

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANIBAL ALONSO CRUZ,) 1:10-cv-02207-LJO-SKO-HC
)
Petitioner,) ORDER GRANTING PETITIONER LEAVE
) TO FILE A MOTION TO AMEND THE
) PETITION TO NAME A PROPER
v.) RESPONDENT NO LATER THAN THIRTY
) (30) DAYS AFTER THE DATE OF
(UNNAMED),) SERVICE OF THIS ORDER
)
Respondent.) FINDINGS AND RECOMMENDATION TO
) DISMISS STATE LAW CLAIM AND TO
_____) REQUIRE A RESPONSE WITH RESPECT
TO PETITIONER'S OTHER CLAIM (DOC.
1)

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 through 304. Pending before the Court is the petition, which was filed on November 29, 2010.

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

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

18 Further, the Court may dismiss a petition for writ of habeas
19 corpus either on its own motion under Habeas Rule 4, pursuant to
20 the respondent's motion to dismiss, or after an answer to the
21 petition has been filed. Advisory Committee Notes to Habeas Rule
22 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
23 (9th Cir. 2001).

24 Here, Petitioner, an inmate of the Lancaster State Prison,
25 is serving consecutive indeterminate life sentences imposed on
26 January 22, 2008, in the Kern County Superior Court for forcible
27 sexual offenses. (Pet. 1.) Petitioner challenges his
28 conviction, which was suffered within the Eastern District of

1 California.

2 II. Petitioner's Failure to Name a Proper Respondent

3 In this case, Petitioner did not name anyone as the
4 Respondent. Petitioner is incarcerated at the California State
5 Prison at Los Angeles County (LAC) located in Lancaster,
6 California. The warden at that facility is Brenda Cash.

7 A petitioner seeking habeas corpus relief under 28 U.S.C.
8 § 2254 must name the state officer having custody of him as the
9 respondent to the petition. Habeas Rule 2(a); Ortiz-Sandoval v.
10 Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California
11 Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the
12 person having custody of an incarcerated petitioner is the warden
13 of the prison in which the petitioner is incarcerated because the
14 warden has "day-to-day control over" the petitioner and thus can
15 produce the petitioner. Brittingham v. United States, 982 F.2d
16 378, 379 (9th Cir. 1992); see also, Stanley v. California Supreme
17 Court, 21 F.3d 359, 360 (9th Cir. 1994). However, the chief
18 officer in charge of state penal institutions is also
19 appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360.

20 Petitioner's failure to name a proper respondent requires
21 dismissal of his habeas petition for lack of jurisdiction.
22 Stanley, 21 F.3d at 360.

23 However, the Court will give Petitioner the opportunity to
24 cure this defect by amending the petition to name a proper
25 respondent, such as the warden of his facility. See, In re
26 Morris, 363 F.3d 891, 893-94 (9th Cir. 2004). In the interest of
27 judicial economy, Petitioner need not file an amended petition.
28 Instead, Petitioner may file a motion entitled "Motion to Amend

1 the Petition to Name a Proper Respondent" wherein Petitioner may
2 name the proper respondent in this action.

3 III. Order Granting Leave to File a Motion to Amend
4 the Petition

5 Accordingly, Petitioner is GRANTED thirty (30) days from the
6 date of service of this order in which to file a motion to amend
7 the instant petition and name a proper respondent. Failure to
8 amend the petition and state a proper respondent will result in a
9 recommendation that the petition be dismissed for lack of
10 jurisdiction.

11 IV. Findings and Recommendation to Dismiss Petitioner's
12 Claim concerning California Penal Code § 654

13 Petitioner raises two claims concerning his convictions: 1)
14 Petitioner was denied his right pursuant to the Fifth, Sixth, and
15 Fourteenth Amendments to put on a defense when information
16 concerning Petitioner's previous relationship with the victim was
17 excluded at argument; and 2) because there was only a single
18 assault, sentences on multiple counts violate Cal. Pen. Code §
19 654, which imposes limits on multiple punishments for multiple
20 crimes.

21 Federal habeas relief is available to state prisoners only
22 to correct violations of the United States Constitution, federal
23 laws, or treaties of the United States. 28 U.S.C. § 2254(a).
24 Federal habeas relief is not available to retry a state issue
25 that does not rise to the level of a federal constitutional
26 violation. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).
27 Alleged errors in the application of state law are not cognizable
28 in federal habeas corpus. Souch v. Schiavo, 289 F.3d 616 (9th
Cir. 2002) (a claim challenging state court's discretionary

1 decision concerning application of state sentencing law presented
2 only state law issues and was not cognizable in a proceeding
3 pursuant to 28 U.S.C. § 2254); Langford v. Day, 110 F.3d 1380,
4 1389 (9th Cir. 1996). The Court accepts a state court's
5 interpretation of state law. Langford v. Day, 110 F.3d 1380,
6 1389 (9th Cir. 1996). In a habeas corpus proceeding, this Court
7 is bound by the California Supreme Court's interpretation of
8 California law unless it is determined that the interpretation is
9 untenable or a veiled attempt to avoid review of federal
10 questions. Murtishaw v. Woodford, 255 F.3d 926, 964 (9th Cir.
11 2001).

12 Application of Cal. Pen. Code § 654 presents a question of
13 state law, and not federal law. Watts v. Bonneville, 879 F.2d
14 685, 687 (9th Cir. 1989). Absent a showing of fundamental
15 unfairness, a state court's sentencing decisions, including a
16 decision whether to impose sentences concurrently or
17 consecutively, are generally a matter of state criminal procedure
18 and thus do not justify federal habeas corpus relief. Christian
19 v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994); Cacoperdo v.
20 Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994).

21 In the petition before the Court, with respect to
22 Petitioner's second claim concerning a violation of § 654, it
23 does not appear that Petitioner alleged fundamental unfairness in
24 the state courts. Petitioner instead claimed an error in the
25 application of state sentencing laws. Petitioner's second claim
26 concerning sentencing error is not cognizable in a proceeding
27 pursuant to § 2254.

28 Therefore, it must be dismissed.

1 However, Petitioner's first claim, when liberally read,
2 appears to allege a cognizable claim of an absence of fundamental
3 fairness in connection with the trial process.

4 V. Recommendation

5 Accordingly, it is RECOMMENDED that:

6 1) Petitioner's second claim, concerning the application of
7 Cal. Pen. Code § 654, be DISMISSED because it is a claim
8 concerning state law that is not cognizable in a proceeding
9 pursuant to 28 U.S.C. § 2254; and

10 2) Insofar as Petitioner claims a violation of his right to
11 a fundamentally fair trial and to due process of law based on
12 exclusion of evidence or limitation of argument concerning the
13 Petitioner's relationship with the victim, the Respondent should
14 be ordered to file a response to the petition.

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

1 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
2 1153 (9th Cir. 1991).

3
4 IT IS SO ORDERED.

5 **Dated: December 6, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE