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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ISAAC MARTINEZ,)	1:11-cv-00215-OWW-SKO-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS
)	TO DISMISS WITHOUT LEAVE TO AMEND
)	PETITIONER'S CLAIMS IN THE FIRST
v.)	AMENDED PETITION BASED ON STATE
)	LAW AND CONCERNING THE STATE
JAMES D. HARTLEY,)	POST-CONVICTION PROCESS (DOC. 9)
)	
Respondent.)	FINDINGS AND RECOMMENDATIONS
)	TO REFER THE REMAINING CLAIMS
)	BACK TO THE MAGISTRATE JUDGE

**OBJECTIONS DEADLINE:
THIRTY (30) DAYS**

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the first amended petition (FAP), which was filed on April 25, 2011.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus.

1 The Court must summarily dismiss a petition "[i]f it plainly
2 appears from the petition and any attached exhibits that the
3 petitioner is not entitled to relief in the district court...."
4 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
5 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
6 1990). Habeas Rule 2(c) requires that a petition 1) specify all
7 grounds of relief available to the Petitioner; 2) state the facts
8 supporting each ground; and 3) state the relief requested.
9 Notice pleading is not sufficient; rather, the petition must
10 state facts that point to a real possibility of constitutional
11 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
12 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
13 Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition
14 that are vague, conclusory, or palpably incredible are subject to
15 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
16 Cir. 1990).

17 Further, the Court may dismiss a petition for writ of habeas
18 corpus either on its own motion under Habeas Rule 4, pursuant to
19 the respondent's motion to dismiss, or after an answer to the
20 petition has been filed. Advisory Committee Notes to Habeas Rule
21 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
22 (9th Cir. 2001).

23 II. Allegations of the First Amended Petition

24 Here, Petitioner alleges that he is an inmate of the
25 California State Prison at Avenal, California, serving a sentence
26 of ten (10) years to life imposed in 1993 by the Los Angeles
27 Superior Court in case number VAO24361. (FAP 7.) Petitioner
28 challenges his sentence as well as the Superior Court's handling

1 of a petition for writ of habeas corpus filed by Petitioner in
2 that court in 2009. (Id.) Petitioner raises the following
3 claims: 1) his conviction and sentence violated his Fifth
4 Amendment protection against double jeopardy as well as the
5 constitution of California; and 2) his rights under federal law
6 and unspecified portions of the Constitution were violated by the
7 California Superior Court's failure to respond in a timely manner
8 to Petitioner's habeas petition in 2009. (Id.)

9 III. Failure to State a Cognizable Double Jeopardy Claim
10 Based on the California Constitution

11 Petitioner argues that his sentence to life plus ten years
12 for kidnaping for the purpose of robbery, and the enhancement of
13 his sentence for a prior conviction, prior prison term, arming,
14 and for use of a handgun violated both federal and state
15 constitutional provisions concerning double jeopardy. (FAP 7,
16 11.) Petitioner contends that the enhancement of his sentence
17 constituted punishment for the same offense because the
18 enhancements constituted lesser offenses that were necessarily
19 included in the offense of kidnaping for robbery.

20 Because the petition was filed after April 24, 1996, the
21 effective date of the Antiterrorism and Effective Death Penalty
22 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
23 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
24 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

25 To the extent that Petitioner relies on the constitution of
26 the state of California, Petitioner has failed to state a claim
27 cognizable in a proceeding pursuant to 28 U.S.C. § 2254.

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1 Federal habeas relief is available to state prisoners only
2 to correct violations of the United States Constitution, federal
3 laws, or treaties of the United States. 28 U.S.C. § 2254(a).
4 Federal habeas relief is not available to retry a state issue
5 that does not rise to the level of a federal constitutional
6 violation. Wilson v. Corcoran, 562 U.S. — , 131 S.Ct. 13, 16
7 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Alleged
8 errors in the application of state law are not cognizable in
9 federal habeas corpus. Souch v. Schaivo, 289 F.3d 616, 623 (9th
10 Cir. 2002).

11 A petition for habeas corpus should not be dismissed without
12 leave to amend unless it appears that no tenable claim for relief
13 can be pleaded were such leave granted. Jarvis v. Nelson, 440
14 F.2d 13, 14 (9th Cir. 1971).

15 Here, Petitioner's claim is deficient not from the absence
16 of facts, but rather because violations of the constitution of
17 the state of California are not subject to this Court's review
18 under 28 U.S.C. § 2254. Given the nature of the defect, the
19 court concludes that granting further leave to amend would be
20 futile. Accordingly, it will be recommended that the claim be
21 dismissed without leave to amend.

22 IV. Failure to State a Cognizable Claim concerning
23 California's Post-Conviction Processes

24 Petitioner alleges that after filing a petition for writ of
25 habeas corpus in the Superior Court concerning denial of a parole
26 release date, the court failed to respond to the petition in a
27 timely manner because the petition remained pending for five
28 months. (FAP 7.) Petitioner argues that his constitutional

1 rights under state and federal law to appeal the denial of parole
2 were violated.

3 As set forth above, to the extent that Petitioner bases his
4 claim on state law, Petitioner has failed to state facts that
5 would entitle him to relief in this proceeding because violations
6 of state law are not in themselves cognizable in a proceeding
7 pursuant to 28 U.S.C. § 2254.

8 Further, to the extent that Petitioner bases his claim on
9 the Federal Constitution, federal habeas relief is not available
10 to redress procedural errors in the state collateral review
11 process. Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998)
12 (claim concerning the alleged bias of a judge in a second post-
13 conviction proceeding for relief); Carriger v. Stewart, 95 F.3d
14 755, 763 (9th Cir. 1996), vacated on other grounds, Carriger v.
15 Stewart, 132 F.3d 463 (1997) (Brady claim in post-conviction
16 proceedings); Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.
17 1989) (claim that a state court's delay in deciding a petition
18 for post-conviction relief violated due process rights).
19 Further, there is no clearly established federal law, as
20 determined by the Supreme Court of the United States, recognizing
21 a due process right to a speedy appeal. Hayes v. Ayers, 632 F.3d
22 500, 523 (9th Cir. 2011).

23 Accordingly, Petitioner's claim concerning the five-month
24 delay by the state court in processing Petitioner's habeas
25 petition is not cognizable in this proceeding. Because the lack
26 of a cognizable claim results from the nature of the claim, and
27 not from the absence of factual allegations, granting leave to
28 amend the claim would be futile. It will, therefore, be

1 recommended that the claim be dismissed without leave to amend.

2 In summary, Petitioner's claims that are based on state law
3 and that concern the state post-conviction process are not
4 cognizable in this proceeding and must be dismissed without leave
5 to amend. With respect to the remaining claim or claims in the
6 petition, it will be recommended that upon the District Judge's
7 disposition of these findings and recommendations, the action be
8 referred back to the Magistrate Judge for further proceedings.

9 V. Recommendations

10 Accordingly, it is RECOMMENDED that:

11 1) Petitioner's claims based on state law and his claim
12 concerning delay in the post-conviction processes of the state
13 court be DISMISSED without leave to amend; and

14 2) Upon dismissal of the claims that are not cognizable,
15 the proceeding be REFERRED back to the Magistrate Judge for
16 further proceedings.

17 These findings and recommendations are submitted to the
18 United States District Court Judge assigned to the case, pursuant
19 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
20 the Local Rules of Practice for the United States District Court,
21 Eastern District of California. Within thirty (30) days after
22 being served with a copy, any party may file written objections
23 with the Court and serve a copy on all parties. Such a document
24 should be captioned "Objections to Magistrate Judge's Findings
25 and Recommendations." Replies to the objections shall be served
26 and filed within fourteen (14) days (plus three (3) days if
27 served by mail) after service of the objections. The Court will
28 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §

1 636 (b) (1) (C). The parties are advised that failure to file
2 objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
4 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 **Dated: July 29, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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