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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

XIONG YENG,  
Petitioner,  
v.  
RICK HILL, Warden,  
Respondent.

Case No. 1:13-cv-01734-AWI-BAM-HC  
FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITIONER'S STATE LAW  
CLAIMS WITHOUT LEAVE TO AMEND (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 October 28, 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 preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly appears

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

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

21 A petition for habeas corpus should not be dismissed without  
22 leave to amend unless it appears that no tenable claim for relief  
23 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d  
24 13, 14 (9th Cir. 1971).

25 Petitioner, an inmate of Folsom State Prison, alleges that he  
26 is serving a sentence of fifteen years to life with the possibility  
27 of parole for attempted murder with use of a firearm, plus a  
28 concurrent term of seven years for shooting into an inhabited

1 vehicle, in violation of Cal. Pen. Code §§ 664, 187, 12022(a)(1),  
2 and 246. The sentence was imposed in 1992 in the Superior Court of  
3 the State of California, County of Merced. (Pet., doc. 1 at 1, 8.)  
4 Petitioner contends that after jury trial, he was convicted as an  
5 accessory, and that the sentence subsequently imposed is unlawful  
6 and unconstitutional because it is based on liability greater than  
7 that of the principal, who pursuant to plea bargain was convicted of  
8 shooting into an inhabited vehicle. (Id. at 2-6, 28, 34.)

9 The Court will not attempt a full summary of Petitioner's  
10 claims in the petition, which is over two hundred and fifty pages  
11 long. In the petition form, which commences at page 28 of the  
12 petition, Petitioner alleges the following claims: 1) trial counsel  
13 was ineffective in failing to object to and otherwise defend against  
14 the unlawful sentence (id. at 35)); 2) Petitioner's sentence  
15 violated Cal. Pen. Code §§ 647, 689, 187, and 12022, Cal. Evid. Code  
16 § 1111, and art. I, § 17 and the equal protection and due process  
17 provisions of the California constitution (id. at 41-42, 66-70); 3)  
18 Petitioner was subjected to an excessive and disproportionate  
19 sentence in violation of the Eighth Amendment because he was  
20 innocent of causing a death or of gross negligence, and his sentence  
21 was tantamount to a sentence of life without the possibility of  
22 parole given his life expectancy of sixty-four years, which is  
23 constitutionally prohibited for non-homicide offenses, (id. at 49-  
24 62, 70, 77-79); 4) principles of equity, equal protection, and due  
25 process mandate amendment of Petitioner's sentence (id. at 66-70);  
26 and 5) there was insufficient evidence that the principal committed  
27 attempted murder, and the court made no finding that the principal  
28 committed attempted murder (id. at 71-76). Petitioner seeks to have

1 his conviction limited to shooting into an inhabited dwelling in  
2 violation of Cal. Pen. Code § 246, and to limit his sentence  
3 correspondingly to seven years. (Id. at 43-44, 65, 70-80.)

#### 4 II. State Law Claims

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

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). The Court accepts a  
19 state court's interpretation of state law. Langford v. Day, 110  
20 F.3d 1180, 1389 (9th Cir. 1996). In a habeas corpus proceeding,  
21 this Court is bound by the California Supreme Court's interpretation  
22 of California law unless it is determined that the interpretation is  
23 untenable or a veiled attempt to avoid review of federal questions.  
24 Murtishaw v. Woodford, 255 F.3d 926, 964 (9th Cir. 2001).

25 Here, there is no indication that the state court's  
26 interpretation of state law was associated with an attempt to avoid  
27 review of federal questions. Thus, this Court is bound by the state  
28 court's interpretation and application of state law.

1           Petitioner raises only state law claims insofar as Petitioner  
2 alleges in his second set of claims that his sentence violated  
3 various statutes of California and provisions of California's  
4 constitution. Because these claims rest solely on state law, they  
5 are not cognizable in a proceeding pursuant to § 2254 and must be  
6 dismissed.

7           Because the defect in these claims stems not from an absence of  
8 allegations of fact but rather from the nature of the claims as  
9 state law claims, the claims should be dismissed without leave to  
10 amend because Petitioner could not allege tenable state law claims  
11 that would warrant relief in this proceeding even if leave to amend  
12 were granted.

13           III. Recommendations

14           In accordance with the foregoing analysis, it is RECOMMENDED  
15 that:

16           1) Petitioner's second claim that his sentence violated state  
17 law be DISMISSED without leave to amend; and

18           2) The matter be referred back to the Magistrate Judge for  
19 further proceedings on the remaining claims in the petition.

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

1 filed within fourteen (14) days (plus three (3) days if served by  
2 mail) after service of the objections. The Court will then review  
3 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
4 The parties are advised that failure to file objections within the  
5 specified time may waive the right to appeal the District Court's  
6 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7  
8 IT IS SO ORDERED.

9 Dated: February 27, 2014

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE