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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SANTOS CRUZ,  Petitioner,  v.  MICHAEL MARTEL,  Respondent.	}	1:09-cv-02162 MJS HC  ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS  ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT  ORDER DECLINING ISSUANCE OF CERTIFICATE OF APPEALABILITY
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Petitioner is a state prisoner proceeding pro se 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. Local Rule 305(b).

**I. 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 dismiss, or after an answer to the petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001). A petition for habeas corpus should not be dismissed without leave to

1 amend unless it appears that no tenable claim for relief can be pleaded were such leave  
2 granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

3 B. Failure to State a Cognizable Federal Claim

4 The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section  
5 2241 of Title 28 of the United States Code provides that habeas corpus shall not extend to a  
6 prisoner unless he is “in custody in violation of the Constitution.” 28 U.S.C. § 2254(a) states:

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

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

16 Petitioner does not challenge the fact or duration of his sentence. Instead he  
17 challenges a Tulare County Superior Court restitution order being enforced/collected by the  
18 California Department of Corrections. (Pet., ECF No. 1.) This is not an proper claim in a  
19 federal habeas action; an order of restitution does not raise a custody requirement. United  
20 States v. Kramer, 195 F.3d 1129, 1130 (9th Cir.1999); United States v. Thiele, 314 F.3d 399,  
21 401 (9th Cir.2002). Since Petitioner’s claim does not challenge the legality of Petitioner’s  
22 custody, it is not cognizable and must be dismissed.

23 C. Certificate of Appealability

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

28 (a) In a habeas corpus proceeding or a proceeding under section 2255  
before a 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.

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

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

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

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

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

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

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

20 In the present case, the Court finds that reasonable jurists would not find debatable or  
21 wrong the Court's determination that Petitioner is not entitled to federal habeas corpus relief,  
22 nor would they find Petitioner deserving of encouragement to proceed further. Petitioner has  
23 not made the required substantial showing of the denial of a constitutional right. Accordingly,  
24 the Court hereby **DECLINES** to issue a certificate of appealability.

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3 **ORDER**

4 Accordingly, IT IS HEREBY ORDERED that:

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

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11 IT IS SO ORDERED.

12 Dated: July 19, 2010

*1s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE

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