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

DONNELL BUTLER,

Petitioner,

v.

ANDRE MATEVOUSIAN,

Respondent.

Case No. 1:17-cv-00345 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 federal prisoner proceeding pro se with a petition for writ of habeas corpus under the authority of 28 U.S.C. § 2241.

Petitioner filed the instant petition for writ of habeas corpus on March 6, 2017. (Pet., ECF No. 1.) In the petition, Petitioner complains that he has been unable to purchase hygiene items or pens from the commissary. Additionally, he complains that he has not received a response to his D.H.O Appeal or Inmate Requests to Staff. He seeks unspecified injunctive relief.

I. Discussion

A. Procedural Grounds for Summary Dismissal

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

If it plainly appears from the petition and any attached exhibits that

1 the petitioner is not entitled to relief in the district court, the judge must
2 dismiss the petition and direct the clerk to notify the petitioner.

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

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

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

12 A federal court may only grant a petition for writ of habeas corpus if the federal
13 petitioner can demonstrate that he "is in custody in violation of the Constitution or laws or
14 treaties of the United States." 28 U.S.C. § 2241(a), (c)(3). A habeas corpus petition is
15 the correct method for a prisoner to challenge "the very fact or duration of his
16 confinement," and where "the relief he seeks is a determination that he is entitled to
17 immediate release or a speedier release from that imprisonment." Preiser v. Rodriguez,
18 411 U.S. 475, 489 (1973). In contrast, a civil rights action pursuant to 42 U.S.C. § 1983
19 is the proper method for a prisoner to challenge the conditions of that confinement.
20 McCarthy v. Bronson, 500 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499. In other
21 words, if a successful conditions of confinement challenge would not necessarily shorten
22 the prisoner's sentence, then § 1983 is the appropriate vehicle. See Wilkinson v. Dotson,
23 544 U.S. 74 (2005).

24 Petitioner's claims do not implicate the fact or duration of his confinement. As
25 stated, Petitioner challenges the conditions of his confinement. Specifically, he
26 challenges the denial of access to commissary items and the failure to process
27 administrative appeals and inmate inquiries. (Id. at 3-4, 6-8.) Although the petition makes
28 passing reference to the appeal of a disciplinary proceeding, the petition contains no
information regarding the nature of that proceeding or its result. There is no indication

1 that the proceeding had any effect on the fact or duration of Petitioner's confinement, nor
2 does Petitioner appear to challenge the disciplinary proceeding itself. Petitioner's claims,
3 even if meritorious, would not implicate the duration of his confinement. Finally,
4 Petitioner does not challenge his underlying conviction by way of this petition.
5 Petitioner's claims are not cognizable grounds for federal habeas corpus relief and must
6 be dismissed. Should Petitioner wish to pursue his claims, he must do so by way of a
7 civil rights complaint. The Court expresses no opinion as to the merits of such a civil
8 rights complaint.

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

13 In an appropriate case a habeas petition may be construed as a Section 1983
14 complaint. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S. Ct. 407, 30 L. Ed. 2d 418
15 (1971). Although the Court may construe a habeas petition as a civil rights action, it is
16 not required to do so. Since the time when the Wilwording case was decided there have
17 been significant changes in the law. For instance, the filing fee for a habeas petition is
18 five dollars, and if leave to proceed in forma pauperis is granted, the fee is forgiven. For
19 civil rights cases, however, the fee is now \$400 and under the Prisoner Litigation Reform
20 Act the prisoner is required to pay it, even if granted in forma pauperis status, by way of
21 deductions from income to the prisoner's trust account. See 28 U.S.C. 1915(b)(1). A
22 prisoner who might be willing to file a habeas petition for which he or she would not have
23 to pay a filing fee might feel otherwise about a civil rights complaint for which the \$350
24 fee would be deducted from income to his or her prisoner account. Also, a civil rights
25 complaint which is dismissed as malicious, frivolous, or for failure to state a claim would
26 count as a "strike" under 28 U.S.C. § 1915(g), which is not true for habeas cases.

27 In view of these potential pitfalls for Petitioner if the petition were construed as a
28 civil rights complaint, the Court will recommend the case be dismissed without prejudice

1 to Petitioner presenting the claims in a civil rights complaint pursuant to 42 U.S.C.
2 § 1983, rather than a habeas petition, which will be assigned a separate civil number.
3 The Clerk of Court shall send Petitioner a blank civil rights complaint form along with a
4 copy of this Order.

5 **II. Conclusion and Recommendation**

6 Therefore it is RECOMMENDED that the petition for writ of habeas corpus be
7 DISMISSED without prejudice to Petitioner's right to file a civil rights action pursuant to
8 42 U.S.C. § 1983. Further, the Court ORDERS the Clerk of Court to assign a District
9 Court Judge to the present matter.

10 These findings and recommendations are submitted to the United States District
11 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636
12 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
13 Eastern District of California. Within thirty (30) days after being served with a copy, any
14 party may file written objections with the Court and serve a copy on all parties. Such a
15 document should be captioned "Objections to Magistrate Judge's Findings and
16 Recommendations." Replies to the objections shall be served and filed within fourteen
17 (14) days (plus three days if served by mail) after service of the objections. The Court
18 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The
19 parties are advised that failure to file objections within the specified time may waive the
20 right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th
21 Cir. 2014).

22
23 IT IS SO ORDERED.

24 Dated: March 23, 2017

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