

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*\*E-FILED - 11/12/08\**

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

GREGORY WELKER, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 JAMES HARTLEY, Warden, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

No. C 08-4551 RMW (PR)  
ORDER TO SHOW CAUSE;  
GRANTING LEAVE TO  
PROCEED IN FORMA  
PAUPERIS; DENYING  
APPOINTMENT OF COUNSEL  
  
(Docket Nos. 2 & 3)

Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner’s application to proceed in forma pauperis (docket no. 2) is GRANTED. The court orders respondent to show cause why a writ of habeas corpus should not be granted and DENIES the motion for appointment of counsel (Docket No. 3).

**BACKGROUND**

According to the petition, in 2006 petitioner was convicted in Santa Clara County Superior Court of continuous sexual abuse of the child following his guilty plea. The trial court sentenced petitioner to a term of 12 years in state prison. On direct appeal, the state appellate court affirmed the judgment, and the state supreme court denied the petition for review. Thereafter, petitioner filed unsuccessful habeas petitions in the state appellate and supreme courts. The instant federal petition was filed on September 30, 2008.

1 **DISCUSSION**

2 **A. Standard of Review**

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

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

10 **B. Petitioner’s Claims**

11 As grounds for federal habeas relief petitioner claims that trial counsel was  
12 ineffective in (1) failing to object to factors considered at sentencing to increase his  
13 sentence; and (2) failing to advise petitioner of the consequences of his conviction under  
14 California’s Sexually Violent Predator’s Act. Liberally construed, petitioner’s allegations  
15 are sufficient to require a response. The court orders respondent to show cause why the  
16 petition should not be granted.

17 **CONCLUSION**

18 1. The clerk shall serve by mail a copy of this order and the petition (docket  
19 no. 1) and all attachments thereto upon the respondent and the respondent’s attorney, the  
20 Attorney General of the State of California. The clerk shall also serve a copy of this order  
21 on the petitioner.

22 2. Respondent shall file with the court and serve on petitioner, within **ninety**  
23 **days** of the date this order is filed, an answer conforming in all respects to Rule 5 of the  
24 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should  
25 not be granted. Respondent shall file with the answer and serve on petitioner a copy of all  
26 portions of the underlying state criminal record that have been transcribed previously and  
27 that are relevant to a determination of the issues presented by the petition.

28 If petitioner wishes to respond to the answer, he shall do so by filing a traverse

1 with the court and serving it on respondent within **thirty days** of the date the answer is  
2 filed.

3 3. Respondent may file a motion to dismiss on procedural grounds in lieu of  
4 an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules  
5 Governing Section 2254 Cases within **ninety days** of the date this order is filed. If  
6 respondent files such a motion, petitioner shall file with the court and serve on respondent  
7 an opposition or statement of non-opposition within **thirty days** of the date the motion is  
8 filed, and respondent **shall** file with the court and serve on petitioner a reply within  
9 **fifteen days** of the date any opposition is filed.

10 4. It is petitioner's responsibility to prosecute this case. Petitioner is reminded  
11 that all communications with the court must be served on respondent by mailing a true  
12 copy of the document to respondent's counsel. Petitioner must keep the court and all  
13 parties informed of any change of address by filing a separate paper captioned "Notice of  
14 Change of Address." He must comply with the court's orders in a timely fashion. Failure  
15 to do so may result in the dismissal of this action for failure to prosecute pursuant to  
16 Federal Rule of Civil Procedure 41(b).

17 5. Petitioner's motion for appointment of counsel is DENIED because there  
18 are no exceptional circumstances, and because there appears to be no need for an  
19 evidentiary hearing. If the circumstances of the case change such that appointment of  
20 counsel becomes warranted, the court will appoint counsel sua sponte at that time.

21 This order terminates docket nos. 2 & 3.

22 IT IS SO ORDERED.

23 DATED: 11/7/08

  
RONALD M. WHYTE  
United States District Judge

for