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United States District Court
For the Northern District of California

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

EARNEST S. HARRIS,

No. C 12-6536 WHA (PR)

Petitioner,

**ORDER TO SHOW CAUSE;
GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS**

v.

LEWIS, Warden,

Respondent.

(Docket No. 2)

_____ /

INTRODUCTION

Petitioner, a California prisoner incarcerated at Pelican Bay State Prison, filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 challenging the calculation of his time credits and the validity of his sentence. For the reasons discussed below, respondent is ordered to show cause why the petition should not be granted based on petitioner’s two cognizable claims, and his other three claims are dismissed. He is also granted leave to proceed in forma pauperis.

STATEMENT

Petitioner was convicted in Del Norte County Superior Court of battery upon a non-prisoner, attempted battery upon a non-prisoner and other related offenses. He was sentenced to a term of two years and eight months in state prison. The California Court of Appeal and the

1 California Supreme Court denied his appeals. His habeas petitions in the state courts also did
2 not succeed.

3 **ANALYSIS**

4 **A. STANDARD OF REVIEW**

5 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
6 custody pursuant to the judgment of a State court only on the ground that he is in custody in
7 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a); *Rose*
8 *v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading
9 requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ
10 of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state
11 court must "specify all the grounds for relief which are available to the petitioner ... and shall
12 set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c) of
13 the Rules Governing Section 2254 Cases, 28 U.S.C. foll. 2254. "[N]otice' pleading is not
14 sufficient, for the petition is expected to state facts that point to a 'real possibility of
15 constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d
16 688, 689 (1st Cir. 1970)).

17 **B. LEGAL CLAIMS**

18 Petitioner states that pursuant to a new California law, California Bill Number SBX3-18
19 he no longer earns credits against his sentence at the rate he previously earned them. He claims
20 that this violates: (1) his rights under the Ex Post Facto Clause, and (2) his plea agreement.
21 When liberally construed, these claims are cognizable.

22 Petitioner's third claim is that the trial court "abused its discretion" by sentencing him to
23 six months on each of two counts of attempted battery because California law does not make
24 attempted battery a crime. His fourth claim is that the trial court "abused its discretion" by
25 failing to sentence him to "one third the middle term," as required by state sentencing
26 guidelines. The federal habeas writ is unavailable for violations of state law or for alleged error
27 in the interpretation or application of state law. *See Swarthout v. Cooke*, 131 S. Ct. 859, 861-62
28 (2011). Claims three and four are not cognizable because they assert a violation of state law

1 and do not claim any violation of federal law. Petitioner's fifth claim is that the superior court
2 erred in failing to rule on the merits of his habeas petition. Errors in the state post-conviction
3 review process are not addressable through federal habeas corpus proceedings, however. *Ortiz*
4 *v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998). Consequently, petitioner's fifth claim is also not
5 cognizable.

6 **CONCLUSION**

7 1. Petitioner's third, fourth and fifth claims, as described above, are **DISMISSED**.

8 2. The clerk shall mail a copy of this order and the petition with all attachments to the
9 respondent and the respondent's attorney, the Attorney General of the State of California. The
10 clerk shall also serve a copy of this order on the petitioner.

11 3. Respondent shall file with the court and serve on petitioner, within ninety days of the
12 issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing
13 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on
14 the claims found cognizable herein. Respondent shall file with the answer and serve on
15 petitioner a copy of all portions of the state trial record that have been transcribed previously
16 and that are relevant to a determination of the issues presented by the petition.

17 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
18 court and serving it on respondent within thirty days of the date the answer is filed.

19 4. Respondent may file, within ninety days, a motion to dismiss on procedural grounds
20 in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
21 Governing Section 2254 Cases. If respondent files such a motion, petitioner shall file with the
22 court and serve on respondent an opposition or statement of non-opposition within thirty days
23 of the date the motion is filed, and respondent shall file with the court and serve on petitioner a
24 reply within fifteen days of the date any opposition is filed.

25 5. Petitioner is reminded that all communications with the court must be served on
26 respondent by mailing a true copy of the document to respondent's counsel. Petitioner must
27 keep the court informed of any change of address and must comply with the court's orders in a
28 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute


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pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

5. The application for leave to proceed in forma pauperis (docket number 2) is **GRANTED** in light of petitioner's lack of funds.

IT IS SO ORDERED.

Dated: February 27, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE