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

ANTHONY R. TURNER,
Petitioner,
vs.
R. Grounds,
Respondent.

No. 2:13-cv-0824-CMK-P

ORDER

_____ /

Petitioner, a state prisoner, brings this action *in propria persona*. Petitioner initiated this action by filing a Notice of Appeal on a California Judicial Council form. Attached to that form, the order petitioner is presumably appealing, is an order from the California Supreme Court denying petitioner’s state habeas petition. With that limited information from petitioner, the court opened this case as a federal habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner, however, states in his filing that he is requesting injunctive relief for retaliation, not that he is challenging his conviction. It would appear, therefore, that his intention was to initiate a prisoner civil rights action under 42 U.S.C. § 1983.

Before this action can proceed, either as a habeas case or a prisoner civil rights action, petitioner’s fee status must be resolved. The court notes that petitioner has not filed an

1 application to proceed in forma pauperis, along with the proper certifications. In addition, before
2 the court could grant such a motion, it has to be determined what type of action petitioner is
3 pursuing so the court can determine the appropriate filing fees.

4 When a state prisoner challenges the legality of his custody – either the fact of
5 confinement or the duration of confinement – and the relief he seeks is a determination that he is
6 entitled to an earlier or immediate release, such a challenge is cognizable in a petition for a writ
7 of habeas corpus under 28 U.S.C. § 2254. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973);
8 see also Neal v. Shimoda, 131 F.3d 818, 824 (9th Cir. 1997); Trimble v. City of Santa Rosa, 49
9 F.3d 583, 586 (9th Cir. 1995) (per curiam). Where a prisoner challenges the conditions of
10 confinement, as opposed to the fact or duration of confinement, his remedy lies in a civil rights
11 action under 42 U.S.C. § 1983. See Rizzo v. Dawson, 778 F.2d 527, 531-32 (9th Cir. 1985).
12 Thus, 28 U.S.C. § 2254 cannot be used to challenge the conditions of confinement, and 42
13 U.S.C. § 1983 cannot be used to challenge the fact or duration of confinement.

14 It appears petitioner wishes to challenge the conditions of his confinement, as he
15 is claiming that he continues suffering from retaliation. However, by filing a notice of appeal
16 and indicating that he is attempting to “appeal” the denial of a state habeas petition, the court
17 opened this action as a habeas case. To challenge the conditions of his confinement, petitioner is
18 attempting to proceed under the wrong process.¹ The Clerk of the Court will be directed to
19 provide petitioner with both a new habeas petition as well as a civil rights complaint, and
20 petitioner will be required to choose how he wishes to proceed and file an amended pleading.

21 Either way petitioner chooses to proceed, his amended petition or complaint must
22 be filed within the time provided in this order. Petitioner is warned that failure to file the
23

24 ¹ The court notes the possibility that plaintiff may be attempting to avoid the issue
25 of whether he is eligible to proceed in forma pauperis in this action because he has filed, on three
26 or more prior occasions, actions which have been dismissed on the grounds that they were
frivolous, malicious, or failed to state a claim. See 28 U.S.C. § 1915(g). To the extent this is
plaintiff’s intention, filing a habeas action to avoid dismissal is not the appropriate remedy.

1 appropriate pleading within the time provided in this order may be grounds for dismissal of this
2 action. See Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992); see also Local Rule 110.
3 Petitioner is also warned that if he files a complaint which fails to comply with Rule 8 may, in
4 the court's discretion, be dismissed with prejudice pursuant to Rule 41(b). See Nevijel v. North
5 Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

6 Petitioner has also filed a motion for the appointment of counsel (Docs. 4, 5) and
7 a motion for an order to show cause (Doc. 6). In his motion for an order to show cause, he is
8 requesting the court allow this action to proceed and grant him in forma pauperis status.
9 However, until an appropriate in forma pauperis application is filed with the court, and the court
10 determines the proper type of proceedings for this action, the court is unable to grant such a
11 request. As for the requests for appointment of counsel, again the court must determine the
12 proper classification for this case before such a request can be evaluated as the standards for
13 appointing counsel are different depending on the type of proceeding. Regardless of they type of
14 proceeding, however, whether counsel is appointed to assist plaintiff will only be necessary if the
15 action proceeds. If this case is dismissed on procedural grounds, appointment of counsel will be
16 unnecessary. Therefore, the motions will be denied without prejudice to renewal once petitioner
17 has filed the necessary amended pleadings and application to proceed in forma pauperis.

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Petitioner's petition is dismissed with leave to amend;
- 20 2. The Clerk of the Court shall send petitioner both a blank petition for writ
21 of habeas corpus and a blank prisoner civil rights form complaint;
- 22 3. Petitioner shall choose whether he will proceed in this action with a
23 habeas petition appropriately challenging a conviction or whether he will file a complaint to
24 proceed in a civil rights action pursuant to 42 U.S.C. § 1983;
- 25 4. Petitioner shall file his amended pleading within 30 days of the date of
26 service of this order;

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5. Petitioner shall also submit on the form provided by the Clerk of the Court, within 30 days from the date of this order, a complete application for leave to proceed in forma pauperis, with the required certifications, or the appropriate filing fee;

6. The Clerk of the Court is further directed to send petitioner a new form Application to Proceed In Forma Pauperis By a Prisoner;

7. Petitioner's motion for an order to show cause (Doc. 6) is denied; and

8. Petitioner's motions for appointment of counsel (Docs. 4, 5) are denied without prejudice to renewal once petitioner determines how he will proceed in this action and files the appropriate amended pleadings and in forma pauperis application.

DATED: March 6, 2014



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE