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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MISTER CARSE BAILEY,<sup>1</sup>

Petitioner,

v.

MARTIN BITER,

Respondent.

Case No. 1:18-cv-01167-JDP (HC)

ORDER DIRECTING CLERK OF COURT TO  
ASSIGN CASE TO DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS AT SCREENING

ECF No. 1

OBJECTIONS DUE IN 14 DAYS

Petitioner Mister Carse Bailey, a state prisoner without counsel, seeks a writ of habeas under 28 U.S.C. § 2254. ECF No. 1. Petitioner lost good time credit after being disciplined for fighting with another inmate and having a cellular phone in prison. He refers the court to administrative records attached to his petition and alleges that prison officials violated his due process rights during his disciplinary hearings. He does not, however, identify any procedural defect or explain how prison officials deprived him of due process. From what we can gather, petitioner was afforded an opportunity to present his case, and we see no due process violation. Petitioner also has not exhausted his remedies in state court. The matter is before the court for

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<sup>1</sup> All documents filed by petitioner, including several documents prepared by prison officials, list petitioner’s first name as “Mister.” ECF No. 1 at 38.

1 preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.<sup>2</sup> Because petitioner  
2 states no cognizable claim and has not exhausted his remedies in state court, we recommend that  
3 the court dismiss the petition at screening.

4 **I. Screening**

5 Under Rule 4, the judge assigned to the habeas proceeding must examine the habeas  
6 petition and order a response to the petition unless it “plainly appears” that the petitioner is not  
7 entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v.*  
8 *Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). The rule allows courts to dismiss petitions that  
9 are patently frivolous, vague, conclusory, palpably incredible, or false. *Hendricks v. Vasquez*,  
10 908 F.2d 490, 491 (9th Cir. 1990). Unlike a complaint in other civil cases, a Section 2254  
11 petition must adhere to a prescribed form that is appended to the Rules Governing Section 2254  
12 Cases. *See Rules Governing Section 2254 Cases*, Rule 2(d). The appended form prompts a  
13 habeas petitioner to provide answers pertaining to various procedural matters, such as exhaustion  
14 and timeliness, and the court may dismiss claims at screening for procedural defects. *See Boyd*,  
15 147 F.3d at 1128.

16 **a. Cognizable Habeas Claim under Federal Law**

17 Petitioner does not attempt to raise any argument in the petition. The petition states:

18 In re Head 42 Cal. 3d 22, 227-28 Cal. Rptr 184 721 P 2d 65 (1986)

19 Due Process procedural

20 See attachment

21 Exhibits

22 ECF No. 1 at 5. Petitioner has attached several exhibits to the petition, including: (1) an  
23 administrative decision from petitioner’s prison disciplinary hearing, which resulted in the loss of

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25 <sup>2</sup> Petitioner originally filed a document titled “Writ of Mandamus” with the Ninth Circuit. ECF  
26 No. 1. He attached to that filing a form commonly used for habeas petitions, *id.* at 3-8, which the  
27 Ninth Circuit construed as a Section 2254 petition and forwarded to this court. ECF No. 2.  
28 Because the court of appeals has construed the document as a Section 2254 petition, the exclusive  
remedy for state prisoners challenging their custody, *Dominguez v. Kernan*, 906 F.3d 1127, 1135  
(9th Cir. 2018), we do the same here and screen the petition under the Rules Governing Section  
2254 Cases.

1 good time credit for fighting, *id.* at 13-21; (2) a rules violation report issued for petitioner’s  
2 possession of a cellular phone in prison, *id.* at 28-29; and (3) an administrative report on the  
3 calculation of petitioner’s release date, which was adjusted for his disciplinary violations, *id.* at  
4 38-39. Petitioner has not filed any brief in support of his petition. We construe his petition as a  
5 challenge to the prison officials’ disciplinary decisions, which ultimately extended petitioner’s  
6 confinement at his prison, and infer that petitioner is claiming a violation of procedural due  
7 process and alleging erroneous decisions by the prison officials. This court has habeas  
8 jurisdiction to consider petitioner’s challenge to the prison disciplinary actions because a  
9 judgment favorable to petitioner—if he shows that prison officials erred by disciplining him by  
10 taking away his good time credit—would necessarily result in an earlier release date. *See Nettles*  
11 *v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016). Petitioner, however, may not proceed beyond  
12 screening because he fails to state a cognizable claim.

13 A federal district court can grant habeas relief when a state prisoner’s custody violates  
14 federal law. *See* 28 U.S.C. §§ 2241(a), (c)(3), 2254(a); *Williams v. Taylor*, 529 U.S. 362, 374-75  
15 (2000). Section 2254 of Title 28, as amended by the Antiterrorism and Effective Death Penalty  
16 Act of 1996 (“AEDPA”), governs a state prisoner’s habeas petition. *See* § 2254; *Harrington v.*  
17 *Richter*, 562 U.S. 86, 97 (2011); *Woodford v. Garceau*, 538 U.S. 202, 206-08 (2003). Under  
18 Section 2254, only a holding from the United States Supreme Court can support petitioner’s  
19 claim. *See Atwood v. Ryan*, 870 F.3d 1033, 1046 (9th Cir. 2017).

20 Here, petitioner states no cognizable claim under federal law. Petitioner cites *In re Head*,  
21 a decision by the California Supreme Court, but that case concerned California state law, not  
22 federal law. *See generally* 42 Cal. 3d 223 (1986). The petition contains a bare reference to “Due  
23 Process procedural,” ECF No. 1 at 5, but the petition itself offers no explanation of how a due  
24 process violation occurred, and petitioner has not filed a brief. Petitioner appears to believe that  
25 this court should review prison officials’ decisions to discipline him without any argument from  
26 him, but judges cannot serve pro se litigants as their advocates. *See Pliler v. Ford*, 542 U.S. 225,  
27 226 (2004) (noting that judges, “impartial decisionmakers,” may not give legal advice to pro se  
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1 litigants). Without any argument from petitioner, we may not construct an argument for him.<sup>3</sup>

2 **b. Exhaustion**

3 Petitioner concedes that he has not exhausted remedies in state court. ECF No. 1 at 7. His  
4 failure to exhaust state court remedies provides another ground for dismissal.

5 Generally, a federal court may not grant a state prisoner’s petition for a writ of habeas  
6 corpus unless the prisoner has exhausted remedies in state court. 28 U.S.C. § 2254(b)(1)(A). To  
7 satisfy the exhaustion requirement, a petitioner must “fairly present” his habeas claims “in each  
8 appropriate state court . . . including a state supreme court with powers of discretionary review.”  
9 *Murray v. Schriro*, 882 F.3d 778, 807 (9th Cir. 2018) (quoting *Baldwin v. Reese*, 541 U.S. 27, 30  
10 (2004)). The exhaustion requirement, rooted in the principles of comity, ensures that the state  
11 courts have “the first opportunity . . . to correct the errors made in the internal administration of  
12 their prisons.” *Simpson v. Thomas*, 528 F.3d 685, 692 (9th Cir. 2008) (quoting *Preiser v.*  
13 *Rodriguez*, 411 U.S. 475, 491-92 (1973)); accord *Beames v. Chappell*, No. 1:10-cv-01429, 2015  
14 WL 403938, at \*3 (E.D. Cal. Jan. 28, 2015) (collecting cases). The exhaustion requirement  
15 applies even when a state prisoner challenges a prison administrative decision on disciplinary  
16 matters. See *Davis v. Silva*, 511 F.3d 1005, 1008 (9th Cir. 2008).

17 Here, petitioner states in his petition that he has not exhausted remedies in state court. See  
18 ECF No. 1 at 7-8. We could not find a petition filed in state court in our independent research. A  
19 petitioner’s failure to exhaust can be excused in various ways, but we do not see a way to excuse  
20 the failure to exhaust here when petitioner has not filed even an untimely petition in state court.  
21 Accordingly, the petition should not proceed beyond screening.

22 We recommend that the court dismiss the petition without prejudice. It does not appear  
23 that petitioner can cure the defects discussed above through an amended petition or any  
24 supplemental submission. We cannot recommend that the petitioner proceed beyond screening,  
25 given the complete absence of any identified due process violation or any attempt to exhaust state  
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27 <sup>3</sup> The exhibits show that petitioner had the opportunity to present his case in his disciplinary  
28 proceedings, see ECF No. 1 at 13-21, and we found no precedent that would support a due  
process claim under these circumstances.

1 court remedies. Still, petitioner has no counsel. The court should dismiss the petition without  
2 prejudice, allowing petitioner to exhaust state court remedies to pursue any claim he might have  
3 and return to this court with a new petition.

4 **II. Certificate of Appealability**

5 A petitioner seeking a writ of habeas corpus has no absolute right to appeal a district  
6 court's denial of a petition; he may appeal only in limited circumstances. *See* 28 U.S.C. § 2253;  
7 *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 Governing Section 2254 Cases  
8 requires a district court to issue or deny a certificate of appealability when entering a final order  
9 adverse to a petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d  
10 1268, 1270 (9th Cir. 1997). A certificate of appealability will not issue unless a petitioner makes  
11 "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This  
12 standard requires the petitioner to show that "jurists of reason could disagree with the district  
13 court's resolution of his constitutional claims or that jurists could conclude the issues presented  
14 are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *see Slack*  
15 *v. McDaniel*, 529 U.S. 473, 484 (2000). The petitioner must show "something more than the  
16 absence of frivolity or the existence of mere good faith." *Miller-El*, 537 U.S. at 338.

17 Reasonable jurists would not disagree that the petition here is an unauthorized successive  
18 petition and that it should not proceed further. Thus, the court should decline to issue a certificate  
19 of appealability.

20 **III. Order**

21 The clerk of court is directed to assign this case to a district judge who will review the  
22 following findings and recommendations.

23 **IV. Findings and recommendations**

24 We recommend that the petition be dismissed without prejudice and that the court decline  
25 to issue a certificate of appealability. We submit the findings and recommendations to the U.S.  
26 District Court Judge who will be assigned to the case under 28 U.S.C. § 636(b)(1)(B) and Rule  
27 304 of the Local Rules of Practice for the United States District Court, Eastern District of  
28 California. Within fourteen days of the service of the findings and recommendations, petitioner

1 may file written objections to the findings and recommendations with the court and serve a copy  
2 on all parties. That document must be captioned “Objections to Magistrate Judge’s Findings and  
3 Recommendations.” The assigned District Judge will then review the findings and  
4 recommendations under 28 U.S.C. § 636(b)(1)(C).

5  
6 IT IS SO ORDERED.

7 Dated: May 20, 2019

  
UNITED STATES MAGISTRATE JUDGE

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11 No. 202