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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Sean Shields,

NO. C 07-00047 JW

Petitioner,

**ORDER GRANTING REQUEST TO
FILED AMENDED PETITION; TO SHOW
CAUSE RE: WRIT OF HABEAS CORPUS
PETITION**

v.

James E. Tilton,

Respondent.

I. INTRODUCTION

Presently before the Court is Petitioner's Request to File an Amended Petition. (See Docket Item Nos. 7, 8.) On November 16, 2007, the Court granted Petitioner's motion to file an Amended Petition. (See Docket Item No. 6.) Due to an error by Petitioner's counsel, Petitioner failed to file his Amended Petition. However, for good cause shown, the Court GRANTS Petitioner leave to file an Amended Petition. Petitioner shall file his Amended Petition as a *separate docket entry* within ten (10) days of this Order.

Petitioner submitted a copy of his proposed Amended Petition with his Request. (See Docket Item No. 8.) Petitioner proposes to file a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his April 10, 2000 conviction. Upon review of Petitioner's Amended Petition, the Court orders Respondent to show cause why the petition should not be granted.

II. BACKGROUND

According to the petition, Petitioner was charged jointly with co-defendant Andre Payton with attempted premeditated murder of a peace officer (Cal. Penal Code § 187, 664(e)), robbery

1 (Cal. Penal Code § 211), and possession of an assault weapon (Cal. Penal Code § 12280(b)). He
2 was found guilty on April 10, 2000. However, the jury found the premeditation allegation not to be
3 true. Further, due to an error in the jury form, the jury was not asked to reach a separate verdict on
4 the peace officer’s allegation. Petitioner was sentenced to 34 years and 8 months.

5 Petitioner filed a timely appeal to the California Court of Appeal. On July 13, 2005, the First
6 Appellate District of the California Court of Appeal issued a decision reversing Petitioner’s
7 conviction on the charge for possession of an assault weapon and remanded for retrial on the peace
8 officer penalty allegation under Cal. Penal Code § 667(e). On September 13, 2005, the California
9 Court of Appeal issued an amended opinion after a rehearing rejecting Petitioner’s claim that a
10 retrial of the peace officer penalty provision violates the double jeopardy clause of the United States
11 Constitution. On October 24, 2005, Petitioner filed a petition for review in the California Supreme
12 Court. On January 4, 2006, the California Supreme Court denied petitioner’s petition for review.
13 On July 13, 2007, Petitioner was resentenced to a total term of 34 years and 8 months.

14 **III. DISCUSSION**

15 **A. Standard of Review**

16 A district court may entertain a petition for writ of habeas corpus “in behalf of a person in
17 custody pursuant to the judgment of a State court only on the ground that he is in custody in
18 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v.
19 Hodges, 423 U.S. 19, 21 (1975).

20 A district court shall “award the writ or issue an order directing the respondent to show cause
21 why the writ should not be granted, unless it appear from the application that the applicant or person
22 detained is not entitled thereto.” 28 U.S.C. § 2243.

23 **B. Petitioner’s Claim**

24 Petitioner alleges that his confinement is unlawful on the ground that his trial should have
25 been severed from his co-defendant’s based on mutually exclusive defenses that deprived Petitioner
26 of his right to a fair trial and due process of law. Liberally construed, Petitioner’s claim appears
27 cognizable under § 2254 and merits an answer from Respondent.

1 In light of Petitioner’s claims, the Court orders Respondent to show cause why the
2 Petitioner’s petition for a writ of habeas corpus should not be granted.

3 **IV. CONCLUSION**

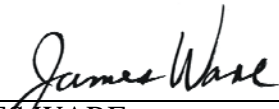
4 The Court ORDERS as follows:

- 5 1. The Clerk shall serve by mail a copy of this Order and the *Amended Petition* attached
6 as Exhibit 1 of Docket Item No. 5 and all attachments upon Respondent and
7 Respondent’s attorney, the Attorney General of the State of California. The Clerk
8 shall also serve a copy of this Order on the Petitioner.
- 9 2. Respondent shall file with the Court and serve on Petitioner, within **sixty (60) days** of
10 the filing of Petitioner’s Amended Petition, an answer conforming in all respects to
11 Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
12 habeas corpus should not be granted. Respondent shall file with the answer and serve
13 on Petitioner a copy of all portions of the underlying state criminal record that have
14 been transcribed previously and that are relevant to a determination of the issues
15 presented by the petition.
- 16 3. If Petitioner wishes to respond to the answer, he shall do so by filing a traverse with
17 the Court and serving it on Respondent within **thirty (30) days** of his receipt of the
18 answer.
- 19 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,
20 as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
21 Section 2254 Cases. If Respondent files such a motion, Petitioner shall file with the
22 Court and serve on Respondent an opposition or statement of non-opposition within
23 **thirty (30) days** of receipt of the motion, and Respondent shall file with the Court
24 and serve on Petitioner a reply within **fifteen (15) days** of receipt of any opposition.
- 25 5. It is Petitioner’s responsibility to prosecute this case. Petitioner is reminded that all
26 communications with the Court must be served on Respondent by mailing a true copy
27 of the document to Respondent’s counsel. Petitioner must keep the Court and all
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parties informed of any change of address by filing a separate paper captioned
“Notice of Change of Address.” He 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).

Dated: June 30, 2009



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Victoria H. Stafford staffordv@att.net

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Dated: June 30, 2009

Richard W. Wieking, Clerk

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By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

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