

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

EDWARD ONTIVEROS,  
Petitioner,  
v.  
S. FRAUENHEIM, Warden,  
Respondent.

Case No. 1:17-cv-01448-MJS (HC)

**ORDER DISMISSING PETITION WITH  
LEAVE TO AMEND**

**(ECF No. 1)**

**THIRTY DAY DEADLINE TO FILE AMENDED  
PETITION**

Petitioner is a state prisoner proceeding pro se on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Although the petition is extremely conclusory, Petitioner appears to challenge the Parole Board's decision to deny him parole.

**I. Procedural Grounds for Summary Dismissal**

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. See

1 Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001). Allegations in a petition that are vague,  
2 conclusory, or palpably incredible are subject to summary dismissal. Hendricks v.  
3 Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be  
4 dismissed without leave to amend unless it appears that no tenable claim for relief can  
5 be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

## 6 **II. Applicable Law – Federal Review of State Parole Decisions**

7 The petition is governed by the Antiterrorism and Effective Death Penalty Act of  
8 1996 (AEDPA). Lindh v. Murphy, 521 U.S. 320, 327, 117 S. Ct. 2059, 138 L. Ed. 2d 481  
9 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999). Under AEDPA, a district  
10 court may entertain a petition for a writ of habeas corpus by a person in custody  
11 pursuant to the judgment of a state court only on the ground that the custody is in  
12 violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 2254(a),  
13 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n.7 (2000); Wilson v. Corcoran, 562  
14 U.S. 1, 5 (2010).

15 California law creates a liberty interest in parole protected by the Fourteenth  
16 Amendment Due Process Clause, and Petitioner is entitled to minimal procedural  
17 protections in the parole determination. Swarthout v. Cooke, 562 U.S. 216, 220 (2011)  
18 (citing Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 12  
19 (1979)). The Supreme Court has held that “a prisoner subject to a parole statute similar  
20 to California's received adequate process when he was allowed an opportunity to be  
21 heard and was provided a statement of the reasons why parole was denied.” Id. A  
22 determination that these minimal protections were afforded ends the federal due process  
23 inquiry. Id.

## 24 **III. Discussion**

25 Here, Petitioner states only that the Parole Board's denial was in “violation of  
26 federal law and unconstitutional impermissible state authority.” He refers the court to  
27 various exhibits and state petitions he contends are attached to his federal petition.  
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1 However, no such documents were filed with the Court. The Court therefore is unable to  
2 understand the nature of Petitioner's claims; whether he indeed alleges that he is in  
3 custody in violation of the Constitution, laws, or treaties of the United States; and  
4 whether he alleges the Parole Board denied him the minimal procedural protections  
5 required under Greenholtz and Swarthout. In other words, as presently pled, the petition  
6 does not assert cognizable federal grounds for challenging the parole decision.

7 Petitioner will be given leave to amend. If Petitioner chooses to amend, his  
8 amended petition should be clearly and boldly titled "FIRST AMENDED PETITION,"  
9 contain the appropriate case number, and be an original signed under penalty of perjury.  
10 Petitioner is advised that an amended petition supercedes the original petition, Forsyth  
11 v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567  
12 (9th Cir. 1987), and must be "complete in itself without reference to the prior or  
13 superceded pleading." Local Rule 220. Accordingly, the amended petition must contain  
14 all the claims Petitioner wishes to present before the Court.

#### 15 **IV. Appointment of Counsel**

16 In the petition, Petitioner requests the appointment of counsel.

17 There currently exists no absolute right to appointment of counsel in habeas  
18 proceedings. See, e.g., Anderson v. Heinze, 258 F.2d 479, 481 (9th Cir. 1958); Mitchell  
19 v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984). However, 18 U.S.C. § 3006A(a)(2)(B)  
20 authorizes the appointment of counsel at any stage of the case if "the interests of justice  
21 so require." See Rule 8(c), Rules Governing Section 2254 Cases. The Court finds that  
22 the interests of justice do not require the appointment of counsel in this case at the  
23 present time.

24 Accordingly, the request for the appointment of counsel will be denied.

#### 25 **V. Conclusion and Order**

26 For the foregoing reasons, it is HEREBY ORDERED that:

- 27 1. Petitioner's request for appointment of counsel is denied;

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2. The petition for writ of habeas corpus is dismissed with leave to amend;
3. The Clerk of Court is DIRECTED to send Petitioner a blank form petition for petitioners filing pursuant to 28 U.S.C. § 2254;
4. Within **thirty (30) days** of the date of service of this order, Petitioner shall file an amended petition; and
5. If Petitioner fails to comply with this order, the undersigned will recommend the action be dismissed for failure to comply with a court order pursuant to Local Rule 110.

IT IS SO ORDERED.

Dated: October 31, 2017

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE