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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RUSSELL MARVIN MARTINEZ,
Petitioner,
v.
ROBERT H. TRIMBLE, Warden,
Respondent.

No. C 11-3553 RS (PR)

ORDER TO SHOW CAUSE

INTRODUCTION

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. 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. The filing fee has been paid.

BACKGROUND

According to the petition, in 2006, a Santa Cruz County Superior Court jury convicted petitioner of second degree murder, and premeditated attempted murder, consequent to which he was sentenced to 35 years-to-life. It appears that petitioner pursued direct, but not collateral, state review of his convictions.

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DISCUSSION

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

11 As grounds for federal habeas relief, petitioner alleges that (1) the trial court gave
12 erroneous instructions on voluntary manslaughter and attempted voluntary manslaughter;
13 (2) the trial court gave erroneous instructions on how and when the jury could consider
14 evidence of provocation; (3) the trial court failed to instruct on how provocation can reduce
15 murder to manslaughter, and attempted murder to attempted manslaughter; (4) defense
16 counsel rendered ineffective assistance by failing to request various instructions, and (5) the
17 cumulative effect of all trial errors violated petitioner’s due process rights. When liberally
18 construed, these claims appear to be cognizable on federal habeas review.

CONCLUSION

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

23 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
24 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
25 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
26 be granted based on petitioner's cognizable claims. Respondent shall file with the answer
27 and serve on petitioner a copy of all portions of the state trial record that previously have

1 been transcribed and that are relevant to a determination of the issues presented by the
2 petition.

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

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

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

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

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

IT IS SO ORDERED.

22 || DATED: November 14, 2011


RICHARD SEEBORG
United States District Judge