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

MARIO ANTONIO BAUTISTA,)
Petitioner,)
v.)
JOHN F. SALAZAR, Warden,)
MATTHEW CATE, Secretary,)
California Department of Corrections)
and Rehabilitation,)
Respondents.)
_____)

No. C 08-4646 MMC (PR)
**ORDER TO SHOW CAUSE;
DISMISSING IMPROPER
RESPONDENT; DENYING AS
MOOT APPLICATION TO
PROCEED IN FORMA PAUPERIS;
DENYING WITHOUT PREJUDICE
MOTION FOR APPOINTMENT OF
COUNSEL**
(Docket Nos. 2 & 3)

On October 7, 2008, petitioner, a California prisoner incarcerated at Chuckawalla Valley State Prison in Blythe, California, and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ Petitioner has paid the filing fee.²

BACKGROUND

In 2006, in the Superior Court of Santa Clara County, petitioner was convicted of rape

¹Petitioner names as respondents Chuckawalla Valley State Prison Warden John F. Salazar, and Matthew Cate, the Secretary of the California Department of Corrections and Rehabilitation. The proper respondent in a habeas action is “the state officer having custody of the applicant,” if the applicant is in custody. See Rule 2, Rules Governing Section 2254 Cases, Rule 2. “The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.” *Id.* Advisory Committee Notes. As Warden Salazar is the only proper respondent named herein, Matthew Cate will be dismissed as a respondent to this action.

²As petitioner has paid the filing fee, his pending application for leave to proceed in forma pauperis will be denied as moot.

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For the Northern District of California

1 and the commission of lewd or lascivious acts on a child under the age of fourteen. He was
2 sentenced to a term of eleven years and four months in state prison. The conviction was
3 affirmed on appeal, and the petition for review was denied. Petitioner did not seek state
4 habeas corpus relief.

5 DISCUSSION

6 This Court may entertain a petition for a writ of habeas corpus “in behalf of a person
7 in custody pursuant to the judgment of a State court only on the ground that he is in custody
8 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);
9 Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an
10 order directing the respondent to show cause why the writ should not be granted, unless it
11 appears from the application that the applicant or person detained is not entitled thereto.”
12 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the
13 petition are vague or conclusory, palpably incredible, or patently frivolous or false. See
14 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison,
15 431 U.S. 63, 75-76 (1977)).

16 Petitioner claims that his conviction and sentence violate his federal constitutional
17 rights because (1) the rape charge was supported by insufficient evidence of the victim’s
18 unconsciousness, (2) the trial court erroneously excluded evidence of the victim’s prior
19 sexual conduct, (3) the trial court erroneously admitted evidence that mischaracterized and
20 ridiculed petitioner’s religious beliefs, (4) the trial was rendered fundamentally unfair as the
21 result of cumulative error, (5) the aggravating factors used to support imposition of a
22 consecutive sentence were found by the trial judge instead of by a jury, and (6) the
23 requirement that petitioner register as a sex offender cannot be upheld because of the
24 unlawful rape conviction. Liberally construed, petitioner’s claims are cognizable.

25 Petitioner moves for the appointment of counsel to represent him in the instant action.
26 The Sixth Amendment’s right to counsel does not apply in habeas actions. Knaubert v.
27 Goldsmith, 791 F.2d 722, 728 (9th Cir.), cert. denied, 479 U.S. 867 (1986). Pursuant to
28 statute, however, a district court is authorized to appoint counsel to represent a habeas

1 petitioner whenever “the court determines that the interests of justice so require and such
2 person is financially unable to obtain representation.” See 18 U.S.C. § 3006A(a)(2)(B).
3 Here, petitioner’s claims have been adequately presented in the petition and the attached state
4 court briefs, which were prepared by counsel on petitioner’s behalf. Consequently, the
5 interests of justice do not require appointment of counsel in the instant case at this time.
6 Accordingly, the request for appointment of counsel will be denied. Should the
7 circumstances change materially at a later stage of the litigation, the Court will reconsider
8 this decision sua sponte.

9 **CONCLUSION**

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

11 1. Matthew Cate is hereby DISMISSED as a respondent to this action.

12 2. Petitioner’s application to proceed in forma pauperis is hereby DENIED as moot.
13 (Docket No. 3.)

14 3. Petitioner’s motion for appointment of counsel is hereby DENIED without
15 prejudice. (Docket No. 2.)

16 4. The Clerk of the Court shall serve by certified mail a copy of this order and the
17 petition, along with all attachments thereto, upon respondent John F. Salazar and
18 respondent’s counsel, the Attorney General for the State of California. The Clerk shall also
19 serve a copy of this order on petitioner.

20 5. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
21 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
22 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
23 be granted based on petitioner’s cognizable claims. Respondent shall file with the answer
24 and serve on petitioner a copy of all portions of the state trial record that have been
25 transcribed previously and that are relevant to a determination of the issues presented by the
26 petition.

27 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
28 the Court and serving it on respondent’s counsel within **thirty (30)** days of the date the

1 answer is filed.

2 6. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this
3 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory
4 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
5 such a motion, petitioner shall file with the Court and serve on respondent an opposition or
6 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and
7 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of
8 the date any opposition is filed.

9 7. Petitioner is reminded that all communications with the Court must be served on
10 respondent by mailing a true copy of the document to respondent's counsel.


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

15 9. Upon a showing of good cause, requests for a reasonable extension of time will be
16 granted as long as they are filed on or before the deadline they seek to extend.

17 This order terminates Docket Nos. 2 and 3.

18 IT IS SO ORDERED.

19 DATED: March 16, 2009

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MAXINE M. CHESNEY
21 United States District Judge
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