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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS COX,  
Petitioner,  
v.  
W.L. MUNIZ,  
Respondent.

Case No. [17-cv-05723-JD](#)

**ORDER FOR RESPONDENT TO  
SHOW CAUSE**

Re: Dkt. Nos. 4, 5

Nicholas Cox, a state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has also filed a motion to proceed in forma pauperis.

**BACKGROUND**

A Contra Costa County jury found petitioner guilty of shooting a firearm at an occupied building and shooting a firearm from a motor vehicle. *People v. Cox*, No. A142894, 2016 WL 4939292, at \*1 (Cal. Ct. App. Sep. 16, 2016). The California Court of Appeal affirmed the conviction. *Id.* The California Supreme Court denied review. Petition at 3.

**DISCUSSION**

**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 requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court

1 must “specify all the grounds for relief available to the petitioner ... [and] state the facts supporting  
2 each ground.” Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. § 2254. “[N]otice’  
3 pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility  
4 of constitutional error.’” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d  
5 688, 689 (1st Cir. 1970)).

6 **LEGAL CLAIMS**

7 As grounds for federal habeas relief, petitioner asserts that his rights to a fair trial and  
8 federal due process were violated because: (1) the trial court erred by failing to instruct the jury on  
9 discharge of a firearm in a grossly negligent manner; and (2) the trial court erred by refusing to  
10 instruct the jury on imperfect defense. Liberally construed, these claims are sufficient to require a  
11 response.

12 Petitioner has also requested the appointment of counsel. The Sixth Amendment’s right to  
13 counsel does not apply in habeas corpus actions. *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th  
14 Cir. 1986). However, 18 U.S.C. § 3006A(a)(2)(B) provides that in habeas cases, whenever “the  
15 court determines that the interests of justice so require”, representation may be provided for any  
16 financially eligible person. Petitioner has presented his claims adequately, and they are not  
17 particularly complex. The request is denied.

18 **CONCLUSION**

19 1. The motion to proceed in forma pauperis (Docket No. 5) is **GRANTED**. The  
20 motion to appoint counsel (Docket No. 4) is **DENIED**.

21 2. The clerk shall serve by regular mail a copy of this order and the petition and all  
22 attachments thereto on respondent and respondent’s attorney, the Attorney General of the State of  
23 California. The clerk also shall serve a copy of this order on petitioner.

24 3. Respondent shall file with the Court and serve on petitioner, within fifty-six (56)  
25 days of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
26 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.  
27 Respondent shall file with the answer and serve on petitioner a copy of all portions of the state  
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1 trial record that have been transcribed previously and that are relevant to a determination of the  
2 issues presented by the petition.

3 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the  
4 Court and serving it on respondent within twenty-eight (28) days of his receipt of the answer.

5 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an  
6 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section  
7 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the date this order  
8 is entered. If a motion is filed, petitioner shall file with the Court and serve on respondent an  
9 opposition or statement of non-opposition within twenty-eight (28) days of receipt of the motion,  
10 and respondent shall file with the Court and serve on petitioner a reply within fourteen (14) days  
11 of receipt of any opposition.

12 5. Petitioner is reminded that all communications with the Court must be served on  
13 respondent by mailing a true copy of the document to respondent's counsel. Petitioner must keep  
14 the Court informed of any change of address and must comply with the Court's orders in a timely  
15 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant  
16 to Federal Rule of Civil Procedure 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir.  
17 1997) (Rule 41(b) applicable in habeas cases).

18 **IT IS SO ORDERED.**

19 Dated: January 9, 2018

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JAMES DONATO  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 NICHOLAS COX,  
4 Plaintiff,

5 v.

6 W.L. MUNIZ,  
7 Defendant.  
8

Case No. [17-cv-05723-JD](#)

**CERTIFICATE OF SERVICE**

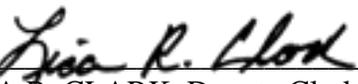
9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
10 District Court, Northern District of California.

11  
12 That on January 9, 2018, I SERVED a true and correct copy(ies) of the attached, by  
13 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
15 receptacle located in the Clerk's office.  
16

17 Nicholas Cox ID: AU6159  
18 Salinas Valley State Prison BLDG 3 1-38  
19 P.O. Box 1050  
20 Soledad, CA 93960-1050

21 Dated: January 9, 2018

22  
23 Susan Y. Soong  
24 Clerk, United States District Court

25  
26 By:   
27 LISA R. CLARK, Deputy Clerk to the  
28 Honorable JAMES DONATO