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

MITCHELL TATMON,

Petitioner,

v.

JOHN W. HAVILAND, Warden,

Respondent.

No. C 09-0094 WHA (PR)

**ORDER TO SHOW CAUSE; DENIAL
OF PETITIONER'S MOTIONS TO
PROCEED IN FORMA PAUPERIS
AND FOR APPOINTMENT OF
COUNSEL**

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

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

STATEMENT

A jury convicted petitioner of carjacking, *see* Cal. Penal Code 215(a); second degree commercial burglary, *see id.* 459; false imprisonment by violence, *see id.* 236; and second degree robbery, *see id.* 211. It also sustained special allegations of personal use of a knife on the first three counts, *see id.* 12022(b)(1). Petitioner admitted numerous prior convictions, including several strikes on each count, *see* 667(e)(2)(A), 1170.12(c)(2)(A)). He was sentenced to an aggregate unstayed term of ninety-three years to life, the main component being consecutive three-strike terms that yielded seventy-five years to life.

1 His conviction was affirmed on direct appeal by the California Court of Appeal, and the
2 California Supreme Court denied review.

3 **DISCUSSION**

4 **A. STANDARD OF REVIEW**

5 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
6 custody pursuant to the judgment of a State court only on the ground that he is in custody in
7 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose*
8 *v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading
9 requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ
10 of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state
11 court must "specify all the grounds for relief which are available to the petitioner ... and shall
12 set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c) of
13 the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. "[N]otice' pleading is not
14 sufficient, for the petition is expected to state facts that point to a 'real possibility of
15 constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d
16 688, 689 (1st Cir. 1970). "Habeas petitions which appear on their face to be legally insufficient
17 are subject to summary dismissal." *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d
18 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

19 **B. LEGAL CLAIMS**

20 As grounds for federal habeas relief, petitioner asserts that: (1) admission of evidence of
21 a 1991 crime violated his due process rights; (2) the prosecutor committed misconduct with
22 respect to the evidence of the 1991 crime; (3) the trial court's use of an improper pinpoint jury
23 instruction violated due process; and (4) the trial court's use of CALJIC 2.90 violated due
24 process. These claims are sufficient to require a response.

25 **C. MOTION FOR COUNSEL**

26 Petitioner has moved for appointment of counsel. The Sixth Amendment's right to
27 counsel does not apply in habeas corpus actions. *Knaubert v. Goldsmith*, 791 F.2d 722, 728
28 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986). However, 18 U.S.C. 3006A(a)(2)(B) authorizes a

1 district court to appoint counsel to represent a habeas petitioner whenever "the court determines
2 that the interests of justice so require and such person is financially unable to obtain
3 representation."

4 Petitioner has presented his claims adequately in the petition, and they are not
5 particularly complex. The interests of justice do not require appointment of counsel.

6 **CONCLUSION**

7 1. In view of petitioner's inmate account balance and income, his application to proceed
8 in forma pauperis (document number 4 on the docket) is **DENIED**. His motion for counsel
9 (document 2) also is **DENIED**.

10 2. The clerk shall mail a copy of this order and the petition with all attachments to the
11 respondent and the respondent's attorney, the Attorney General of the State of California. The
12 clerk shall also serve a copy of this order on the petitioner.

13 3. Respondent shall file with the court and serve on petitioner, within sixty days of
14 service of this order, an answer conforming in all respects to Rule 5 of the Rules Governing
15 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.
16 Respondent shall file with the answer and serve on petitioner a copy of all portions of the state
17 trial record that have been transcribed previously and that are relevant to a determination of the
18 issues presented by the petition.

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

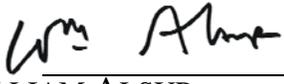
21 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,
22 as set forth in Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a
23 motion, petitioner shall file with the court and serve on respondent an opposition or statement of
24 non-opposition within thirty days of receipt of the motion, and respondent shall file with the
25 court and serve on petitioner a reply within 15 days of receipt of any opposition. If a motion is
26 filed it will be ruled upon without oral argument, unless otherwise ordered.

27 5. Petitioner is reminded that all communications with the court must be served on
28 respondent by mailing a copy of the document to respondent's counsel. Papers intended to be

1 filed in this case should be addressed to the clerk rather than to the undersigned. Petitioner also
2 must keep the court informed of any change of address by filing a separate paper with the clerk
3 headed "Notice of Change of Address," and comply with any orders of the court within the time
4 allowed, or ask for an extension of that time. Failure to do so may result in the dismissal of this
5 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez*
6 *v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

7 **IT IS SO ORDERED.**

8 Dated: May 15, 2009.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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