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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD SCOTT KINDRED,
Petitioner,
v.
CALIFORNIA DEPARTMENT OF
STATE HOSPITALS,
Respondent.

Case No. 1:18-cv-00147-MJS (HC)

**ORDER TO SHOW CAUSE WHY THE
PETITION SHOULD NOT BE DISMISSED
FOR FAILURE TO STATE A COGNIZABLE
CLAIM
(ECF NO. 1)
THIRTY (30) DAY DEADLINE**

Petitioner is proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. He is detained at Coalinga State Hospital as a sexually violent predator pursuant to California Welfare and Institutions Code § 6600, et seq. He complains he has been denied bariatric surgery for treatment of his obesity and diabetes.

I. Discussion

A. Procedural Grounds for Summary Dismissal

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

¹ The Rules Governing Section 2254 Cases may be applied to petitions for writ of habeas corpus other than those brought under § 2254 at the Court's discretion. See, Rule 1(b) of the Rules Governing Section 2254 Cases. Civil Rule 81(a)(4) provides that the rules "apply to proceedings for habeas corpus . . . to the 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 If it plainly appears from the petition and any attached
2 exhibits that the petitioner is not entitled to relief in the district
3 court, the judge must dismiss the petition and direct the clerk
4 to notify the petitioner.

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

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

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

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

22 Petitioner's claims do not implicate the fact or duration of his confinement.
23 Petitioner does not challenge his underlying detention but rather his conditions of his
24 confinement, specifically his medical care. Petitioner attempts to allege an effect on the
25 duration of his confinement by stating that medical personnel have opined that he must
26 remain committed because his obesity will prevent him from having a normal romantic
27 relationship in a non-institutional setting. However, any such claim is speculative.
28 Bariatric surgery will not necessarily result in Petitioner's speedier release. Accordingly,
this allegation does not confer habeas jurisdiction on the Court. See Nettles v. Grounds,

1 830 F.3d 922, 935 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 645, 196 L. Ed. 2d
2 542 (2017). Petitioner's claims, even if meritorious, would not provide a basis for federal
3 habeas jurisdiction.

4 A petition for habeas corpus should not be dismissed without leave to amend
5 unless it appears that no tenable claim for relief can be pleaded were such leave
6 granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971). Thus, Petitioner will be
7 provided the opportunity to file an amended petition.

8 **II. Order**

9 It is HEREBY ORDERED that:

- 10 1. Petitioner shall show cause, within thirty days of the date of service of this
11 order, why the petition should not be dismissed for Petitioner's failure to
12 state a cognizable habeas claim;
- 13 2. If Petitioner chooses to amend his petition, he must file his amended
14 petition for writ of habeas corpus within thirty days of the date of service of
15 this order; and
- 16 3. Failure to respond to this order will result in a recommendation that the
17 petition be dismissed.

18 IT IS SO ORDERED.

19 Dated: February 14, 2018

20 /s/ Michael J. Seng
21 UNITED STATES MAGISTRATE JUDGE
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