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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

BERNARD C. HUGHES,

 Petitioner,

 v.

MARTIN BITER, Warden,

 Respondent.

Case No. 1:14-cv-01237-LJO-BAM-HC

ORDER GRANTING PETITIONER'S MOTION
TO AMEND THE PETITION TO NAME A
PROPER RESPONDENT (Doc. 8)

ORDER DIRECTING THE CLERK TO CHANGE
THE NAME OF THE RESPONDENT

FINDINGS AND RECOMMENDATIONS TO
DISMISS PETITIONER'S STATE LAW
CLAIMS (Doc. 1) AND TO REFER THE
CASE BACK TO THE MAGISTRATE JUDGE
FOR FURTHER PROCEEDINGS

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 Petitioner's motion to amend the petition to name as Respondent Martin Biter, the warden of his institution of confinement, which was filed on September 2, 2014, in response to the Court's order of August 12, 2014, granting Petitioner leave to file a motion to amend without having to file a completely new petition.

1 I. Order Granting Petitioner's Motion to Amend the Petition
2 and Directing the Clerk to Change the Name of the
3 Respondent

4 A petitioner seeking habeas relief must name the state officer
5 having custody of him or her as the respondent to the petition.
6 Rule 2(a) of the Rules Governing Section 2254 Cases in the United
7 States District Courts (Habeas Rules); Ortiz-Sandoval v. Gomez, 81
8 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme Court,
9 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having
10 custody of the prisoner is the warden of the prison because the
11 warden has "day to day control over" the prisoner. Brittingham v.
12 United States, 982 F.2d 378, 279 (9th Cir. 1992). Therefore,
13 Petitioner's request is proper.

14 Accordingly, it is ORDERED that Petitioner's motion to amend
15 the petition is GRANTED, and the Clerk is DIRECTED to change the
16 name of the Respondent to Warden Martin Biter.

17 II. Screening the Petition

18 Habeas Rule 4 requires the Court to make a preliminary review
19 of each petition for writ of habeas corpus. The Court must
20 summarily dismiss a petition "[i]f it plainly appears from the
21 petition and any attached exhibits that the petitioner is not
22 entitled to relief in the district court...." Habeas Rule 4;
23 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also
24 Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule
25 2(c) requires that a petition 1) specify all grounds of relief
26 available to the Petitioner; 2) state the facts supporting each
27 ground; and 3) state the relief requested. Notice pleading is not
28 sufficient; rather, the petition must state facts that point to a
real possibility of constitutional error. Rule 4, Advisory

1 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420
2 (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)).

3 Allegations in a petition that are vague, conclusory, or palpably
4 incredible are subject to summary dismissal. Hendricks v. Vasquez,
5 908 F.2d at 491.

6 Further, the Court may dismiss a petition for writ of habeas
7 corpus either on its own motion under Habeas Rule 4, pursuant to the
8 respondent's motion to dismiss, or after an answer to the petition
9 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976
10 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.
11 2001).

12 A petition for habeas corpus should not be dismissed without
13 leave to amend unless it appears that no tenable claim for relief
14 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d
15 13, 14 (9th Cir. 1971).

16 Petitioner alleges that he is an inmate of the Kern Valley
17 State Prison (KVSP) serving a sentence of eighty-eight years to life
18 imposed in the Mariposa Superior Court on December 17, 2010, for
19 burglary, possession of firearms and ammunition by a felon,
20 receiving stolen property, and a false license plate.

21 Petitioner raises the following claims in the petition: 1) a
22 denial of access to exculpatory biological evidence violated his
23 right to due process of law protected by the Fourteenth Amendment;
24 2) the exclusion of evidence of his third party culpability defense
25 violated his right to due process of law protected by the Fourteenth
26 Amendment; 3) the admission of unreliable evidence was an abuse of
27 discretion and denial of due process of law; 4) he suffered a denial
28 of his Sixth and Fourteenth Amendment right to self-representation;

1 5) his counsel's failure to introduce a local statute that
2 prohibited use of a purported confession denied his rights to due
3 process, a fair trial, and the effective assistance of counsel
4 protected by the Sixth and Fourteenth Amendments; 6) the deprivation
5 of confidential communication "between attorney and private
6 investigator" (pet., doc. 1, 13) before trial denied his rights to
7 the effective assistance of counsel and due process protected by the
8 Sixth and Fourteenth Amendments; 7) counsel's making the decision
9 himself whether Petitioner would take the stand in his own defense
10 denied Petitioner's right to the effective assistance of counsel at
11 trial and on appeal; 8) counsel's failure to introduce evidence of
12 letters from the victim's caretaker violated Petitioner's rights to
13 the effective assistance of counsel and due process; 9) failing to
14 permit a handwriting expert at Petitioner's pro se motion
15 constituted an abuse of the trial court's discretion; 10) trial
16 counsel's failure to object to a witness who could not identify
17 Petitioner but whose testimony was used to convict Petitioner denied
18 Petitioner his right to the effective assistance of counsel; and 11)
19 the cumulative errors denied Petitioner's right to due process under
20 the Fifth and Fourteenth Amendments.

21 III. Dismissal of State Law Claims

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 Federal habeas relief is available to state prisoners only to
28 correct violations of the United States Constitution, federal laws,

1 or treaties of the United States. 28 U.S.C. § 2254(a). Federal
2 habeas relief is not available to retry a state issue that does not
3 rise to the level of a federal constitutional violation. Wilson v.
4 Corcoran, 562 U.S. -, 131 S.Ct. 13, 16 (2010); Estelle v. McGuire,
5 502 U.S. 62, 67-68 (1991). Alleged errors in the application of
6 state law are not cognizable in federal habeas corpus. Souch v.
7 Schaivo, 289 F.3d 616, 623 (9th Cir. 2002). The Court accepts a
8 state court's interpretation of state law. Langford v. Day, 110
9 F.3d 1180, 1389 (9th Cir. 1996). In a habeas corpus proceeding,
10 this Court is bound by the California Supreme Court's interpretation
11 of California law unless it is determined that the interpretation is
12 untenable or a veiled attempt to avoid review of federal questions.
13 Murtishaw v. Woodford, 255 F.3d 926, 964 (9th Cir. 2001).

14 Here, there is no indication that the state court's
15 interpretation or application of state law was associated with an
16 attempt to avoid review of federal questions. Thus, this Court is
17 bound by the state court's interpretation and application of state
18 law.

19 Petitioner raises only state law claims insofar as Petitioner
20 alleges in his third claim that the trial court abused its
21 discretion with respect to the admission of unreliable evidence and
22 in his ninth claim that the trial court abused its discretion with
23 respect to the provision of an expert or the admission of expert
24 testimony. These matters appear to address only matters of state
25 law that are evaluated under state law standards. The erroneous
26 admission of the evidence under California's Evidence Code or other
27 violation of a state's evidentiary rules does not state a federal
28

1 claim that would entitle Petitioner to relief in a proceeding
2 pursuant to 28 U.S.C. § 2254. Jammal v. Van de Kamp, 926 F.2d 918,
3 919 (9th Cir. 1991). To the extent that Petitioner alleges that
4 these rulings violated his federal rights, Petitioner's claims
5 remain before the Court. However, to the extent that Petitioner
6 raises evidentiary error under state law, the claims should be
7 dismissed.

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

16 IV. Further Proceedings

17 Petitioner has complied with the Court's order to provide a
18 declaration in support of the petition. Once Petitioner's state law
19 claims are dismissed from the petition, the case is ready for
20 further proceedings before the Magistrate, including directing a
21 response to the petition and scheduling further pleadings and
22 motions.

24 V. Recommendations

25 In accordance with the foregoing analysis, it is RECOMMENDED
26 that:
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28 1) Petitioner's state law claims be DISMISSED without leave to

1 amend; and

2 2) The matter be REFERRED back to the Magistrate Judge for
3 further proceedings.

4 These findings and recommendations are submitted to the United
5 States District Court Judge assigned to the case, pursuant to the
6 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local
7 Rules of Practice for the United States District Court, Eastern
8 District of California. Within thirty (30) days after being served
9 with a copy, any party may file written objections with the Court
10 and serve a copy on all parties. Such a document should be
11 captioned "Objections to Magistrate Judge's Findings and
12 Recommendations." Replies to the objections shall be served and
13 filed within fourteen (14) days (plus three (3) days if served by
14 mail) after service of the objections. The Court will then review
15 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).
16 The parties are advised that failure to file objections within the
17 specified time may "waive their right to challenge the magistrate's
18 factual findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834,
19 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391,
20 1394 (9th Cir. 1991)).

21 IT IS SO ORDERED.

22
23 Dated: January 16, 2015

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