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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JONATHAN WAYNE PETERSON,
Petitioner,
v.
DAVE DAVIES,
Respondent.

No. 2:14-cv-2659 KJM CKD P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On April 27, 2015, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having carefully reviewed the file, the court defers consideration of the findings and recommendations and refers the matter to the Office of the Federal Defender for consideration of whether petitioner is eligible for appointment of counsel.

1 Petitioner claims that he was improperly denied 184 days of presentence custody credits
2 as well as 92 days of conduct credit against the four year prison term he is currently serving
3 following his 2012 conviction on charges of assault with force likely to cause great bodily injury
4 in violation of California Penal Code § 245(a)(1). Petitioner claims this denial was due to
5 erroneous information in a probation report. Specifically, petitioner contends he should have
6 received credit for a period between December 7, 2011 and June 7, 2012, when petitioner was in
7 custody at the Yuba County Jail.

8 The magistrate judge finds that “[c]ontrary to the parole agent’s assertion that petitioner
9 was in custody between December 2011 and June 2012, it appears that petitioner was not
10 incarcerated during that period as evidenced by the fact that he committed yet another offense on
11 February 24, 2011, CT 132, and on July 26, 2011, when he committed the offense for which he is
12 currently in prison. *Id.* at 128.” ECF No. 20 at 4. Although not entirely clear, it appears that the
13 magistrate judge intended to find that, while petitioner was in custody between December 2011
14 and June 2012, contrary to the parole agent’s assertion the basis for that incarceration was not
15 parole violations for absconding and for a drunk driving arrest from Sutter County.

16 This court’s review leads it to conclude the record reflects the following: Petitioner was
17 arrested on July 26, 2011 on the charges that led to his present incarceration. ECF No. 1 at 126-
18 128, 133. He was arraigned on those charges on July 28, 2011. ECF No. 1 at 81-83. Prior to his
19 arrest, petitioner had been free on his own recognizance (O.R.) following a July 8, 2011
20 conviction for assault with a deadly weapon. ECF No. 1 at 82-86. Following the arraignment,
21 petitioner’s O.R. release was revoked, bail was set at \$80,000, and petitioner was remanded to
22 custody. *Id.* at 86-89. On August 2, 2011, a parole agent retained petitioner’s parole hold and
23 referred petitioner to the Board of Parole Hearings (BPH) for a parole revocation hearing. *Id.* at
24 123-24. The record before the court shows that some action was taken by the BPH on August 8,
25 2011. *Id.* at 130. That action was subsequently rescinded at a hearing on October 31, 2011. *Id.*
26 at 133. At the October 31, 2011 BPH hearing, petitioner’s parole was revoked with a return to
27 custody for 12 months. *Id.* The revocation offense is identified as “245(a)(1),” the same as the
28 charge for which petitioner is currently incarcerated. *Id.* The findings of the hearing officers

1 include failure to report and resisting arrest as well as the assault with a deadly weapon charge.
2 *Id.* at 131-32. In another section of the summary of decision, in a space for “Reasons Remedial
3 Sanctions Not Chosen,” a box is checked and the words “pending local criminal charges” appear
4 next to the checked box. *Id.* at 133. There is nothing in the record that shows when, if ever,
5 petitioner commenced serving the 12 month return to custody following this parole revocation.


6 A fair reading of the record thus suggests that the basis for petitioner’s incarceration
7 between December 2011 and June 2012 was either his inability to post bail pending resolution of
8 the criminal charges that led to his present incarceration or the parole revocation term imposed on
9 October 31, 2011, and not the reasons relied on by the state trial court in denying petitioner credit
10 against his sentence for this period.

11 Petitioner may have a liberty interest in credit for presentence custody if he can “show
12 ‘that he could have been free’ during the time period in question ‘but for the same conduct that
13 led to the instant conviction and sentence.’” *Robinson v. Marshall*, 66 F.3d 249, 250 (9th Cir.
14 1995). Before the court can assess whether petitioner may be entitled to habeas corpus relief on
15 this claim, the record must be expanded to include evidence of when, if at all, petitioner was
16 incarcerated on the parole revocation term imposed at the October 31, 2011 parole revocation
17 hearing.

18 In light of the complexity of the legal issues involved, the court has determined that the
19 interests of justice may require appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2)(B). The
20 matter will be referred to the Office of the Federal Defender to determine whether petitioner is
21 financially eligible for appointment of counsel. Thereafter, the court will make such further
22 orders as are necessary to resolution of this action.

23 In accordance with the above, IT IS HEREBY ORDERED that this matter is referred to
24 the Office of the Federal Defender. Within fourteen days of this order, the Federal Defender shall
25 inform the court in writing whether petitioner is financially eligible for appointment of counsel in
26 this matter.

27 DATED: September 29, 2015.

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UNITED STATES DISTRICT JUDGE