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

EVARISTO TOSCANO,
Petitioner,

No. C 17-4060 WHA (PR)

ORDER TO SHOW CAUSE

v.

JOE A. LIZARRAGA,
Respondent.

INTRODUCTION

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

STATEMENT

Petitioner was convicted in Alameda County Superior Court of one count of first-degree murder and three counts of attempted murder, and firearm allegations related to those convictions were found true. His appeals to the California Court of Appeals and the California Supreme Court were denied. He habeas petition in the state courts was also denied. Thereafter, petitioner filed the instant federal petition.

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 v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading

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

9 **B. LEGAL CLAIMS**

10 Petitioner claims that: (1) the admission of a double hearsay statement by a witness
11 violated various constitutional provisions and was not harmless error; (2) the police lost
12 material exculpatory evidence; (3) there was not adequate “comparable” evidence to the
13 exculpatory recorded interviews that were lost; (4) there was evidence that the recorded
14 interviews were lost in bad faith; (5) his right to due process was violated because the trial court
15 did not allow him to file a motion to sever, which would have been meritorious under California
16 law; (6) the trial judge’s comments while cross-examining an expert witness violated his right
17 to due process and to a jury trial; and (7) petitioner did not receive effective assistance of
18 counsel at trial. When liberally construed, these claim warrant a response.

19 **CONCLUSION**

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

23 2. Respondent shall file with the court and serve on petitioner, within **sixty-three (63)**
24 **days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
25 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
26 granted based on the claim found cognizable herein. Respondent shall file with the answer and
27 serve on petitioner a copy of all portions of the state prison disciplinary proceedings that are
28 relevant to a determination of the issues presented by the petition.

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

3. Respondent may file, within **sixty-three (63) days**, a motion to dismiss on procedural grounds in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a motion, petitioner shall file with the court and serve on respondent an opposition or statement of non-opposition within **twenty-eight days** of the date the motion is filed, and respondent shall file with the court and serve on petitioner a reply within **fourteen days** of the date any opposition is filed.

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

IT IS SO ORDERED.

Dated: July 27, 2017.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE