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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO VERA,  
Petitioner,  
v.  
CONNIE GIPSON,  
Respondent.

Case No. 1:13-cv-00814-AWI-SKO-HC  
FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITIONER'S FIRST THROUGH  
FOURTH CLAIMS WITHOUT LEAVE TO  
AMEND (DOC. 1)  
AND TO REFER THE MATTER BACK TO THE  
MAGISTRATE JUDGE FOR PROCEEDINGS ON  
THE REMAINING CLAIM(S)

**OBJECTIONS DEADLINE: 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 May 30, 2013.

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

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

17 The Court may dismiss a petition for writ of habeas corpus  
18 either on its own motion under Habeas Rule 4, pursuant to the  
19 respondent's motion to dismiss, or after an answer to the petition  
20 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976  
21 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.  
22 2001). However, a petition for habeas corpus should not be  
23 dismissed without leave to amend unless it appears that no tenable  
24 claim for relief can be pleaded were such leave granted. Jarvis v.  
25 Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

26 Here, Petitioner, an inmate of the California Substance Abuse  
27 Treatment Facility at Corcoran, California (CSATF), challenges a  
28 decision of California's Board of Parole Hearings (BPH) which he

1 describes as occurring on February 15, 2013. (Pet., doc. 1, 1.)  
2 However, Petitioner also submits an affidavit describing a parole  
3 hearing scheduled to take place before the BPH on February 15, 2012,  
4 to which Petitioner was not taken. Instead, on Friday February 10,  
5 2012, or on February 17, 2012, Petitioner was transported to a  
6 hearing without being notified of the reasons for the hearing. (Id.  
7 at 20.) At the beginning of the hearing, Petitioner requested a  
8 postponement, but the translating officer did not or was unable to  
9 communicate that to the hearing officer, who then ordered that  
10 Petitioner be removed momentarily from the proceeding. The hearing  
11 proceeded in Petitioner's absence, and he did not have an  
12 opportunity to present his case. A correctional officer gave  
13 Petitioner some papers but did not read them to Petitioner. (Id.)

14 Petitioner's allegations in the petition are truncated and  
15 somewhat unclear. He has attached documentation concerning numerous  
16 prison appeals which do not appear to relate directly to the claims  
17 before the Court. The Court will set forth Petitioner's allegations  
18 to the extent that they can reasonably be understood. Petitioner  
19 raises the following claims in the petition: 1) a governmental  
20 entity, which appears to be a California court, failed to notify  
21 Petitioner that a pending case would be dismissed for failure to  
22 prosecute based on Petitioner's inability to gain access to the law  
23 library, and the court thereby interfered with Petitioner's access  
24 to an appeal (pet. 4-5); 2) Petitioner suffered "mail fraud" or  
25 "censorship" when on September 27, 2012, he gave records and an  
26 informal reply to a correctional officer to mail, the officer  
27 refused to sign the proof of service, and Petitioner received a  
28 notice from a state court on October 17, 2012, that the records had

1 not been received (id. at 4-6); 3) the CDCR refused to provide  
2 Petitioner with the file review that Commissioner Lopez had ordered  
3 and, therefore, was in contempt of Commissioner Lopez's order (id.  
4 at 7, 40, 67); 4) a preliminary injunction or temporary restraining  
5 order is appropriate because the Kern County Superior Court failed  
6 to grant Petitioner a default judgment in his habeas proceeding (id.  
7 at 7, 31); and 5) a parole hearing was held on or about February 10  
8 or 17, 2012, without notice to Petitioner, without his presence, and  
9 without his having an opportunity to present his case (id. at 20,  
10 67).

## 11 II. Claims concerning Conditions of Confinement

12 Because the petition was filed after April 24, 1996, the  
13 effective date of the Antiterrorism and Effective Death Penalty Act  
14 of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.  
15 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
16 1499 (9th Cir. 1997).

17 A federal court may only grant a state prisoner's petition for  
18 writ of habeas corpus if the petitioner can show that "he is in  
19 custody in violation of the Constitution or laws or treaties of the  
20 United States." 28 U.S.C. § 2254(a). A habeas corpus petition is  
21 the correct method for a prisoner to challenge the legality or  
22 duration of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th  
23 Cir. 1991) (quoting Preiser v. Rodriguez, 411 U.S. 475, 485 (1973));  
24 Advisory Committee Notes to Habeas Rule 1, 1976 Adoption.

25 In contrast, a civil rights action pursuant to 42 U.S.C.  
26 § 1983 is the proper method for a prisoner to challenge the  
27 conditions of that confinement. McCarthy v. Bronson, 500 U.S. 136,  
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1 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at 574;  
2 Advisory Committee Notes to Habeas Rule 1.

3 Here, Petitioner's first claim concerning interference with  
4 access to the courts does not directly concern the legality or  
5 duration of Petitioner's confinement; rather, it relates to the  
6 conditions under which Petitioner was confined. Petitioner's second  
7 claim concerning interference with his outgoing legal mail also  
8 relates to the conditions of Petitioner's confinement and not the  
9 legality or duration of that confinement. Because the claims  
10 concern prison conditions, they should be brought in a civil rights  
11 action. Thus, even if leave to amend were granted, Petitioner would  
12 not be able to state a tenable habeas claim.

13 Accordingly, Petitioner's two conditions claims should be  
14 dismissed without leave to amend.

15 III. State Law Claims

16 Petitioner's third claim concerning contempt of a state  
17 officer's order and his fourth claim concerning the state court's  
18 failure to grant a default judgment in a habeas proceeding relate to  
19 actions of state judicial or executive officers that were  
20 necessarily undertaken pursuant to state law.

21 Petitioner's third claim alleges that the California Department  
22 of Corrections and Rehabilitation (CDCR) refused to provide  
23 Petitioner with a file review that Commissioner Lopez had ordered,  
24 and thus the CDCR was in contempt of Commissioner Lopez's order.  
25 The nature and context of the order for a file review are unclear,  
26 but the gravamen of Petitioner's complaint is that the CDCR's  
27 omission was not in compliance with the order of a state officer who  
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1 apparently was a commissioner of the BPH, and who necessarily was  
2 acting according to state law.

3 Similarly, with respect to Petitioner's fourth claim that a  
4 state court failed to award Petitioner a default judgment in his  
5 habeas corpus proceeding, the Kings County Superior Court  
6 expressly informed Petitioner that his motion for default judgment  
7 would not be processed because there were no default judgments in  
8 habeas corpus. (Id. at 31.) The court was thus acting pursuant to  
9 its interpretation and application of state law.

10 Federal habeas relief is available to state prisoners only to  
11 correct violations of the United States Constitution, federal laws,  
12 or treaties of the United States. 28 U.S.C. § 2254(a). Federal  
13 habeas relief is not available to retry a state issue that does not  
14 rise to the level of a federal constitutional violation. Wilson v.  
15 Corcoran, 562 U.S. —, 131 S.Ct. 13, 16 (2010); Estelle v. McGuire,  
16 502 U.S. 62, 67-68 (1991). Alleged errors in the application of  
17 state law are not cognizable in federal habeas corpus. Souch v.  
18 Schaivo, 289 F.3d 616, 623 (9th Cir. 2002) (an ex post facto claim  
19 challenging state court's discretionary decision concerning  
20 application of state sentencing law presented only state law issues  
21 and was not cognizable in a proceeding pursuant to 28 U.S.C.  
22 § 2254); Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996). The  
23 Court accepts a state court's interpretation of state law. Langford  
24 v. Day, 110 F.3d at 1389. In a habeas corpus proceeding, this Court  
25 is bound by the California Supreme Court's interpretation of  
26 California law unless the interpretation is deemed untenable or a  
27 veiled attempt to avoid review of federal questions. Murtishaw v.  
28 Woodford, 255 F.3d 926, 964 (9th Cir. 2001).

1 Here, there is no basis for a conclusion that the CDCR or the  
2 state court attempted to avoid review of federal questions. This  
3 Court is bound by the state court's interpretation and application  
4 of state law. Because Petitioner's third and fourth claims present  
5 solely questions of state law, they are not cognizable in a  
6 proceeding pursuant to 28 U.S.C. § 2254.

7 Accordingly, Petitioner's claims concerning the CDCR's failure  
8 to comply with the order of a state commissioner and a state court's  
9 failure to grant Petitioner's motion for a default judgment should  
10 be dismissed without leave to amend. In sum, Petitioner's first,  
11 second, third, and fourth claims should be dismissed without leave  
12 to amend.

13 Petitioner's pro se petition may be construed as setting forth  
14 an additional claim, the fifth, relating to the parole proceedings  
15 and the state authorities' failure to provide him with a file review  
16 or access to documents before the hearing, notice of the hearing, an  
17 opportunity to be present at the hearing, and an opportunity to be  
18 heard. Petitioner cites to cases that articulate due process  
19 standards. Accordingly, the Court understands that Petitioner  
20 raises an additional due process claim or claims relating to the  
21 denial of an opportunity to have access to his records and the  
22 denial of notice and the opportunity to be present and to be heard.

23 In light of the additional claim that would remain pending  
24 before the Court if these findings and recommendations were adopted  
25 by the District Judge, it will be recommended that after the  
26 District Judge has completed consideration of the findings and  
27 recommendations, the matter be referred back to the Magistrate Judge  
28 for further proceedings on the remaining claim, including

1 preparation of an order to the Respondent to respond to the  
2 remaining due process claim or claims in the petition.

3 IV. Recommendations

4 Accordingly, it is RECOMMENDED that:

5 1) Petitioner's first, second, third, and fourth claims be  
6 DISMISSED without leave to amend because they are not cognizable in  
7 this proceeding pursuant to 28 U.S.C. § 2254; and

8 2) The matter be REFERRED back to the Magistrate Judge for  
9 further proceedings on the remaining due process claim or claims,  
10 including preparation of an order directing Respondent to respond to  
11 the remaining due process claim or claims in the petition.

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

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1 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: July 16, 2013

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE