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

ORLANDO M. OBLIGACION,)	
)	
Petitioner,)	No. C 09-6003 CRB (PR)
)	
vs.)	ORDER TO SHOW CAUSE
)	
MIKE McDONALD, Warden,)	(Docket # 2 & 4)
)	
Respondent.)	
_____)	

Petitioner, a state prisoner incarcerated at High Desert State Prison in Susanville, California, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254. He also seeks to proceed in forma pauperis under 28 U.S.C. § 1915.

BACKGROUND

On March 5, 2008, petitioner was convicted by a jury in Alameda County Superior Court of deliberately evading an officer in violation of section 2800.2(a) of the California Vehicle Code (count two). Although unclear, it appears that the jury also convicted him of assault on a peace officer in violation of section 245(c) of the California Penal Code (count one). The April 2, 2008 sentencing order indicates that petitioner received the upper term of six years for count one, but

1 the July 8, 2008 amended abstract of judgment indicates that the upper term of
2 six years was for count two. In addition to the upper term of six years for counts
3 one and/or two, petitioner received a one-year enhancement for a prior conviction
4 for a total term of seven years in state prison.

5 Petitioner did not appeal, but later began seeking collateral relief until the
6 Supreme Court of California denied his final state habeas petition on November
7 19, 2009.

8 DISCUSSION

9 A. Standard of Review

10 This court may entertain a petition for a writ of habeas corpus "in behalf
11 of a person in custody pursuant to the judgment of a State court only on the
12 ground that he is in custody in violation of the Constitution or laws or treaties of
13 the United States." 28 U.S.C. § 2254(a).

14 It shall "award the writ or issue an order directing the respondent to show
15 cause why the writ should not be granted, unless it appears from the application
16 that the applicant or person detained is not entitled thereto." Id. § 2243.

17 B. Claims

18 Petitioner seeks federal habeas corpus relief on the ground that the
19 imposition of the upper term of six years, without his admission of any
20 aggravating facts or waiver of jury trial rights, violated his Sixth and Fourteenth
21 Amendment rights under Cunningham v. California, 549 U.S. 270 (2007). He
22 also claims ineffective assistance of counsel based on counsel's failure to file a
23 notice of appeal. Liberally construed, petitioner's claims appear cognizable
24 under § 2254 and merit an answer from respondent. See Zichko v. Idaho, 247
25 F.3d 1015, 1020 (9th Cir. 2001) (federal courts must construe pro se petitions for
26 writs of habeas corpus liberally).

1 **CONCLUSION**

2 For the foregoing reasons and for good cause shown,

3 1. Petitioner's request to proceed in forma pauperis (docket # 2 & 4) is
4 GRANTED.

5 2. The clerk shall serve by certified mail a copy of this order and the
6 petition and all attachments thereto on respondent and respondent's attorney, the
7 Attorney General of the State of California. The clerk also shall serve a copy of
8 this order on petitioner.

9 3. Respondent shall file with the court and serve on petitioner, within
10 60 days of the issuance of this order, an answer conforming in all respects to Rule
11 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
12 habeas corpus should not be granted. Respondent shall file with the answer and
13 serve on petitioner a copy of all portions of the state trial record that have been
14 transcribed previously and that are relevant to a determination of the issues
15 presented by the petition.

16 If petitioner wishes to respond to the answer, he shall do so by filing a
17 traverse with the court and serving it on respondent within 30 days of his receipt
18 of the answer.

19 4. Respondent may file a motion to dismiss on procedural grounds in
20 lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the
21 Rules Governing Section 2254 Cases. If respondent files such a motion,
22 petitioner shall file with the court and serve on respondent an opposition or
23 statement of non-opposition within 30 days of receipt of the motion, and
24 respondent shall file with the court and serve on petitioner a reply within 15 days
25 of receipt of any opposition.

26 /

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

5 SO ORDERED.

6 DATED: April 16, 2010



CHARLES R. BREYER
United States District Judge

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