

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

3
4 MANUEL ZARATE,

No. C 12-6143 CW (PR)

5 Petitioner,

ORDER OF DISMISSAL WITH
LEAVE TO AMEND;

6 v.

DIRECTING CLERK TO
PROVIDE PETITIONER WITH
CIVIL RIGHTS COMPLAINT

7 GREG LEWIS, Warden, et al.

FORM AND IN FORMA
PAUPERIS APPLICATION

8 Respondents.

9 _____/

10
11 Petitioner, a state prisoner, has filed a pro se petition for
12 a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging
13 his validation as a gang member and resulting indeterminate
14 retention in the Secured Housing Unit (SHU) at Pelican Bay State
15 Prison (PBSP) for more than twenty years.

16 Petitioner previously filed a habeas petition in this court
17 challenging the confiscation of his mail by prison officials and
18 the placement in his prison file of alleged false information
19 concerning his gang affiliation. See Zarate v. Lewis, C 10-4727
20 CW (PR). On March 20, 2012, the Court granted Respondent's motion
21 to dismiss the petition and found Petitioner's claims not
22 cognizable because (1) he had failed to show how the confiscation
23 of his mail affects the fact or duration of his custody and,
24 therefore, such claim must be brought under 42 U.S.C. § 1983 and
25 not in a habeas petition, (2) his allegations that the documents
26 referring to his gang membership may result in a delay or denial
27 of parole involve discretionary decisions too speculative to state
28 a claim for habeas corpus relief and he has no liberty interest in
the precise accuracy of his prison files under § 1983, and (3) his

1 allegations of violations of state law do not present
2 constitutional claims for habeas corpus relief or under § 1983.
3 Consequently, the Court entered judgment in favor of Respondent.
4 In so doing, the Court explained to Petitioner that he could raise
5 his federal constitutional claims in a civil rights action.

6 Thereafter, Petitioner moved for reconsideration of the order
7 of dismissal, arguing that the Court had misconstrued the nature
8 of his claims because his intent was to challenge his validation
9 as a gang member and indeterminate sentence in the SHU based on
10 the contents of the confiscated mail and the placement of false
11 information in his prison file. He argued such claim can be
12 brought in a habeas corpus action because his indeterminate
13 retention in the SHU affects his ability to become eligible for
14 parole. The Court denied Petitioner's motion, finding as follows:

15 As explained to Petitioner previously, the Ninth
16 Circuit has held that "habeas jurisdiction is absent,
17 and a § 1983 action proper, where a successful challenge
18 to a prison condition will not necessarily shorten the
19 prisoner's sentence." Ramirez v. Galaza, 334 F.3d 850,
20 859 (9th Cir. 2003). In particular, where, as here, a
21 prisoner's successful challenge to his administrative
22 segregation will not necessarily shorten his sentence,
23 habeas jurisdiction does not lie. See id. In this
24 case, even if Petitioner is successful in attacking his
25 gang validation, expunging the records from his prison
26 file and terminating his confinement in the SHU, "[t]he
27 parole board will still have the authority to deny [his]
28 request[] for parole on the basis of any of the grounds
presently available to it in evaluating such a request."
Id. (internal quotation and citation omitted). Because
a successful claim would not necessarily result in
Petitioner's release on parole, he may not proceed with
his claim by way of federal habeas corpus.

Order at 3:10-26.

In the present petition, Petitioner presents essentially the
same arguments raised in his prior petition and motion for
reconsideration. He seeks habeas corpus relief and expungement of

1 the false information from his prison file. His arguments appear
2 to be grounded in the First Amendment and the due process clause
3 of the Fourteenth Amendment.

4 For the reasons discussed in the orders dismissing the first
5 petition and denying reconsideration, Petitioner's claims are not
6 cognizable in federal habeas corpus because the relief he seeks
7 would not necessarily shorten his sentence. See Ramirez v.
8 Galaza, 334 F.3d 850, 859 (9th Cir. 2003). Thus, if he wishes to
9 proceed with these claims he must do so in a civil rights action.

10 Where a prisoner files a habeas petition attacking the
11 conditions of his confinement the district court may construe such
12 petition as a civil rights action under § 1983. See Wilwording v.
13 Swenson, 404 U.S. 249, 251 (1971). The Court will not do so here
14 unless Petitioner affirmatively informs the Court that he wants
15 this case to proceed as a civil rights action, because § 1983
16 actions filed by prisoners are subject to certain statutory
17 requirements of which Petitioner should be aware before deciding
18 to proceed with a § 1983 action. In particular, § 1983 cases
19 filed by prisoners are subject to a requirement that the claims be
20 administratively exhausted. See 42 U.S.C. § 1997e(a). Further,
21 such cases are subject to a \$350.00 filing fee, rather than the
22 \$5.00 dollar filing fee for habeas cases, see 28 U.S.C. § 1914(a),
23 and the fee must be paid even if IFP status is granted, by way of
24 deductions from the prisoner's trust account until the full
25 \$350.00 fee is paid. See 28 U.S.C. § 1915(b).

26 Accordingly, this case is DISMISSED with leave to amend for
27 Petitioner to file a civil rights complaint. Should he fail to do
28 so, the case will be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. This case is DISMISSED with leave to amend. If Petitioner intends to allege a cause of action under 42 U.S.C. § 1983, he must do so by filing a civil rights complaint no later than thirty days from the date of this Order. He must use the court's civil rights form, write the case number for this action (C 12-6143 CW (PR)) on the form and complete all sections of the form.

2. Petitioner has not filed an application to proceed IFP. As noted above, the filing fee for a civil rights action is \$350.00. Accordingly, before this case can proceed as a civil rights action, Petitioner must, no later than thirty days from the date of this Order, pay the \$350.00 filing fee or file a completed application for leave to proceed IFP.

3. The failure to file a completed civil rights form and to pay the filing fee or file the requisite IFP documents within the thirty day deadline shall result in the dismissal of this action without prejudice.

The Clerk of the Court shall send Petitioner a blank civil rights form and the Court's prisoner IFP application form along with a copy of this Order.

IT IS SO ORDERED.

Dated: 12/28/2012


CLAUDIA WILKEN
United States District Judge