

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

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6 **II. Bivens¹ Complaint or Habeas Corpus Petition?**

7 Challenges to the conditions of federal prison life are properly brought in a civil rights
8 under 42 U.S.C. § 1983 or in a *Bivens* action. *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991).

9 A federal petition for writ of habeas corpus concerns whether a petitioner is in custody in
10 violation of the Constitution. 28 U.S.C. § 2241. "Habeas corpus is the exclusive remedy for a
11 state prisoner who challenges the fact or duration of his confinement and seeks immediate or
12 speedier release, even though such a claim may come within the literal terms of § 1983." *Preiser*
13 *v. Rodriguez*, 411 U.S. 475, 488-89 (1973). *See also Nettles v. Grounds*, 788 F.3d 992, 1004 (9th
14 Cir. 2015).

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16 Although Petitioner apparently has been convicted of narcotics possession using a false
17 positive NIK test as evidence, the petition does not seek relief from any penalty imposed as a
18 result of a disciplinary action. Instead, Petitioner seeks a court order for controlled testing to
19 resolve whether NIK tests of coffee-stained brown napkins produce test results that falsely
20 indicate the presence of narcotics. His claim is properly advanced in a civil rights complaint
21 pursuant to *Bivens*, not in a habeas petition. Accordingly, the undersigned recommends that the
22 Court dismiss the petition without prejudice to Petitioner's re-alleging his claim in a civil rights
23 action.
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¹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1 **III. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a
3 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*
4 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a
5 certificate of appealability is 28 U.S.C. § 2253, which provides:
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7 (a) In a habeas corpus proceeding or a proceeding under section 2255
8 before a district judge, the final order shall be subject to review, on appeal, by
9 the court of appeals for the circuit in which the proceeding is held.

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

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

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

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

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

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

26 If a court denies a habeas petition, the court may only issue a certificate of appealability
27 "if jurists of reason could disagree with the district court's resolution of his constitutional claims
28 or that jurists could conclude the issues presented are adequate to deserve encouragement to
proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Although the petitioner is not required to prove the merits of his case, he must demonstrate

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1 "something more than the absence of frivolity or the existence of mere good faith on his . . .
2 part." *Miller-El*, 537 U.S. at 338.

3 Reasonable jurists would not find the Court's determination that Petitioner is not entitled
4 to advance his alleged claims in an action for writ of habeas corpus to be debatable or wrong, or
5 conclude that the issues presented required further adjudication. Accordingly, the Court should
6 decline to issue a certificate of appealability.
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8 **IV. Conclusion and Recommendation**

9 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus
10 without prejudice to Petitioner's advancing his claim in a complaint for civil rights relief and that
11 the Court decline to issue a certificate of appealability.

12 These Findings and Recommendations will be submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**
14 **(30) days** after being served with these Findings and Recommendations, Petitioner may file
15 written objections with the Court. The document should be captioned "Objections to Magistrate
16 Judge's Findings and Recommendations." Petitioner is advised that failure to file objections
17 within the specified time may constitute waiver of the right to appeal the District Court's order.
18 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d
19 1391, 1394 (9th Cir. 1991)).
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22 IT IS SO ORDERED.

23 Dated: April 24, 2017

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