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United States District Court
For the Northern District of California

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

JAVIER FRANK GARCIA,)	No. C 09-04264 JW (PR)
)	
Petitioner,)	ORDER TO SHOW CAUSE;
)	DENYING MOTION FOR LEAVE
vs.)	TO PROCEED <i>IN FORMA</i>
)	<i>PAUPERIS</i>
)	
J. W. HAVILAND, Warden,)	
)	
Respondent.)	
_____)	(Docket No. 4)

Petitioner, a state prisoner incarcerated at the Pleasant Valley State Prison in Coalinga, California, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state conviction. Petitioner has paid the filing fee.

BACKGROUND

According to the petition, petitioner was found guilty in the Superior Court of the State of California in and for the County of Santa Clara of assault with a deadly weapon and a prior conviction. (Pet. at 1.) Petitioner was sentenced on November 3, 2006, to nine years in state prison. (Id.)

Petitioner appealed the conviction; the state appellate court affirmed the conviction and the state high court denied review. (Id. at 3.) Petitioner filed the

1 instant federal habeas petition on September 15, 2009.

2
3 **DISCUSSION**

4 A. Standard of Review

5 This court may entertain a petition for a 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
7 he is in custody in violation of the Constitution or laws or treaties of the United
8 States.” 28 U.S.C. § 2254(a).

9 It 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
11 the applicant or person detained is not entitled thereto.” Id. § 2243.

12 B. Legal Claims

13 Petitioner raises the following grounds for federal habeas relief: 1) there was
14 insufficient evidence to support the conviction for assault with a deadly weapon,
15 (Pet. Attach. at 4); 2) the trial court erred in giving deficient jury instructions with
16 respect to “aiding and abetting” liability, (id. at 11); 3) the prosecution committed
17 misconduct in putting forth a legally incorrect theory of aiding and abetting liability
18 in his closing argument, (id. at 15); and 4) the trial court erred in admitting
19 prejudicial evidence with minimal probative value, (id. at 15). Liberally construed,
20 petitioner’s claims appear cognizable under § 2254 and merit an answer from
21 respondent.

22
23 **CONCLUSION**

24 For the foregoing reasons and for good cause shown,

25 1. Petitioner’s motion for leave to proceed in forma pauperis (Docket No.
26 4) is DENIED as moot because petitioner has paid the filing fee. (See Docket No.
27 7.).

28 2. The clerk shall serve by certified mail a copy of this order and the

1 petition and all attachments thereto on respondent and respondent's attorney, the
2 Attorney General of the State of California. The clerk also shall serve a copy of this
3 order on petitioner.

4 3. Respondent shall file with the court and serve on petitioner, within
5 **sixty (60) days** of the issuance of this order, an answer conforming in all respects to
6 Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
7 habeas corpus should not be issued. Respondent shall file with the answer and serve
8 on petitioner a copy of all portions of the state trial record that have been transcribed
9 previously and that are relevant to a determination of the issues presented by the
10 petition.

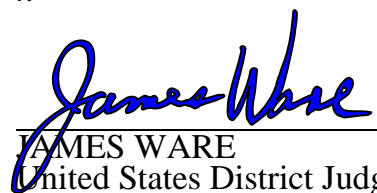
11 If petitioner wishes to respond to the answer, he shall do so by filing a
12 traverse with the court and serving it on respondent within **thirty (30) days** of his
13 receipt of the answer.

14 4. Respondent may file a motion to dismiss on procedural grounds in lieu
15 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
16 Governing Section 2254 Cases. If respondent files such a motion, petitioner shall
17 file with the court and serve on respondent an opposition or statement of non-
18 opposition within **thirty (30) days** of receipt of the motion, and respondent shall file
19 with the court and serve on petitioner a reply within **fifteen (15) days** of receipt of
20 any opposition.

21 5. Petitioner is reminded that all communications with the court must be
22 served on respondent by mailing a true copy of the document to respondent's
23 counsel. Petitioner must also keep the court and all parties informed of any change
24 of address.

25 This order terminates Docket No. 4.

26
27 DATED: February 10, 2010



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JAVIER FRANK GARCIA,
Petitioner,

Case Number: CV09-04264 JW

CERTIFICATE OF SERVICE

v.

J W HAVILAND, Warden,
Respondent.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 2/19/2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Javier Frank Garcia F-52997
CSP Solano
P. O. Box 4000
Vacaville, Ca 95696

Dated: 2/19/2010

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk