

APPENDIX A

The Opinion of the District Court of Southern
Illinois

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**MASOUD BAMDAD,
No. 47237-112,**

Petitioner,

vs.

Case No. 16-cv-1227-DRH

**WARDEN, U.S.P. MARION,
and ATTORNEY GENERAL,**

Respondents.

MEMORANDUM AND ORDER

HERNDON, District Judge:

Petitioner, currently incarcerated in the USP-Marion, brings this habeas corpus action pursuant to 28 U.S.C. § 2241, seeking release in order to obtain medical treatment outside the prison.

This case is now before the Court for a preliminary review of the Petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in United States District Courts. Rule 4 provides that upon preliminary consideration by the district court judge, "[i]f it plainly appears from 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." Rule 1(b) of those Rules gives this Court the authority to apply the rules to other habeas corpus cases, such as this action under 28 U.S.C. § 2241. After carefully reviewing the Petition, the Court concludes that Petitioner is not entitled to habeas relief, and the petition must be dismissed.

The Petition

Petitioner is a former practicing physician, who was convicted in California in 2009 of unlawfully distributing oxycodone. In 2010, he was sentenced to 25 years in prison. (Doc. 1, p. 2). He is now age 63. (Doc. 3, p. 1). He asserts that he is being held at Marion under "inhumane condition[s]." (Doc. 1, p. 1). He explicitly states that "this Petition is not about challenging Bamdad's conviction and sentence, but is about the manner, condition, and execution of his sentence." (Doc. 1, p. 2).

Petitioner references two assaults that occurred early in his incarceration, in which he suffered physical and emotional injuries that continue to affect him. He has two pending civil rights cases in other courts, in which he is seeking damages related to those matters. (Doc. 1, p. 2). An October 2009 incident of alleged excessive force by guards caused nerve damage in Petitioner's right hand, and he still suffers from limited movement, numbness and tingling in that extremity. (Doc. 1, p. 3). In 2013, Petitioner was assaulted by a cellmate, leaving him with a concussion, fractured nose, herniated cervical discs, and ongoing dizziness, hearing loss, light-headedness, and "fuzziness." (Doc. 1, pp. 3-4). He states that he has brought the present Petition over delays in treatment and the refusal to treat his current medical problems related to those injuries. (Doc. 1, p. 2).

Petitioner continues to have difficulty breathing and sleeping due to the nasal fracture, which has never been evaluated or treated. Marion medical

providers have given Petitioner only nasal spray, which helps his breathing for a short time and then loses its effect. He has received no treatment for the concussion, and a scheduled MRI test was cancelled by Marion officials. He continues to suffer from headaches and dizzy spells daily. (Doc. 1, p. 5). While at Marion, Petitioner was given some tests for his cervical spine pain, was referred to an outside pain specialist, and received one round of injections. That intervention did not help, and he was not approved for additional treatment. He saw a physical therapist who advised him to perform exercises which he had already been doing. (Doc. 1, pp. 5-6). The lack of a proper mattress or pillow aggravates his neck condition. He is unable to get further treatment which he believes is necessary for the cervical spine injuries.

Petitioner additionally suffers from oversensitivity, disfigurement, and loss of movement in his feet and toes, due to burns he sustained during his wartime service as a flight surgeon. He is also diabetic. He needs special soft shoes to prevent sores from developing on his feet from these conditions. At his previous prisons, he was medically approved to get the special shoes, but since his transfer to Marion in October 2013, officials there have refused to provide them because of the expense. (Doc. 1, p. 7). He further suffers from diverticulosis and gastroesophageal reflux, and his medications had previously been provided to him at no cost. At Marion, however, he has been required to purchase those medications himself, which he cannot afford to do. (Doc. 1, p. 8).

Petitioner asserts that filing another *Bivens* action would be useless and

futile. He argues that a § 2241 petition is proper because he is not seeking money damages, but instead requests injunctive relief from cruel and unusual treatment, in the form of an order for release so that he may obtain medical attention for his many ailments. (Doc. 1, p. 9).

Discussion

As stated above, Petitioner brings this action under the umbrella of habeas corpus law. 28 U.S.C. § 2241. Typically, the writ of habeas corpus is used to completely free an inmate from unlawful custody. *Preiser v. Rodriguez*, 411 U.S. 475, 484-85 (1973). Release from custody is indeed what Petitioner seeks herein. However, this Court must look beyond that request for relief, to independently evaluate the substance of Petitioner's claim and determine whether the correct statute – in this case 28 U.S.C. § 2241 – is being invoked. *Preiser*, 411 U.S. at 500 (dismissing § 1983 civil rights claims that should have been brought as petitions for writ of habeas corpus); *Bunn v. Conley*, 309 F.3d 1002, 1006-07 (7th Cir. 2002) (district court should not have recharacterized declaratory judgment action as petition for habeas corpus); *Godoski v. United States*, 304 F.3d 761, 763 (7th Cir. 2002) (court must evaluate independently the substance of the claim being brought, to see if correct statute is being invoked). If a prisoner is challenging the conditions of his confinement, rather than the fact of confinement, then his remedy is under civil rights law – not habeas corpus. *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991); see also *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999).

Section 2241 provides, in relevant part: "The writ of habeas corpus shall not extend to a prisoner unless - . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). The federal habeas corpus statute cannot be used to challenge conditions of confinement. *Glaus v. Anderson*, 408 F.3d 382, 386-87 (7th Cir. 2005); *Williams v. Wisconsin*, 336 F.3d 576, 579 (7th Cir. 2003); *DeWalt v. Carter*, 224 F.3d 607, 617 (7th Cir. 2000); *Pischke*, 178 F.3d at 500; *Graham*, 922 F.2d at 381.

In his pleading, Petitioner clearly states that he is not challenging his conviction or sentence. He does not raise a claim in this action that the fact of his confinement is unconstitutional.¹ He states that the Petition is related to the "execution of his sentence," but does not contest any aspect of how the Bureau of Prisons is carrying out the sentencing court's judgment as to the length of his imprisonment. The pleading raises no issue that would affect the level or duration of Petitioner's incarceration.

Rather, all of Petitioner's claims focus on Marion officials' failure to provide him with necessary medical treatment, and lengthy delays in giving him what treatment he has received, which he argues has subjected him to cruel and unusual punishment. These assertions suggest potential violations of Petitioner's Eighth Amendment rights and are, without a doubt, a challenge to the conditions of confinement that falls squarely within the realm of a civil rights action. The

¹ Petitioner has previously brought two unsuccessful habeas challenges in this Court under § 2241, each of which attacked the validity of his conviction and/or sentence. *Bamdad v. Holder*, Case No. 14-cv-853-DRH; *Bamdad v. Walton*, Case No. 15-cv-886-DRH.

substance of Petitioner's claims thus does not bring this action within the scope of habeas relief available under §2241. Instead, his claims are cognizable, if at all, in an action brought pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).²

While in the past, courts sometimes construed a mistakenly-labeled habeas corpus petition as a civil rights complaint, *see, e.g., Graham v. Broglin*, 922 F.2d 379, 381-82 (7th Cir. 1991) (collecting cases), in more recent cases the Seventh Circuit has held that district courts should not do this. *Bunn v. Conley*, 309 F.3d 1002, 1007 (7th Cir. 2002); *Moore v. Pemberton*, 110 F.3d 22, 24 (7th Cir. 1997). It would be particularly inappropriate to recast Petitioner's action here, because he would face obstacles under the Prison Litigation Reform Act, Title VIII of Pub. L. No. 104-134, 110 Stat. 1321 (effective April 26, 1996). *See generally* 28 U.S.C. § 1915. Specifically, Petitioner would be responsible for paying a much higher filing fee of \$400 (the fee would be only \$350 if Petitioner were granted leave to proceed *in forma pauperis*). Furthermore, Petitioner might be assessed a "strike" if the Court determined that the action was frivolous, malicious, or failed to state a claim upon which relief may be granted. 28 U.S.C. § 1915(g). Therefore, the Court will not recharacterize the instant habeas Petition as a civil rights complaint. Instead, this action shall be dismissed.

² A *Bivens* action is the federal equivalent of a civil rights action brought under 42 U.S.C. § 1983. *See Glaus v. Anderson*, 408 F.3d 382, 386 (7th Cir. 2005); *Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir. 1997) (collecting cases).

Disposition

To summarize, the Court is unable to provide the relief Petitioner seeks under § 2241. Accordingly, this habeas corpus action is **DISMISSED** without prejudice to Petitioner pursuing his claims in a civil rights complaint. The Court expresses no opinion as to the merits of Petitioner's claims if brought in a *Bivens* action.

All pending motions are **DENIED AS MOOT**.

The Clerk shall **CLOSE THIS CASE** and enter judgment accordingly.

Further, the Clerk is **DIRECTED** to mail Petitioner a blank civil rights complaint form and instructions, along with a blank form motion/affidavit to proceed without prepaying fees or costs, to assist him if he wishes to bring his claims in a civil rights action.

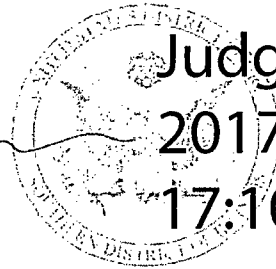
If petitioner wishes to appeal this dismissal, he may file a notice of appeal with this court within thirty days of the entry of judgment. FED. R. APP. P. 4(a)(4). A motion for leave to appeal *in forma pauperis* should set forth the issues petitioner plans to present on appeal. See FED. R. APP. P. 24(a)(1)(C). If petitioner does choose to appeal and is allowed to proceed IFP, he will be liable for a portion of the \$505.00 appellate filing fee (the amount to be determined based on his prison trust fund account records for the past six months) irrespective of the outcome of the appeal. See FED. R. APP. P. 3(e); 28 U.S.C. § 1915(e)(2); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999); *Lucien v. Jockisch*, 133 F.3d

464, 467 (7th Cir. 1998). A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) may toll the 30-day appeal deadline. A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of the judgment, and this 28-day deadline cannot be extended. It is not necessary for petitioner to obtain a certificate of appealability from this disposition of his § 2241 petition. *Walker v. O'Brien*, 216 F.3d 626, 638 (7th Cir. 2000).

IT IS SO ORDERED.

Signed this 1st day of March, 2017.

David A. Herndon



Judge Herndon

2017.03.01

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United States District Court Judge

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APPENDIX E

Letters of the Seventh Circuit Regarding the Dismissal
of the Petitioner's Appeal for being Unable to
Pay the Appellate Fees Upfront

APPENDIX B

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-3350
www.ca7.uscourts.gov

ORDER

May 16, 2017

Before

DIANE P. WOOD, *Chief Judge*
MICHAEL S. KANNE, *Circuit Judge*

No. 17-1609	MASOUD BAMDAD, Petitioner - Appellant v. MAUREEN P. BAIRD, Warden, et al., Respondents - Appellees
Originating Case Information:	
District Court No: 3:16-cv-01227-DRH Southern District of Illinois District Judge David R. Herndon	

The following is before the court: **MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**, filed on April 10, 2017, by the pro se appellant,

Upon consideration of appellant's motion, the district court's final order, and the record on appeal,

IT IS ORDERED that the motion for leave to proceed on appeal in forma pauperis is **DENIED**. Appellant shall pay the required docketing fee within 14 days, or this appeal will be dismissed for failure to prosecute pursuant to Circuit Rule 3(b).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

June 1, 2017

Before

DIANE P. WOOD, *Chief Judge*
MICHAEL S. KANNE, *Circuit Judge*

No. 17-1609	MASOUD BAMDAD, Petitioner - Appellant v. MAUREEN P. BAIRD, Warden, et al., Respondents - Appellees
Originating Case Information:	
District Court No: 3:16-cv-01227-DRH Southern District of Illinois District Judge David R. Herndon	

Upon consideration of the **MOTION FOR RECONSIDERATION OF PROCEEDING ON APPEAL UNDER FORMA PAUPERIS STATUTE OR EXTENSION OF TIME FOR PREPARING THE APPELLATE FEES**, filed on May 26, 2017, by the pro se appellant,

IT IS ORDERED that the request to reconsider this court's order denying the appellant's motion to proceed in forma pauperis is **DENIED**.

IT IS FURTHER ORDERED that the appellant's request for an extension is **GRANTED** only to the extent that the appellant shall pay the required docketing fee by September 1, 2017, or this appeal will be dismissed for failure to prosecute pursuant to Circuit Rule 3(b). No further extensions of time to pay the fee will be allowed.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

September 6, 2017

Before

DIANE P. WOOD, *Chief Judge*

No. 17-1609	MASOUD BAMDAD, Petitioner - Appellant v. MAUREEN P. BAIRD, Warden, et al., Respondents - Appellees
Originating Case Information:	
District Court No: 3:16-cv-01227-DRH Southern District of Illinois District Judge David R. Herndon	

Upon consideration of the **MOTION FOR RECONSIDERATION OF PREVIOUS ORDER BY CHIEF JUDGE WOOD**, filed on August 29, 2017, by the pro se appellant,

IT IS ORDERED that the appellant's request for another extension of time to pay the filing fee is **DENIED**.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF ISSUANCE OF MANDATE

October 2, 2017

To: Justine Flanagan
UNITED STATES DISTRICT COURT
Southern District of Illinois
East St. Louis, IL 62201-0000

No. 17-1609	MASOUD BAMDAD, Petitioner - Appellant v. MAUREEN P. BAIRD, Warden, et al., Respondents - Appellees
Originating Case Information:	
District Court No: 3:16-cv-01227-DRH Southern District of Illinois District Judge David R. Herndon	

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

TYPE OF DISMISSAL:

Circuit Rule 3(b)

STATUS OF THE RECORD:

no record to be returned

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date:

Received by:

form name: c7_Mandate(form ID: 135)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

October 2, 2017

By the Court:

No. 17-1609	MASOUD BAMDAD, Petitioner - Appellant v. MAUREEN P. BAIRD, Warden, et al., Respondents - Appellees
Originating Case Information:	
District Court No: 3:16-cv-01227-DRH Southern District of Illinois District Judge David R. Herndon	

This cause, docketed on March 22, 2017, is **DISMISSED** for failure to timely pay the required docketing fee, pursuant to Circuit Rule 3(b).

form name: c7_FinalOrderWMandate(form ID: 137)