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

5 JAMES SEEGARS,

No. C 08-03940 CW (PR)

6
7 Petitioner,

ORDER OF DISMISSAL

8 v.

9 JAMES D. HARTLEY, Warden,

10 Respondent.
11 _____/

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

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
habeas petition. Consequently, the petition fails to
state a cognizable claim for federal habeas relief.

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

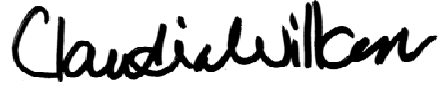
17 In the present petition, Petitioner raises the same right to a
18 jury trial claim based on the Apprendi line of cases. For the
19 reasons explained in Judge Jenkin's September 12, 2007 Order
20 denying Petitioner's motion objecting to the dismissal, the
21 petition is DISMISSED without prejudice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

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

25 ¹ Apprendi v. New Jersey, 530 U.S. 466, 488-90 (2000) ("Other
26 than the fact of a prior conviction, any fact that increases the
27 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

6 CLAUDIA WILKEN
United States District Judge

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

4 JAMES SEEGARS,

5 Plaintiff,

6 v.

7 JAMES D HARTLEY et al,

8 Defendant.

Case Number: CV08-03940 CW

CERTIFICATE OF SERVICE

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

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

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

20 Dated: December 15, 2008

21 Richard W. Wieking, Clerk
22 By: Sheilah Cahill, Deputy Clerk
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25
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