

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD A. GARY,  
  
Plaintiff,  
  
v.  
  
DEPARTMENT OF CORRECTIONS, et  
al.,  
  
Defendants.

No. 2:16-cv-1060 AC P

ORDER

Plaintiff commenced this action while incarcerated at Deuel Vocational Institution (DVI), under the authority of the California Department of Corrections and Rehabilitation (CDCR). Plaintiff alleged that DVI/CDCR miscalculated his sentence credits based on his May 1997 sentence and wrongly denied him release. The complaint sought plaintiff’s immediate release from prison, credit to plaintiff’s term of parole for the days he was “held over,” and monetary compensation for the days he was “falsely imprisoned.” See ECF No. 1. The court construed the complaint as a putative petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and accorded plaintiff the opportunity to submit a completed habeas petition. See ECF No. 6. Because the nature of this case remained unclear, the court deferred ruling on plaintiff’s motion to proceed in forma pauperis.

Thereafter, plaintiff filed a partially completed habeas petition, ECF No. 9, and a notice of

1 change of address to the Los Angeles County Jail, in which he stated that he was being held as a  
2 civil detainee awaiting a probable cause hearing on a Sexually Violent Predator (SVP) petition,  
3 ECF No. 8. Review of this court’s docket<sup>1</sup> demonstrates that plaintiff is now incarcerated at  
4 Coalinga State Hospital, under the authority of the California Department of State Hospitals. See  
5 Gary v. Kincaid et al., Case No. 1:18-cv-0612 LJO BAM. Once a person is adjudicated a  
6 sexually violent predator, he is “committed for an indeterminate term to the custody of the State  
7 Department of State Hospitals for appropriate treatment and confinement in a secure facility  
8 designated by the Director of State Hospitals.” Cal. Welf. & Inst. Code § 6604.

9 Several problems beset the proposed habeas petition, as set forth below. Plaintiff will be  
10 accorded an opportunity to correct these deficiencies in an amended habeas petition, or to request  
11 the voluntary dismissal of this action without prejudice. The court will direct that this case be  
12 designated an action in habeas corpus pursuant to 28 U.S.C. § 2254, with the proper respondent.

13 The initial problem involves this court’s jurisdiction. Section 2254 authorizes a federal  
14 court to “entertain an application for a writ of habeas corpus in behalf of a person in custody  
15 pursuant to the judgment of a State court only on the ground that he is in custody in violation of  
16 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). It is not clear  
17 from the current petition, even when read in tandem with the original complaint, whether plaintiff  
18 is currently “in custody” for purposes of challenging the calculation of his sentence credits based  
19 on his May 1997 sentence.

20 The Supreme Court has construed Section 2254 to require that “the habeas petitioner be  
21 ‘in custody’ under the conviction or sentence under attack at the time his petition is filed.”  
22 Maleng v. Cook, 490 U.S. 488, 490-91 (1989) (citation omitted) (finding federal petitioner “in  
23 custody” on a state sentence enhanced by an allegedly invalid prior state conviction). The Ninth  
24 Circuit Court of Appeals has held that a civilly committed habeas petitioner confined indefinitely

---

25  
26 <sup>1</sup> See <http://appellatecases.courtinfo.ca.gov/search>. This court may take judicial notice of its own  
27 records and the records of other courts. See United States v. Howard, 381 F.3d 873, 876 n.1 (9th  
28 Cir. 2004); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Fed. R. Evid. 201  
(court may take judicial notice of facts that are capable of accurate determination by sources  
whose accuracy cannot reasonably be questioned).

1 pursuant to a SVP statute may challenge a prior, fully expired, criminal conviction upon a  
2 showing that the conviction served as a necessary predicate for petitioner's current commitment.  
3 See Brock v. Weston, 31 F.3d 887, 889-90 (9th Cir. 1994) (habeas petitioner confined indefinitely  
4 pursuant to the Washington SVP Act permitted to challenge a prior, fully expired criminal  
5 conviction upon a showing that the conviction served as a necessary predicate for petitioner's  
6 current confinement).

7 Although Brock was decided before the 1996 implementation of the Antiterrorism and  
8 Effective Death Penalty Act of 1996 (AEDPA), and Prison Litigation Reform Act (PLRA), the  
9 Ninth Circuit relied on Brock to hold, in 2001, that "a habeas petitioner is 'in custody' for the  
10 purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to  
11 comply with a state sex offender registration law because the earlier rape conviction 'is a  
12 necessary predicate' to the failure to register charge." Zichko v. Idaho, 247 F.3d 1015, 1019-20  
13 (9th Cir. 2001), as amended (June 5, 2001) (citing Brock, 31 F.3d at 890, for the "holding that the  
14 habeas petitioner could challenge an earlier, expired conviction while involuntarily committed for  
15 treatment as a violent sexual predator"). "It is well settled that a habeas corpus petitioner meets  
16 the statutory 'in custody' requirements when, at the time he files the petition [ ] ... he is in custody  
17 pursuant to another conviction that is positively and demonstrably related to the conviction he  
18 attacks." Carter v. Proconier, 755 F.2d 1126, 1129 (5th Cir.1985) (quoted with approval by the  
19 Ninth Circuit in Zichko, 247 F.3d at 1019).

20 As construed by another magistrate judge in this court, "[t]he cases of Zichko v. Idaho,  
21 247 F.3d 1015, 1020 (9th Cir. 2001), and Brock v. Weston, 31 F.3d 887 (9th Cir. 1994), stand for  
22 the proposition that a mental commitment 'conviction' bears a substantial nexus to a previous  
23 criminal conviction, if the criminal conviction is a necessary predicate to the civil commitment."  
24 Townsend v. King, 2014 WL 2197553, at \*3, 2014 U.S. Dist. LEXIS 72115 at \*8 (E.D. Cal. May  
25 27, 2014) (Case No. 2:13-cv-00859 GEB GGH P (ECF No. 29 at 5)) (finding that petitioner's  
26 current commitment as a mentally disordered offender (MDO), was necessarily predicated on his  
27 prior violent criminal conviction and thus rendered petitioner "in custody" for purposes of  
28 attacking the prior criminal conviction). While these authorities indicate that plaintiff in this case

1 (hereafter “petitioner”) may meet the “in custody” requirement under 28 U.S.C. § 2254, petitioner  
2 must so demonstrate in an amended petition.<sup>2</sup>

3 Next, and significantly, the proposed petition fails to set forth any grounds for relief. See  
4 ECF No. 9 at 4-5. Although it appears that petitioner anticipated the court would consider the  
5 petition in tandem with the complaint, that is not the case – a proposed petition for writ of habeas  
6 corpus filed pursuant to 28 U.S.C. § 2254 must be complete in itself. Appropriate exhibits may  
7 be attached, but the petition must contain all grounds for relief and all necessary factual  
8 allegations and not rely on any other document for completeness.

9 The current petition also fails to demonstrate whether petitioner exhausted his state court  
10 remedies or, if not, whether a stay of this proceeding is requested to do so. The petition states  
11 generally that an appeal to the California Supreme Court was previously filed, without providing  
12 further information, see id. at 3, and that a petition or appeal was then currently pending in an  
13 unidentified state or federal court, id. at 5. Section 2254 authorizes a federal court to grant only  
14 those federal claims that were previously exhausted in the state courts. 28 U.S.C. § 2254(b).  
15 Although an unexhausted habeas petition may, under limited circumstances, be stayed pending  
16 exhaustion, the petitioner must show that “[1] petitioner had good cause for his failure to  
17 exhaust, [2] his unexhausted claims are potentially meritorious, and [3] there is no indication that  
18 the petitioner engaged in intentionally dilatory litigation tactics.” Mena v. Long, 813 F.3d 907,  
19 910 (9th Cir. 2016) (quoting Rhines v. Weber, 544 U.S. 269, 278 (2005)). The instant petition  
20 does not address exhaustion.

21 Finally, the proposed petition does not comply with the requirement that a federal petition  
22 for writ of habeas corpus name as respondent the state officer having current custody of the  
23 petitioner. See 28 U.S.C. § 2254; Rule 2(a) of the Rules Governing Section 2254 Cases in the  
24 United States District Courts. Nevertheless, the court will direct the Clerk of Court to designate

---

25  
26 <sup>2</sup> Should petitioner seek instead to challenge his SVP commitment directly, he must do so in a  
27 new case with a new petition. “It is well established that detainees under an involuntary civil  
28 commitment scheme such as SVPA may use a § 2254 habeas petition to challenge a term of  
confinement.” Huftile v. Miccio-Fonseca, 410 F.3d 1136, 1139-40 (9th Cir. 2005) (citing Duncan  
v. Walker, 533 U.S. 167, 176 (2001)).

1 this action as one filed pursuant to 28 U.S.C. § 2254, and identify the respondent as the Executive  
2 Director of Coalinga State Hospital.<sup>3</sup>

3 For these several reasons, IT IS HEREBY ORDERED that:

4 1. Petitioner shall, within thirty (30) dates after the filing date of this order: (1) file a First  
5 Amended Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, on the form provided  
6 herewith, AND (2) file a completed application to proceed in forma pauperis; OR (2) request the  
7 voluntary dismissal of this action without prejudice.

8 2. The Clerk of Court is directed to: (1) designate on the docket that this action is filed  
9 pursuant to 28 U.S.C. § 2254; (2) identify the respondent as Brandon Price, Executive Director,  
10 Coalinga State Hospital; and (3) send petitioner, together with a copy of this order: (a) a new  
11 application to proceed in forma pauperis, and (b) the form used by prisoners in this district to  
12 pursue a petition for writ of habeas corpus under 28 U.S.C. § 2254.

13 3. Failure of petitioner to timely comply with this order will result in a recommendation  
14 that this action be dismissed without prejudice.

15 DATED: August 22, 2018

16  
17   
18 ALLISON CLAIRE  
19 UNITED STATES MAGISTRATE JUDGE  
20  
21  
22  
23  
24  
25  
26

27 <sup>3</sup> Should petitioner indicate that he intends to proceed in this action with a First Amended  
28 Petition, this court will then consider whether it is appropriate to transfer this case to the Fresno  
Division of this court based on venue considerations.