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

TONEY ALFONSO JOHNSON,

Petitioner,

v.

JOSIE GASTELO,

Respondent.

No. C 17-6070 WHA (PR)

**ORDER TO SHOW CAUSE;  
GRANTING LEAVE TO PROCEED  
IN FORMA PAUPERIS**

(Dkt. No. 3)

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**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 San Mateo County Superior Court of kidnapping, robbery, and firearms offenses. The trial court gave him a life sentence in state prison. His appeals to the California Court of Appeals and the California Supreme Court were denied in 2016. His habeas petitions in all three levels of the state courts were denied earlier this year. 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*

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 set  
5 forth in summary form the facts supporting each of the grounds thus specified.” Rule 2(c) of the  
6 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 that his appellate counsel was ineffective in failing to claim on appeal  
12 that there was insufficient evidence to support the guilty verdict on any of his convictions. When  
13 liberally construed, this claim warrants a response.

14 **CONCLUSION**

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

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

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

26 3. Respondent may file, within **sixty-three (63) days**, a motion to dismiss on procedural  
27 grounds in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the  
28 Rules Governing Section 2254 Cases. If respondent files such a motion, petitioner shall file with

1 the court and serve on respondent an opposition or statement of non-opposition within **twenty-**  
2 **eight days** of the date the motion is filed, and respondent shall file with the court and serve on  
3 petitioner a reply within **fourteen days** of the date any opposition is filed.

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

10 5. The application to proceed in forma pauperis is **GRANTED** in light of petitioner's lack  
11 of funds.

12 **IT IS SO ORDERED.**

13 Dated: November 6, 2017.

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16 WILLIAM ALSUP  
17 UNITED STATES DISTRICT JUDGE  
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