UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT GONZALEZ GALVAN, Petitioner, v. DERRAL ADAMS, Respondent.	1:09-cv-01872-JLT HC ORDER TO SHOW CAUSE WHY THE AMENDED PETITION SHOULD NOT BE DISMISSED FOR VIOLATION OF THE ONE-YEAR STATUTE OF LIMITATIONS AND FOR LACK OF EXHAUSTION (Doc. 10) ORDER DISMISSING GROUND TWO IN THE AMENDED PETITION FOR FAILURE TO STATE A COGNIZABLE HABEAS CLAIM (Doc. 11) ORDER DIRECTING PETITIONER TO FILE A RESPONSE WITHIN THIRTY DAYS

PROCEDURAL HISTORY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 2, 2009, Petitioner filed his written consent to the jurisdiction of the United States Magistrate Judge for all purposes. (Doc. 3).

Because of the unusual nature of this case's procedural history, the Court feels obliged to set forth that history in some detail. The instant federal petition for writ of habeas corpus was filed on

October 20, 2009.[1] Because the original petition was filed on a form entitled "Petition for Issuance of Certificate of Appealability On Appeal From Denial of Writ of Habeas Corpus," and because that form failed to include sufficient information for the Court to conduct its preliminary screening, the Court, on January 19, 2010, ordered Petitioner to file an amended petition within thirty days. (Doc. 6). The Court ordered the Clerk of the Court to send Petitioner a form for filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On February 16, 2010, the Court's electronic docket indicates that Petitioner filed a federal petition in this Court that he may have intended to be the amended petition in this case. However, the document was not identified as an "amended petition;" therefore, the Clerk of the Court, believing it to be a new case, assigned the document a case number of 1:10-cv-00251-LJO-DLB. A review of that case's docket indicates that the petition in case number 1:10-cv-00251-LJO-DLB challenged Petitioner's October 30, 2000 conviction in the Fresno County Superior Court and raised two claims: (1) the plea agreement was involuntary because Petitioner misunderstood the consequences, i.e., the "excessive" restitution fine; and (2) trial court error in imposing an excessive restitution fine.

On March 17, 2010, the Magistrate Judge assigned to case number 1:10-00251-LJO-DLB issued Findings and Recommendations to dismiss Ground Two as non-cognizable in a habeas proceedings. (Doc. 6). On April 15, 2010, the District Judge adopted those Findings and Recommendations and dismissed Ground Two. (Doc. 7). On April 29, 2010, the Magistrate Judge in that case ordered Respondent to file a response to the remaining claim, i.e., Ground One. (Doc.

---

[1] In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); see, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000), *amended* May 23, 2001, *vacated and remanded on other grounds sub nom*. Carey v. Saffold, 536 U.S. 214, 226 (2002). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th cir. 2003). Accordingly, for all of Petitioner's state petitions and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation. Petitioner signed the original petition on October 20, 2009. (Doc. 1, p. 15).

9). On June 22, 2010, Respondent filed a motion to dismiss Ground One as untimely and as being unexhausted. (Doc. 13).

Meanwhile, in this case, the Magistrate Judge, unaware that what appears to be the amended petition was actually filed by the Clerk of the Court as a new case and assigned case number 1:10-cv-00251-LJO-DLB, assumed that Petitioner had not complied with the Court's order of January 19, 2010 to file an amended petition, and therefore, on April 5, 2010, issued an Order to Show Cause why the petition should not be dismissed for failure to comply with the Court's prior order. (Doc. 7). On April 19, 2010, Petitioner filed a response, stating in part, "On January [sic] I did file a amended petition on a proper habeas corpus form approved by the court. I do apologize. I was under the imprission [sic] that this was done. I'm requesting an extension of time to file an amended petition." (Doc. 8). On April 21, 2010, the Court, still unaware of case number 1:10-00251-LJO-DLB, issued an order granting Petitioner thirty days within which to file his amended petition. (Doc. 9). On May 10, 2010, Petitioner filed the instant first amended petition, raising three claims: (1) involuntary plea agreement due to Petitioner's mental condition at the time; (2) illegal and excessive restitution fine; and (3) ineffective assistance of counsel in failing to object to the illegal and excessive restitution fine. (Doc. 10).

In cases such as this, where a copy of a petition or an amended petition has inadvertently been given a new case number and a second case has been opened, the Court would either consolidate those cases using the lower case number and construe the petition filed in the "new" case as an amended petition in the "old" case, or would dismiss the later case outright as duplicative if the two pleadings raised identical issues. Unfortunately, however, neither alternative appears practical in this situation because the "first amended petition" in this case contains a claim, i.e., ineffective assistance of counsel, not included in the petition in case number 1:10-00251-LJO-DLB. Moreover, the cases are at different stages of litigation: the restitution claim in the latter case has already been dismissed by the District Judge in that case and Respondent has already responded to the remaining claim of an involuntary plea by claiming it should be dismissed as untimely and unexhausted. Therefore, despite the obvious duplication of Court resources involved in addressing Petitioner's claims twice in separate cases before different judges, the two cases will nevertheless be allowed to

proceed as they are presented postured. However, the Court will take judicial notice of the Court's rulings in case number 1:10-00251-LJO-DLB and the documents filed therein.

After conducting a preliminary review of the first amended petition, it appears that the petition is untimely and should therefore be dismissed. It also appears that the claims raised therein have not been exhausted in state court. Moreover, as was the case in case number 1:10-00251-LJO-DLB, Ground Two must be dismissed since a habeas claim cannot be predicated upon a claim for restitution. Accordingly, the Court will dismiss Ground Two and issue an Order to Show Cause why Grounds One and Three should not be dismissed as untimely and unexhausted.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases. 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 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this Order to Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in Herbst.

B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied,* 118 S.Ct. 586 (1997). The instant petition was filed on October 20, 2009, and thus, it is subject to the provisions

of the AEDPA.

The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was 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
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In most cases, the limitation period begins running on the date that the petitioner's direct review became final. Here, the Petitioner was convicted on September 15, 2000 for, inter alia, kidnapping and sentenced to two consecutive life terms with the possibility of parole plus various enhancements. (Case number 1:10-cv-00251-LJO-DLB ("No. 10-251"), Lodged Documents ("LD") 1). On direct appeal, the Court of Appeal, Fifth Appellate District ("5th DCA"), ruled that a two-year enhancement imposed by the trial court violated the plea agreement and remanded the case for re-sentencing on May 1, 2002. (No. 10-251, LD 2). On July 25, 2002, at the re-sentencing hearing, the trial court re-sentenced Petitioner on the two-year enhancement pursuant to the terms of the plead agreement. (Id., LD 3). Petitioner did not appeal the re-sentencing.

California state law governs the period within which prisoners have to file an appeal and, in turn, that law governs the date of finality of convictions. See, e.g., Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D. Cal. 2001)(California

conviction becomes final 60 days after the superior court proceedings have concluded, citing prior Rule of Court, Rule 31(d)). Pursuant to California Rules of Court, Rule 8.308(a), a criminal defendant convicted of a felony must file his notice of appeal within sixty days of the rendition of judgment. See People v. Mendez, 19 Cal.4th 1084, 1086, 969 P.2d 146, 147 (1999)(citing prior Rule of Court, Rule 31(d)). Because Petitioner did not file a notice of appeal from his re-sentencing on July 25, 2002, his direct review concluded on September 23, 2002, when the sixty-day period for filing a notice of appeal expired. The one-year period under the AEDPA would have commenced the following day, on September 24, 2002, and Petitioner would have had one year from that date, or until September 23, 2003, within which to file his federal petition for writ of habeas corpus. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir.2001).

As mentioned, the instant petition was filed on October 20, 2009, over six years after the date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or equitable tolling, the instant petition is untimely and should be dismissed.

C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Under the AEDPA, the statute of limitations is tolled during the time that a properly filed application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that 'a California petitioner completes a full round of [state] collateral review," so long as there is no unreasonable delay in the intervals between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold, 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed. For example, no statutory tolling is allowed for the period of time between finality of an

appeal and the filing of an application for post-conviction or other collateral review in state court, because no state court application is "pending" during that time. Nino, 183 F.3d at 1006-1007. Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the petitioner's later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

The petition and the lodged documents filed in Respondent's motion to dismiss in case number 1:10-00251-LJO-DLB, establish that Petitioner filed the following state habeas petitions related to his 2000 Fresno County Superior Court conviction: (1) filed in the Fresno County Superior Court in October 2007 and denied on October 19, 2007; (2) filed in the 5th DCA on June 10, 2009 and denied on June 19, 2009. (Doc. 10, pp. 2-3; No. 10-251, LD 4, 5, & 6).

Even assuming, however, that these two state petitions were "properly filed" within the meaning of the AEDPA, neither entitles Petitioner to statutory tolling since they were filed after the one-year period expired in 2003. A petitioner is not entitled to tolling where the limitations period has already run prior to filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003)("section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."); Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after expiration of the one-year limitations period).

Here, as mentioned, the limitations period expired on September 23, 2003, over four years *before* Petitioner filed his first state habeas petition. Accordingly, he cannot avail himself of the

statutory tolling provisions of the AEDPA. Thus, unless Petitioner is entitled to equitable tolling, the petition is untimely.

D. Equitable Tolling

The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable tolling in appropriate cases. Holland v. Florida, __S.Ct.__, 2010 WL 2346549 *9 (U.S.S.C. June 14, 2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period is subject to equitable tolling when "extraordinary circumstances beyond a prisoner's control make it impossible to file the petition on time." Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Holland, 2010 WL 2346549 at *12; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a consequence, "equitable tolling is unavailable in most cases." Miles, 187 F. 3d at 1107.

In this case, Petitioner has made no express claim of entitlement to equitable tolling and, based on the record now before the Court, the Court sees no basis for such a claim. Accordingly, Petitioner is not entitled to equitable tolling. Thus, the petition is untimely and should be dismissed.

E. Failure To Exhaust State Remedies.

As an alternative and additional basis for dismissal of the petition, it appears that Petitioner has failed to exhaust any of his three claims in state court.

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501

U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

Additionally, the petitioner must have specifically told the state court that he was raising a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States Supreme Court reiterated the rule as follows:

> In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state remedies requires that petitioners "fairly presen[t]" federal claims to the state courts in order to give the State the "opportunity to pass upon and correct alleged violations of the prisoners' federal rights" (some internal quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

> Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his federal claims in state court *unless he specifically indicated to that court that those claims were based on federal law*. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held that the *petitioner must make the federal basis of the claim explicit either by citing federal law or the decisions of federal courts, even if the federal basis is "self-evident*," Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided under state law on the same considerations that would control resolution of the claim on federal grounds. Hiivala v. Wood, 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); . . . .
>
> In Johnson, we explained that the petitioner must alert the state court to the fact that the relevant claim is a federal one without regard to how similar the state and federal standards for reviewing the claim may be or how obvious the violation of federal law is.

Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

Here, the amended petition indicates that while Petitioner has filed state habeas petitions in the Superior Court and the 5th DCA, he has never presented any of the claims in the amended petition to the California Supreme Court. (Doc. 10, pp. 2-3). Because Petitioner has not presented his claims for federal relief to the California Supreme Court, the Court must dismiss the petition. See Calderon v. United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc); Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997). The Court cannot consider a petition that is entirely unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Calderon, 107 F.3d at 760.

However, because it is possible that Petitioner has presented those three claims to the California Supreme Court and simply failed to notify the Court of that fact, he will be given an opportunity, in his response to the Order to Show Cause, to present documentation to that effect. If Petitioner is unable to establish, through documents and court filings, that he has presented all of his claims to the California Supreme Court, the Court will have to dismiss the petition as entirely unexhausted.

F. Failure To State A Cognizable Habeas Claim As To Ground Two.

Ground Two alleges that the trial court erred and abused its discretion in imposing an excessive restitution fine without first conducting an inquiry into Petitioner's ability to pay. (Doc. 10, p. 4). As discussed below, challenges to restitution fines do not invoke the Court's habeas jurisdiction and are not cognizable in habeas proceedings.

Pursuant to 28 U.S.C. § 2254(a), "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody pursuant to the judgment of a State court* only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." (Emphasis supplied). The "in custody" requirement is jurisdiction for a federal habeas court. Baily v. Hill, 599 F.3d 976, 978 (9th Cir. 2010). In Baily, the Ninth Circuit observed that the "in custody" requirement of federal habeas law has two aspects. First, the petitioner must be "under the conviction or sentence under attack at the time his petition is filed." Baily, 599 F.3d at 978-979, *quoting* Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005). For this aspect of "in custody," actual physical custody is not

indispensable to confer jurisdiction; rather, the court will have habeas jurisdiction if a sufficient "restraint on liberty," as opposed to a mere "collateral consequence of a conviction," exists. Id. at 979. In this case, because Petitioner was in physical custody of Respondent at the time he filed the instant petition, and has remained in the physical custody of Respondent throughout these proceedings, this first aspect of the "in custody" requirement is not at issue.

The second aspect of "in custody," however, is fatal to Petitioner's habeas claim:

> The plain meaning of the test of § 2254(a) makes clear that physical custody alone is insufficient to confer jurisdiction. Section 2254(a)'s language permitting a habeas petition to be entertained 'only on the ground that [the petition] is in custody in violation of the Constitution or laws or treaties of the United States," explicitly requires a nexus between the petitioner's claim and the unlawful nature of the custody.
>
> Giving the crucial statutory phrase within § 2254(a) its ordinary, natural meaning, we cannot but conclude that to sustain his habeas challenge, [petitioner] must show that his custody in itself, or its conditions, offends federal law. It is not enough for [petitioner] to say, in substance, my custody is okay and consistent with federal law, but I should not be burdened by this restitution requirement. What [petitioner] is required to pay in restitution is not by ordinary meaning a part of his custody.

Baily, 599 F.3d at 980. (Citations omitted).

In Baily, the petitioner, as is the case here in Grounds one, two, and four, had challenged only his restitution fine. After the above discussion, the Ninth Circuit flatly rejected habeas jurisdiction under such circumstances:

> [Petitioner's] challenge to the restitution order lacks any nexus, as required by the plain test of § 2254(a), to his custody. While [petitioner's] liberty has been severely restrained by his conviction and custodial sentence, the remedy that [petitioner] seeks, the elimination or alteration of a money judgment, does not directly impact–and is not directed at the source of the restraint on–his liberty. If successful, [petitioner] could reduce his liability for restitution but would still have to serve the rest of his custodial sentence in the same manner; his remedy would affect only the fact or quantity of the restitution that he has to pay to the victim. [Petitioner's] argument is only that he has been ordered to pay restitution "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), and not that his custody is unlawful. That he is in physical custody while attacking the restitution order is insufficient to confer jurisdiction over his habeas petition.

Baily, 599 F.3d at 981.

Ground two does not challenge any aspect of Petitioner's convictions in the Fresno County Superior Court. Rather, in that claim, Petitioner's only complaint is the legality and size of the restitution fine that was imposed. While Petitioner was clearly in the physical custody of Respondent at the commencement of these proceedings, and while he remains in custody of

Respondent at this time, such physical custody is insufficient to confer habeas jurisdiction for Ground Two. Id. In the absence of any challenge to Petitioner's conviction and sentence in Ground Two, the required nexus between that claim and the unlawfulness of Petitioner's custody is absent. Id. Accordingly, without habeas jurisdiction, the Court cannot proceed on Ground Two. Id.

Based on the foregoing, the Court will dismiss Ground Two as non-cognizable.

ORDER

For the foregoing reasons, the Court HEREBY ORDERS as follows:

1. Ground Two in the amended petition (Doc. 10), is DISMISSED for failure to state a claim upon which habeas relief can be granted.

ORDER TO SHOW CAUSE

For the foregoing reasons, the Court HEREBY ORDERS:

1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of service of this Order why the amended petition, which now includes only Grounds One and Three, should not be dismissed for violation of the one-year statute of limitations in 28 U.S.C. § 2244(d) and for lack of exhaustion. In his response to this Order to Show Cause, Petitioner should provide any evidence in his possession to establish his entitlement to some form of tolling under the AEDPA sufficient to make the instant petition timely, and/or proof that he has presented Grounds One and Three to the California Supreme Court.

Petitioner is forewarned that his failure to comply with this order may result in a Order that the Petition be dismissed pursuant to Local Rule 110.

IT IS SO ORDERED.

Dated: **June 25, 2010**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE