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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 No. C 05-5428 MHP (pr)

8 JEFFREY LEE DUVARDO,

ORDER TO SHOW CAUSE

9 Petitioner,

10 v.

11 GEORGE GIURBINO, warden,

12 Respondent.
13 _____/

14 **INTRODUCTION**

15 Jeffrey Lee Duvardo filed a pro se petition for writ of habeas corpus to challenge his
16 2002 murder convictions from Lake County Superior Court. At Duvardo's request, the court
17 stayed proceedings in this action so that Duvardo could exhaust state court remedies for
18 several claims he wanted to present in federal court. Duvardo apparently has completed his
19 state court exhaustion efforts and now wants to move forward with this action. He recently
20 filed a "motion to submit habeas," a request for counsel, and an amended habeas petition.

21 **BACKGROUND**

22 Duvardo was convicted in Lake County Superior Court of two counts of first degree
23 murder with special circumstances and two counts of elder abuse. His parents were the
24 victims. On May 16, 2002, he was sentenced to life imprisonment without the possibility of
25 parole.

26 He appealed. His conviction was affirmed by the California Court of Appeal in 2004
27 and his petition for review was denied by the California Supreme Court in 2005. He also
28 filed unsuccessful petitions for writ of habeas corpus in state court.

1 The petition for writ of habeas corpus in this action was originally filed on December
2 30, 2005. The action was stayed at Duvardo's request so that he could exhaust state court
3 remedies as to some of his claims. On June 12, 2007, Duvardo filed a "motion to submit
4 habeas," an amended habeas petition and a request for appointment of counsel.

5 **DISCUSSION**

6 A. Lifting The Stay And Reopening The Action

7 As soon as he filed his federal petition, Duvardo sought a stay so he could exhaust
8 state court remedies as to some unexhausted claims. The court required him to file a motion
9 for a stay that complied with Rhines v. Weber, 125 S. Ct. 1528 (200). Duvardo did so, and
10 the court stayed the proceedings and administratively closed the case. Duvardo recently filed
11 a motion to submit habeas that, liberally construed, appears to inform the court that he has
12 completed his exhaustion efforts and wants to proceed with this action. He also filed an
13 amended habeas petition with his motion to submit habeas. No opposition to the motion was
14 made, but that is because the stay was imposed at the outset of the action before respondent
15 was served or entered any appearance in this action.

16 Upon due consideration, the court GRANTS the motion to submit habeas. (Docket #
17 10.) The stay is lifted. The clerk will REOPEN this action that had been closed
18 administratively. The court now does the initial review of the amended petition pursuant to
19 28 U.S.C. §2243 and Rule 4 of the Rules Governing Section 2254 Cases.

20 B. Initial Review Of Amended Petition

21 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
22 custody pursuant to the judgment of a State court only on the ground that he is in custody in
23 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
24 A district court considering an application for a writ of habeas corpus shall "award the writ or
25 issue an order directing the respondent to show cause why the writ should not be granted,
26 unless it appears from the application that the applicant or person detained is not entitled
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1 thereto." 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in
2 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. See
3 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

4 The amended petition lists seven claims: (1) Duvardo's right to due process was
5 violated because the evidence was insufficient to support the verdicts, (2) his right to due
6 process was violated by the "introduction of unqualified and otherwise inadmissible
7 'victimology' opinion testimony," (3) his right to due process was violated by the admission
8 of impermissible character evidence, (4) his rights to effective assistance of counsel and due
9 process were violated by counsel's failure to submit critical items of evidence to proper
10 forensic testing and/or examination, (5) his right to due process was "violated by the illegal
11 bar of police reports that permitted the state to misrepresent known facts," (6) cumulative
12 error, and (7) his right to due process and effective assistance of appellate counsel were
13 violated by appellate counsel's failure to raise critical issues in the original appeal. See
14 Amended Petition, p. 2-3. The federal constitutional claims asserted are cognizable and
15 warrant a response from respondent.

16 In several of the claims, Duvardo asserts that the errors violated state law as well as
17 the federal constitution. The allegations of state law errors are dismissed without leave to
18 amend because state law errors cannot support habeas relief in federal court. Federal habeas
19 relief is only available for a violation of the "Constitution or laws or treaties of the United
20 States," 28 U.S.C. § 2254(d), and is not available for a state law error.

21 CONCLUSION

22 1. The amended petition states cognizable claims for habeas relief and warrants a
23 response.

24 2. The clerk shall serve by certified mail a copy of this order and a copy of all the
25 documents in the case file upon respondent and respondent's attorney, the Attorney General
26 of the State of California.

1 3. Respondent must file and serve upon petitioner, on or before **September 21,**
2 **2007**, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254
3 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent must
4 file with the answer a copy of all portions of the state court record that have been previously
5 transcribed and that are relevant to a determination of the issues presented by the amended
6 petition.

7 4. If petitioner wishes to respond to the answer, he must do so by filing a traverse
8 with the court and serving it on respondent on or before **October 26, 2007**.

9 5. Petitioner is responsible for prosecuting this case. He must keep the court
10 informed of any change of address and must comply with the court's orders in a timely
11 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
12 pursuant to Federal Rule of Civil Procedure 41(b).

13 6. The "motion to submit habeas" is construed to be a motion to lift the stay,
14 reopen the action, and proceed with the amended petition and is **GRANTED**. (Docket # 10.)

15 7. Petitioner's third request for appointment of counsel is **DENIED** for the same
16 reasons his first request for counsel was denied in the order upon initial review. (Docket #
17 11.)

18 IT IS SO ORDERED.

19 DATED: July 11, 2007



Marilyn Hall Patel
United States District Judge

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