

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

4 KENNETH L. BRUMFIELD,
5 Plaintiff,

No. C 08-04257 SBA (PR)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

6 v.

7 CITY OF SAN FRANCISCO, et al.,
8 Defendants.
9 _____/

10 This case was opened when Plaintiff, a state prisoner, filed a complaint on the Court's civil
11 rights form. Plaintiff thereafter filed an application to proceed in forma pauperis (IFP). The Court
12 has granted him leave to proceed IFP.

13 Although Plaintiff submitted his claims on a civil rights form, it is apparent that he intended
14 to file a petition for a writ of habeas corpus because he claims he is being "illegally detailed" on
15 "charges refiled Feb. 2008 based on 'erroneous information.'" (Compl. at 3.) Accordingly, the Clerk
16 of the Court shall reclassify this case on the docket as a habeas action. The filing fee will be \$5.00.

17 The civil rights form Plaintiff used does not include the information necessary to pursue a
18 habeas action. Based on the information on the form, the Court cannot determine whether Plaintiff
19 has exhausted his claims in the California courts before filing this action. Federal habeas petitioners
20 are first required to exhaust state judicial remedies, either on direct appeal or through collateral
21 proceedings, by presenting the highest state court available with a fair opportunity to rule on the
22 merits of each and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b), (c); Rose v.
23 Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S. 1, 3 (1981); McNeeley v.
24 Arave, 842 F.2d 230, 231 (9th Cir. 1988). The state's highest court must be given an opportunity to
25 rule on the claims even if review is discretionary. See O'Sullivan v. Boerckel, 526 U.S. 838, 845
26 (1999) (petitioner must invoke "one complete round of the State's established appellate review
27 process"). Therefore, Plaintiff cannot present claims to this Court which he has not first raised in the
28

1 highest state court available, the Supreme Court of California, usually by direct appeal or by way of
2 a state habeas petition.

3 The Court cannot fairly evaluate this habeas action in its present state. Accordingly, the
4 Court will allow Plaintiff an opportunity to file amended claims on the Court's habeas form to
5 correct these deficiencies, if he wishes to go forward with this action as a habeas action. The failure
6 to file a completed habeas form as directed below will result in the dismissal of this action without
7 prejudice.

8 CONCLUSION

9 1. The Clerk shall reclassify this case on the docket as a habeas action with a filing fee
10 of \$5.00.

11 2. No later than **thirty (30) days** from the date of this Order, Plaintiff shall file with the
12 Court the attached 28 U.S.C. § 2254 habeas petition form, completed in full, including the state post-
13 conviction relief he has sought and any claims he seeks to raise in federal court. He should clearly
14 write in the correct caption and case number for this action, C 08-04257 CW (PR).

15 3. If Plaintiff fails to file a completed § 2254 habeas petition form within the thirty-day
16 deadline, the case will be closed for failure to prosecute under Rule 41(b) of the Federal Rules of
17 Civil Procedure. See Link v. Wabash R.R., 370 U.S. 626, 633 (1962) (pursuant to Rule 41(b), a
18 district court may on its own motion, dismiss an action for failure to prosecute or to comply with a
19 court order); see also Malone v. United States Postal Serv., 833 F.2d 128, 133 (9th Cir. 1987) (the
20 district court should afford the litigant prior notice before dismissing for failure to prosecute).

21 4. The Clerk send Plaintiff a blank § 2254 habeas petition form.

22 IT IS SO ORDERED.

23 DATED: 11/4/09


SAUNDRA BROWN ARMSTRONG
United States District Judge

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

4
5
6 KENNETH L. BRUMFIELD,
7 Plaintiff,

Case Number: CV08-04257 SBA
CERTIFICATE OF SERVICE

8 v.
9 SF CITY OF 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
Court, Northern District of California.

13 That on November 16, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.

16
17 Kenneth L. Brumfield 2306531
18 California State Prison - San Quentin
San Quentin, CA 94964

19 Dated: November 16, 2009

20 Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk