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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 JOSEPH E JOHNSON JR,

No. C 08-05148 SI

9 Petitioner,

**ORDER TO SHOW CAUSE**

10 v.

11 ROBERT L. AYERS, *et al.*,

12 Respondents.  
13 \_\_\_\_\_/

14 **INTRODUCTION**

15 Joseph Everett Johnson, Jr., an inmate at San Quentin State Prison, filed this action for a writ  
16 of habeas corpus pursuant to 28 U.S.C. § 2254. His petition is now before the court for review pursuant  
17 to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.  
18

19 **BACKGROUND**

20 On July 22, 2005, following a jury trial at San Mateo County Superior Court, Johnson was  
21 convicted of unlawful vehicle taking, possession of a firearm by a felon, possession of ammunition by  
22 a felon, possession of drug paraphernalia, and receiving stolen property. *See* Cal. Veh. Code §  
23 10851(a); Cal. Penal Code §§ 12021(a), 12316(b)(1), 496(a); Cal. Health & Safety Code § 11364. The  
24 trial court found that Johnson had been convicted of a prior serious felony for which he served a term  
25 of imprisonment within the meaning of Cal. Penal Code §§ 667.5(b) and 1170.12(c)(1). On September  
26 30, 2005, he was sentenced to term of nine years and eight months. Johnson appealed. His  
27 conviction and sentence were affirmed by the California Court of Appeal on October 30, 2006, and his  
28 petition for review was denied by the California Supreme Court on January 3, 2007.

1 Johnson petitioned to the United States Supreme Court and was granted a writ of certiorari. On  
2 April 16, 2007, the United States Supreme Court vacated Johnson’s judgment, and remanded the case  
3 to the California Court of Appeal on April 16, 2007. On remand, the California Court of Appeal re-  
4 affirmed petitioner’s conviction on September 27, 2007. Johnson’s second petition for review was  
5 denied by the California Supreme Court on December 12, 2007. On March 3, 2008, Johnson’s second  
6 petition for a writ of certiorari was denied. Johnson then filed this action.

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8 **DISCUSSION**

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

17 Johnson asserts that his sentence was imposed in violation of his Sixth and Fourteenth  
18 Amendment rights because the court relied on sentence-elevating factors not found by a jury to impose  
19 an upper term sentence. *See Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856 (2007).

20  
21 **CONCLUSION**

22 For the foregoing reasons,


- 23 1. The petition states cognizable claims for habeas relief and warrants a response.
- 24 2. The clerk shall serve by certified mail a copy of this order, the petition and all  
25 attachments thereto upon respondent and respondent’s attorney, the Attorney General of the State of  
26 California. The clerk shall also serve a copy of this order on petitioner.
- 27 3. Respondent must file and serve upon petitioner, on or before **March 26, 2009**, an answer  
28 conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why

1 a writ of habeas corpus should not be issued. Respondent must file with the answer a copy of all  
2 portions of the court proceedings that have been previously transcribed and that are relevant to a  
3 determination of the issues presented by the petition.

4 4. If petitioner wishes to respond to the answer, he must do so by filing a traverse with the  
5 court and serving it on respondent on or before **April 30, 2009**.

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7 **IT IS SO ORDERED.**

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9 Dated: 1/26/09

  
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SUSAN ILLSTON  
United States District Judge