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United States District Court
For the Northern District of California

E-Filed 9/9/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANTHONY WAYNE MYERS, SR.,

No. C 11-1435 RS (PR)

Petitioner,

ORDER TO SHOW CAUSE;

v.

ORDER REOPENING ACTION;

PEOPLE OF THE STATE OF
CALIFORNIA,

ORDER VACATING PRIOR ORDERS

Respondent.

INTRODUCTION

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. The petition was dismissed because petitioner failed to pay the filing fee, or to file a complete *in forma pauperis* application, by the deadline. Petitioner has now paid the filing fee. Accordingly, the action is hereby REOPENED. The order of dismissal (Docket No. 6), and the judgment (Docket No. 7), are hereby VACATED. The petition is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

No. C 11-1435 RS (PR)
ORDER TO SHOW CAUSE

1 **BACKGROUND**

2 In 2008, petitioner was convicted of rape and other crimes in a Del Norte County
3 Superior Court, and was sentenced to 46 years-to-life in state prison. It appears that
4 petitioner filed the instant federal habeas action after being denied relief on direct state
5 review.

6 **DISCUSSION**

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

16 As grounds for federal habeas relief, petitioner claims that (1) the trial court violated
17 his right to due process by allowing the presentation of character evidence; (2) the trial court
18 failed to instruct the jury that it must be unanimous as to which act constituted which
19 offense; (3) there was insufficient evidence as to various convictions;¹ and (4) he was
20 improperly sentenced under Cal. Pen. Code § 654.² Liberally construed, Claims 1–3 are
21 cognizable on federal habeas review. Claim 4, however, is purely a state law claim, and
22 therefore is not cognizable here. State law claims are not remediable on federal habeas
23 review, even if state law was erroneously interpreted or applied. *See Swarthout v. Cooke*,
24 131 S. Ct. 859, 861–62 (2011). Accordingly, Claim 4 is DISMISSED without leave to

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26 _____
¹ This encompasses Claims 3–5 listed in the petition.

27 ² This encompasses Claims 6 & 7 listed in the petition.

1 amend.

2 **CONCLUSION**

3 1. The Clerk shall serve by certified mail a copy of this order, the petition and all
4 attachments thereto, on respondent and respondent's counsel, the Attorney General for the
5 State of California. The Clerk shall also serve a copy of this order on petitioner.

6 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
7 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
8 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
9 be granted based on petitioner's cognizable claim. Respondent shall file with the answer and
10 serve on petitioner a copy of all portions of the state trial record that previously have been
11 transcribed and that are relevant to a determination of the issues presented by the petition.

12 3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse
13 with the Court and serving it on respondent's counsel within **thirty (30)** days of the date the
14 answer is filed.

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

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

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

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1 7. Upon a showing of good cause, requests for a reasonable extension of time will be
2 granted provided they are filed on or before the deadline they seek to extend.

3 8. Petitioner's motion to reopen the action (Docket No. 11) is DENIED as moot.
4 The Clerk is directed to reopen this action, and to terminate Docket No. 11.

5 **IT IS SO ORDERED.**

6 DATED: September 9, 2011


RICHARD SEEBORG
United States District Judge

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