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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 LUKE SCARMAZZO,

12 Petitioner,

13 v.

14 S. LANGFORD,

15 Respondent.
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Case No. 1:17-cv-01188-LJO-EPG-HC

ORDER DENYING AS MOOT
PETITIONER'S REQUEST TO FILE
AMENDED PETITION (ECF No. 15)

ORDER GRANTING PETITIONER'S
REQUEST TO REINSTATE CASE TO THE
CENTRAL DISTRICT OF CALIFORNIA
(ECF No. 10)

ORDER TRANSFERRING CASE TO THE
UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF
CALIFORNIA

19 Petitioner Luke Scarmazzo is a federal prisoner proceeding *pro se* with a petition for writ
20 of habeas corpus.

21 **I.**

22 **BACKGROUND**

23 Petitioner is confined at the Federal Correctional Institution in Victorville, California,
24 which is located within the Central District of California. On August 28, 2017, Petitioner filed a
25 federal habeas petition pursuant to 28 U.S.C. § 2241 in the United States District Court for the
26 Central District of California, challenging his incarceration and seeking dismissal of his criminal
27 judgment in United States v. Scarmazzo, No. 1:06-cr-00342-LJO-1 (E.D. Cal.), "because the
28 expenditure of funds to continue his incarceration violates § 537 and the Appropriations Clause

1 of the Constitution of the United States.” (ECF No. 1; ECF No. 2 at 18).¹ The United States
2 District Court for the Central District of California found that that § 2255 is the exclusive means
3 by which Petitioner may bring his claim and transferred the petition to this Court. (ECF No. 6).

4 On September 14, 2017, Petitioner filed a request that the case be transferred back to the
5 Central District of California, arguing that he “is challenging the conditions (funding) of his
6 incarceration” and “does not consent to his case being transferred to the Eastern District[.]” (ECF
7 No. 10 at 1, 2). On September 29, 2017, the Magistrate Judge issued findings and
8 recommendation to categorize the petition as a § 2255 motion and to deny Petitioner’s request to
9 transfer the case back to the United States District Court for the Central District of California.
10 (ECF No. 12). On October 4, 2017, Petitioner filed a motion to request further judicial review of
11 the Central District’s transfer order. Petitioner also sought leave to file an amended petition.
12 (ECF No. 15). On October 25, 2017, Petitioner filed objections to the findings and
13 recommendation with an amended petition attached thereto. (ECF No. 16).

14 II.

15 DISCUSSION

16 A. Amendment

17 The Ninth Circuit has held that “Federal Rule of Civil Procedure 15(a), which allows
18 litigants to amend their pleadings once ‘as a matter of course’ before a responsive pleading has
19 been filed, applies to habeas corpus actions.” Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir.
20 2000). No responsive pleading has been filed in the instant case, and thus, Petitioner is entitled to
21 amend his pleading once as a matter of course. Accordingly, the Court denies as moot
22 Petitioner’s request for leave to amend and will consider Petitioner’s amended petition.²

23 B. Jurisdiction

24 A district court must address the threshold question whether a petition was properly
25 brought under § 2241 or § 2255 in order to determine whether the district court has jurisdiction.

26 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

27 ² In light of the amended petition, the Court finds that review of the findings and recommendation issued on
28 September 29, 2017 regarding the original petition is not necessary. In the interest of judicial efficiency, the Court
will undertake the jurisdictional analysis of the amended petition without referring the matter to the Magistrate
Judge.

1 Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000) (per curiam). “Generally, motions to
2 contest the legality of a sentence must be filed under § 2255 in the sentencing court, while
3 petitions that challenge the manner, location, or conditions of a sentence’s execution must be
4 brought pursuant to § 2241 in the custodial court.” Id. at 867.

5 In the instant case, the United State District Court for the Central District of California
6 summarized the original petition as follows: Petitioner “alleges that his continued incarceration is
7 unlawful because congressional appropriations enacted postconviction prohibit the Department
8 of Justice from using appropriated funds to prosecute crimes related to state-sanctioned
9 marijuana activities.” (ECF No. 6 at 2). The Central District found that Petitioner’s claims fall
10 under § 2255 because “Petitioner does not challenge the manner, location, or conditions of his
11 sentence; rather, he seeks to contest the legality of his sentence in light of recent congressional
12 acts and Ninth Circuit law.” (ECF No. 6 at 1). The Central District also found that Petitioner
13 could not proceed pursuant to § 2241 on the basis that the remedy available under § 2255 was
14 “inadequate or ineffective to test the validity of his detention,” 28 U.S.C. § 2255(e), because
15 “Petitioner has not made a claim of actual innocence or alleged that he has not had an
16 unobstructed procedural shot at presenting that claim.” (ECF No. 6 at 2).

17 “Under the law of the case doctrine, the transferee court should not revisit the transferor
18 court’s characterization of the petition unless that characterization was ‘clearly erroneous’ or
19 would result in ‘manifest injustice.’” Muth v. Fondren, 676 F.3d 815, 818 (9th Cir. 2012) (citing
20 Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 & n.5 (1988)). The Court also
21 “may have discretion to depart from the law of the case where . . . other changed circumstances
22 exist.” United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). Here, the Court finds that
23 a changed circumstance exists in light of the amended petition wherein Petitioner clarifies in
24 pertinent part:

25 Mr. Scarmazzo is not challenging his conviction or his sentence.
26 He will remain a felon in the eyes of the law, with all the direct and
27 collateral consequences that status imposes. Unlike Mr.
28 Scarmazzo’s imprisonment, however, those consequences cost the
DOJ nothing and therefore comply with the Appropriations Clause.
The same cannot be said of the execution of his sentence. Without

1 funds to execute Petitioner's sentence he is being held in custody
2 in violation of the Constitution and this petition must be granted.

3 (ECF No. 16 at 12).

4 The Court finds Davies v. Benov, 856 F.3d 1243 (9th Cir. 2017), to be instructive. The
5 petitioner in Davies brought a challenge similar to the one in the instant case, "contending that a
6 congressional appropriations rider prohibits the Bureau of Prisons (BOP) from using federal
7 funds to incarcerate him and seeking release from custody to remedy the wrongful expenditure."
8 Davies, 856 F.3d at 1245. The district court found that the challenge was properly brought
9 pursuant to 28 U.S.C. § 2241. Davies v. Benov, No. 1:15-cv-00275 MJS (HC), 2015 WL
10 5813640, at *1 (E.D. Cal. Sept. 30, 2015). On appeal, the parties did not dispute, and the Ninth
11 Circuit did not disturb, this determination. Opening Brief of Petitioner-Appellant & Answering
12 Brief of Respondent-Appellee, Davies, 856 F.3d 1243 (No. 15-17256). The Ninth Circuit noted
13 the petitioner's contention that he "challenges the execution of the sentence—because the BOP's
14 expenditure of funds to incarcerate him unlawfully contravenes the appropriations rider—and
15 does not challenge the legality of the sentence itself." Davies, 856 F.3d at 1247. The Ninth
16 Circuit appeared to recognize a distinction between the petitioner's "challenges to the execution
17 and conditions of his sentence" and challenges "to the legality of his sentence," but ultimately
18 found that the plea agreement collateral-attack waiver provision encompassed both types of
19 challenges. Id.

20 Based on the foregoing, the Court finds that the amended petition challenges the
21 execution of Petitioner's sentence and is properly brought under 28 U.S.C. § 2241. Therefore,
22 this Court is without jurisdiction as it is not the custodial court. See Hernandez, 204 F.3d at 867
23 ("[P]etitions that challenge the manner, location, or conditions of a sentence's execution must be
24 brought pursuant to § 2241 in the custodial court.").

25 III.

26 ORDER

27 Accordingly, IT IS HEREBY ORDERED that:

- 28 1. Petitioner's request to file an amended petition (ECF No. 15) is DENIED AS MOOT;

2. Petitioner's request to reinstate the case to the United States District Court for the Central District of California (ECF No. 10) is GRANTED; and

3. This action is transferred to the United States District Court for the Central District of California.

IT IS SO ORDERED.

Dated: **November 16, 2017**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE