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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUSTIN JOSEPH SILVA,
Petitioner,
v.
KINGS COUNTY JAIL, et al.,
Respondents.

Case No. 1:17-cv-01405-MJS (HC)

**ORDER DIRECTING CLERK'S OFFICE TO
ASSIGN A DISTRICT JUDGE TO THIS
MATTER**

**FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF HABEAS
CORPUS**

(ECF NO. 1)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

Petitioner is proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2241. He is detained at the Kings County Jail awaiting trial.

Petitioner complains of the following: "medical procedures, cruel and unusual punishment, manipulation, jail conditions, title 15 violations, civil rights infringement, mental health violations." (ECF No. 1 at 2.) Accordingly, while Petitioner asserts that he is entitled to relief, it does not appear that his claims implicate the fact or length of his detention. Petitioner was ordered to show cause why the petition should not be dismissed on that basis. (ECF No. 4.) He did not respond and the time for doing so has passed. Accordingly, the undersigned recommends dismissal of the petition.

1 **I. Discussion**

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

3 Rule 4 of the Rules Governing Section 2254¹ Cases provides in pertinent part:

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

8 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a
9 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the
10 respondent's motion to dismiss, or after an answer to the petition has been filed. A
11 petition for habeas corpus should not be dismissed without leave to amend unless it
12 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).

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

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

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

24 Petitioner's claims do not implicate the fact or duration of his confinement.

25 ¹ The Rules Governing Section 2254 Cases may be applied to petitions for writ of habeas corpus other
26 than those brought under § 2254 at the Court's discretion. See, Rule 1(b) of the Rules Governing Section
27 2254 Cases. Civil Rule 81(a)(4) provides that the rules "apply to proceedings for habeas corpus . . . to the
28 extent that the practice in such proceedings is not specified in a federal statute, the Rules Governing
Section 2254 Cases, or the Rules Governing 2255 Cases; and has previously conformed to the practice in
civil actions." Fed. R. Civ. P. 81(a)(4).

1 Petitioner does not challenge his underlying detention but rather his conditions of his
2 confinement, specifically the medical and mental health care, other unspecified
3 conditions, and violations of state policies, procedures, and regulations. Petitioner's
4 claims, even if meritorious, would not provide a basis for federal habeas jurisdiction.

5 A petition for habeas corpus should not be dismissed without leave to amend
6 unless it appears that no tenable claim for relief can be pleaded were such leave
7 granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971). Here, Petitioner was ordered
8 to show cause why the petition should not be dismissed and afforded the opportunity to
9 file an amended petition. He did not do so. As it does not appear possible that the
10 deficiencies identified herein can be cured through amendment, Petitioner is not entitled
11 to further leave to amend prior to dismissal of the entire action. See Lopez v. Smith, 203
12 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc).

13 **C. Conversion to Civil Rights Action**

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

1 In view of these potential pitfalls for Petitioner if the petition were construed as a
2 civil rights complaint, the Court will recommend the case be dismissed without prejudice
3 to Petitioner presenting the claims in a civil rights complaint pursuant to 42 U.S.C.
4 § 1983, rather than a habeas petition, which will be assigned a separate civil number.

5 **II. Conclusion and Recommendation**

6 Because all parties have not consented to Magistrate Judge jurisdiction pursuant
7 to 28 U.S.C. § 636(c), the Clerk of Court is directed to randomly assign this matter to a
8 District Judge.

9 Based on the foregoing analysis, it is HEREBY RECOMMENDED that the petition
10 be dismissed, without prejudice to Petitioner bringing his claims in a civil rights complaint
11 pursuant to 42 U.S.C. § 1983.

12 The findings and recommendation are submitted to the assigned United States
13 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and
14 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern
15 District of California. Within fourteen (14) days after being served with a copy, the parties
16 may file written objections with the Court. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendation." Any reply to the
18 objections shall be served and filed within fourteen (14) days after service of the
19 objections. The parties are advised that failure to file objections within the specified time
20 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839
21 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).
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24 IT IS SO ORDERED.

25 Dated: December 4, 2017

26 /s/ Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE
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