

ADDENDUM

APPENDIX-A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3782

Kevin Kerr

Petitioner - Appellant

v.

Jefferson B. Sessions, III, Attorney General of the United States

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:17-cv-03337-RK)

JUDGMENT

Before WOLLMAN, BOWMAN and LOKEN, Circuit Judges.

The court has reviewed the original file of the United States District Court. Appellant's application to proceed in forma pauperis is granted.

It is ordered by the court that the judgment of the district court is summarily affirmed.
See Eighth Circuit Rule 47A(a).

May 11, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX-B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

KEVIN JEROME KERR

Petitioner,

vs.

LORETTA E. LYNCH,

Respondent.

Case No. 17-3337-CV-S-RK-P

**ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL AND
FORWARDING CASE TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

On October 24, 2017, this Court entered its Order and Judgment denying Petitioner's 28 U.S.C. § 2241 petition and dismissing this case.¹ Petitioner has since filed a notice of appeal. Doc. 11. Although Petitioner did not also file a request to proceed *in forma pauperis* on appeal, this Court assumes his intent to do so.

Under 28 U.S.C. § 1915, an appeal *in forma pauperis* may be permitted if an affidavit, including a statement of all assets possessed and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. *See* Fed. R. App. P. 24(a). Good faith requires that Petitioner's argument on appeal must not be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Because Petitioner has presented no non-frivolous issues deserving of appellate review, Petitioner will be denied leave to proceed *in forma pauperis* on appeal. Petitioner may renew his request with the Eighth Circuit.

Accordingly, it is **ORDERED** that Petitioner is denied leave to proceed *in forma pauperis* on appeal and that the Clerk of the Court electronically forward this case to the United States Court of Appeals for the Eighth Circuit for further processing of Petitioner's appeal.

/s/ Roseann A. Ketchmark

ROSEANN A. KETCHMARK
UNITED STATES DISTRICT JUDGE

Dated: December 19, 2017.

¹ Because the Antiterrorism and Effective Death Penalty Act's certificate of appealability requirement does not apply to federal prisoners proceeding under 28 U.S.C. § 2241, this Court was not required to determine whether a certificate of appealability should issue. *See Langella v. Anderson*, 612 F.3d 938, 939 n. 2 (8th Cir. 2010).

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

KEVIN JEROME KERR

Petitioner,

vs.

LORETTA E. LYNCH,

Respondent.

Case No. 17-3337-CV-S-RK-P

ORDER DISMISSING CASE WITHOUT PREJUDICE

Petitioner, an inmate at the United States Medical Center for Federal Prisoners (USMCFP) in Springfield, Missouri, has filed *pro se* this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the reasons set forth below, it appears on the face of the petition that Petitioner is not entitled to relief in this Court. Accordingly, this case will be dismissed without prejudice. *See* 28 U.S.C. § 2254, Rule 4 (“If it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.”).

Petitioner raises three grounds for relief. In Ground 1, Petitioner argues that “the judgment, conviction, and 18 U.S.C. § 4245 civil commitment imposed against this Petitioner is in violation of his creator endowed life and liberty as secured by the 5th and 6th Amendments.” Doc. 1, p. 4. Petitioner argues that his civil commitment proceedings deprived “Him of the ‘Liberty’ Endowed by the Koranic Literary Work ‘Allah’ that is Judicially Determined to be in Need of Care and Treatment (a mandatory behavior modification) of which Psychotropic Medication is Justified to Render this Petitioner competent for Trial . . .” *Id.* at 5. In Ground 2, Petitioner argues that “Respondent’s presumption is rebutted in the administrative remedy procedure, and the continuation of treatment is cruel and unusual punishment because if the expert opinions be true in fact, this Petitioner did not

waive the right to counsel in the criminal case and new trial or appeal is barred by time expiration.” *Id.* at 6. In Ground 3, Petitioner argues that “the continuation of treatment is cruel and unusual punishment because not within the exception of [*Youngberg v. Romeo*, 457 U.S. 307 (1982)] and the criminal commitment judicial recommendation for educational and vocational training, the acceptance of which required authorization in conformity with the Holy Quran.” *Id.* at 6. Petitioner attaches several exhibits to his petition, including various grievances he filed concerning his mental health treatment and the responses he received thereto. Doc. 1-1.

Initially, Petitioner’s allegations are conclusory and are unsupported by particularized facts warranting habeas relief. *See Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir. 1990) (“[P]etitioner must state specific, particularized facts which entitle him or her to habeas corpus relief for each ground specified.”). Because Petitioner’s allegations lack sufficient clarity, Petitioner fails to establish that he is entitled to habeas corpus relief.

Insofar as Petitioner’s allegations challenge the conditions of his confinement, including his mental health treatment, such claims should be raised in an action brought pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), not in a petition for writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475 (1971) (holding that the purpose of habeas corpus is to challenge duration or length, but not conditions of confinement). Notably, the case Petitioner cites in Ground 3, *Youngberg*, relates to a civil rights action under 42 U.S.C. § 1983.

Even if the petition could be construed as a *Bivens* complaint, Petitioner fails to state a claim. To state a *Bivens* claim, a plaintiff “must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Wilson v. Northcutt*, 441 F.3d 586, 591 (8th Cir. 2006). Petitioner does not state individual actions performed by Respondent that violated his constitutional rights. Accordingly, insofar as Petitioner is challenging his conditions of confinement, Petitioner’s petition

will be dismissed, without prejudice, to Petitioner seeking relief through a properly-filed *Bivens* civil rights action

Insofar as Petitioner is challenging the constitutionality of his federal conviction, an inmate in federal custody may challenge the constitutionality of a federal conviction or sentence only by filing a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255 in the sentencing court. The court where the inmate is incarcerated lacks jurisdiction to hear collateral challenges raised in a petition for writ of habeas corpus brought under 28 U.S.C. § 2241, *see Winston v. Mustain*, 562 F.2d 565, 567 (8th Cir. 1977), unless Petitioner can show that § 2255 is inadequate or ineffective to test the legality of his detention, *United States v. Lurie*, 207 F.3d 1075, 1077 (8th Cir. 2000). Petitioner bears the burden of demonstrating that inadequacy or ineffectiveness. *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003).

Petitioner has not met his burden to show that § 2255 is inadequate or ineffective to challenge his conviction and sentence. Petitioner was sentenced in the Eastern District of Michigan in Case No. 95-CR-80972. Doc. 1, p. 1. Petitioner indicates that he filed a motion under § 2255 in the Eastern District of Michigan, which was dismissed on July 8, 2005. *Id.* at 7. Under the section asking Petitioner to explain why § 2255 is not an adequate remedy, Petitioner makes the following conclusory statement:

The Judgment and Commitment Court's prior Limitations Memorandum Opinion that this Petitioner's Mental Health was not in controversy (at the time that He was Actually Civilly Committed) precluded a Merits Determination on the issue of "Competency" in the 2255 Proceeding with respect to this Petitioner's November 1989 Nationality Proclamation Testamentary Act Supplementing and Publicly Performed in accordance with *Dred Scott v. Sanford*, *supra* as said Waiver encompasses the "Competency" to waive the right to Sixth Amendment assistance of Counsel. To wit, the Trial Court's non-cognizable "Nationality", "Mental condition not in Controversy" Memorandum Opinion, Denied this Petitioner A Reasonable Opportunity to obtain a Reliable Judicial Determination of the Fundamental Legality of the Psychology Department's October 2002 Medication Justification to render this Petitioner "competent for trial."

Id. at 9.

These allegations are largely incomprehensible do not sufficiently explain why Petitioner is unable to seek relief through § 2255. Therefore, insofar as Petitioner intended to challenge his conviction or sentence, this petition must be dismissed for lack of jurisdiction, and Petitioner must seek relief through § 2255 or otherwise seek permission to file a second or successive Section 2255 motion, if necessary, pursuant to 28 U.S.C. §2255(h).

Finally, insofar as Petitioner's claims could be interpreted as a challenge to Petitioner's confinement pursuant to 18 U.S.C. § 4245, for the reasons set forth in this Court's dismissal of Petitioner's prior § 2241 petitions, this Court finds that Petitioner is lawfully confined for mental health care and treatment pursuant to 18 U.S.C. § 4245. *See Kerr v. Lynch*, 16-3099-CV-S-MDH-P (W.D. Mo. April 1, 2016); *Kerr v. Sanders*, No. 13-3066-CV-H-MDH (W.D. Mo. Jan. 31, 2014); *United States v. Kerr*, No. 09-3438-CV-RED (W.D. Mo. Nov. 24, 2009). In Case No. 09-09-3438-CV-RED, the government has filed annual reports indicating that staff at USMCFP have determined that Petitioner continues to suffer from a significant mental illness which requires continued psychiatric hospitalization. Petitioner fails to set forth non-conclusory allegations and particularized facts as to why his confinement pursuant to 18 U.S.C. § 4245 should be amended in light of these determinations. *See Adams*, 897 F.2d at 334.

Accordingly, it is **ORDERED** that this case is summarily dismissed without prejudice for the reasons set forth herein.

/s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK
UNITED STATES DISTRICT JUDGE

Dated: October 24, 2017.

**Additional material
from this filing is
available in the
Clerk's Office.**