



1 facts supporting each ground; and 3) state the relief requested. Notice pleading is not sufficient; the  
2 petition must state facts that point to a real possibility of constitutional error. Rule 4, Advisory  
3 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.  
4 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition that are vague, conclusory, or palpably  
5 incredible are subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at 491.

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

12 Here, Petitioner alleges that, while a state prisoner, he was convicted of indecent exposure in the  
13 Kings County Superior Court based upon allegations that Petitioner had masturbated in his prison cell  
14 in a way meant to be seen by a female staff member. (Doc. 1, p. 1). The conviction was later affirmed  
15 by the California Court of Appeal, Fifth Appellate District (“5<sup>th</sup> DCA”) by an unpublished opinion  
16 dated May 12, 2015. (Doc. 1, p. 10). Petitioner then filed a petition for review in the California  
17 Supreme Court that was denied on July 29, 2015. (Doc. 1, p. 1).

18 Petitioner alleges numerous flaws in both his bench trial and in the 5<sup>th</sup> DCA’s opinion.  
19 Petitioner requests an order from this Court reversing the 5<sup>th</sup> DCA and ordering the trial court to  
20 acknowledge the reversal of his conviction and order his release from confinement. (Doc. 1, p. 5).

#### 21 B. Lack Of Jurisdiction Under Writ of Mandate Statute

22 The federal mandamus statute provides: “the district courts shall have original jurisdiction of  
23 any action in the nature of mandamus to compel an officer or employee of the United States or any  
24 agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361. A writ of mandamus is an  
25 extraordinary writ, and is issued only when (1) the plaintiff’s claim is “clear and certain;” (2) the  
26 defendant official’s duty to act is ministerial and “so plainly prescribed as to be free from doubt; and  
27 (3) no other adequate remedy is available. Barron v. Reich, 13 F.3d 1370, 1374 (9<sup>th</sup> Cir. 1994)  
28 (citations omitted).

1 Further, although 28 U.S.C. § 1651 states that all courts established by Act of Congress “may  
2 issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the  
3 usages and principles of law,” the courts lack subject matter jurisdiction to issue a writ of mandamus to  
4 a state employee. See Demos v. United States District Court for the E. Dist. of Wash., 925 F.2d 1160,  
5 1161–62 (9th Cir.1991) (state court).

6 In Silveyra v. Moschorak, the Ninth Circuit held that the Mandamus Act may be invoked to  
7 compel a federal official to perform a duty owed to a plaintiff who “falls within the ‘zone of interests’  
8 protected by the underlying statute.” 989 F.2d 1012, 1014 n. 1 (9<sup>th</sup> Cir. 1993) (*citing* Jarecki v. United  
9 States, 590 F.2d 670, 675 (7<sup>th</sup> Cir. 1979)). Mandamus is appropriate when the official’s duty to act is  
10 ministerial in nature and so plain as to be free from doubt. Id. Even where an official’s responsibilities  
11 are in some respects discretionary, mandamus is appropriate if ““statutory or regulatory standards  
12 delimiting the scope or manner in which such discretion can be exercised . . . have been ignored or  
13 violated.”” Carpet, Linoleum and resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564,  
14 566 (10<sup>th</sup> Cir. 1981) (citation omitted); see also, Work v. United Staes ex rel Rives, 267 U.S. 175, 177,  
15 45 S.Ct. 252, 253 (1925)(mandamus is appropriate if an official transgresses the limits of her  
16 discretion).

17 However, mandamus relief is only available to compel an officer of the United States to  
18 perform a duty; federal courts are without the power to issue mandamus to direct state courts or their  
19 judicial officers in the performance of their duties. A petition for mandamus to compel a state court to  
20 take or refrain from some action is *frivolous as a matter of law*. Demos v. U.S. District Court, 925 F.2d  
21 1160, 1161-72 (9<sup>th</sup> Cir.) (Imposing no filing in forma pauperis order), *cert. denied*, 111 S.Ct. 1082  
22 (1991); Clark v. Washington, 366 F.2d 678, 681 (9<sup>th</sup> Cir. 1966) (attorney contested disbarment and  
23 sought reinstatement); Dunlap v. Corbin, 532 F.Supp. 183, 187 (D. Ariz. 1981) (plaintiff sought order  
24 from federal court directing state court to provide speedy trial), *aff’d without opinion*, 673 F.2d 1337  
25 (9<sup>th</sup> Cir. 1982).

26 Because Petitioner seeks mandamus relief directed at a state agency, i.e., the 5<sup>th</sup> DCA, this  
27 Court lacks jurisdiction under § 1651. Hence, as discussed above, the petition is frivolous as a matter  
28 of law. Accordingly, the Court will recommend that the petition be dismissed.

1 ///

2 **ORDER**

3 For the foregoing reasons, the Clerk of the Court is DIRECTED to assign a United States  
4 District judge to this case.

5 **RECOMMENDATION**

6 Accordingly, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus be  
7 DISMISSED for lack of jurisdiction.

8 This Findings and Recommendation is submitted to the United States District Court Judge  
9 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
10 Rules of Practice for the United States District Court, Eastern District of California. **Within 21 days**  
11 after being served with a copy of this Findings and Recommendation, any party may file written  
12 objections with the Court and serve a copy on all parties. Such a document should be captioned  
13 “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the Objections shall be  
14 served and filed **within 10 days** after service of the Objections. The Court will then review the  
15 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to  
16 file objections within the specified time may waive the right to appeal the Order of the District Court.  
17 Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

18  
19 IT IS SO ORDERED.

20 Dated: October 28, 2015

/s/ Jennifer L. Thurston  
21 UNITED STATES MAGISTRATE JUDGE