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

ANTHONY L. ROBINSON,)	No. C 11-00816 EJD (PR)
Petitioner,)	ORDER TO SHOW CAUSE
vs.)	
TIM VIRGA, Warden,)	
Respondent.)	
_____)	

Petitioner, a state prisoner currently incarcerated at the California State Prison - Sacramento in Represa, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his state conviction. Petitioner has paid the filing fee.

BACKGROUND

According to the petition, Petitioner was found guilty in Monterey County Superior Court of two counts of misdemeanor battery without serious injury, battery by prisoner on non-confined person, and a prior felony conviction. (Pet. at 1.)

Petitioner was sentenced to six years in state prison on November 29, 2001. (Id.)

Petitioner filed state habeas petitions, with the California Supreme Court denying review in November 2009. (Id. at 4.) Petitioner filed the instant federal

1 habeas petition on February 22, 2011.
2

3 **DISCUSSION**

4 A. Standard of Review

5 This court may entertain a petition for a writ of habeas corpus “in behalf of a
6 person in custody pursuant to the judgment of a State court only on the ground that
7 he is in custody in violation of the Constitution or laws or treaties of the United
8 States.” 28 U.S.C. § 2254(a).

9 It shall “award the writ or issue an order directing the respondent to show
10 cause why the writ should not be granted, unless it appears from the application that
11 the applicant or person detained is not entitled thereto.” Id. § 2243.

12 B. Legal Claims

13 Petitioner raises the following claims for federal habeas relief: 1) the trial
14 court erred by imposing an excessive sentence in violation of Cunningham v.
15 California, 549 U.S. 270 (2007), (Pet., Attach. “A”); 2) the trial court erred in using
16 a prior felony in sentencing, (id., Attach. “B”); 3) the trial court erred when it
17 applied a sentence enhancement to double his sentence beyond the statutory
18 maximum for a non-violent or serious felony, (id., Attach. “C”); and 4) the trial
19 court erred when it imposed an excessive restitution fine, (id., Attach. “D”).
20 Liberally construed, claims 1-3 appear cognizable under § 2254 and merit an answer
21 from Respondent. However, Petitioner’s restitution claim must be dismissed
22 because success on this claim would not impact the length of his confinement; he
23 would still have to serve the rest of his prison sentence in the same manner. See
24 Bailey v. Hill, 599 F.3d 976, 984 (2010). Accordingly, claim 4 is DISMISSED for
25 failure to state a claim .

26 **CONCLUSION**

27 For the foregoing reasons and for good cause shown,

28 1. The Clerk shall serve by certified mail a copy of this order and the

1 petition and all attachments thereto on Respondent and Respondent's attorney, the
2 Attorney General of the State of California. The Clerk also shall serve a copy of this
3 order on Petitioner.

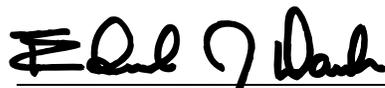
4 2. Respondent shall file with the court and serve on petitioner, within
5 **sixty (60) days** of the issuance of this order, an answer conforming in all respects to
6 Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
7 habeas corpus should not be issued. Respondent shall file with the answer and serve
8 on Petitioner a copy of all portions of the state trial record that have been transcribed
9 previously and that are relevant to a determination of the issues presented by the
10 petition.

11 If Petitioner wishes to respond to the answer, he shall do so by filing a
12 traverse with the Court and serving it on Respondent within **thirty (30) days** of his
13 receipt of the answer.

14 3. Respondent may file a motion to dismiss on procedural grounds in lieu
15 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
16 Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall
17 file with the Court and serve on Respondent an opposition or statement of non-
18 opposition within **thirty (30) days** of receipt of the motion, and Respondent shall
19 file with the court and serve on Petitioner a reply within **fifteen (15) days** of receipt
20 of any opposition.

21 4. Petitioner is reminded that all communications with the court must be
22 served on Respondent by mailing a true copy of the document to Respondent's
23 counsel. Petitioner must also keep the Court and all parties informed of any change
24 of address.

25
26 DATED: September 28, 2011



EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY L ROBINSON,
Petitioner,

Case Number: CV11-00816 EJD

CERTIFICATE OF SERVICE

v.

TIM VIRGA, Warden,
Respondent.

_____/

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

That on 9/28/2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Anthony L. Robinson E-91884
California State Prison (SAC)
P. O. Box 29
Represa, CA 95671

Dated: 9/28/2011

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk