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

ANTHONY JOHNSON,

No. C 11-03530 SI

Petitioner,

**ORDER TO SHOW CAUSE AND
DENYING REQUEST FOR
EVIDENTIARY HEARING**

v.

RAUL LOPEZ, WARDEN,

Respondent.

_____ /

United States District Court
For the Northern District of California

Anthony Johnson, an inmate of the California Department of Corrections, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His 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.

BACKGROUND

The petition provides the following information: Johnson was convicted in San Francisco Superior Court of first degree murder, use of a firearm in commission of crime, being a felon in possession of a firearm, possession of cocaine base for sale, possession of cocaine while armed with a firearm, and misdemeanor resisting arrest. On October 26, 2007, he was sentenced to twenty five years to life on the murder count and an additional term of twenty five years for the use of the firearm in the murder, for a total sentence of fifty years to life. Johnson appealed, and his conviction was affirmed. The California Supreme Court denied Johnson’s petition for review on July 28, 2010. Johnson filed a petition for writ of habeas corpus in the Supreme Court of California. That petition was denied on February 16, 2011.

DISCUSSION

1
2 This court may entertain a petition for writ of habeas corpus “in behalf of a person in custody
3 pursuant to the judgment of a State court only on the ground that he is in custody in violation of the
4 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A district court considering
5 an application for a writ of habeas corpus shall “award the writ or issue an order directing the
6 respondent to show cause why the writ should not be granted, unless it appears from the application that
7 the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is
8 appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or
9 patently frivolous or false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

10 The petition alleges the following: (1) Petitioner was denied his right to counsel under the Sixth
11 and Fourteenth Amendments; (2) admission of testimony concerning a proposed plea agreement violated
12 his rights under the Fifth, Sixth and Fourteenth Amendments; (3) admission of testimony concerning
13 a self-defense theory violated his rights under the Fifth, Sixth and Fourteenth Amendments; (4)
14 admission of testimony regarding his offer to plead guilty violated his rights under the Fifth, Sixth and
15 Fourteenth Amendments; (5) his attorney’s failure to object to the foregoing testimony constituted
16 ineffective assistance of counsel in violation of the Sixth Amendment; (6) the trial court’s exclusion of
17 a statement from an unnamed informant violated his rights under the Fifth, Sixth and Fourteenth
18 Amendments; (7) the questioning of petitioner’s knowledge and use of firearms violated his rights under
19 the Fifth, Sixth and Fourteenth Amendments; (8) exclusion of testimony regarding the victim’s gang
20 membership violated Petitioner’s rights under the Sixth Amendment; and (9) the trial court’s
21 questioning and excusing of a juror violated his rights under the Fifth, Sixth and Fourteenth
22 Amendments. Liberally construed, the claims appear to be cognizable in a federal habeas action.

23
24 **MOTION FOR EVIDENTIARY HEARING**

25 Petitioner has also filed a request for an evidentiary hearing regarding his claims of ineffective
26 assistance of counsel. Docket No. 2. This request is foreclosed by the Supreme Court’s decision in
27 *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). In that case the Supreme Court held that where habeas
28 claims had been decided on their merits in state court, a federal court’s review under 28 U.S.C. section

1 2254(d)(1) – whether the state court determination was contrary to or an unreasonable application of
2 established federal law – must be confined to the record that was before the state court. 131 S. Ct. at
3 1398. The *Pinholster* Court specifically found that the District Court should not have held an
4 evidentiary hearing regarding Pinholster’s claims of ineffective assistance of counsel until after the
5 Court determined that the petition survived review under Section 2254(d)(1). *Id.*, at 1398. Therefore,
6 the Court will deny without prejudice Johnson’s motion for an evidentiary hearing. The motion may be
7 renewed if, after full briefing, the Court determines that some or all of Johnson’s claims survive review
8 under Section 2254(d)(1).

9 **CONCLUSION**

10 For the foregoing reasons,

11 1. The petition states cognizable claims for habeas relief and warrants a response.

12 2. The clerk shall serve by certified mail a copy of this order, the petition and all
13 attachments thereto upon respondent and respondent’s attorney, the Attorney General of the State of
14 California. The clerk shall also serve a copy of this order on petitioner.


15 3. Respondent must file and serve upon petitioner, on or before September 30, 2011, an
16 answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause
17 why a writ of habeas corpus should not be issued. Respondent must file with the answer a copy of all
18 portions of the court proceedings that have been previously transcribed and that are relevant to a
19 determination of the issues presented by the petition.

20 4. If petitioner wishes to respond to the answer, he must do so by filing a traverse with the
21 court and serving it on respondent on or before October 31, 2011.

22 5. Petitioner’s motion for an evidentiary hearing is DENIED without prejudice.

23
24 **IT IS SO ORDERED.**

25
26 Dated: August 1, 2011

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28 _____
SUSAN ILLSTON
United States District Judge