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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL RENE RUIZ,) 1:09-cv-00939-SKO-HC
)
Petitioner,) ORDER DISMISSING PETITION FOR
) WRIT OF HABEAS CORPUS FOR LACK OF
) SUBJECT MATTER JURISDICTION
v.) (Doc. 1)
)
M. MARTEL, Warden, et al.,) ORDER DIRECTING THE CLERK TO
) ENTER JUDGMENT AND CLOSE THE CASE
Respondents.)
) ORDER DECLINING TO ISSUE A
_____) CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on May 26, 2009 (doc. 5). Pending before the Court is the petition, which was filed on May 18, 2009.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United

1 States District Courts (Habeas Rules) requires the Court to make
2 a preliminary review of each petition for writ of habeas corpus.
3 The Court must summarily dismiss a petition "[i]f it plainly
4 appears from the petition and any attached exhibits that the
5 petitioner is not entitled to relief in the district court...."
6 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
7 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
8 1990). Habeas Rule 2(c) requires that a petition 1) specify all
9 grounds of relief available to the Petitioner; 2) state the facts
10 supporting each ground; and 3) state the relief requested.
11 Notice pleading is not sufficient; rather, the petition must
12 state facts that point to a real possibility of constitutional
13 error. Habeas Rule 4, adv. comm. notes, 1976 adoption; O'Bremski
14 v. Maass, 915 F.2d at 420 (quoting Blackledge v. Allison, 431
15 U.S. 63, 75 n. 7 (1977)).

16 Further, the Court may dismiss a petition for writ of habeas
17 corpus either on its own motion under Rule 4, pursuant to the
18 respondent's motion to dismiss, or after an answer to the
19 petition has been filed. Advisory committee notes to Habeas Rule
20 8, 1976 adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
21 (9th Cir. 2001).

22 II. Custody

23 Habeas relief shall be granted to a person in custody
24 pursuant to the judgment of a state court only on the ground that
25 the custody violates the Constitution, laws, or treaties of the
26 United States. 28 U.S.C. § 2254(a). The "in custody"
27 requirement for a habeas petition pursuant to § 2254 is
28 jurisdictional and thus is the first question a habeas court must

1 consider. Bailey v. Hill, 599 F.3d 976, 978 (9th Cir. 2010).
2 The requirement has two aspects: 1) the petitioner must be in
3 custody at the time the petition is filed, and 2) the custody
4 must be under the conviction or sentence under attack at the time
5 the petition is filed. Id.

6 "Custody" includes physical imprisonment as well as other
7 significant or severe restraints on liberty, but it does not
8 include mere collateral consequences of a conviction. Id. at
9 978-79, 980. It is established that the imposition of a fine, by
10 itself, is not sufficient to meet the jurisdictional requirements
11 of § 2254. Id. at 979 (quoting Williamson v. Gregoire, 151 F.3d
12 1180, 1183 (9th Cir. 1998)). Further, liability under a
13 restitution order is not a sufficiently serious restraint on
14 liberty to warrant habeas relief. Bailey v. Hill, 599 F.3d at
15 979.

16 The mere fact that a petitioner is physically in custody
17 when challenging a restitution order is insufficient to render
18 the claim cognizable where the petitioner is not challenging the
19 lawfulness of his custody under federal law. Bailey v. Hill, 599
20 F.3d at 979-980, 984. Mere physical custody does not provide the
21 required nexus between the petitioner's claim and the unlawful
22 nature of the custody; instead, § 2254(a) requires that the
23 substance of the claim being asserted must challenge the legality
24 of the custody on the ground that it is, or was imposed, in
25 violation of the Constitution, laws, or treaties of the United
26 States. Id. at 980-81.

27 Further, the remedy for claims concerning restitution,
28 namely, eliminating or altering a money judgment, has no direct

1 impact upon, and is not directed at the source of the restraint
2 upon, the petitioner's liberty. Instead, it would affect only
3 the fact or amount of the restitution that has to be paid.

4 Id. at 981.

5 III. Analysis

6 Here, Petitioner has alleged that at the time of filing the
7 petition, he was a state prisoner serving a life sentence. (Pet.
8 11.) He challenges a state sentencing court's imposition of a
9 restitution fine pursuant to Cal. Govt. Code § 13967 in February
10 1991, which was accompanied by a sentence of three years and
11 eight months. (Pet. 1, 12.) Petitioner argues that the \$1,000
12 fine was imposed without a determination that Petitioner had the
13 ability to pay the fine; Petitioner also argues that his counsel
14 was ineffective at sentencing for failing to object to the
15 restitution fine. (Pet. 12-13.) However, Petitioner further
16 alleges that he served out the entire term of imprisonment and
17 parole imposed in 1991. (Id. 13.) It was only after Petitioner
18 was subsequently arrested and sentenced to prison for a life term
19 that efforts were made to collect the restitution fine. (Id. at
20 13-14.)

21 It thus appears that Petitioner's custody is not related to
22 the restitution fine he challenges, and that Petitioner's claim
23 does not challenge the lawfulness of his custody or its duration.
24 Likewise, any remedy fashioned by this Court would affect only a
25 monetary obligation, and not Petitioner's custody.

26 Accordingly, the Court concludes that it does not have
27 subject matter jurisdiction over Petitioner's claim or claims.
28

1 IV. Dismissal of the Petition

2 Because this Court does not have jurisdiction over a habeas
3 corpus petition brought pursuant to § 2254 challenging only a
4 restitution order, the petition must be dismissed. Bailey v.
5 Hill, 599 F.3d 976, 984 (9th Cir. 2010).

6 V. Certificate of Appealability

7 Unless a circuit justice or judge issues a certificate of
8 appealability, an appeal may not be taken to the court of appeals
9 from the final order in a habeas proceeding in which the
10 detention complained of arises out of process issued by a state
11 court. 28 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537
12 U.S. 322, 336 (2003). A certificate of appealability may issue
13 only if the applicant makes a substantial showing of the denial
14 of a constitutional right. § 2253(c) (2). Under this standard, a
15 petitioner must show that reasonable jurists could debate whether
16 the petition should have been resolved in a different manner or
17 that the issues presented were adequate to deserve encouragement
18 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
19 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
20 certificate should issue if the Petitioner shows that jurists of
21 reason would find it debatable whether the petition states a
22 valid claim of the denial of a constitutional right or that
23 jurists of reason would find it debatable whether the district
24 court was correct in any procedural ruling. Slack v. McDaniel,
25 529 U.S. 473, 483-84 (2000). In determining this issue, a court
26 conducts an overview of the claims in the habeas petition,
27 generally assesses their merits, and determines whether the
28 resolution was debatable among jurists of reason or wrong. Id.

1 It is necessary for an applicant to show more than an absence of
2 frivolity or the existence of mere good faith; however, it is not
3 necessary for an applicant to show that the appeal will succeed.
4 Id. at 338.

5 A district court must issue or deny a certificate of
6 appealability when it enters a final order adverse to the
7 applicant. Habeas Rule 11(a).

8 Here, because Petitioner's claims relate only to a
9 restitution order, jurists of reason would not find it debatable
10 whether the Court was correct in its ruling. Accordingly,
11 Petitioner has not made a substantial showing of the denial of a
12 constitutional right, and the Court declines to issue a
13 certificate of appealability.

14 VI. Disposition

15 Accordingly, it is ORDERED that:

16 1) The petition for writ of habeas corpus is DISMISSED for
17 lack of subject matter jurisdiction;

18 2) The Clerk of Court is DIRECTED to enter judgment and
19 close the case; and

20 3) The Court DECLINES to issue a certificate of
21 appealability.

22
23 IT IS SO ORDERED.

24 **Dated: June 25, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE