

6 The scope of habeas corpus is prescribed by statute. Section 2241(c) provides that habeas
7 corpus shall not extend to a prisoner unless he is "in custody in violation of the Constitution." The
8 Supreme Court has held that "the essence of habeas corpus is an attack by a person in custody upon
9 the legality of that custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

10 Here, Petitioner fails to state a cognizable federal claim. He does not allege a violation of
11 the Constitution or federal law, nor does he argue that he is in custody in violation of the
12 Constitution or federal law. He alleges only that a clerical error was made in the transcript of his
13 2008 criminal trial, which ended in a mistrial, and that correction of the error would enable him to
14 secure placement in a mental hospital, not federal prison. These are not cognizable grounds for a
15 petition for habeas corpus pursuant to 28 U.S.C. § 2241.
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17 The proper procedure for correcting a transcript is by motion in the Court in which the
18 underlying legal proceeding occurred. "The Court may correct a clerical mistake or mistake
19 arising from oversight or omission whenever one is found in a judgment, order, or other part of a
20 record. The court may do so on motion or on its own, with or without notice." F.R.Civ.P. 60(a).
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22 Petitioner has already moved the Court for correction of the transcript. *See United States v.*
23 *Brown*, Doc. 146 (E.D.Cal. Feb. 22, 2016) (No. 1:08-cr-00347-DAD-1). The Court found no
24 factual basis for the requested modification of the transcript and denied the motion. *See United*
25 *States v. Brown*, Doc. 147 (E.D.Cal. Mar. 1, 2016) (No. 1:08-cr-00347-DAD-1). Petitioner's
26 recourse lies in an appeal of the denial of the motion, not in a petition for writ of habeas corpus.
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1 **III. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district
3 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*,
4 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate
5 of appealability is 28 U.S.C. § 2253, which provides:

6 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
7 district judge, the final order shall be subject to review, on appeal, by the court of
8 appeals for the circuit in which the proceeding is held.

9 (b) There shall be no right of appeal from a final order in a proceeding to test the
10 validity of a warrant to remove to another district or place for commitment or trial
11 a person charged with a criminal offense against the United States, or to test the
12 validity of such person's detention pending removal proceedings.

13 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
14 appeal may not be taken to the court of appeals from—

15 (A) the final order in a habeas corpus proceeding in which the detention
16 complained of arises out of process issued by a State court; or

17 (B) the final order in a proceeding under section 2255.

18 (2) A certificate of appealability may issue under paragraph (1) only if the
19 applicant has made a substantial showing of the denial of a constitutional
20 right.

21 (3) The certificate of appealability under paragraph (1) shall indicate which
22 specific issues or issues satisfy the showing required by paragraph (2).

23 If a court denies a habeas petition, the court may only issue a certificate of appealability "if
24 jurists of reason could disagree with the district court's resolution of his constitutional claims or that
25 jurists could conclude the issues presented are adequate to deserve encouragement to proceed
26 further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the
27 petitioner is not required to prove the merits of his case, he must demonstrate "something more than
28 the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at
338.

1 Here, the Court finds that reasonable jurists would not find the Court's determination that it
2 lacks jurisdiction to consider the petition for writ of habeas corpus to be debatable or wrong.
3 Petitioner has not made the required substantial showing of the denial of a constitutional right.
4 Accordingly, the Court declines to issue a certificate of appealability.

5 **IV. Conclusion and Recommendation**

6 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus
7 for lack of subject matter jurisdiction and decline to issue a certificate of appealability.
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9 These Findings and Recommendations will be submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty (30) days**
11 after being served with these Findings and Recommendations, Petitioner may file written objections
12 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
13 Recommendations." Petitioner is advised that failure to file objections within the specified time
14 may constitute waiver of the right to appeal the District Court's order. *Wilkerson v. Wheeler*, 772
15 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).
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18 IT IS SO ORDERED.

19 Dated: May 17, 2016

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE