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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5 OAKLAND DIVISION
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7 KARL D. BRITT,

8 Petitioner,

No. C 12-2160 PJH (PR)

9 v.

10 TERRIE L. GONZALEZ, Warden,

11 Respondent.

**ORDER GRANTING LEAVE
TO PROCEED IN FORMA
PAUPERIS, DISMISSING
PETITION, AND DENYING
CERTIFICATE OF
APPEALABILITY**

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13 This case was opened when petitioner, a prisoner at the California Men's Colony,
14 filed a petition for a writ of habeas corpus directed to a judgment of the California Superior
15 Court for Sonoma County. He contends that the court improperly imposed a restitution
16 obligation upon him without determining whether there was any realistic possibility of his
17 paying it. The court does not, however, have jurisdiction over a "state prisoner's in-custody
18 challenge to a restitution order imposed as part of a criminal sentence." See *Bailey v. Hill*,
19 599 F.3d 976, 982 (9th Cir. 2010) (state prisoner's claim regarding restitution order is not
20 claim that prisoner is in custody "in violation of the Constitution or laws or treaties of the
21 United States," as required by 28 U.S.C. § 2254(a) for habeas jurisdiction).

22 In an appropriate case a habeas petition may be construed as a Section 1983
23 complaint. *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971). Although the court *may*
24 construe a habeas petition as a civil rights action, it is not *required* to do so. Since the time
25 the *Wilwording* case was decided there have been significant changes in the law. For
26 instance, the filing fee for a habeas petition is five dollars, and if leave to proceed in forma
27 pauperis is granted, the fee is forgiven. For civil rights cases, however, the fee is now \$350
28 and under the Prisoner Litigation Reform Act the prisoner is required to pay it, even if

1 granted in forma pauperis status, by way of deductions from income to the prisoner's trust
2 account. See 28 U.S.C. 1915(b)(1). A prisoner who might be willing to file a habeas
3 petition for which he or she would not have to pay a filing fee might feel otherwise about a
4 civil rights complaint for which the \$350 fee would be deducted from income to his or her
5 prisoner account. Also, a civil rights complaint which is dismissed as malicious, frivolous,
6 or for failure to state a claim would count as a "strike" under 28 U.S.C. § 1915(g), which is
7 not true for habeas cases.

8 In view of these potential pitfalls for petitioner if the court were to construe the
9 petition as a civil rights complaint, the case will be dismissed without prejudice to his filing a
10 civil rights action if he wishes to do so in light of the above.

11 Petitioner's motion for leave to proceed in forma pauperis (document number 2 on
12 the docket) is **GRANTED**. This case is **DISMISSED**. Petitioner's motion for modification of
13 the sentence (document 3) is **DENIED** as moot.

14 Because reasonable jurists would not find the result here debatable, a certificate of
15 appealability ("COA") is **DENIED**. See *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000)
16 (standard for COA). The clerk shall close the file.

17 **IT IS SO ORDERED.**

18 Dated: May 25, 2012.



PHYLLIS J. HAMILTON
United States District Judge

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