



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

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**RONALD ALVARADO,**  
**Petitioner,**  
**v.**  
**PEOPLE OF CALIFORNIA,**  
**Respondent.**

---

**NO. CV 14-08448-FMO (MAN)**  
**ORDER: DISMISSING PETITION WITH**  
**PREJUDICE; AND DENYING CERTIFICATE**  
**OF APPEALABILITY**

On October 30, 2014, Petitioner, a California prisoner, filed a habeas petition, pursuant to 28 U.S.C. § 2254 (“Petition”). Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides that a petition for writ of habeas corpus “must” be summarily dismissed “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” Here, it plainly appears that the claim raised in the Petition is not cognizable and could not state any basis for federal habeas relief even if amendment were allowed. Therefore, the Petition must be summarily dismissed.

///  
///  
///  
///

1 **BACKGROUND**

2  
3 On December 11, 2008, Petitioner filed a Section 2254 habeas petition in Case No. CV 98-  
4 9446-RSWL (MAN) (the “First Action”). By Judgment entered on June 4, 1999, the First Action  
5 was dismissed without prejudice “for failure to prosecute.”  
6

7 On September 27, 1999, in Case No. CV 99-9820-RSWL (MAN) (the “Second Action”),  
8 Petitioner filed another Section 2254 habeas petition, which was identical to the petition filed in  
9 the First Action. The Second Action petition attacked Petitioner’s 1996 conviction for second  
10 degree murder sustained in Los Angeles County Superior Court Case Number SA021068, for which  
11 Petitioner received a sentence of 19 years to life in state prison (the “State Conviction”). The  
12 Second Action was dismissed with prejudice on April 19, 2000, on the ground that it was untimely.  
13 On December 8, 2000, the United States Court of Appeals for the Ninth Circuit denied Petitioner’s  
14 request for a certificate of appealability (Case No. 00-56075).<sup>1</sup>  
15

16 On September 29, 2014, Petitioner filed a letter bearing the subject line “Habeas Corpus  
17 Time Extension To Timely File” (“Motion”). The Motion asked the Court to provide Petitioner with  
18 a 30-day extension of time to file a Section 2254 habeas petition with respect to an unspecified  
19 state conviction. On September 30, 2014, the Court denied the Motion without prejudice, on the  
20 ground that the Court lacked jurisdiction to consider it. Petitioner has not appealed.  
21

22 The instant Petition stems from the 1996 State Conviction and raises a single claim, which  
23 challenges the restitution order imposed by the state trial court on July 2, 1996. Petitioner alleges  
24 that he should have received a restitution hearing to determine his ability to pay the amount of  
25

---

26 <sup>1</sup> Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has taken judicial  
27 notice of its records and files, as well as the Ninth Circuit dockets available electronically through  
28 the PACER system and the dockets for the California Supreme Court and California Court of  
Appeal are available at: [appellatecases.courtinfo.ca.gov](http://appellatecases.courtinfo.ca.gov).

1 restitution ordered, which was \$5,000. He argues that this Court should strike the \$5,000  
2 restitution ordered by the state court and reduce the amount of restitution Petitioner must pay  
3 to \$200.

4  
5 Petitioner alleges that he has not filed any state post-conviction proceedings. (Petition at  
6 3.) However, he has appended to the Petition copies of orders denying habeas relief issued by  
7 the trial court, the California Court of Appeal, and the California Supreme Court in 2013 and 2014,  
8 which appear to relate to habeas relief Petitioner sought regarding his July 2, 1996 sentence.  
9 Thus, it is possible that the restitution claim alleged in the Petition is exhausted.

## 10 11 DISCUSSION

12  
13 The Petition suffers from two obvious procedural flaws. First, in violation of Rule 2(a) of  
14 the Rules Governing Section 2254 Cases in the United States District Courts, the Petition does not  
15 name an appropriate Respondent. Pursuant to Rule 2(a), Petitioner was required to name as  
16 Respondent the state officer who has custody of him, *i.e.*, the Warden of his present institution.  
17 This procedural defect could be corrected if Petitioner were afforded leave to amend.

18  
19 Second, it appears that the Petition is an unauthorized second or successive Section 2254  
20 petition within the meaning of 28 U.S.C. § 2244(b), which provides that state habeas petitioners  
21 generally may file only one federal habeas petition challenging a particular state conviction and/or  
22 sentence. “A habeas petition is second or successive . . . if it raises claims that were or could  
23 have been adjudicated on the merits” in an earlier Section 2254 petition. McNabb v. Yates, 576  
24 F.3d 1028, 1029 (9th Cir. 2009). Petitioner’s challenge to his restitution order appears to be the  
25 type of claim that could have been filed in the Second Action.

26  
27 In any event, even when Section 2244(b) provides a basis for pursuing a second or  
28 successive Section 2254 habeas petition, state habeas petitioners seeking relief in this district

1 court must *first* obtain authorization from the Ninth Circuit before filing any such second or  
2 successive petition. 28 U.S.C. § 2244(b)(3). The Ninth Circuit “may authorize the filing of the  
3 second or successive [petition] only if it presents a claim not previously raised that satisfies one  
4 of the two grounds articulated in § 2242(b)(2).” Burton v. Stewart, 127 S. Ct. 793, 796 (2007).  
5 A review of the dockets for the Ninth Circuit show that Petitioner has not sought or obtained leave  
6 from the Ninth Circuit to file a second or successive petition in this Court.

7  
8 By the Second Action, Petitioner sought Section 2254 relief based on the same State  
9 Conviction at issue here. The untimeliness of the Second Action “presents a ‘permanent and  
10 incurable’ bar to federal review,” and the dismissal of the Second Action “constitutes a disposition  
11 on the merits” for purposes of Section 2244(b). McNabb, 576 F.3d at 1030 (citation omitted).  
12 The present Petition, thus, is second or successive within the meaning of Section 2244(b). *See*  
13 *id.* (holding “that dismissal of a section 2254 habeas petition for failure to comply with the statute  
14 of limitations renders subsequent petitions second or successive for purposes of” Section  
15 2244(b)). As Petitioner has not sought or obtained permission from the Ninth Circuit to bring a  
16 second or successive Section 2254 petition, this Court thus lacks jurisdiction to consider the  
17 Petition. 28 U.S.C. § 2244(b); *see also* Burton, 127 S. Ct. at 799 (district court lacks jurisdiction  
18 to consider the merits of a second or successive petition absent prior authorization from the circuit  
19 court).

20  
21 Generally, an unauthorized second or successive petition is dismissed without prejudice.  
22 Here, however, there is a readily-apparent and non-rectifiable defect that would render any  
23 further pursuit by Petitioner of his restitution claim futile and inappropriate. Accordingly, the  
24 dismissal of this action with prejudice is required.

25  
26 28 U.S.C. § 2254(a) provides that a federal court may entertain a habeas petition “on  
27 behalf of a person in custody pursuant to the judgment of a State court only on the ground that  
28 he is in custody in violation of the Constitution or laws or treaties of the United States.” The fact

1 of a state prisoner's physical custody alone is insufficient to confer habeas jurisdiction; rather,  
2 jurisdiction exists only if there is a nexus between the petitioner's claim and the allegedly unlawful  
3 nature of the custody. Bailey v. Hill, 599 F.3d 976, 980 (9th Cir. 2010).

4  
5 The claim alleged in the Petition is not cognizable in federal habeas review, because as the  
6 Ninth Circuit has made clear, the federal habeas statute does not provide jurisdiction over a claim  
7 challenging a restitution order, even when the petitioner is incarcerated. In Bailey, the petitioner  
8 pleaded guilty and was ordered to pay restitution. He filed a Section 2254 petition in which he  
9 alleged that his counsel provided ineffective assistance by not objecting to the restitution order  
10 imposed upon him. The Ninth Circuit affirmed the dismissal of the petition on the ground that  
11 the petitioner did not meet Section 2254's "in custody" requirement for jurisdiction. Bailey, 599  
12 F.3d at 977. The Ninth Circuit concluded that Section 2254 "does not confer jurisdiction over a  
13 state prisoner's in-custody challenge to the non-custodial portion of his criminal sentence," such  
14 as a restitution order. *Id.* at 982; *see also id.* at 984 ("we hold that § 2254(a) does not confer  
15 jurisdiction over a habeas corpus petition raising an in-custody challenge to a restitution order");  
16 Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) (observing that, "[i]n general, courts  
17 hold that the imposition of a fine . . . is merely a collateral consequence of conviction, and does  
18 not meet the 'in custody' requirement").

19  
20 A challenge based on the imposition of a restitution fine -- whether direct or indirect --  
21 does not provide the requisite jurisdictional nexus. Bailey, 599 F.3d at 981. The Ninth Circuit has  
22 made clear that this Court lacks jurisdiction to consider Petitioner's challenge to the restitution fine  
23 imposed by the trial court and Petitioner's complaint that he did not receive a hearing to  
24 determine his ability to pay restitution. *Id.* at 984 ("courts do not have jurisdiction over a habeas  
25 corpus petition brought pursuant to § 2254 challenging only a restitution order"). Accordingly,  
26 the Petition is not cognizable and must be dismissed.

27  
28 For the foregoing reasons, IT IS ORDERED that: the Petition is dismissed, with prejudice,

