

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**RICHARD KIMBRO,**  
Petitioner,  
  
v.  
  
**SCOTT FRAUENHEIM, Warden,**  
Respondent.

Case No. 1:15-cv-01789 MJS (HC)

**FINDINGS AND RECOMMENDATION TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS**

**(Doc. 1)**

**ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT COURT JUDGE TO  
THE PRESENT MATTER**

Petitioner is a state prisoner proceeding *pro se* with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

**I. BACKGROUND**

Petitioner is currently in the custody of the California Department of Corrections. Petitioner was convicted by the Mariposa County Superior Court in April, 2005 to an indeterminate prison sentence of fifteen years to life. (Pet., ECF No. 1 at 1.) Petitioner filed the instant petition on November 30, 2015. He challenges the imposition of the \$10,000 restitution award made at trial. (See Pet.)

1 **II. DISCUSSION**

2 **A. Screening Standard**

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to  
4 dismiss a petition if it "plainly appears from the petition and any attached exhibits that the  
5 petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing  
6 Section 2254 Cases.

7 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an  
8 answer if the motion attacks the pleadings for failing to exhaust state remedies or being  
9 in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418,  
10 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to  
11 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using  
12 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);  
13 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a  
14 respondent can file a motion to dismiss after the court orders a response, and the Court  
15 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &  
16 n. 12.

17 Moreover, the Advisory Committee Notes to Rule 8 of the Rules Governing  
18 Section 2254 Cases indicates that the court may dismiss a petition for writ of habeas  
19 corpus either on its own motion under Rule 4, pursuant to the respondent's motion to  
20 dismiss, or after an answer to the petition has been filed. See, e.g., Miles v.  
21 Schwarzenegger, 2008 U.S. Dist. LEXIS 72056, 2008 WL 3244143, at \*1 (E.D. Cal. Aug.  
22 7, 2008) (dismissing habeas petition pursuant to respondent's motion to dismiss for  
23 failure to state a claim). However, a petition for writ of habeas corpus should not be  
24 dismissed without leave to amend unless it appears that no tenable claim for relief can  
25 be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

26  
27 **B. Cognizability of Petitioner's Claim**

28 Petitioner challenges the imposition of a \$10,000 restitution fine under California

1 Penal Code § 1202.4 (Pet. at 7.) Such a claim is not cognizable on federal habeas  
2 review. A federal court may entertain a habeas petition "in behalf of a person in custody  
3 pursuant to the judgment of a State court only on the ground that he is in custody in  
4 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §  
5 2254(a). The Ninth Circuit has held that "§ 2254(a) does not confer jurisdiction over a  
6 state prisoner's in-custody challenge to a restitution order imposed as part of a criminal  
7 sentence." Bailey v. Hill, 599 F.3d 976, 981-82 (9th Cir. 2010); see also United States v.  
8 Thiele, 314 F.3d 399, 400 (9th Cir. 2002) (claim challenging a restitution fine is not  
9 cognizable basis for habeas relief because such claims do not challenge the validity or  
10 duration of confinement); United States v. Kramer 195 F.3d 1129, 1130 (9th Cir. 1999)  
11 (same); Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) (imposition of fine is  
12 "merely a collateral consequence of conviction" and, as such, is not sufficient to  
13 establish federal habeas jurisdiction). Petitioner's sole claim does not provide a  
14 cognizable basis for habeas relief. As it appears no tenable claims for relief can be  
15 plead, the petition shall be dismissed without leave to amend. Jarvis, 440 F.2d 13, 14.

### 17 **III. ORDER AND RECOMMENDATION**

18 Accordingly, it is RECOMMENDED that the petition be DISMISSED without leave  
19 to amend. Further, the Court ORDERS the Clerk of Court to assign a District Court judge  
20 to the instant matter.

21 These findings and recommendations are submitted to the United States District  
22 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636  
23 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,  
24 Eastern District of California. Within thirty (30) days after being served with a copy, any  
25 party may file written objections with the Court and serve a copy on all parties. Such a  
26 document should be captioned "Objections to Magistrate Judge's Findings and  
27 Recommendations." Replies to the objections shall be served and filed within fourteen  
28 (14) days (plus three (3) days if served by mail) after service of the objections. The Court

1 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).

2 The parties are advised that failure to file objections within the specified time may  
3 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,  
4 839 (9th Cir. 2014).

5  
6 IT IS SO ORDERED.

7 Dated: January 13, 2016

/s/ Michael J. Seng  
8 UNITED STATES MAGISTRATE JUDGE

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28