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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RAUL TORRES,	)	1:09-cv-00995 MJS HC
	)	
Petitioner,	)	ORDER DISMISSING PETITION FOR WRIT
	)	OF HABEAS CORPUS
v.	)	
	)	ORDER DIRECTING CLERK OF COURT
	)	TO ENTER JUDGMENT
DARRELL G. ADAMS, Warden,	)	
	)	ORDER DECLINING ISSUANCE OF
Respondent.	)	CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has consented to exercise of Magistrate Judge jurisdiction. He filed the instant petition for writ of habeas corpus on December 10, 2008.

**DISCUSSION**

A. Procedural Grounds for Summary Dismissal

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to

1 dismiss, or after an answer to the petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9th  
2 Cir.2001). A petition for habeas corpus should not be dismissed without leave to amend unless it  
3 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,  
4 440 F.2d 13, 14 (9th Cir. 1971).

5 B. Failure to State a Cognizable Federal Claim

6 The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241 of  
7 Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner unless  
8 he is “in custody in violation of the Constitution.” 28 U.S.C. § 2254(a) states:

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

13 (emphasis added). See also, Rule 1 to the Rules Governing Section 2254 Cases in the United States  
14 District Court. The Supreme Court has held that “the essence of habeas corpus is an attack by a  
15 person in custody upon the legality of that custody . . .” Preiser v. Rodriguez, 411 U.S. 475, 484  
16 (1973).

17 Petitioner challenges the restitution order of the Fresno County Superior Court being  
18 collected by the California Department of Corrections. Specifically, Petitioner states that he is only  
19 contesting the restitution order. (Court Doc. 1, p. 5). This is not an proper claim in a federal habeas  
20 action, because an order of restitution does not satisfy the custody requirement. United States v.  
21 Kramer, 195 F.3d 1129, 1130 (9th Cir.1999), *as amended*, (Nov. 18, 1999). Further, collateral relief  
22 from a restitution fine is not made available because Petitioner is also subject to custodial penalties.  
23 United States v. Thiele, 314 F.3d 399, 402 (9th Cir.2002). The claim is not cognizable as it does not  
24 challenge the legality of Petitioner’s custody. Therefore, the petition must be dismissed.

25 C. Certificate of Appealability

26 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
27 district court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-  
28 El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue  
a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

1 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
2 district judge, the final order shall be subject to review, on appeal, by the court  
of appeals for the circuit in which the proceeding is held.

3 (b) There shall be no right of appeal from a final order in a proceeding to test the  
4 validity of a warrant to remove to another district or place for commitment or trial  
5 a person charged with a criminal offense against the United States, or to test the  
6 validity of such person's detention pending removal proceedings.

7 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an  
8 appeal may not be taken to the court of appeals from—

9 (A) the final order in a habeas corpus proceeding in which the  
10 detention complained of arises out of process issued by a State  
11 court; or

12 (B) the final order in a proceeding under section 2255.

13 (2) A certificate of appealability may issue under paragraph (1) only if the  
14 applicant has made a substantial showing of the denial of a constitutional right.

15 (3) The certificate of appealability under paragraph (1) shall indicate which  
16 specific issue or issues satisfy the showing required by paragraph (2).

17 If a court denies a petitioner's petition, the court may only issue a certificate of appealability  
18 "if jurists of reason could disagree with the district court's resolution of his constitutional claims or  
19 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed  
20 further." Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the  
21 petitioner is not required to prove the merits of his case, he must demonstrate "something more than  
22 the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, 123 S.Ct. at  
23 1040.

24 In the present case, the Court finds that reasonable jurists would not find the Court's  
25 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or  
26 deserving of encouragement to proceed further. Petitioner has not made the required substantial  
27 showing of the denial of a constitutional right. Accordingly, the Court hereby **DECLINES** to issue a  
28 certificate of appealability.

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**ORDER**

Accordingly, IT IS HEREBY ORDERED that:

- 1. The Petition for Writ of Habeas Corpus is DISMISSED with prejudice;
- 2. The Clerk of Court is DIRECTED to enter judgment; and
- 3. The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

**Dated:** April 29, 2010

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE