

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GEORGE RED, JR.,)	Case No.: 10-CV-04730-LHK
)	
Petitioner,)	ORDER DISMISSING PETITION;
v.)	DENYING MOTION TO APPOINT
)	COUNSEL AS MOOT
KATHLEEN DICKINSON, Warden of the)	
California Medical Facility,)	
)	
Respondent.)	
)	

Petitioner George Red, Jr., is a California state prisoner proceeding *pro se*. On October 20, 2010, he initiated this action by filing a petition for a writ of mandate ordering Respondent to recall Petitioner’s sentence and recommend resentencing and providing other relief. Petitioner also moved for appointment of counsel. For the reasons set forth below, the Petition is DISMISSED, and Petitioner’s motion for appointment of counsel is DENIED as moot.

I. Legal Standard

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a); *In re Arizona*, 528 F.3d 652, 657 (9th Cir. 2008). A district court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if it “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). Under § 1915A, when

1 determining whether a complaint states a claim, a court must accept as true all allegations of
2 material fact and must construe those facts in the light most favorable to the plaintiff. *Resnick v.*
3 *Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Additionally, courts must construe *pro se* pleadings
4 liberally. *Id.*

5 II. Discussion

6 Petitioner seeks a writ of mandate ordering the Warden of the California Medical Facility,
7 where Petitioner is incarcerated, to recall Petitioner’s sentence. Compl. at 1. The federal
8 mandamus statute grants district courts jurisdiction “to compel an officer or employee of the
9 United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361.
10 Mandamus jurisdiction exists when (1) a plaintiff has a clear right to relief; (2) a defendant has a
11 duty to act that is “ministerial and so plainly prescribed as to be free from doubt”; and (3) no other
12 adequate remedy is available. *Piledrivers’ Local Union No. 2375 v. Smith*, 695 F.2d 390, 392 (9th
13 Cir. 1982) (quoting *Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir.1970)).

14 Here, the Court lacks subject matter jurisdiction over the Petition because Respondent is not
15 “an officer or employee of the United States or any agency thereof,” but rather an officer or
16 employee of the state of California. 28 U.S.C. § 1361; *see also, e.g., Williams v. Supreme Court of*
17 *California*, No. C 10-3834, 2010 WL 4065409, at *1 (N.D. Cal. 2010); *Newton v. Poindexter*, 578
18 F. Supp. 277, 279 (E.D. Cal. 1984). Because the Court lacks mandamus jurisdiction over a petition
19 seeking to compel action by a state employee, the Court concludes that the Petition in this case fails
20 to state a claim upon which relief may be granted. Petitioner’s mandamus remedy, if any, lies in
21 state court.¹

22 III. Conclusion

23 For the foregoing reasons, the Court DISMISSES the Petition pursuant to 28 U.S.C.
24 § 1915A(a) for failure to state a claim upon which relief may be granted. Additionally, the Court
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26 ¹ The Court notes, in addition, that to the extent Petitioner seeks to challenge the legality or
27 duration of his confinement, a petition for habeas corpus brought in state court may be the proper
28 mechanism for his challenge. *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991); *see also People v.*
Picklesimer, 48 Cal. 4th 330, 339, 226 P. 3d 348 (2010) (distinguishing a petition for habeas
corpus, which may be filed by a prisoner still in custody, from a petition for writ of mandate, which
may be filed by individuals released from custody).

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DENIES as moot Petitioner’s motion for appointment of counsel. The clerk shall close the file and terminate any pending motions.

IT IS SO ORDERED.

Dated: November 1, 2010



LUCY H. KOH
United States District Judge