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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND ASARE,

Petitioner,

No. CIV S-11-0478 JAM EFB P

vs.

STANISLAUS COUNTY SUPERIOR
COURT,

Respondent.

ORDER AND
FINDINGS AND RECOMMENDATIONS

Petitioner is a detainee of the federal Bureau of Immigrations and Customs Enforcement at Florence Correctional Center. He seeks leave to proceed *in forma pauperis*. Dckt. No. 8. His application makes the showing required by 28 U.S.C. § 1915(a) and therefore his request to proceed is granted.

Petitioner has filed the instant a writ of habeas corpus under 28 U.S.C. § 2254 alleging various constitutional infirmities in a state court petty theft conviction sustained in 2007 and apparently forming the basis of his current immigration detention. The court finds that it is without jurisdiction to entertain the petition and therefore recommends that it be dismissed. *See* Rule 4, Rules Governing § 2254 Proceedings.

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1 A district court must entertain a habeas petition “in behalf of a person in custody
2 pursuant to the judgment of a State court only on the ground that he is in custody in violation of
3 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A judge
4 entertaining a habeas petition “shall forthwith award the writ or issue an order directing the
5 respondent to show cause why the writ should not be granted, unless it appears from the
6 application that the
7 applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. The petition must be
8 dismissed if on initial review the court finds that “it plainly appears from the petition and any
9 attached exhibits that the petitioner is not entitled to relief in the district court.” Rule 4, Rules
10 Governing § 2254 Proceedings. An application for federal habeas relief must specify all grounds
11 for relief, state facts supporting each ground and state the relief requested. Rule 2, Rules
12 Governing § 2254 Cases. While under Ninth Circuit precedent, this court must liberally construe
13 the allegations of a prisoner proceeding without counsel, *see Roy v. Lampert*, 465 F.3d 964, 970
14 (9th Cir. 2006), the court cannot grant relief based on conclusory allegations not supported by
15 any specific facts, *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995); *James v. Borg*, 24 F.3d
16 20, 26 (9th Cir. 1994).

17 Here, petitioner challenges a state-court conviction of petty theft sustained in 2007, but is
18 no longer in state custody. Dckt. No. 7, Am. Pet. at 1, 4. It appears from the face of the petition
19 that petitioner is instead in the custody of federal immigration officials under an order of
20 deportation. *See id.* at 1 (noting place of confinement as “ICE Florence Detention Center”) & 4
21 (alleging that trial counsel was ineffective for failing to obtain a conviction on a non-deportable
22 offense and that petitioner’s plea was involuntary because he did not know the conviction could
23 become a basis for his deportation).

24 Federal court jurisdiction to review a petition for writ of habeas corpus brought under 28
25 U.S.C. § 2254 lies only where the petitioner is “in custody pursuant to the judgment of a State
26 court.” The Ninth Circuit has held that, once the sentence imposed for a conviction has

1 completely expired and the petitioner is no longer in state custody, the immigration
2 consequences of that conviction – including deportation – are considered “collateral” and do not
3 provide a basis for federal jurisdiction under § 2254. *Resendiz v. Kovensky*, 416 F.3d 952, 956-
4 57 (9th Cir. 2005).

5 There are two possible exceptions to § 2254’s “in custody” requirement. First, a
6 complete deprivation of counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), in the
7 underlying state proceedings may be challenged in a federal habeas proceeding although the
8 petitioner is no longer serving the state sentence and is instead in federal custody. *Resendiz*, 416
9 F.3d at 959 (citing *Curtis v. United States*, 511 U.S. 485, 494-96 (1994)). The Supreme Court
10 has squarely held that claims of ineffective assistance of counsel and that a plea was not knowing
11 and intelligent do not fall within this limited exception. *Curtis*, 511 U.S. at 496. Because
12 petitioner argues solely ineffective assistance of trial counsel and that his plea was not knowing
13 and intelligent, the petition does not fall within this first exception.

14 A second potential exception may exist “where ‘a state court . . . without justification,
15 refuse[s] to rule on a constitutional claim that has been presented to it’ or when a defendant
16 ‘obtain[s] compelling evidence that he is actually innocent.’” *Resendiz*, 416 F.3d at 959 (quoting
17 *Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394, 405 (2001)). There is no argument of
18 actual innocence in the petition; instead, petitioner wishes that he had been informed and had
19 understood the immigration consequences of his guilty plea. Further, the petition shows that
20 petitioner has not presented his claims at all to the state courts. Dckt. No. 7 at 1-2 (indicating
21 that petitioner did not appeal or file a state habeas petition concerning the conviction).
22 Accordingly, the petition does not fall within the second exception.

23 Further, the court cannot obtain jurisdiction over the petition by construing it as one
24 brought under 28 U.S.C. § 2241, which generally provides an avenue of habeas relief for persons
25 in federal custody. In *Contreras v. Schiltgen*, the Ninth Circuit held that a federal court lacks
26 jurisdiction to entertain a § 2241 habeas petition brought by an individual in immigration

1 detention on the ground that his or her state conviction, which provided the basis for immigration
2 detention, was unconstitutional. 122 F.3d 30 (9th Cir. 1997), *aff'd on add'l grounds by*
3 *Contreras v. Schiltgen*, 151 F.3d 906 (9th Cir. 1998); *see also Resendiz*, 416 F.3d at 960-61.

4 Accordingly, it is hereby ORDERED that petitioner's motion to proceed in forma
5 pauperis (Docket No. 8) is granted.

6 Because the court lacks jurisdiction to entertain the petition, it is hereby
7 RECOMMENDED that the petition be dismissed.

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
10 after being served with these findings and recommendations, any party may file written
11 objections with the court and serve a copy on all parties. Such a document should be captioned
12 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
13 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
14 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In
15 his objections petitioner may address whether a certificate of appealability should issue in the
16 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing
17 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
18 enters a final order adverse to the applicant).

19 Dated: April 12, 2011.

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21 EDMUND F. BRENNAN
22 UNITED STATES MAGISTRATE JUDGE
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