

1 Petitioner has already been advised that claims concerning the conditions of his
2 confinement and violations of his constitutional rights are properly raised in a civil rights
3 complaint filed pursuant to 42 U.S.C. § 1983, which provides a remedy for violations of civil
4 rights by state actors. ECF No. 37. A habeas corpus petition is the correct method for a prisoner
5 to challenge the “legality or duration” of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th
6 Cir. 1991) (quoting Preiser v. Rodriguez, 411 U.S. 475, 485 (1973)); 28 U.S.C. § 2254.
7 “[H]abeas jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a
8 prison condition will not necessarily shorten the prisoner’s sentence.” Ramirez v. Galaza, 334
9 F.3d 850, 859 (9th Cir. 2003). Petitioner’s claims regarding officer conduct are not properly
10 before the court in a habeas action and if he seeks to pursue these claims, he must bring them in a
11 civil rights action after he has exhausted his available administrative remedies.

12 Even if petitioner’s request for a temporary restraining order were appropriate in this
13 action, his request should still be denied. The standard for issuing a temporary restraining order
14 is essentially the same as that for issuing a preliminary injunction. Stuhlberg Int’l Sales Co. v.
15 John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001) (stating that the analysis for
16 temporary restraining orders and preliminary injunctions is “substantially identical”). The
17 moving party must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to
18 suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its
19 favor; and (4) that the relief sought is in the public interest. Winter v. Natural Res. Def. Council,
20 Inc., 555 U.S. 7, 20 (2008). The Ninth Circuit has held that injunctive relief may issue, even if
21 the moving party cannot show a likelihood of success on the merits, if “‘serious questions going
22 to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support
23 issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood
24 of irreparable injury and that the injunction is in the public interest.” Alliance for the Wild
25 Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under either formulation of the
26 principles, preliminary injunctive relief should be denied if the probability of success on the
27 merits is low. Johnson v. California State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir.
28 1995) (“[E]ven if the balance of hardships tips decidedly in favor of the moving party, it must be

1 shown as an irreducible minimum that there is a fair chance of success on the merits.’” (quoting
2 Martin v. International Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984)). Petitioner has
3 failed to demonstrate that he has a fair chance of success on the merits, which bars relief under
4 either version of the test and his request for a temporary restraining order should therefore be
5 denied.

6 II. Request for Extension

7 Respondent’s motion to dismiss the petition was filed on August 7, 2015. ECF No. 29.
8 On August 18, 2015, petitioner filed a motion to extend his deadline to respond by an unspecified
9 amount of time. ECF No. 30. The motion was granted on September 9, 2015, and petitioner was
10 given thirty days from the date of the order to file his response. ECF No. 33. On September 20,
11 2015, petitioner filed a second motion for extension, this time requesting that his deadline be
12 extended by ninety days. ECF No. 34. The request was granted and petitioner was given until
13 January 7, 2016, to file his response to the motion to dismiss. ECF No. 35. In granting the
14 motion, petitioner was advised that no further extensions would be granted absent a showing of
15 extraordinary cause. ECF No. 35. Petitioner has now filed a third motion seeking an extension of
16 unspecified length. ECF No. 42.

17 In his motion, petitioner states that he broke his right leg on January 3, 2016, and has been
18 told that he will require surgery to put a screw in his hip and leg. Id. at 1. He asks that he be
19 given an extension “until [he] get[s] well again.” Id. While the court is sympathetic to
20 petitioner’s injury, the injury occurred only four days before his deadline to file a response and
21 petitioner offers no explanation as to what has prevented him from completing his response
22 during the time he was given with the previous two extensions. Id. Petitioner has failed to show
23 extraordinary cause warranting another extension of his deadline and the motion for extension
24 will be denied. Respondent’s motion to dismiss is deemed submitted and will be considered by
25 the court in due course.

26 III. Request for Appointment of Counsel

27 Petitioner also requests that he be appointed counsel because he “is uneducated in legal
28 procedures, and is unable to proceed alone.” ECF No. 42. With respect to petitioner’s request for

1 counsel, there currently exists no absolute right to appointment of counsel in habeas proceedings.
2 See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). While 18 U.S.C. § 3006A authorizes
3 the appointment of counsel at any stage of the case “if the interests of justice so require,” Rule
4 8(c), Fed. R. Governing § 2254 Cases, “[i]ndigent state prisoners applying for habeas corpus
5 relief are not entitled to appointed counsel unless the circumstances of a particular case indicate
6 that appointed counsel is necessary to prevent due process violations,” Chaney v. Lewis, 801 F.2d
7 1191, 1196 (9th Cir. 1986) (citations omitted).

8 Petitioner alleges only that he is uneducated in legal procedures and is therefore unable to
9 proceed without assistance. ECF No. 42 at 2. However, not having a legal education is a
10 difficulty faced by many prisoners. To the extent that petitioner has previously alleged that he is
11 a mental health patient and handicapped (ECF Nos. 30, 34), he has not demonstrated how these
12 conditions warrant appointment of counsel. Petitioner’s filings also show that he has been able to
13 secure the assistance of other inmates in pursuing this action and he is therefore not without
14 assistance. Finally, respondent’s motion to dismiss does not raise issues of such complexity that
15 appointment of counsel is warranted at this stage of the case. For these reasons, the court does
16 not find that the interests of justice would be served by the appointment of counsel at the present
17 time.

18 IV. Summary

19 The undersigned is recommending that petitioner’s request for a temporary restraining
20 order be denied because petitioner is complaining about the conditions of his confinement and
21 these issues need to be filed in a separate civil rights complaint. The claims are not proper in this
22 case because they do not have anything to do with the length or legality of petitioner’s sentence.
23 The request should also be denied because petitioner has not shown that he has a fair chance of
24 succeeding on his habeas petition.

25 Petitioner’s request for an extension of time to respond to respondent’s motion to dismiss
26 is denied because petitioner has had about five months to respond to the motion to dismiss and
27 has not explained why he was not able to complete his response during that time.

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1 Petitioner's motion for appointment of counsel is denied because the challenges faced by
2 petitioner are not uncommon, his filings demonstrate that he has been able to get help from other
3 inmates, and the motion to dismiss does not raise difficult issues that would require appointment
4 of counsel.

5 Accordingly, IT IS HEREBY ORDERED that:

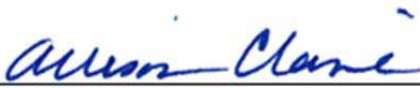
6 1. Petitioner's motion for extension of time to respond to respondent's motion to dismiss
7 (ECF No. 42) is denied.

8 2. Petitioner's motion for appointment of counsel (ECF No. 42) is denied.

9 IT IS FURTHER RECOMMENDED that petitioner's motion for a temporary restraining
10 order (ECF No. 38) be denied.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
16 objections shall be filed and served within fourteen days after service of the objections. The
17 parties are advised that failure to file objections within the specified time may waive the right to
18 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: January 21, 2016

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21 ALLISON CLAIRE
22 UNITED STATES MAGISTRATE JUDGE
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