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E-Filed 5/31/12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANTONIO T. PULIDO,
Petitioner,

No. C 12-0489 RS (PR)

ORDER TO SHOW CAUSE

v.

MATIN BITER, Warden,
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 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. **The petition appears to be untimely under § 2254. Respondent is directed to consider first if the petition is in fact untimely. If it is, respondent may file a motion to dismiss on such grounds, though he is not required to do so.**

No. C 12-0489 RS (PR)
ORDER TO SHOW CAUSE

United States District Court
For the Northern District of California

1 **BACKGROUND**

2 According to the petition, in 2007, in the Sonoma County Superior Court, petitioner
3 pleaded guilty to aggravated assault and other charges apparently related to gang activity.
4 Consequent to this proceeding, petitioner was sentenced to 29 years in state prison.

5 **DISCUSSION**

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

15 As grounds for federal habeas relief, petitioner claims (1) he had no opportunity to
16 consult confidentially with counsel; (2) his psychological condition rendered his plea
17 involuntary; (3) the prosecutor’s “package deal” for the gang members rendered his plea
18 involuntary; (4) he received ineffective assistance of counsel; (5) the conditions of
19 confinement are unconstitutional under the Eighth Amendment; (6) his sentence violates the
20 Eighth Amendment; (7) the sentencing enhancement he received violates the Equal
21 Protection Clause; and (8) his incarceration in solitary confinement violates the Eighth
22 Amendment. Claims 5 and 8 are DISMISSED because they are not brought appropriately in
23 a federal habeas action, which relates only to the legality and duration, not the conditions, of
24 confinement. If petitioner seeks relief for 5 and 8, he must file a civil rights action.
25 Accordingly, the dismissal of these claims is without prejudice to petitioner filing such an
26 action. The remaining claims, when liberally construed, appear to be cognizable on federal
27 habeas review.

1 **CONCLUSION**

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

5 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
6 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
7 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
8 be granted based on petitioner’s cognizable claims. Respondent shall file with the answer
9 and serve on petitioner a copy of all portions of the state trial record that previously have
10 been transcribed and that are relevant to a determination of the issues presented by the
11 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. The Clerk shall amend the docket to reflect that Martin Biter, the warden of the
4 prison in which petitioner is housed, is the **sole** respondent in this action. Petitioner
5 erroneously also named as respondent Matthew Cate, Director of the California Department
6 of Corrections and Rehabilitation. Biter, not Cate, is the sole proper respondent in this
7 action, as he is the custodian having day-to-day control over petitioner, the only person who
8 can produce “the body” of the petitioner. *Brittingham v. United States*, 982 F.2d 378, 379
9 (9th Cir. 1992) (quoting *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986)).

10 **IT IS SO ORDERED.**

11 DATED: May 31, 2012


RICHARD SEEBORG
United States District Judge

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