

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

4
5 JAMES EDWARD THOMAS,

No. C 10-00591 SBA (PR)

6 Petitioner,

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND; DENYING PETITIONER'S
SECOND REQUEST FOR
APPOINTMENT OF COUNSEL; AND
INSTRUCTIONS TO CLERK**

7 v.

8 JAMES WALKER,

9 Respondent.

10 This case was commenced when Petitioner filed a document captioned "Habeas Petition."¹
11 On April 23, 2010, the Court granted Petitioner's application to proceed in forma pauperis (IFP), and
12 it also denied his first request for appointment of counsel. He has recently filed a second request for
13 appointment of counsel.

14 It is unclear exactly what Petitioner is challenging in his "Habeas Petition." The Court
15 cannot fairly evaluate the petition in its present state, nor can the Court be certain that he intended to
16 file a 28 U.S.C. § 2254 petition at all. In the petition, he also seems to allege that his constitutional
17 rights were violated in the County of Santa Clara by officers who arrested him on an unspecified
18 date.

19 Accordingly, the Court will dismiss the petition with leave to amend and allow Petitioner an
20 opportunity to file either a proper 28 U.S.C. § 2254 petition on the enclosed habeas form or a proper
21 42 U.S.C. § 1983 complaint on the enclosed civil rights form.

22 If Petitioner chooses to file a 28 U.S.C. § 2254 petition, he must clearly state his grounds for
23 relief and whether he is challenging his criminal conviction and sentence, the conditions of his
24 confinement, or the execution of his sentence. He must also set out how he has exhausted his
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28 ¹ The Court notes that Petitioner filed his "Habeas Petition" on the Court's civil rights
complaint form. On that form and in several of Petitioner's letters, he refers to this action as a his
"habeas petition" or a "writ/petition for habeas corpus review." Therefore, the Court assumes that
Petitioner intended for this action to be opened as a habeas corpus action, which it was.

1 claims, that is, what he did to present them first to the highest state court available, which is the
2 Supreme Court of California.

3 If Petitioner chooses to file a 42 U.S.C. § 1983 complaint, Petitioner is particularly directed
4 to name as defendants each person who caused a violation of his constitutional rights and explain
5 what each person did to cause the violation. Liability under § 1983 arises only upon a showing of
6 personal participation by the defendant. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).
7 There is no respondeat superior liability under § 1983, i.e., no liability under the theory that a
8 supervisor is responsible for the actions or omissions of his or her subordinate. See Leer v. Murphy,
9 844 F.2d 628, 634 (9th Cir. 1988) (liability may be imposed on individual defendant under § 1983
10 only if plaintiff can show that defendant proximately caused deprivation of federally protected
11 right). The Court further notes that the filing fee for a civil rights action is \$350.00. Before this
12 action may proceed as a civil rights action, Petitioner must pay the \$350.00 filing fee, or file another
13 application for leave to proceed IFP with supporting documents, no later than **thirty (30) days** from
14 the date of this Order.² He shall include with his payment or with his IFP application a clear
15 indication that it is for the above-referenced case number, Case No. C 10-00591 SBA (PR).

16 CONCLUSION

17 1. The instant petition is DISMISSED with leave to amend within **thirty (30) days** from
18 the filing date of this Order. Petitioner shall file either a civil rights complaint on the enclosed
19 complaint form or a first amended petition on the enclosed habeas form, as set forth below. **Failure**
20 **to do so within the thirty-day deadline shall result in dismissal of this action without prejudice.**

21 2. Petitioner must write the case number for this action -- Case No. C 10-00591 SBA
22 (PR) -- on the form and complete all sections of the form. Petitioner shall take care to write clearly
23 and legibly, so that the Court can read what he writes.

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26 _____
27 ² Because Petitioner originally filed this case as a habeas corpus action, the filing fee was
28 \$5.00. His IFP application has already been granted, as mentioned above. If he chooses to proceed
with this case as civil rights action, the portion of the Court's April 23, 2010 Order granting
Petitioner IFP status in this action will be vacated. Instead, his application for leave to proceed IFP
will be denied without prejudice to filing a new application or paying the full \$350.00 filing fee for
civil rights actions.

1 If Petitioner chooses to file an amended habeas petition, it must include the words
2 "AMENDED PETITION" on the first page. The amended petition shall be on the Court's form for
3 habeas petitions, a copy of which is enclosed with Petitioner's copy of this Order.

4 If Petitioner chooses to file a civil rights action, he must complete the Court's civil rights
5 complaint form, a copy of which is enclosed with his copy of this Order. Furthermore, Petitioner
6 must pay the requisite \$350.00 filing fee in this action no later than **thirty (30) days** from the date of
7 this Order. He shall include with his payment a clear indication that it is for the above-referenced
8 case number, Case No. C 10-00591 SBA (PR). In the event that Petitioner is unable to pay the filing
9 fee, he shall submit an IFP application, trust account statement and certificate of funds no later than
10 **thirty (30) days** from the date of this Order. **Failure to pay the filing fee or file the requisite**
11 **documents (along with his civil rights complaint form) within the thirty-day deadline shall**
12 **result in dismissal of this action without prejudice.**

13 3. Petitioner's second motion for appointment of counsel (docket no. 19) is DENIED
14 without prejudice.

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

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5. The Clerk of the Court shall send Petitioner a blank civil rights complaint form and a

1 blank habeas corpus petition form along with his copy of this Order.

2 IT IS SO ORDERED.

3 DATED: 7/29/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

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

4 JAMES EDWARD THOMAS,

5 Plaintiff,

6 v.

7 JAMES WALKER et al,

8 Defendant.

Case Number: CV10-00591 SBA

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 July 30, 2010, 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 Edward Thomas F-21197
16 California State Prison - Folsom
17 P.O. Box 290066
18 Represa, CA 95671-0066

19 Dated: July 30, 2010

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