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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAMARCUS ANTHONY THOMPSON,
Petitioner,
v.
ROBERT W. FOX,
Respondent.

Case No. 14-CV-05178-LHK

ORDER TO SHOW CAUSE

On November 21, 2014, Petitioner Damarcus Anthony Thompson (“Petitioner”), represented by counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his detention at the California Medical Facility in Vacaville, California. ECF No. 1. On August 28, 2015, Petitioner filed a First Amended Petition for Writ of Habeas Corpus. ECF No. 14 (“First Amended Petition”). For good cause shown, the Court hereby ORDERS Respondent Robert W. Fox (“Respondent”) to show cause why the First Amended Petition should not be granted.

I. BACKGROUND

On September 6, 2011, following a jury trial, Petitioner was convicted of gross vehicular manslaughter while intoxicated; fleeing the scene of the crime; driving under the influence of

1 alcohol and causing personal injury; and leaving the scene of an injury producing accident. First
2 Am. Pet. ¶ 1. In addition, Petitioner was convicted of causing bodily injury and death to multiple
3 victims, driving at an excessive speed, and causing great bodily injury to multiple victims. *Id.*

4 On October 21, 2011, Petitioner was sentenced to a total term of 20 years 10 months in
5 state prison. *Id.* ¶ 2. On November 15, 2011, Petitioner filed a timely appeal to the First Appellate
6 District alleging insufficient evidence to support Petitioner’s convictions, instructional error,
7 prosecutorial misconduct, and sentencing error. *Id.* ¶ 3. On May 28, 2013, the First District Court
8 of Appeal affirmed the judgment of the trial court, but remanded for resentencing. *Id.* ¶ 4.
9 Petitioner subsequently filed a petition for review with the California Supreme Court, which the
10 California Supreme Court denied on August 30, 2013. *Id.* ¶ 5. On October 18, 2013, Petitioner
11 was resentenced to a total term of 16 years, 10 months. *Id.* ¶ 6.

12 On November 21, 2014, Petitioner filed the instant Petition. ECF No. 1. On February 2,
13 2015, Respondent filed a motion to dismiss for failure to exhaust state remedies on the grounds
14 that one of Petitioner’s asserted grounds for relief—that the prosecutor committed misconduct in
15 closing arguments—was not presented to the California Supreme Court and therefore the petition
16 contained an unexhausted claim. ECF No. 7, at 3. Petitioner did not file an opposition to
17 Respondent’s motion to dismiss. Rather, on February 17, 2015, Petitioner filed a motion to amend
18 the petition for writ of habeas corpus, requesting leave to amend the petition to remove
19 Petitioner’s unexhausted claim. ECF No. 8, at 1. Also on February 17, 2015, Petitioner filed a
20 motion to stay and hold the petition in abeyance so that Petitioner could exhaust a new claim in
21 state court. ECF No. 9, at 1.

22 On July 29, 2015, the Court granted Petitioner’s motion to amend the petition, denied
23 Respondent’s motion to dismiss as moot, and denied Petitioner’s motion to stay on the grounds
24 that the new claim lacked merit. ECF No. 13. The Court ordered Petitioner to file an amended
25 petition within 30 days of the date of the Order. *Id.* at 13. On August 28, 2015, Petitioner timely
26 filed the First Amended Petition. *See* First Am. Pet.

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1 **II. DISCUSSION**

2 **A. Standard of Review**

3 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
4 custody pursuant to the judgment of a State court only on the ground that he is in custody in
5 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The
6 Court shall “award the writ or issue an order directing the respondent to show cause why the writ
7 should not be granted, unless it appears from the application that the applicant or person detained
8 is not entitled thereto.” *Id.* § 2243.

9 **B. Claims**

10 Petitioner asserts two claims: (1) there was insufficient evidence to support Petitioner’s
11 convictions; and (2) the trial court failed to adequately inform the jury of the necessary elements
12 of gross vehicular manslaughter while intoxicated and thereby deprived Petitioner of his right to
13 be found guilty unless all elements of the offense are proven to the jury beyond a reasonable
14 doubt. Pet. ¶ 18.

15 Petitioner’s claims appear cognizable under § 2254 and merit an answer from Respondent.
16 Accordingly, the Court hereby ORDERS Respondent to show cause why the First Amended
17 Petition should not be granted.

18 **III. CONCLUSION**

19 For the foregoing reasons and for good cause shown,

20 1. The Clerk shall serve by certified mail a copy of this Order and the Amended Petition
21 (ECF No. 15) and all attachments thereto on Respondent and Respondent’s attorney, the Attorney
22 General of the State of California. The Clerk shall also serve a copy of this Order on Petitioner.

23 2. Respondent shall file with the Court and serve on Petitioner, within **sixty (60) days** of
24 the issuance of this Order, an Answer conforming in all respects to Rule 5 of the Rules Governing
25 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.

26 Respondent shall file with the Answer and serve on Petitioner a copy of all portions of the state
27 trial record that have been transcribed previously and that are relevant to a determination of the

1 issues presented by the Amended Petition.

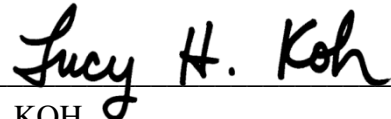
2 3. If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with
3 the Court and serving it on Respondent within **thirty (30) days** of his receipt of the Answer.

4 4. Respondent may file a Motion to Dismiss on procedural grounds in lieu of an Answer,
5 as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254
6 Cases within **sixty (60) days** of the issuance of this Order. If Respondent files such a motion,
7 Petitioner shall file with the Court and serve on Respondent an Opposition or Statement of Non-
8 opposition within **thirty (30) days** of receipt of the motion, and Respondent shall file with the
9 Court and serve on Petitioner a Reply within **fifteen (15) days** of receipt of any Opposition.

10 5. Petitioner is reminded that all communications with the Court must be served on
11 Respondent by mailing a true copy of the document to Respondent's counsel. Petitioner must also
12 keep the Court and all parties informed of any change of address. Petitioner must comply with the
13 Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for
14 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

15 **IT IS SO ORDERED.**

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17 Dated: September 2, 2015



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19 LUCY H. KOH
United States District Judge

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