

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

GARY WESTOVER,
Petitioner,

v.

SHAWN HATTON,
Respondent.

Case No. [16-cv-07404-LB](#)

ORDER TO SHOW CAUSE

Re: ECF No. 15

INTRODUCTION

Gary Westover, a prisoner housed at the Pleasant Valley State Prison, filed this *pro se* action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He consented to proceed before a magistrate judge. (ECF No. 12.) The court reviewed his petition, determined that it stated two claims and ordered Mr. Westover to file an amendment to allege facts in support of a third potential claim. (ECF No. 13.) Mr. Westover then filed an amended petition, which now before the court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. This order requires the respondent to respond to the amended petition.

STATEMENT

Mr. Westover provides the following information: After a jury trial in Santa Clara County Superior Court, Mr. Westover was convicted of second degree murder, gross vehicular manslaughter while intoxicated, driving while under the influence of alcohol and causing injury, and driving with a blood alcohol level of 0.08 percent or more and causing injury. Sentence enhancement allegations were found true. Mr. Westover was sentenced to a term of 15 years to life consecutive to 10 years in state prison.

He appealed. The California Court of Appeal affirmed Mr. Westover's conviction in 2015 and the California Supreme Court denied his petition for review in 2016.

ANALYSIS

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). A district court considering an application for a writ of habeas corpus shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

The amended petition alleges the following claims: (1) the trial court's denial of Mr. Westover's request for a pinpoint instruction on his theory of the case violated Mr. Westover's Fourteenth Amendment right to due process; (2) the jury instructions reduced the prosecution's burden of proof to less than proof-beyond-a-reasonable-doubt, in violation of Mr. Westover's Fourteenth Amendment right to due process; (3) the exclusion of certain evidence about drunk driving violated Mr. Westover's Sixth Amendment rights to compulsory process and confrontation, and Fourteenth Amendment right to due process; (4) Mr. Westover's Fourteenth Amendment right to due process was violated when the prosecutor engaged in misconduct during closing argument with his comments on the meaning of the word "conscious;" (5) Mr. Westover received ineffective assistance of trial counsel when counsel relied on the PAS results for a rising blood-alcohol argument, but failed to show that the PAS machine was properly calibrated; and (6) the cumulative effect of the foregoing errors requires the conviction to be set aside. Liberally

1 construed, these claims are cognizable in a federal habeas action.

2 **CONCLUSION**

3 For the foregoing reasons,

4 1. The amended petition warrants a response.

5 2. The clerk shall serve by mail a copy of this order and the amended petition upon the
6 respondent and the respondent's attorney, the Attorney General of the State of California. The
7 clerk shall also serve a copy of this order on the petitioner.

8 3. The clerk also shall serve a copy of the "consent or declination to magistrate judge
9 jurisdiction" form upon the respondent and the respondent's attorney, the Attorney General of the
10 State of California.

11 4. The respondent must file and serve upon the petitioner, on or before **June 2, 2017**, an
12 answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing
13 cause why a writ of habeas corpus should not be issued. The respondent must file with the answer
14 a copy of all portions of the court proceedings that have been previously transcribed and that are
15 relevant to a determination of the issues presented by the petitioner.

16 5. If the petitioner wishes to respond to the answer, he must do so by filing a traverse with the
17 court and serving it on the respondent on or before **July 30, 2017**.

18 6. The petitioner is responsible for prosecuting this case. The petitioner must promptly keep
19 the court informed of any change of address and must comply with the court's orders in a timely
20 fashion.

21 7. The petitioner is cautioned that he must include the case name and case number for this
22 case on the first page of any document he submits to the court for consideration in this case.

23 **IT IS SO ORDERED.**

24 Dated: April 5, 2017

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26 LAUREL BEELER
27 United States Magistrate Judge
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