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

MARCOS ANTHONY CUEVAS,

No. C 13-5790 WHA (PR)

Petitioner,

**ORDER TO SHOW CAUSE;
DENYING APPOINTMENT OF
COUNSEL; GRANTING LEAVE TO
PROCEED IN FORMA PAUPERIS**

v.

MONTGOMERY,

Respondent.

(Dkt. 2, 4, 6)

INTRODUCTION

Petitioner, a California prisoner, filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254. For the reasons discussed below, respondent is ordered to show cause why the petition should not be granted.

STATEMENT

Petitioner was convicted in 2011 of murder. He was sentenced to a term of life without the possibility of parole. The judgment was affirmed by the California Court of Appeal, and the California Supreme Court denied the petition for review.

ANALYSIS

A. STANDARD OF REVIEW

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

1 *v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading
2 requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ
3 of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state
4 court must “specify all the grounds for relief which are available to the petitioner ... and shall
5 set forth in summary form the facts supporting each of the grounds thus specified.” Rule 2(c) of
6 the Rules Governing Section 2254 Cases, 28 U.S.C. foll. 2254. “[N]otice’ pleading is not
7 sufficient, for the petition is expected to state facts that point to a ‘real possibility of
8 constitutional error.’” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d
9 688, 689 (1st Cir. 1970)).

10 **B. LEGAL CLAIMS**

11 Petitioner claims: (1) his right to due process was violated because the trial court
12 admitted cumulative and prejudicial evidence of his gangs; and (2) the trial court’s denial of
13 petitioner’s motion to discharge the jury panel violated his right to due process and to an
14 impartial jury. When liberally construed, these claims are sufficient to warrant an answer from
15 respondent.

16 **CONCLUSION**

17 1. The clerk shall mail a copy of this order and the petition with all attachments to the
18 respondent and the respondent's attorney, the Attorney General of the State of California. The
19 clerk shall also serve a copy of this order on the petitioner.

20 2. Respondent shall file with the court and serve on petitioner, within ninety-one days
21 of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
22 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
23 granted based on the claims found cognizable herein. Respondent shall file with the answer and
24 serve on petitioner a copy of all portions of the state trial record that have been transcribed
25 previously and that are relevant to a determination of the issues presented by the petition.

26 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
27 court and serving it on respondent within twenty-eight days of the date the answer is filed.

28 3. Respondent may file, within ninety-one days, a motion to dismiss on procedural

1 grounds in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the
2 Rules Governing Section 2254 Cases. If respondent files such a motion, petitioner shall file
3 with the court and serve on respondent an opposition or statement of non-opposition within
4 twenty-eight days of the date the motion is filed, and respondent shall file with the court and
5 serve on petitioner a reply within fourteen days of the date any opposition is filed.

6 4. Petitioner is reminded that all communications with the court must be served on
7 respondent by mailing a true copy of the document to respondent's counsel. Petitioner must
8 keep the court informed of any change of address and must comply with the court's orders in a
9 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
10 pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772
11 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

12 5. The application to proceed in forma pauperis (dkt. 2, 6) is **GRANTED**. The motion for
13 appointment of counsel is **DENIED** without prejudice because there is no need for an evidentiary
14 hearing and petitioner has thus far been able to present his claims effectively.

15 **IT IS SO ORDERED.**

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17 Dated: February 6, 2014.

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19 WILLIAM ALSUP
20 UNITED STATES DISTRICT JUDGE
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