

United States District Court
For the Northern District of California

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

GILBERT ROBLES, JR.,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

No. C 11-00038 CW (PR)

ORDER OF DISMISSAL WITH LEAVE
TO AMEND

This case was opened when Plaintiff, a state prisoner, filed a complaint on the Court's civil rights form. The Clerk of the Court sent him a notice that he had failed to pay the \$350.00 filing fee or apply for leave to proceed in forma pauperis (IFP). Plaintiff thereafter filed an application to proceed IFP.

Although Plaintiff submitted his claims on a civil rights form, it is apparent that he intended to file a petition for a writ of habeas corpus because he challenges his conviction. Accordingly, the Clerk of the Court shall reclassify this case on the docket as a habeas action. The filing fee will be \$5.00.

The civil rights form Plaintiff used does not include the information necessary to pursue a habeas action. Based on the information on the form, the Court cannot determine whether Plaintiff has exhausted his claims in the California courts before filing this action. Federal habeas petitioners are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. 28

1 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982);
2 Duckworth v. Serrano, 454 U.S. 1, 3 (1981); McNeeley v. Arave, 842
3 F.2d 230, 231 (9th Cir. 1988). The state's highest court must be
4 given an opportunity to rule on the claims even if review is
5 discretionary. See O'Sullivan v. Boerckel, 526 U.S. 838, 845
6 (1999) (petitioner must invoke "one complete round of the State's
7 established appellate review process"). Therefore, Plaintiff
8 cannot present claims to this Court which he has not first raised
9 in the highest state court available, the Supreme Court of
10 California, usually by direct appeal or by way of a state habeas
11 petition.

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

19 CONCLUSION

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

22 2. Plaintiff's motion to proceed IFP is GRANTED.

23 3. No later than thirty (30) days from the date of this
24 Order, Plaintiff shall file with the Court the attached 28 U.S.C.
25 § 2254 habeas petition form, completed in full, including the state
26 post-conviction relief he has sought and any claims he seeks to
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1 raise in federal court. He should clearly write in the correct
2 caption and case number for this action, C 11-00038 CW (PR).

3 4. If Plaintiff fails to file a completed § 2254 habeas
4 petition form within the thirty-day deadline, the case will be
5 dismissed for failure to prosecute under Rule 41(b) of the Federal
6 Rules of Civil Procedure. See Link v. Wabash R.R., 370 U.S. 626,
7 633 (1962) (pursuant to Rule 41(b), a district court may on its own
8 motion, dismiss an action for failure to prosecute or to comply
9 with a court order); see also Malone v. United States Postal
10 Serv., 833 F.2d 128, 133 (9th Cir. 1987) (the district court should
11 afford the litigant prior notice before dismissing for failure to
12 prosecute).

13 5. Plaintiff's motion for appointment of counsel (docket no.
14 6) is DENIED. The Sixth Amendment right to counsel does not apply
15 in habeas corpus actions. See Knaubert v. Goldsmith, 791 F.2d 722,
16 728 (9th Cir. 1986). Title 18 U.S.C. § 3006A(a)(2)(B), however,
17 authorizes a district court to appoint counsel to represent a
18 habeas petitioner whenever "the court determines that the interests
19 of justice so require" and such person is financially unable to
20 obtain representation. The decision to appoint counsel is within
21 the discretion of the district court. See Chaney v. Lewis, 801
22 F.2d 1191, 1196 (9th Cir. 1986); Knaubert, 791 F.2d at 728; Bashor
23 v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984). The courts have
24 made appointment of counsel the exception rather than the rule by
25 limiting it to: (1) capital cases; (2) cases that turn on
26 substantial and complex procedural, legal or mixed legal and
27 factual questions; (3) cases involving uneducated or mentally or
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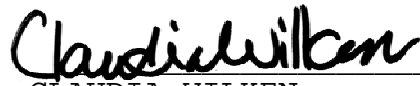
1 physically impaired petitioners; (4) cases likely to require the
2 assistance of experts either in framing or in trying the claims;
3 (5) cases in which petitioner is in no position to investigate
4 crucial facts; and (6) factually complex cases. See generally 1 J.
5 Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure
6 § 12.3b at 383-86 (2d ed. 1994). Appointment is mandatory only
7 when the circumstances of a particular case indicate that appointed
8 counsel is necessary to prevent due process violations. See
9 Chaney, 801 F.2d at 1196; Eskridge v. Rhay, 345 F.2d 778, 782 (9th
10 Cir. 1965).

11 6. The Clerk of the Court shall send Plaintiff a blank
12 § 2254 habeas petition form.

13 7. This Order terminates Docket nos. 5 and 6.

14 IT IS SO ORDERED.

15 DATED: 3/4/2011



CLAUDIA WILKEN
United States District Judge

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

4 GILBERT ROSALES JR.,

5 Plaintiff,

6 v.

7 CALIFORNIA STATE OF et al,

8 Defendant.

Case Number: CV11-00038 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 March 4, 2011, I SERVED a true and correct copy(ies) of the attached **and a blank § 2254**
12 **habeas petition form**, by placing said copy(ies) in a postage paid envelope addressed to the
13 person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said
14 copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

15 Gilbert Robles K11761
16 Kern Valley State Prison
17 P.O. Box 5104
18 D3-220 Low
19 Delano, CA 93216

20 Dated: March 4, 2011

21 Richard W. Wiekling, Clerk
22 By: Nikki Riley, Deputy Clerk
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