

1
2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5
6

7 KENNETH HARVEY,

8 Petitioner,

No. C 07-4229 PJH (PR)

9 vs.

10 D. K. SISTO, Warden,

11 Respondent.

**ORDER TO SHOW CAUSE;
GRANT OF LEAVE TO
PROCEED IN FORMA
PAUPERIS**

12
13 Petitioner, a California prisoner currently incarcerated at California State Prison-
14 Solano, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.
15 He also requests leave to proceed in forma pauperis.

16 Venue is proper because the conviction was obtained in Alameda County, which is
17 in this district. See 28 U.S.C. § 2241(d).

18 **BACKGROUND**

19 A jury convicted petitioner of murder and being an ex-felon in possession of a
20 firearm. He was sentenced to prison for fifty-two years to life. Petitioner unsuccessfully
21 appealed his conviction to the California Court of Appeal and the Supreme Court of
22 California denied review. He also has filed state habeas petitions, all of which were denied.

23 **DISCUSSION**

24 **A. Standard of Review**

25 This court may entertain a petition for a writ of habeas corpus "in behalf of a person
26 in custody pursuant to the judgment of a State court only on the ground that he is in
27 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
28 2254(a). It shall "award the writ or issue an order directing the respondent to show cause

1 why the writ should not be granted, unless it appears from the application that the applicant
2 or person detained is not entitled thereto." *Id.* § 2243.

3 **B. Legal Claims**

4 As grounds for federal habeas relief, petitioner asserts that: (1) his due process
5 rights were violated when the prosecutor proceeded on a felony-murder theory which had
6 not been part of the case; (2) his due process rights were violated by the court's instructing
7 the jury on robbery and aiding and abetting; (3) there was insufficient evidence to support
8 the conviction; (4) his right to effective assistance of counsel was violated when the trial
9 court would not appoint substitute counsel to file a motion for new trial on ineffective
10 assistance grounds; (5) his counsel was ineffective at trial; and (6) the prosecutor
11 committed misconduct by falsely stating that one of the guns found at petitioner's house
12 was the victim's. These contentions are sufficient to require a response.

13 **C. Motion for Appointment of Counsel**

14 Petitioner moves for appointment of counsel. The Sixth Amendment's right to
15 counsel does not apply in habeas corpus actions. *Knaubert v. Goldsmith*, 791 F.2d 722,
16 728 (9th Cir. 1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes appointment of
17 counsel to represent a habeas petitioner whenever "the court determines that the interests
18 of justice so require and such person is financially unable to obtain representation."

19 Petitioner has presented his claims adequately in the petition, and they are not
20 particularly complex. The interests of justice do not require appointment of counsel. The
21 motion for appointment of counsel will be denied.

22 **CONCLUSION**

23 1. Leave to proceed in forma pauperis (document number 2 on the docket is
24 **GRANTED**. Petitioner's motion for appointment of counsel (document 3) is **DENIED**.

25 2. The clerk shall serve by regular mail a copy of this order and the petition and all
26 attachments thereto on respondent and respondent's attorney, the Attorney General of the
27 State of California. The clerk also shall serve a copy of this order on petitioner.

28 3. Respondent shall file with the court and serve on petitioner, within sixty days of

1 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
2 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
3 granted. Respondent shall file with the answer and serve on petitioner a copy of all
4 portions of the state trial record that have been transcribed previously and that are relevant
5 to a determination of the issues presented by the petition.

6 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
7 the court and serving it on respondent within thirty days of his receipt of the answer.

8 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an
9 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
10 Section 2254 Cases. If respondent files such a motion, petitioner shall file with the court
11 and serve on respondent an opposition or statement of non-opposition within thirty days of
12 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply
13 within fifteen days of receipt of any opposition.

14 5. Petitioner is reminded that all communications with the court must be served on
15 respondent by mailing a true copy of the document to respondent's counsel. Petitioner
16 must keep the court informed of any change of address and must comply with the court's
17 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
18 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*
19 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

20 **IT IS SO ORDERED.**

21 Dated: August 21, 2007.



PHYLLIS J. HAMILTON
United States District Judge