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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DAMIEN DWAYNE OLIVE,  
Petitioner,

No. C 16-02773 RS (PR)

**ORDER TO SHOW CAUSE**

v.

CHRISTIAN PFEIFFER, Warden,  
Respondent.

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**INTRODUCTION**

Petitioner seeks federal habeas relief under 28 U.S.C. § 2254 from his state convictions. The petition for such relief is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases. Respondent shall file a response to the petition on or before October 17, 2016, unless an extension is granted.

**BACKGROUND**

According to the petition, in 2013, a San Francisco County Superior Court jury convicted petitioner of first degree burglary. He was sentenced to nine years in state prison.

**DISCUSSION**

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

1 A district court considering an application for a writ of habeas corpus shall “award the writ  
2 or issue an order directing the respondent to show cause why the writ should not be granted,  
3 unless it appears from the application that the applicant or person detained is not entitled  
4 thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in  
5 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See*  
6 *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

7 As grounds for federal habeas relief, petitioner alleges (1) there was insufficient  
8 evidence to support his conviction for burglary; and (2) evidence used at trial had been seized  
9 in violation of the Fourth Amendment. When liberally construed, Claim 1 is cognizable on  
10 federal habeas review.

11 Claim 2 is not, however, and is DISMISSED. Fourth Amendment claims are barred  
12 from federal habeas review unless the state did not provide an opportunity for full and fair  
13 litigation of those claims. *Stone v. Powell*, 428 U.S. 465, 481–82, 494 (1976). The existence  
14 of a state procedure allowing an opportunity for a full and fair litigation of Fourth  
15 Amendment claims, rather than a defendant’s actual use of those procedures, bars federal  
16 habeas consideration of those claims. *See Gordon v. Duran*, 895 F.2d 610, 613–14 (9th Cir.  
17 1990) (whether or not defendant litigated Fourth Amendment claim in state court is irrelevant  
18 if he had opportunity to do so under California law). California’s state procedure provides an  
19 opportunity for full litigation of Fourth Amendment claims. *See id.*; Cal. Pen. Code  
20 § 1538.5.

## 21 CONCLUSION

22 1. The Clerk shall serve a copy of this order, the petition and all attachments thereto,  
23 on respondent and respondent’s counsel, the Attorney General for the State of California.  
24 The Clerk shall also serve a copy of this order on petitioner.

25 2. Respondent shall file with the Court and serve on petitioner, within **sixty (60)** days  
26 of the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules  
27 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
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1 granted based on petitioner's cognizable claims. Respondent shall file with the answer and  
2 serve on petitioner a copy of all portions of the state trial record that previously have been  
3 transcribed and that are relevant to a determination of the issues presented by the petition.

4 3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse  
5 with the Court and serving it on respondent's counsel within **thirty (30)** days of the date the  
6 answer is filed.

7 4. In lieu of an answer, respondent may file, within **sixty (60)** days of the date this  
8 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory  
9 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files  
10 such a motion, petitioner shall file with the Court and serve on respondent an opposition or  
11 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and  
12 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of  
13 the date any opposition is filed.

14 5. Petitioner is reminded that all communications with the Court must be served on  
15 respondent by mailing a true copy of the document to respondent's counsel.

16 6. It is petitioner's responsibility to prosecute this case. Petitioner must keep the  
17 Court and respondent informed of any change of address and must comply with the Court's  
18 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
19 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

20 7. Upon a showing of good cause, requests for a reasonable extension of time will be  
21 granted provided they are filed on or before the deadline they seek to extend.

22 8. Petitioner's motion to proceed *in forma pauperis* (Docket No. 2) is GRANTED.

23 9. The Clerk shall terminate Docket No. 2.

24 **IT IS SO ORDERED.**

25 DATED: August 4, 2016

  
RICHARD SEEBORG  
United States District Judge