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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DANNY TORRES,
Petitioner,
v.
GARY SWARTHOUT, Warden,
Respondent.

Case No. 15-CV-00369-LHK
ORDER TO SHOW CAUSE
Re: Dkt. No. 1

On January 27, 2015, Petitioner Danny Torres (“Petitioner”), represented by counsel, filed a Petition for Writ of Habeas Corpus challenging his detention at the California State Prison, Solano, in Vacaville, California. ECF No. 1 (“Petition”). For good cause shown, the Court hereby ORDERS Respondent to show cause why the Petition should not be granted.

I. BACKGROUND

A. Factual Background

On August 21, 1997, Petitioner was charged with felony robbery, in violation of California Penal Code § 211. Petition at 3. Petitioner’s information “also alleged that [P]etitioner had suffered three prior strike convictions under [California’s] three strikes law, two for robbery and one for burglary of an inhabited dwelling (i.e., first degree burglary).” ECF No. 1-1 (“Exh. A”) at

1 1. On March 12, 1998, a jury convicted Petitioner of felony robbery and, in a bifurcated
2 proceeding, the state trial court subsequently determined that Petitioner had committed the three
3 prior strikes at issue. *Id.* On June 17, 1998, the state trial court sentenced Petitioner to thirty-five
4 years to life of imprisonment, as required under California’s three strikes law. *Id.* On August 6,
5 1998, Petitioner filed a notice of appeal, which the Sixth District Court of Appeal denied. *Id.* at 2.
6 It is unclear whether Petitioner sought review from the California Supreme Court of the Sixth
7 District Court of Appeal’s decision.

8 On June 5, 2013, Petitioner filed a state habeas petition in Monterey County Superior
9 Court. Petitioner’s state habeas petition “allege[d] that the [state trial] court [had] wrongfully
10 found that [Petitioner’s] prior conviction for burglary qualified as a strike under the three-strikes
11 law.” *Id.* at 1. In addition, Petitioner contended that “[P]etitioner’s trial attorney [had] rendered
12 ineffective assistance of counsel for failing to object at the time of sentencing” to Petitioner’s prior
13 burglary conviction, and that Petitioner’s “appellate attorney was ineffective for not raising the
14 issue on appeal.” *Id.*

15 On August 2, 2013, the Monterey County Superior Court denied Petitioner’s state habeas
16 petition on the merits. *Id.* at 2–3. On March 3, 2014, the Sixth District Court of Appeal
17 summarily affirmed the Monterey County Superior Court’s decision. ECF No. 1-1 (“Exh. B”).
18 On May 21, 2014, the California Supreme Court denied Petitioner’s state habeas petition. ECF
19 No. 1-1 (“Exh. C.”). Following the California Supreme Court’s decision, Petitioner filed the
20 instant Petition on January 27, 2015. On December 30, 2015, this case was reassigned from
21 Magistrate Judge Kandis Westmore to the undersigned Judge.

22 **II. LEGAL STANDARD**

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

1 is not entitled thereto.” 28 U.S.C. § 2243.

2 **III. DISCUSSION**

3 In the instant Petition, Petitioner asserts that (1) “the use of Petitioner’s burglary ‘strike’
4 was an improper characterization of the offense,” and that (2) “trial counsel was ineffective for not
5 vigorously demanding proof of the nature of the prior [strike] and arguing that it was not a
6 strikable offense.” Petition at 11, 15. Unlike Petitioner’s state habeas petition, the instant Petition
7 does not argue that Petitioner’s appellate counsel was ineffective. In addition, Petitioner claims
8 that “[t]he [Monterey County] Superior Court denied Petitioner[’s] [state habeas petition] in part
9 on the notion that he was not timely in [filing] his [state habeas] petition.” *Id.* at 4. Accordingly,
10 Petitioner also discusses why equitable tolling should apply to the instant Petition. *Id.* at 4–15.

11 After reviewing the Monterey County Superior Court’s opinion, the Court observes that
12 the Monterey County Superior Court did not find Petitioner’s state habeas petition to be untimely
13 or—for that matter—even discuss the issue of timeliness. In denying Petitioner’s state habeas
14 petition, the California Supreme Court, however, cited *In re Robbins*, 959 P.2d 311 (Cal. 1998),
15 and *In re Clark*, 855 P.2d 729 (Cal. 1993), two cases which discuss timeliness and delay.

16 In any event, the Court finds that the instant Petition raises claims that appear cognizable
17 under 28 U.S.C. § 2254 and thus merits an answer from Respondent. Accordingly, the Court
18 ORDERS Respondent to show cause why the Petition should not be granted.

19 **IV. CONCLUSION**

20 For the foregoing reasons and for good cause shown,

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

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

27 Respondent shall file with the Answer and serve on Petitioner a copy of all portions of the state

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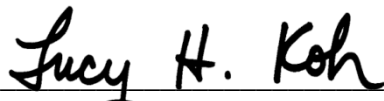
1 trial record that have been transcribed previously and that are relevant to a determination of the
2 issues presented by the Petition.

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

5 4. Respondent may file a Motion to Dismiss on procedural grounds in lieu of an Answer,
6 as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254
7 Cases within **sixty (60) days** of the issuance of this Order. If Respondent files such a motion,
8 Petitioner shall file with the Court and serve on Respondent an Opposition or Statement of Non-
9 opposition within **twenty eight (28) days** of the motion, and Respondent shall file with the Court
10 and serve on Petitioner a Reply within **fourteen (14) days** of receipt of any Opposition.

11 **IT IS SO ORDERED.**

12 Dated: March 29, 2016

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15 LUCY H. KOH
16 United States District Judge

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