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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NOV 15 2006
SAN FRANCISCO, CALIF.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAMES LIMA,

Petitioner,

v.

M. C. KRAMER, Warden,

Respondent.

Civil No. 06-2388 LAB (BLM)

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA PAUPERIS
AND DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE TO
AMEND**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

REQUEST TO PROCEED IN FORMA PAUPERIS

Petitioner has no funds on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

The Petition must be dismissed, however, because Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States.

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1 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
2 federal habeas corpus claims:

3 The Supreme Court, a Justice thereof, a circuit judge, or a district
4 court shall entertain an application for a writ of habeas corpus in
5 behalf of a person in custody pursuant to the judgment of a State
6 court only on the ground that he is in custody in violation of the
7 Constitution or laws or treaties of the United States.

8 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
9 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
10 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
11 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
12 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
13 United States.” See 28 U.S.C. § 2254(a).

14 Here, Petitioner raises numerous claims, including: that the appellate court failed to
15 instruct the trial court on how to proceed upon reversal, prosecutorial misconduct, several claims
16 of erroneous admission of evidence, the denial of the right to present a defense, several claims
17 of instructional errors. (See Pet. at 6-21.) However, in no way does Petitioner claim he is “in
18 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
19 § 2254 (emphasis added.)

20 Further, the Court notes Petitioner must have exhausted the state judicial remedies as to
21 any federal claims before bringing his claims via federal habeas. State prisoners who wish to
22 challenge their state court conviction must first exhaust state judicial remedies. 28 U.S.C.
23 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To properly exhaust state court
24 judicial remedies a petitioner must allege, in state court, how one or more of his or her federal
25 rights have been violated.

26 The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts
27 are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they
28 must surely be alerted to the fact that the prisoners are asserting claims under the United States
Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes

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1 to claim that an evidentiary ruling at a state court trial denied him the due process of law
2 guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state
3 court.” Id. (emphasis added).

4 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
5 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
6 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
7 to the judgment of a State court. The limitation period shall run from the latest of:

8 (A) the date on which the judgment became final by the
9 conclusion of direct review or the expiration of the time for seeking
such review;

10 (B) the date on which the impediment to filing an application
11 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
12 by such State action;

13 (C) the date on which the constitutional right asserted was
14 initially recognized by the Supreme Court, if the right has been
newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or
16 claims presented could have been discovered through the exercise
of due diligence.

17 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

18 The Court also notes that the statute of limitations does not run while a properly filed state
19 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003,
20 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4,
21 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
22 the appropriate court officer for placement into the record] are in compliance with the applicable
23 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
24 limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167,
25 181-82 (2001).

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CONCLUSION

Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner has failed to state a cognizable federal claim. To have this case reopened, Petitioner must, **no later than December 30, 2006**, file a First Amended Petition that cures the pleading deficiencies set forth above. **The Clerk of Court shall include a blank First Amended Petition form with this Order for Petitioner's convenience.**

IT IS SO ORDERED.

DATED: 11-14-06 Larry A. Burns

Larry Alan Burns
United States District Judge