

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NATHANIEL WALLACE,

Petitioner,

5

BOARD OF PRISON HEARINGS

Respondent.

Case No. 1:14-cv-00058-SKO-HC

ORDER DISMISSING PETITIONER'S STATE LAW CLAIMS WITHOUT LEAVE TO AMEND AND DISMISSING THE REMAINDER OF THE PETITION WITH LEAVE TO FILE A FIRST AMENDED PETITION NO LATER THAN THIRTY DAYS AFTER THE DATE OF SERVICE OF THIS ORDER (DOC. 1)

ORDER DIRECTING THE CLERK TO SEND  
TO PETITIONER WITH THIS ORDER A  
FORM PETITION PURSUANT TO 28 U.S.C.  
§ 2254

**FILING 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. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting Petitioner's consent in a document signed by Petitioner and filed by Petitioner on January 29, 2014

Pending before the Court is the petition, which was filed on

1 December 23, 2013, and transferred to this Court on January 15,  
2 2014.

3       I. Screening the Petition

4       Rule 4 of the Rules Governing § 2254 Cases in the United States  
5 District Courts (Habeas Rules) requires the Court to make a  
6 preliminary review of each petition for writ of habeas corpus. The  
7 Court must summarily dismiss a petition "[i]f it plainly appears  
8 from the petition and any attached exhibits that the petitioner is  
9 not entitled to relief in the district court...." Habeas Rule 4;  
10 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also  
11 Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule  
12 2(c) requires that a petition 1) specify all grounds of relief  
13 available to the Petitioner; 2) state the facts supporting each  
14 ground; and 3) state the relief requested. Notice pleading is not  
15 sufficient; the petition must state facts that point to a real  
16 possibility of constitutional error. Rule 4, Advisory Committee  
17 Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting  
18 Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in  
19 a petition that are vague, conclusory, or palpably incredible are  
20 subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at  
21 491.

22       The Court may dismiss a petition for writ of habeas corpus  
23 either on its own motion under Habeas Rule 4, pursuant to the  
24 respondent's motion to dismiss, or after an answer to the petition  
25 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976  
Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.  
2001). A petition for writ of habeas corpus should not be dismissed  
without leave to amend unless it appears that no tenable claim for

1 relief can be pleaded were such leave granted. Jarvis v. Nelson,  
2 440 F.2d 13, 14 (9th Cir. 1971).

3       II. Failure to Allege Facts Warranting Habeas Relief

4 Petitioner alleges that he is an inmate of the Kern Valley  
5 State Prison, which is located within the territorial boundaries of  
6 this district. Although Petitioner's claims are unclear, it appears  
7 that Petitioner challenges neither his sentence, nor the calculation  
8 of his sentence. However, Petitioner does not identify the state  
9 court in which he was convicted or his offense of conviction.

10 Petitioner alleges he had an original commitment of July 27,  
11 1990, and received an additional commitment on August 31, 1990.  
12 Petitioner does not allege any further facts concerning these  
13 commitments. He alleges that on September 25, 1990, Respondent  
14 Board of Prison Hearings extended his term secretly and changed it  
15 from determinate to indeterminate in violation of Cal. Pen. Code §  
16 654; this concerns not conduct by prison authorities, but rather  
17 dual use of facts in sentencing. Petitioner states that the  
18 additional commitment was thus really a constitutionally defective  
19 prior conviction. Petitioner alleges generally, without stating any  
20 supporting facts, that he suffered a violation of his rights to due  
21 process and equal protection of the laws.

22       Because the petition was filed after April 24, 1996, the  
23 effective date of the Antiterrorism and Effective Death Penalty Act  
24 of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.  
25 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
26 1499 (9th Cir. 1997).

27       A district court may entertain a petition for a writ of habeas  
28 corpus by a person in custody pursuant to the judgment of a state

1 court only on the ground that the custody is in violation of the  
2 Constitution, laws, or treaties of the United States. 28 U.S.C.  
3 §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n.7  
4 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13, 16 (2010)  
5 (per curiam). The notice pleading standard applicable in ordinary  
6 civil proceedings does not apply in habeas corpus cases. Habeas  
7 Rules 2(c), 4, and 5(b) require a more detailed statement of all  
8 grounds for relief and the facts supporting each ground, and the  
9 petition is expected to state facts that point to a real possibility  
10 of constitutional error and show the relationship of the facts to  
11 the claim. Habeas Rule 4, Advisory Committee Notes, 1976 Adoption;  
12 Mayle v. Felix, 545 U.S. 644, 655 (2005); O'Bremski v. Maass, 915  
13 F.2d 418, 420 (9th Cir. 1990) (quoting Blackledge v. Allison, 431  
14 U.S. 63, 75 n.7 (1977)). The purpose of the rules is to assist the  
15 district court in determining whether the respondent should be  
16 ordered to show cause why the writ should not be granted and to  
17 permit the filing of an answer that satisfies the requirement that  
18 it address the allegations in the petition. Mayle v. Felix, 545  
19 U.S. at 655. Allegations in a petition that are vague,  
20 conclusional, or palpably incredible, and that are unsupported by a  
21 statement of specific facts, are insufficient to warrant relief and  
22 are subject to summary dismissal. Jones v. Gomez, 66 F.3d 199, 204-  
23 05 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

24 Here, Petitioner concludes that he suffered equal protection  
25 and due process allegations, but he fails to allege any specific  
26 facts in support of his claims. Petitioner also fails to allege  
27 facts that would enable this Court to determine the appropriate  
28 venue of this action. Pursuant to 28 U.S.C. § 2241(d), a state

1 prisoner seeking relief pursuant to § 2254 may proceed in either the  
2 district of conviction or the district of confinement. However,  
3 petitions challenging a conviction preferably are heard in the  
4 district of conviction, Laue v. Nelson, 279 F.Supp. 265, 266  
5 (N.D.Cal. 1968); petitions challenging execution of sentence are  
6 preferably heard in the district where the inmate is confined, Dunne  
7 v. Henman, 875 F.2d 244, 249 (9th Cir. 1989). Traditional  
8 considerations of venue, such as the convenience of parties and  
9 witnesses and the interests of justice are also considered. Braden  
10 v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 495  
11 (1973).

12 Here, the uncertainty of Petitioner's claims and his failure to  
13 identify the court in which he suffered conviction of the commitment  
14 offenses has prevented the Court from determining the correct venue  
15 for this action. Petitioner will be given an opportunity to inform  
16 the Court fully of his claims and to identify the court of  
17 conviction in an amended petition.

18 Because Petitioner has failed to include any statement of  
19 supporting facts with respect to his claim or claims, the claims  
20 must be dismissed. However, it is possible that Petitioner could  
21 state facts supporting his claims. Accordingly, with the exception  
22 of the state claims discussed below, Petitioner's claims will be  
23 dismissed as uncertain, but Petitioner will be given leave to file  
24 an amended petition with respect to the claims.

25 III. State Claims

26 Federal habeas relief is available to state prisoners only to  
27 correct violations of the United States Constitution, federal laws,  
28 or treaties of the United States. 28 U.S.C. § 2254(a). Federal

1 habeas relief is not available to retry a state issue that does not  
2 rise to the level of a federal constitutional violation. Wilson v.  
3 Corcoran, 562 U.S. — , 131 S.Ct. 13, 16 (2010); Estelle v. McGuire,  
4 502 U.S. 62, 67-68 (1991). Alleged errors in the application of  
5 state law are not cognizable in federal habeas corpus. Souch v.  
6 Schaivo, 289 F.3d 616, 623 (9th Cir. 2002). The Court accepts a  
7 state court's interpretation of state law. Langford v. Day, 110  
8 F.3d at 1389. In a habeas corpus proceeding, this Court is bound by  
9 the California Supreme Court's interpretation of California law  
10 unless the interpretation is deemed untenable or a veiled attempt to  
11 avoid review of federal questions. Murtishaw v. Woodford, 255 F.3d  
12 926, 964 (9th Cir. 2001). Here, there is no indication that any  
13 state court's interpretation of state law was associated with an  
14 attempt to avoid review of federal questions. Thus, this Court is  
15 bound by the state court's interpretation and application of state  
16 law, including any interpretation or application of Cal. Pen. Code §  
17 654.

18 Insofar as Petitioner rests his claim or claims solely on state  
19 law, including Cal. Pen. Code § 654, he fails to state facts that  
20 would entitle him to relief in a proceeding pursuant to 28 U.S.C.  
21 § 2254. Thus, Petitioner's claim or claims based on an application  
22 or interpretation of California law must be dismissed because they  
23 are not cognizable in a § 2254 proceeding.

24 Further, because Petitioner's state claims are defective not  
25 because of any dearth of factual allegations, but rather because of  
26 their nature as being based solely on state law, Petitioner could  
27 not state tenable state law claims even if leave to amend were  
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1 granted. Thus, Petitioner's state law claims will be dismissed  
2 without leave to amend.

3       IV. Naming a Proper Respondent

4 Petitioner named as Respondent the Board of Prison Hearings.  
5 (Pet., doc. 1, 1.) Petitioner is incarcerated at the Kern Valley  
6 State Prison located at Delano, California. The official website of  
7 the California Department of Corrections and Rehabilitation (CDCR)  
8 reflects that the warden at that facility is Martin Biter.<sup>1</sup>

9       A petitioner who is seeking habeas corpus relief under 28  
10 U.S.C. § 2254 must name the state officer having custody of him as  
11 the respondent to the petition. Habeas Rule 2(a); Ortiz-Sandoval v.  
12 Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California  
13 Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). The person having  
14 custody of an incarcerated petitioner is generally the warden of the  
15 prison where the petitioner is incarcerated because the warden has  
16 "day-to-day control over" the petitioner and can produce the  
17 petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th  
18 Cir. 1992); see also, Stanley v. California Supreme Court, 21 F.3d  
19 at 360. However, the chief officer in charge of state penal  
20 institutions, such as the Secretary of the CDCR, is also  
21 appropriate. Ortiz-Sandoval, 81 F.3d at 894; Stanley, 21 F.3d at  
22 360.

23       Petitioner's failure to name a proper respondent may require  
24 dismissal of his habeas petition for a failure to name a person who  
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26       <sup>1</sup> The Court may take judicial notice of facts that are capable of accurate and  
27 ready determination by resort to sources whose accuracy cannot reasonably be  
28 questioned, including undisputed information posted on official websites. Fed. R.  
Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993);  
Daniels-Hall v. National Education Association, 629 F.3d 992, 999 (9th Cir. 2010).  
The address of the official website for the CDCR is <http://www.cdcr.ca.gov>.

1 can produce the petitioner in response to an order of the Court and  
2 thereby to secure personal jurisdiction. See, Smith v. Idaho, 392  
3 F.3d 350, 355 n.3 (9th Cir. 2004). This Court must ask sua sponte  
4 whether the respondent who is named has the power to order the  
5 petitioner's release. If not, the Court may not grant effective  
6 relief, and thus it should not hear the case unless the petition is  
7 amended to name a respondent who can grant the desired relief. Id.  
8 The Court will give Petitioner the opportunity to cure this defect  
9 by amending the petition to name a proper respondent, such as the  
10 warden of his facility. See, In re Morris, 363 F.3d 891, 893-94  
11 (9th Cir. 2004).

12       V. Amendment of the Petition

13       As discussed above, the petition must be dismissed. Petitioner  
14 will be given leave to file a first amended petition to cure the  
15 deficiencies, and specifically to state and document facts in  
16 support of his uncertain claim or claims. Petitioner is advised  
17 that failure to file a petition in compliance with this order (i.e.,  
18 a completed petition form with cognizable federal claims clearly  
19 stated) within the allotted time will result in dismissal of the  
20 petition and termination of the action. Petitioner is advised that  
21 the amended petition should be entitled, "First Amended Petition,"  
22 and it must refer to the case number in this action. Petitioner is  
23 further informed that pursuant to Local Rule 220, unless prior  
24 approval to the contrary is obtained from the Court, every pleading  
25 as to which an amendment or supplement is permitted shall be retyped  
26 or rewritten and filed so that it is complete in itself without  
27 reference to the prior or superseded pleading. The Clerk will be  
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directed to send to Petitioner a blank form petition for a proceeding pursuant to § 2254.

## VI. Disposition

Accordingly, it is ORDERED that:

1) Petitioner's state law claim or claims are DISMISSED without leave to amend;

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

3) 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

4) 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: **February 27, 2014**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE