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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TIEN PHAM,

Petitioner,

No. C 06-4133 PJH

v.

JAMES TILTON,

Respondent.

**ORDER TO SHOW CAUSE
AND ORDER DENYING REQUEST
TO PROCEED IN FORMA PAUPERIS**

Petitioner Tien Pham, a state prisoner incarcerated at High Desert State Prison in Susanville, California, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He also requests leave to proceed in forma pauperis.

BACKGROUND

Following a court trial in Santa Clara County, petitioner was convicted of three counts of attempted murder (Cal. Pen. Code §§ 187, 664(a)). The court also found true the allegations of gang enhancement (Cal. Pen. Code § 186.22(b)(1)), and the allegations that petitioner had used a deadly and dangerous weapon (Cal. Pen. Code § 12022(b)(1)) and had personally inflicted great bodily injury (Cal. Pen. Code § 12022.7(a)). Petitioner was committed to state prison for a term of 28 years and 4 months. The sentence included a 10-year term for the gang enhancement.

On appeal, petitioner challenged the sufficiency of the evidence to support the attempted murder counts and the gang enhancement. The California Court of Appeal

United States District Court
For the Northern District of California

1 affirmed the judgment of conviction on September 26, 2005, and the California Supreme
2 Court denied review on November 30, 2005.

3 **DISCUSSION**

4 A. Legal Standard

5 The district court may entertain a petition for writ of habeas corpus “in behalf of a
6 person in custody pursuant to the judgment of a State court only on the ground that he is in
7 custody in violation of the Constitution or laws and treaties of the United States.” 28 U.S.C.
8 § 2254(a).

9 The court shall “award the writ or issue an order directing the respondent to show
10 cause why the writ should not be granted, unless it appears from the application that the
11 applicant or person detained is not entitled thereto.” *Id.* § 2243.

12 B. Legal Claims

13 Petitioner argues that the evidence supporting the allegations of gang enhancement
14 was “constitutionally insufficient.” The court interprets this as an assertion that petitioner’s
15 due process rights were violated. This claim is cognizable.

16 **CONCLUSION**

17 1. In view of petitioner’s prisoner account balance over the period from
18 December 26, 2005, through May 26, 2006, the court finds that leave to proceed in forma
19 pauperis must be DENIED. Petitioner shall pay the five dollar (\$5.00) filing fee within thirty
20 days of the date of this order. Failure to do so may result in the petition being dismissed for
21 failure to prosecute and failure to comply with a court order. See Fed. R. Civ. P. 41(b). 2.

22 The clerk shall serve by certified mail a copy of this order and the petition and all
23 attachments thereto on respondent and respondent’s attorney, the Attorney General of the
24 State of California. The clerk shall also serve a copy of this order on petitioner’s counsel.

25 3. No later than October 4, 2006, respondent shall file an answer confirming
26 in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a
27 writ of habeas corpus should not be issued. Respondent shall file with the answer and
28 serve on petitioner’s counsel a copy of all portions of the state trial record that have been

1 transcribed previously and that are relevant to a determination of the issues presented by
2 the petition.

3 4. If petitioner wishes to respond to the answer, he shall do so by filing a
4 traverse with the court no later than November 6, 2006.

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6 **IT IS SO ORDERED.**

7 Dated: July 13, 2006



PHYLLIS J. HAMILTON
United States District Judge

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