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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RONALD EDWARD McNABB,)	1:10-cv-01191-SKO-HC
)	
Petitioner,	)	ORDER DEEMING SUPPLEMENTAL BRIEF
	)	TO BE PART OF THE PETITION
	)	(DOCS. 1, 7)
v.)	
	)	ORDER CONSTRUING THE PETITION TO
WARDEN YATES, et al.,	)	CHALLENGE THE DENIAL OF PAROLE ON
	)	AUGUST 1, 2006
Respondent.)	
	)	ORDER DENYING WITHOUT PREJUDICE
	)	PETITIONER'S MOTIONS FOR AN
	)	EVIDENTIARY HEARING (DOC. 10) AND
	)	FOR SUMMARY JUDGMENT (DOC. 11)
		ORDER CONSTRUING PETITIONER'S
		PETITION FOR WRIT OF MANDATE
		(DOC. 13) TO BE A REQUEST FOR A
		DECISION ON THE MERITS
		ORDER DENYING PETITIONER'S
		REQUEST FOR A DECISION ON THE
		MERITS (DOC. 13)
		ORDER REQUIRING RESPONDENT TO
		FILE A RESPONSE TO THE PETITION
		ORDER SETTING A BRIEFING SCHEDULE
		ORDER DIRECTING THE CLERK TO
		SERVE DOCUMENTS ON THE ATTORNEY
		GENERAL

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant

1 to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1),
2 Petitioner has consented to the jurisdiction of the United States
3 Magistrate Judge to conduct all further proceedings in the case,
4 including the entry of final judgment, by manifesting consent in
5 a signed writing filed by Petitioner on August 30, 2010 (doc. 9).
6 Pending before the Court is the petition, which was filed in the
7 United States District Court for the Central District of
8 California on June 22, 2010, and transferred to this Court on
9 July 1, 2010.

10 I. Deeming the Supplemental Brief to Be Part of the
11 Petition

12 Several weeks after the petition was transferred to this
13 Court, Petitioner filed a supplemental brief on July 22, 2010.
14 The brief concerns denial of Petitioner's parole, and
15 specifically the absence of evidence for the conclusion that he
16 remains a danger to society. It thus appears appropriate to
17 consider the brief as a supplement to the petition.

18 Accordingly, the supplemental brief filed on July 22, 2010
19 (doc. 7) is DEEMED to be a part of, and supplement to, the
20 petition.

21 II. Screening and Construing the Petition

22 Rule 4 of the Rules Governing § 2254 Cases in the United
23 States District Courts (Habeas Rules) requires the Court to make
24 a preliminary review of each petition for writ of habeas corpus.
25 The Court must summarily dismiss a petition "[i]f it plainly
26 appears from the petition and any attached exhibits that the
27 petitioner is not entitled to relief in the district court...."
28 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.

1 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
2 1990). Habeas Rule 2(c) requires that a petition 1) specify all
3 grounds of relief available to the Petitioner; 2) state the facts
4 supporting each ground; and 3) state the relief requested.
5 Notice pleading is not sufficient; rather, the petition must
6 state facts that point to a real possibility of constitutional
7 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
8 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
9 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
10 that are vague, conclusory, or palpably incredible are subject to
11 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
12 Cir. 1990).

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

19 Here, the petition refers to the denial of Petitioner's
20 parole. Petitioner argues that the denial violated 1) his right
21 to due process of law under the Fourteenth Amendment because of
22 an absence of evidence to support the finding concerning the
23 danger that Petitioner presented and the callous nature of his
24 offense, 2) his right to be protected against ex post facto laws,
25 and 3) his Eighth Amendment right to be free of cruel and unusual
26 punishments.

27 Although the petition includes materials relating to
28 numerous, past denials of parole (Pet. 10-15, Supp. [doc. 7] 6-

1 36), Petitioner complains of the continuing denial of parole.
2 The Court understands that the gravamen of Petitioner's complaint
3 is thus the most recent denial of his parole that occurred on
4 August 1, 2006. (Pet. 16.) To construe the petition as
5 challenging other, past denials would be inconsistent with the
6 governing procedural principle that a habeas petition
7 appropriately addresses only a single tribunal's decision. Rule
8 2(e) of the Rules Governing Section 2254 Cases in the United
9 States District Courts (Habeas Rules). Thus, should Petitioner
10 wish to challenge a different decision or decisions, he would
11 have to file a separate petition for each parole decision
12 challenged. Further, Petitioner does not purport to have
13 exhausted state court remedies as to all the denials of parole
14 that occurred in the past.

15 Therefore, the Court CONSTRUES the petition as challenging
16 the decision of August 1, 2006, finding Petitioner unsuitable for
17 parole.¹

18 III. Denial of Petitioner's Motion for Evidentiary Hearing

19 On September 1, 2010, Petitioner filed a motion for an
20 evidentiary hearing on the ground that the merits of a factual
21 dispute were not resolved in state court proceedings. (Doc. 10.)

22 The legal standards that govern Petitioner's motion are
23 established. If a petition is not dismissed, the Court must
24

25 ¹The Court notes that Petitioner appears to have twice challenged this
26 particular denial of parole, but petitions in both cases were dismissed
27 without prejudice. The petition filed in McNabb v. Board of Prison Terms,
28 1:07-cv-01535-AWI-SMS, was dismissed without prejudice for lack of exhaustion
by judgment entered February 26, 2008 (docs. 9, 12, 13). The petition filed
in McNabb v. Warden, et al., 1:08-cv-00173-LJO-SMS, was dismissed without
prejudice at Petitioner's request by judgment entered on March 4, 2008 (docs.
7, 8).

1 review the answer, any transcripts and records of state court
2 proceedings, and any materials submitted under Rule 7 to
3 determine whether an evidentiary hearing is warranted. Rule 8(a)
4 of the Rules Governing Section 2254 Cases in the United States
5 District Courts (Habeas Rules). In considering a request for an
6 evidentiary hearing, the Court must first determine whether a
7 factual basis exists in the record to support the petitioner's
8 claim. Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999).

9 In this order, this Court will direct the Respondent to file
10 a response to the petition. It is thus too early to determine
11 whether Petitioner is entitled to an evidentiary hearing because
12 the full record is not before the Court. Further, Petitioner has
13 not demonstrated that there is a disputed material fact that
14 would require factual development by way of an evidentiary
15 hearing.

16 Accordingly, Petitioner's motion for an evidentiary hearing
17 is DENIED without prejudice.

18 IV. Denial of Petitioner's Motion for Summary Judgment

19 On October 27, 2010, Petitioner filed a motion for summary
20 judgment. (Doc. 11.)

21 Petitioner contends that his petition and the supplement
22 thereto establish that his petition should be granted. However,
23 the full record of the proceedings before the parole authority is
24 not before the Court and Respondent has not briefed the issues.
25 Thus, it is premature to consider Petitioner's motion for summary
26 judgment.

27 Petitioner asserts in his motion that there are no issues of
28

1 material fact.² Although this may ultimately be shown by a
2 complete record to be true, at the present stage of the
3 proceedings, Petitioner has not yet shown that he is entitled to
4 judgment as a matter of law.

5 Accordingly, Petitioner's motion for summary judgment is
6 DENIED without prejudice.

7 V. Order Construing the Petition for Writ of Mandamus
8 to Be a Request for a Decision on the Merits and Denying
9 the Request

10 On December 8, 2010, Petitioner filed a document entitled,
11 "Petition for Writ of Mandamus." (Doc. 13.) This document was
12 filed within the instant habeas corpus proceeding and is directed
13 to the United States District Court for the Eastern District of
14 California. Further, review of the document reflects that
15 Petitioner seeks to have the Court consider the petition for writ
16 of habeas corpus on the merits, grant the petition, and release
17 Petitioner. (Doc. 13, 1-2.) Petitioner cites to Johnson v.
18 Rogers, 917 F.2d 1283 (10th Cir. 1990), in which the Court of
19 Appeals directed a district court to proceed to determine a
20 habeas petition that had been at issue for over fourteen months.

21 Because the document seeking mandamus relief was directed to
22 this Court and seeks only that the Court "READ, CONSIDER, AND
23 GRANT" the petition for writ of habeas corpus (doc. 13, 2), the
24 Court CONSTRUES Petitioner's petition for writ of mandamus to be
25 a request for a decision on the merits.

26 In the instant case, the petition is not at issue; a
27 response is just being ordered now. It would be premature to

28 ²This assertion appears to be inconsistent with Petitioner's request for
an evidentiary hearing.

1 consider the merits of the petition.

2 Accordingly, the Court DENIES Petitioner's request for a
3 decision on the merits.

4 VI. Response to the Petition

5 The Court has conducted a preliminary review of the
6 petition. It is not clear from the face of the petition whether
7 Petitioner is entitled to relief. 28 U.S.C. § 2243.

8 Accordingly, pursuant to Rule 4 of the Rules Governing Section
9 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,³
10 the Court hereby ORDERS:

11 1. Respondent SHALL FILE a RESPONSE to the petition⁴
12 within **SIXTY (60) days** of the date of service of this
13 order. See Rule 4, Rules Governing Section 2254 Cases;
14 Cluchette v. Rushen, 770 F.2d 1469, 1473-1474 (9th Cir.
15 1985) (court has discretion to fix time for filing a
16 response). A response can be made by filing one of the
17 following:

18 A. An ANSWER addressing the merits of the petition.
19 Respondent SHALL INCLUDE with the ANSWER any and
20 all transcripts or other documents necessary for
21 the resolution of the issues presented in the
22 petition. See Rule 5, Rules Governing Section

23
24 ³The Federal Rules of Civil Procedure "apply to proceedings for habeas
25 corpus ... to the extent that the practice in those proceedings (A) is not
26 specified in a federal statute, the Rules Governing Section 2254 Cases, or the
27 Rules Governing Section 2255 Cases; and (B) has previously conformed to the
28 practice in civil actions." Fed. R. Civ. P. 81(a)(4). Rule 12 also provides
"[t]he Federal Rules of Civil Procedure, to the extent that they are not
inconsistent with any statutory provisions or these rules, may be applied to a
proceeding under these rules." Rule 12, Rules Governing Section 2254 Cases.

⁴Respondent is advised that a scanned copy of the petition is available
in the Court's electronic case filing system (CM/ECF).

1 2254 Cases. Any argument by Respondent that a
2 claim of Petitioner has been *procedurally*
3 *defaulted* SHALL BE MADE in the ANSWER, but must
4 also address the merits of the claim asserted.

5 B. A MOTION TO DISMISS the petition. A motion to
6 dismiss SHALL INCLUDE copies of all Petitioner's
7 state court filings and dispositive rulings. See
8 Rule 5, Rules Governing Section 2254 Cases.⁵

9 2. If Respondent files an answer to the petition,
10 Petitioner MAY FILE a traverse within **THIRTY (30) days**
11 of the date Respondent's answer is filed with the
12 Court. If no traverse is filed, the petition and
13 answer are deemed submitted at the expiration of the
14 thirty (30) days.

15 3. If Respondent files a motion to dismiss, Petitioner
16 SHALL FILE an opposition or statement of non-opposition
17 within **TWENTY-ONE (21) days** of the date Respondent's
18 motion is filed with the Court. If no opposition is
19 filed, the motion to dismiss is deemed submitted at the
20 expiration of the thirty (30) days. Any reply to an
21 opposition to the motion to dismiss SHALL BE FILED
22 within **SEVEN (7) days** after the opposition is served.

23
24 ⁵Rule 4 of the Rules Governing Section 2254 Cases provides that upon the
25 Court's determination that summary dismissal is inappropriate, the "judge must
26 order the respondent to file an answer, motion, or other response within a
27 fixed time, or to take other action the judge may order." Rule 4, Rules
28 Governing Section 2254 Cases; see also Advisory Committee Notes to Rules 4 and
5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate
the need for filing an answer on the substantive merits of the petition and
that the respondent may file a motion to dismiss for failure to exhaust);
White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (providing that a motion
to dismiss pursuant to Rule 4 is proper in a federal habeas proceeding).

1 4. Unless already submitted, both Respondent and
2 Petitioner SHALL COMPLETE and RETURN to the Court
3 within **THIRTY (30) days** a consent/decline form
4 indicating whether the party consents or declines to
5 consent to the jurisdiction of the United States
6 Magistrate Judge pursuant to Title 28 U.S.C.
7 § 636(c)(1).

8 5. The Clerk of the Court is DIRECTED to SERVE a copy of
9 this order on the Attorney General or his
10 representative.

11 All motions shall be submitted on the record and briefs
12 filed without oral argument unless otherwise ordered by the
13 Court. Local Rule 230(1). Requests for extensions of time will
14 only be granted upon a showing of good cause. All provisions of
15 Local Rule 110 are applicable to this order.

16
17 IT IS SO ORDERED.

18 **Dated: December 16, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE