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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JOHN L. DEAN,

Petitioner,

No. C 10-2465 PJH (PR)

vs.

RAUL LOPEZ, Warden,

Respondent.

**ORDER TO SHOW CAUSE;
DENIAL OF PETITIONER'S
MOTION FOR STAY**

This is a habeas case brought pursuant to 28 U.S.C. § 2254 by a state prisoner. He has paid the filing fee.

Petitioner was convicted in Marin County, which is in this district, so venue is proper here. See 28 U.S.C. § 2241(d).

BACKGROUND

A Marin County jury convicted petitioner of battery with serious bodily injury, see Cal. Penal Code § 243(d), and assault by means of force likely to cause great bodily injury, see Cal. Penal Code § 245(a)(1). The jury also found that the assault resulted in great bodily injury and was committed within a domestic relationship. See Cal. Penal Code § 12022.7(e). The court sentenced petitioner to prison for seven years.

Petitioner unsuccessfully appealed his conviction to the California Court of Appeal and the Supreme Court of California denied review.

DISCUSSION

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

1 in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
2 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet
3 heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An
4 application for a federal writ of habeas corpus filed by a prisoner who is in state custody
5 pursuant to a judgment of a state court must "specify all the grounds for relief which are
6 available to the petitioner ... and shall set forth in summary form the facts supporting each
7 of the grounds thus specified." Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C.
8 foll. § 2254. "[N]otice' pleading is not sufficient, for the petition is expected to state facts
9 that point to a 'real possibility of constitutional error.'" Rule 4 Advisory Committee Notes
10 (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970). "Habeas petitions which
11 appear on their face to be legally insufficient are subject to summary dismissal." *Calderon*
12 *v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J.,
13 concurring).

14 **B. Legal Claims**

15 As grounds for habeas relief, petitioner asserts that: (1) his conviction was in
16 violation of his federal due process and confrontation rights because it was based on
17 testimony by a witness who was unable to tell the difference between truth and falsehood;
18 (2) the trial court's failure to intervene sua sponte when it became apparent that the witness
19 was incompetent to testify was a violation of his constitutional rights; and (3) trial counsel
20 was ineffective in not objecting at trial to the witness's incompetency.

21 Issue two contains no reference to any particular constitutional provision, and the
22 court is unaware of any constitutional requirement that a trial court intervene sua sponte to
23 question the competency of a witness. Nor do the facts alleged point to a 'real possibility of
24 constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut*, 431 F.2d at 689).
25 Issue two will be dismissed; the other issues are sufficient to require an answer.

26 **C. Motion for Stay**

27 Petitioner has filed a motion for a stay to allow him to exhaust additional claims of
28 ineffective assistance of counsel. Although a district court may grant such a stay to allow

1 exhaustion, it can only do so when it has first determined that there was good cause for the
2 petitioner's failure to exhaust the claims in state court and that the claims are potentially
3 meritorious. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Petitioner here has neither
4 shown good cause for his failure to exhaust earlier, nor provided information as to the
5 substance of the claims that would allow the court to evaluate whether they are potentially
6 meritorious. The motion will be denied.

7 **CONCLUSION**

8 1. Petitioner's motion for a stay (document number 2) is **DENIED**. Issue two is
9 **DISMISSED**.

10 2. The clerk shall serve by regular mail a copy of this order and the petition and all
11 attachments thereto on respondent and respondent's attorney, the Attorney General of the
12 State of California. The clerk also shall serve a copy of this order on petitioner.

13 3. Respondent shall file with the court and serve on petitioner, within sixty days of
14 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
15 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
16 granted. Respondent shall file with the answer and serve on petitioner a copy of all
17 portions of the state trial record that have been transcribed previously and that are relevant
18 to a determination of the issues presented by the petition.

19 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
20 the court and serving it on respondent within thirty days of his receipt of the answer.

21 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an
22 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
23 Section 2254 Cases. If respondent files such a motion, petitioner shall file with the court
24 and serve on respondent an opposition or statement of non-opposition within thirty days of
25 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply
26 within fifteen days of receipt of any opposition.

27 5. Petitioner is reminded that all communications with the court must be served on
28 respondent by mailing a true copy of the document to respondent's counsel. Petitioner

1 must keep the court informed of any change of address and must comply with the court's
2 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
3 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*
4 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

5 **IT IS SO ORDERED.**

6 Dated: January 31, 2011.



PHYLLIS J. HAMILTON
United States District Judge

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