

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICK D. BURKE, ) No. C 07-2832 MMC (PR)  
Petitioner, )  
v. )  
WARDEN D.K. SISTO, ) **ORDER OF DISMISSAL WITH  
LEAVE TO AMEND; GRANTING  
APPLICATION TO PROCEED IN  
FORMA PAUPERIS**  
Respondent. ) (Docket No. 2)  
\_\_\_\_\_  
)

On May 31, 2007, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has applied for leave to proceed in forma pauperis.

## BACKGROUND

In 2003, in Santa Clara County Superior Court, petitioner was convicted of vandalism and driving under the influence of alcohol (“D.U.I.”), and sentenced to a term of six years and four months in state prison. Petitioner challenged his vandalism conviction<sup>1</sup> by habeas petitions filed in the San Francisco County Superior Court, the California Court of Appeal and the Supreme Court of California. All three habeas petitions were denied.

## DISCUSSION

**A. Standard of Review**

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody

<sup>1</sup>Petitioner states he is only challenging his vandalism conviction herein, not his D.U.I. conviction.

1 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);  
2 Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an  
3 order directing the respondent to show cause why the writ should not be granted, unless it  
4 appears from the application that the applicant or person detained is not entitled thereto.”  
5 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the  
6 petition are vague or conclusory, palpably incredible, or patently frivolous or false. See  
7 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison,  
8 431 U.S. 63, 75-76 (1977)).

9 B. Petitioner’s Claims

10 Petitioner claims: (1) his attorney advised him to plead nolo contendere to the  
11 vandalism charge despite the fact that there was no evidence to support the charge; (2) that  
12 his vandalism conviction was based on false evidence; and (3) that he was given an illegal  
13 sentence based on false information and ineffective assistance of counsel.

14 Petitioner’s three claims fail to state a cognizable basis for federal habeas relief, in  
15 that they do not allege a violation of federal law. A writ of habeas corpus is available under  
16 28 U.S.C. § 2254 “only on the basis of some transgression of federal law binding on the state  
17 courts.” Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456  
18 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986). The writ is not available to  
19 redress violations of state law or for alleged error in the interpretation or application of state  
20 law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Here, petitioner has not identified  
21 what federal law allegedly was violated, as is necessary to provide respondent with adequate  
22 notice of the claims being asserted. See Hendricks, 908 F.2d at 491-92 (holding petitioner  
23 must state claims with sufficient specificity to allow respondent to prepare response).  
24 Petitioner will be given leave to amend his claims to allege what federal law, if any, he is  
25 asserting was violated. Petitioner is advised that any federal basis for such claims must be  
26 exhausted, by petitioner’s having sufficiently presented *the federal basis* for the claims, in  
27 addition to any other arguments in support of the claims, to the Supreme Court of California,  
28 before raising them in federal court. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S.

1 509, 515-16 (1982).

2 **CONCLUSION**

3 For the reasons stated above, the Court orders as follows:

4 1. The instant petition is DISMISSED with leave to amend. Within **thirty (30)**  
5 **days** of the date this order is filed, petitioner must file an amended petition in which he  
6 corrects the deficiencies noted above. The amended petition must include the caption and  
7 civil case number used in this order, No. C 07-2832 MMC (PR), and must include the words  
8 AMENDED PETITION on the first page. In the amended petition, petitioner must include  
9 all the claims he wishes to present; he may not incorporate by reference any portion of his  
10 initial petition.

11 2. **If petitioner fails to timely amend the petition as ordered herein, the**  
12 **petition will be dismissed.**

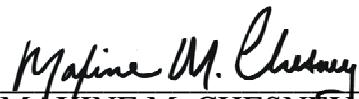
13 3. It is petitioner's responsibility to prosecute this case. Petitioner must keep the  
14 Court and respondent informed of any change of address and must comply with the Court's  
15 orders in a timely fashion. Failure to do so may result in the dismissal of this action,  
16 pursuant to Federal Rule of Civil Procedure 41(b) and/or Civil Local Rule 3-11, for failure to  
17 prosecute.

18 4. In light of petitioner's lack of funds, the application to proceed in forma  
19 pauperis is GRANTED.

20 This order terminates Docket No. 2.

21 IT IS SO ORDERED.

22 DATED: June 13, 2007

  
23 MAXINE M. CHESNEY  
24 United States District Judge

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