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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES SEEGARS,

No. C 08-03940 CW (PR)

Petitioner,

ORDER OF DISMISSAL

v.

JAMES D. HARTLEY, Warden,

Respondent.
_____ /

Petitioner, a state prisoner, filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and an application for leave to proceed in forma pauperis (IFP). Petitioner has filed a previous petition for a writ of habeas corpus with this Court, challenging the same conviction and sentence. See Case No. C 07-3139 MJJ (PR). Specifically, he alleged that his 1989 sentence violated his Sixth Amendment right to a jury trial because the trial judge imposed the "upper term" following a jury verdict. On July 31, 2007, Judge Martin J. Jenkins dismissed the petition without prejudice to refiling once all state court post-conviction challenges to Petitioner's conviction and sentence were completed, and all claims Petitioner wished to raise in federal court were presented to the California Supreme Court. See July 31, 2007 Order in Case No. C 07-3139 MJJ (PR) at 1-2 (citing Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983)). Petitioner filed a motion objecting to the dismissal,

1 stating that his pending habeas petition in the California Supreme
2 Court sought production of a transcript. On September 12, 2007,
3 Judge Jenkins reviewed Petitioner's objection and concluded that
4 the rule in Sherwood did not apply. See Sept. 12, 2007 Order in
5 Case No. C 07-3139 MJJ (PR) at 1. However, Judge Jenkins denied
6 the motion, and found the dismissal appropriate for another reason,
7 namely that the petition failed to state a cognizable claim for
8 relief:

9 As Apprendi¹ does not apply retroactively to
10 petitioner's 1989 sentence, he may not challenge his
11 sentence on the basis of the Apprendi rule in a federal
12 habeas petition. Consequently, the petition fails to
13 state a cognizable claim for federal habeas relief.

14 Id. at 2-3 (footnote added). Petitioner appealed the dismissal and
15 filed a motion for a certificate of appealability (COA). On
16 November 7, 2007, Judge Jenkins denied Petitioner's motion for a
17 COA. On June 20, 2008, the Ninth Circuit Court of Appeals denied
18 his motion for a COA.

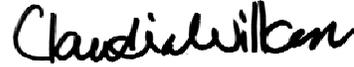
19 In the present petition, Petitioner raises the same right to a
20 jury trial claim based on the Apprendi line of cases. For the
21 reasons explained in Judge Jenkin's September 12, 2007 Order
22 denying Petitioner's motion objecting to the dismissal, the
23 petition is DISMISSED without prejudice because it fails to state a
24 cognizable claim for federal habeas relief.

25 Based solely on Petitioner's lack of financial resources, his
26 application to proceed IFP (docket no. 3) is GRANTED.

27 ¹ Apprendi v. New Jersey, 530 U.S. 466, 488-90 (2000) ("Other
28 than the fact of a prior conviction, any fact that increases the
penalty for a crime beyond the prescribed statutory maximum must be
submitted to a jury, and proved beyond a reasonable doubt.").

1 The Clerk of the Court shall enter judgment in accordance with
2 this Order, terminate all other pending motions, and close the
3 file.

4 IT IS SO ORDERED.



5 DATED: 12/15/08

CLAUDIA WILKEN
United States District Judge

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

5 JAMES SEEGARS,

Case Number: CV08-03940 CW

6 Plaintiff,

CERTIFICATE OF SERVICE

7 v.

8 JAMES D HARTLEY et al,

9 Defendant.
10 _____/

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

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

17 James Seegars E-16635
18 Avenal State Prison
19 1 Kings Way
20 P.O. Box 9
21 Avenal, CA 93204

22 Dated: December 15, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California