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6 UNITED STATES DISTRICT COURT
7
8 EASTERN DISTRICT OF CALIFORNIA

9 ERMILIO RODRIGUEZ MORALES,) 1:13-cv-00683-BAM-HC
10)
11) Petitioner,) ORDER SUBSTITUTING ACTING WARDEN
12) FRED FOULK AS RESPONDENT
13)
14) v.) ORDER DISMISSING THE PETITION
15) (DOC. 1) WITH LEAVE TO FILE A
16) FIRST AMENDED PETITION NO LATER
17) THAN THIRTY (30) DAYS AFTER
18) SERVICE OF THIS ORDER
19)
20) FRED FOULK, Warden,)
21) Respondent.)
22)
23) ORDER DIRECTING THE CLERK TO SEND
24) PETITIONER A BLANK PETITION FORM
25)

26 **FILING DEADLINE: THIRTY (30) DAYS**

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1 motion to dismiss the petition for lack of jurisdiction or, in
2 the alternative, to transfer the petition to this Court because
3 Petitioner was convicted in the Superior Court of the State of
4 California, County of Kern, a trial court that is located within
5 the territory of this district. In the motion, the Respondent
6 stated that although Petitioner failed to name a respondent other
7 than "Warden," Fred Foulk is the acting warden at High Desert
8 State Prison, where Petitioner is currently incarcerated. (Doc.
9 5, 1, n.1.)

10 Fed. R. Civ. P. 25(d) provides that when a public officer
11 who is a party to a civil action in an official capacity dies,
12 resigns, or otherwise ceases to hold office while the action is
13 pending, the officer's successor is automatically substituted as
14 a party. It further provides that the Court may order
15 substitution at any time, but the absence of such an order does
16 not affect the substitution.

17 Here, it is clear that in responding to the petition,
18 Respondent waived any objection to jurisdiction over the
19 Respondent. Respondent further confirmed that the acting warden
20 at Petitioner's institution of confinement is Warden Fred Foulk.

21 Accordingly, it will be ordered that Warden Fred Foulk be
22 substituted as Respondent.

23 II. Screening the Petition

24 Rule 4 of the Rules Governing § 2254 Cases in the United
25 States District Courts (Habeas Rules) requires the Court to make
26 a preliminary review of each petition for writ of habeas corpus.
27 The Court must summarily dismiss a petition "[i]f it plainly
28 appears from the petition and any attached exhibits that the

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

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

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

24 Here, Petitioner alleges that he is serving a twenty-five-
25 year sentence imposed in the Kern County Superior Court on
26 December 17, 2010, for violating Cal. Pen. Code §§ 288a(c)(2),
27 288(a)(b)(2), and 288(c)(1). Petitioner alleges the following
28 claims: 1) "SINCE RECANTATIONS RESULT IN REVERSAL PROCEEDING

1 DECLARATION FROM SELINA SHOULD SEEK A STOLL EVALUATION HEARING
2 ACTUAL INNOCENCE" (doc. 1, 3); 2) "TO BE SUPPRESSION OF EVIDENCE
3 WHICH CAN BE SUPPORTED BY THE FACTS WHICH ARE BEING PRESENTED IN
4 THE COURT" (id.); and 3) "MS SINGH DID NOT PRESERVE THE ISSUE ON
5 THE CREDIBLE IN HER TESTIMONY" (id. at 4).

6 Petitioner states supporting facts for each of these claims.
7 The facts stated in support of the first claim were that
8 Petitioner's trial attorney was ineffective, and that due process
9 was violated under the sentencing guidelines that should have
10 been dismissed for reasons relating to expert or forensic
11 evidence. (Id. at 3.)

12 The facts supporting the second claim are that petitioner's
13 appellate attorney agreed with a defense expert's assessment that
14 forensic evidence was insufficient to establish guilt beyond a
15 reasonable doubt, but that the law gives this determination to
16 the jury. (Id.)

17 The supporting facts for the third claim are as follows:

18 THE PROSECUTIONS EXPERT GAVE AN OPINION OF THE FORENSIC
19 THAT EXPERTS SAID YOU DIDN'T DO IT THIS SHOULD HAD BEEN
20 SUPPRESS AND THE MOTION TO BE SET FOR A NEW TRIAL AND FOR
21 INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL TO BE UPHELD ON];
22 THE MAJOR POINT OF ALL THE LACK OF EVIDENCE WHICH DIDN'T
23 SUPPORT THE CLIAM (sic).

24 (Id. at 4.)

25 The notice pleading standard applicable in ordinary civil
26 proceedings does not apply in habeas corpus cases; rather, Habeas
27 Rules 2(c), 4, and 5(b) require a more detailed statement of all
28 grounds for relief and the facts supporting each ground; the
petition is expected to state facts that point to a real
possibility of constitutional error and show the relationship of

1 the facts to the claim. Habeas Rule 4, Advisory Committee Notes,
2 1976 Adoption; Mayle v. Felix, 545 U.S. 644, 655 (2005);
3 O'Bremski v. Maass, 915 F.2d at 420. This is because the purpose
4 of the rules is to assist the district court in determining
5 whether the respondent should be ordered to show cause why the
6 writ should not be granted and to permit the filing of an answer
7 that satisfies the requirement that it address the allegations in
8 the petition. Mayle v. Felix, 545 U.S. at 655. Allegations in a
9 petition that are vague, conclusional, or palpably incredible,
10 and that are unsupported by a statement of specific facts, are
11 insufficient to warrant relief and are subject to summary
12 dismissal. Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995);
13 James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

14 Petitioner's statement of his claims is uncertain. With
15 respect to Petitioner's first claim, the recantation is not
16 identified; further, it is unclear what conduct of Petitioner's
17 trial attorney is the basis of the claim or whether the conduct
18 relates to trial proceedings or the sentencing. With respect to
19 Petitioner's second claim, it is unclear what evidence was or was
20 not suppressed or what aspect of the evidence, if any, was
21 insufficient. With respect to Petitioner's third claim, it is
22 unclear what issue was not preserved or what testimony is
23 referred to, and the nature and significance of any expert
24 testimony is not clear. In short, Petitioner has not clearly and
25 simply set forth for each claim the legal basis of the claim and
26 the facts supporting the claim. Because the petition is so
27 unclear and uncertain, it would be a futile act for the Court to
28 direct the Respondent to file an answer to the petition.

1 However, it is possible that Petitioner could clearly and
2 simply state the legal bases and the supporting facts for each of
3 his claims.

4 Accordingly, the claims will be dismissed as uncertain, but
5 Petitioner will be given leave to file an amended petition with
6 respect to the claims.

7 III. Amendment of the Petition

8 The instant petition must be dismissed for the reasons
9 stated above. Petitioner will be given an opportunity to file a
10 first amended petition to cure the deficiencies. Petitioner is
11 advised that failure to file a petition in compliance with this
12 order (i.e., a completed petition with cognizable federal claims
13 and the supporting facts clearly stated and with exhaustion of
14 state remedies clearly stated) within the allotted time will
15 result in the dismissal of the petition and the termination of
16 the action.

17 Petitioner is advised that the amended petition should be
18 entitled, "First Amended Petition," and it must refer to the case
19 number in this action. Further, Petitioner is informed that
20 Local Rule 220 provides that unless prior approval to the
21 contrary is obtained from the Court, every pleading as to which
22 an amendment or supplement is permitted shall be retyped or
23 rewritten and filed so that it is complete in itself without
24 reference to the prior or superseded pleading.

25 IV. Disposition

26 Accordingly, it is ORDERED that:

27 1) The Clerk is DIRECTED to substitute as Respondent in
28 this action Warden Fred Foulk; and

2) The petition for writ of habeas corpus is DISMISSED with leave to amend; and

2) Petitioner is GRANTED thirty (30) days from the date of service of this order to file an amended petition in compliance with this order; and

3) The Clerk of the Court is DIRECTED to send Petitioner a form petition pursuant to 28 U.S.C. § 2254.

IT IS SO ORDERED.

Dated: June 25, 2013

/s/ **Barbara A. McAuliffe**
UNITED STATES MAGISTRATE JUDGE