

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 15 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HAMID MICHAEL HEJAZI,

Petitioner-Appellant,

v.

CLIFTON HARROLD, Lane County
Sheriff,

Respondent-Appellee.

No. 20-35104

D.C. No. 6:19-cv-01844-HZ
District of Oregon,
Eugene

ORDER

Before: RAWLINSON and BRESS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See*
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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ORDER

Before: McKEOWN and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No.5) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Wilson v. Belleque*, 554 F.3d 816, 825-26 (9th Cir. 2009).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HAMID MICHAEL HEJAZI,

Case No. 6:19-cv-01844-HZ

Petitioner,

ORDER TO DISMISS

v.

CLIFTON HARROLD,

Respondent.

HERNANDEZ, District Judge.

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner's Application for Leave to Proceed *In Forma Pauperis* (#2) is granted. However, for the reasons that follow, the Petition for Writ of Habeas Corpus (#1) is summarily dismissed, without prejudice.¹ See Rule 4, Rules Governing Section 2254 Cases.

¹ On January 2, 2020, Petitioner filed an Amended Petition (#7), but his filing does not comply with Local Rule 15-1(c) which requires a party moving to amend a pleading to "reproduce the entire pleading and . . . not incorporate any part of the prior pleading by reference." The Court has, however, considered the contents of the proposed amendment in reaching its decision in this case.

BACKGROUND

Petitioner, a pretrial detainee, filed this habeas corpus case with the Court on November 15, 2019. He complains of various rulings by the Lane County Circuit Court, but principally takes issue with the Circuit Court's failure to comply to his right to a speedy trial.² He asserts that his trial was set for October 29, 2019, but on or about October 14, 2019, the trial court insisted he waive his speedy trial rights if he wished to enjoy the appointment of substitute counsel. He asks this Court to enforce his right to a speedy trial.

STANDARDS

The federal courts "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). This Court may summarily dismiss a habeas corpus petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." Rule 4, Rules Governing Section 2254 Cases; see also *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir.

² Petitioner also complains about the conditions of his confinement within the Lane County Jail, but such claims are not properly raised in this habeas corpus case. See *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003).

1990), cert. denied, 498 U.S. 1096 (1991); *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

DISCUSSION

As an initial matter, because Petitioner seeks to challenge the legality of his confinement, but is not in custody pursuant to a state court judgment, the Court construes petitioner's pleading as a Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241. See *Stow v. Murashige*, 389 F.3d 880, 882 (9th Cir. 2004) (§ 2241 is the proper vehicle by which to challenge the confinement of a person who is not currently in custody pursuant to a state court judgment). Despite this characterization, Rule 4 of the Rules Governing Section 2254 Cases pertaining to summary dismissal remains applicable to this case. See Rule 1(b) of the Rules Governing Section 2254 Cases.

A habeas petitioner must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court will consider the merits of those claims. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). "In general, a habeas petition should be dismissed if a petitioner has failed to exhaust state remedies as to even one claim." *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994) (citing *Rose*). A habeas corpus action that is filed prior to the completion

of exhaustion should be dismissed without prejudice. *Davis v. Silva*, 511 F.3d 1005, 1008 (9th Cir. 2008). The proper time to determine whether petitioner has exhausted his state court remedies is at the time he files his federal habeas corpus petition. *Brown v. Maass*, 11 F.3d 914, 915 (9th Cir. 1993).

In this case, Petitioner claims that "all grounds for relief that Petitioner has raised have been presented to the highest state court having jurisdiction. The Court of Appeal and Supreme Court have ignored Petitioner. No petition is pending, and the state filed writ habeas corpus has been outright ignored without valid consideration." Petition (#1), p. 4. Petitioner's assertion of complete exhaustion is not credible. His initial trial date was set for October 29, 2019, and he first learned that the trial might not take place on time on October 14, 2019. Between October and the filing of this case on November 15, Petitioner could not have given the Oregon court system a meaningful opportunity to address his claims at the circuit and appellate levels. Accordingly, the Court finds Petitioner has not fairly presented any of his claims to Oregon's state courts, leaving them unexhausted for purposes of federal habeas corpus review.

Moreover, Petitioner asks this Court to intervene in his ongoing state criminal proceedings, something it is only empowered

to do in the event of extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37 (1971). Petitioner's case presents no such circumstances. Indeed, it appears from the Petition that the minimal delay he is currently experiencing in state court is due to his attorney's desire to have Petitioner's competency evaluated.³ See Petition (#1), p. 4. For all of these reasons, the Petition for Writ of Habeas Corpus is not properly before this Court. Because Petitioner cannot cure these deficiencies by way of amending his Petition, the dismissal is without leave to amend.

CONCLUSION

Petitioner's Application for Leave to Proceed In Forma Pauperis (#2) is granted. However, for the reasons identified above, the Petition for Writ of Habeas Corpus (#1) is dismissed, without prejudice, and the pending Motion for Appointment of Counsel (#8) is denied.

IT IS SO ORDERED.

DATED this 12 day of January, 2020.

Marco A. Hernandez
Marco A. Hernandez
United States District Judge

³ The attorney pursuing the competency determination was appointed to represent Petitioner in "late November" which would have been at roughly the same time Petitioner filed this case, and not long after the initial scheduled trial date of October 29, 2019. Amendment to Petition (#7), p. 3. Such a development is not an extraordinary circumstance justifying federal court intervention.

5 - ORDER TO DISMISS