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

WINSTON KEMPER,	)	No. C 08-2870 JSW (PR)
	)	
Petitioner,	)	
	)	<b>ORDER OF DISMISSAL WITH LEAVE</b>
vs.	)	<b>TO AMEND AND INSTRUCTIONS TO</b>
	)	<b>THE CLERK</b>
SUPERIOR COURT OF ALAMEDA	)	
COUNTY,	)	
	)	
Respondent.	)	

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**INTRODUCTION**

Petitioner, a prisoner of the State of California, currently incarcerated at Pleasant Valley State Prison in Coalinga, California, has filed a habeas corpus petition on his own form. Petitioner has paid the \$5.00 habeas corpus filing fee.

The petition is now before the Court for review pursuant to 28 U.S.C. §2243 and Rule 4 of the Rules Governing Section 2254 Cases. Because the Court cannot determine the nature of the claims Petitioner intends to present to this Court and the relief he seeks, the petition is dismissed with leave to amend within thirty days.

**BACKGROUND**

According to the petition, Petitioner was filed a prior lawsuit in this Court under Case No. C-04-1667 JSW (PR). Petitioner contends that the dismissal of that prior action was based on discrimination, without providing any details of the discriminatory motive or action. Petitioner further alleges that actions of this Court as well as the Superior Court, State Board of Control and Board of Supervisors violated his rights to access the courts under *Lewis v. Casey*, 518 U.S. 343, 350 (1996). Petitioner further claims that

1 there may be a “conflict of interest” here because this Court “allowed a flawed second  
2 charge against me (this conviction)[.]” Finally, Petitioner apparently raises an allegation  
3 of ineffective assistance of counsel against his trial attorney for the criminal charges for  
4 which he is currently incarcerated. Petitioner filed the instant action on June 9, 2008.

## 5 DISCUSSION

### 6 I. Standard of Review

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

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

### 14 II. Discussion

15 Although Petitioner has identified the claims he has raised as a habeas corpus  
16 petition, it is unclear whether they are properly filed in this Court as such. The  
17 complaint is largely incomprehensible and do not specify the relief sought. Petitioner  
18 has also attached documents from the state courts concerning his criminal conviction.  
19 However, it is unclear why they are attached and how they relate to the instant petition.  
20 It appears from his petition that Petitioner is alleging violations of his constitutional  
21 rights during his incarceration, properly brought under 42 U.S.C. § 1983, rather than  
22 challenging the lawfulness of his confinement, the province of habeas corpus.

23 “Federal law opens two main avenues to relief on complaints related to  
24 imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the  
25 Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges  
26 to the lawfulness of confinement or to particulars affecting its duration are the province  
27 of habeas corpus.” *Hill v. McDonough*, 547 U.S. 573, 579 (2006) (quoting *Muhammad*

1 v. *Close*, 540 U.S. 749, 750 (2004)). "An inmate's challenge to the circumstances of his  
2 confinement, however, may be brought under § 1983." *Id.*

3 Traditionally, challenges to prison conditions have been cognizable only via  
4 § 1983, while challenges implicating the fact or duration of confinement must be brought  
5 through a habeas petition. *Docken v. Chase*, 393 F.3d 1024, 1026 (9th Cir. 2004). The  
6 two remedies are not always mutually exclusive, however. *Id.* at 1031.

7 The Supreme Court has consistently held that any claim by a prisoner attacking  
8 the fact or duration of his confinement must be brought under the habeas sections of  
9 Title 28 of the United States Code. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998);  
10 *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Preiser v. Rodriguez*, 411 U.S. 475, 500  
11 (1973). A claim that would necessarily imply the invalidity of a prisoner's conviction or  
12 continuing confinement must be brought in a habeas petition. *See id.* The Ninth Circuit  
13 has held that "habeas jurisdiction is absent, and a § 1983 action proper, where a  
14 successful challenge to a prison condition will not necessarily shorten the prisoner's  
15 sentence." *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003).

16 Petitioner must decide which claims he wishes to be considered here and clearly  
17 present them to this Court. If he has claims of each type, both challenges to the  
18 conditions of his confinement and to the underlying conviction, he must present them in  
19 separate actions. If Petitioner only wishes to proceed on a civil rights complaint here,  
20 the Court may construe this complaint as such. *See Wilwording v. Swenson*, 404 U.S.  
21 249, 251 (1971). However, if Petitioner is pursuing a civil rights case here, Petitioner  
22 should be aware that he will be liable for the filing fee of \$350 and under the Prisoner  
23 Litigation Reform Act the prisoner is required to pay it, even if granted *in forma*  
24 *pauperis* status, by way of deductions from his or her prisoner account.

25 Petitioner must clearly state the nature of his claims and must include the  
26 substance of the claims and relief sought on the Court's form habeas or civil rights  
27 petition, which he must complete to the best of his ability. Petitioner will be provided  
28

1 with these forms by the Court Clerk. Within thirty days of the date of this order,  
2 Petitioner must file a civil rights complaint or a habeas corpus petition on the Court's  
3 form which informs the Court of the nature of his claims.

4 **CONCLUSION**

5 For the foregoing reasons and for good cause shown, this action is dismissed with  
6 leave to file a complaint of petition within *thirty days* of the date of this order. Failure to  
7 file either by the deadline will result in dismissal of this action. Petitioner is reminded  
8 that an amended complaint filed as a matter of course or after leave of court supersedes  
9 the original complaint. "[A] plaintiff waives all causes of action alleged in the original  
10 complaint which are not alleged in the amended complaint." *London v. Coopers &*  
11 *Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981). Petitioner must include all of the civil  
12 rights or habeas claims he intends to pursue on the Court's form. The Clerk of Court  
13 shall provide Petitioner with a copy of each of these forms.

14 It is Petitioner's responsibility to prosecute this case. He must keep the Court  
15 informed of any change of address by filing a separate paper with the clerk headed  
16 "Notice of Change of Address." He must comply with any orders of the Court within the  
17 time allowed, or ask for an extension of that time. Failure to do so may result in the  
18 dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil  
19 Procedure 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule  
20 41(b) applicable in habeas cases).

21 IT IS SO ORDERED.

22 DATED: December 15, 2008

23   
24 \_\_\_\_\_  
25 JEFFREY S. WHITE  
26 United States District Judge  
27  
28

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5 WINSTON KEMPER,  
6  
7 Plaintiff,

Case Number: CV08-02870 JSW

**CERTIFICATE OF SERVICE**

8 v.

9 SUPERIOR COURT OF ALAMEDA  
COUNTY et al,

10 Defendant.  
11 \_\_\_\_\_/

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

14 That on December 15, 2008, I SERVED a true and correct copy(ies) of the attached, by placing  
15 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
16 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
17 delivery receptacle located in the Clerk's office.

18 Winston Kemper  
19 Pleasant Valley State Prison  
20 B64476  
P.O. Box 8500  
Coalinga, CA 93210

21 Dated: December 15, 2008

*Jennifer Ottolini*  
22 Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk  
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