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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIGUEL SOTO,)
)
 Petitioner,)
)
 vs.)
)
 PEOPLE OF THE STATE OF)
 CALIFORNIA,)
)
 Respondent.)
 _____)

No. C 12-4194 LHK (PR)

ORDER RE-OPENING CASE;
GRANTING APPLICATION TO
PROCEED IN FORMA
PAUPERIS; ORDER OF
DISMISSAL

On August 9, 2012, Petitioner, a California state prisoner, filed this *pro se* petition, pursuant to 28 U.S.C. § 2254. That same day, the Clerk notified Petitioner that, within thirty days, he was required to either pay the filing fee or a completed application to proceed in forma pauperis. On September 20, 2012, after receiving no response from Petitioner, the Court dismissed this action. On October, 3, 2012, Petitioner filed an application to proceed in forma pauperis. The Court construes this application as a motion to re-open, as well as an application to proceed in forma pauperis. So construed, the motion to re-open is GRANTED. The Clerk shall vacate the judgment, and RE-OPEN this case. Plaintiff's application to proceed in forma pauperis is GRANTED.

For the reasons that follow, however, the Court DISMISSES this case.

1 **DISCUSSION**

2 I. Standard of Review

3 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
4 custody pursuant to the judgment of a state court only on the ground that he is in custody in
5 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *Rose*
6 *v. Hodges*, 423 U.S. 19, 21 (1975).

7 A district court shall “award the writ or issue an order directing the respondent to show
8 cause why the writ should not be granted, unless it appears from the application that the
9 applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243.

10 II. Analysis

11 Petitioner argues that the trial court violated his rights by imposing restitution before
12 considering whether Petitioner had any ability to pay it. However, because this claim does not
13 go to the fact or length of Petitioner’s incarceration, it is not a proper ground for federal habeas
14 relief.

15 The federal habeas statute does not provide jurisdiction over a claim challenging a
16 restitution order, even when the petitioner is incarcerated. *Bailey v. Hill*, 599 F.3d 976, 980 (9th
17 Cir. 2010). In *Bailey*, the petitioner pleaded guilty and was ordered to pay restitution. He filed a
18 section 2254 petition alleging that his counsel provided ineffective assistance by not objecting to
19 the restitution order. The Ninth Circuit affirmed the dismissal of the petition on the ground that
20 the petitioner did not meet section 2254’s “in custody” requirement for jurisdiction. *Id.* The
21 Ninth Circuit concluded that section 2254 does not confer jurisdiction over a state prisoner’s
22 in-custody challenge to the non-custodial portion of his criminal sentence, such as a restitution
23 order. *Id.* at 981.

24 Here, Petitioner challenges only the restitution fine imposed. Petitioner does not allege
25 that he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28
26 U.S.C. § 2254. Petitioner does not claim that his custody or conviction is unlawful. Thus, this
27 Court lacks jurisdiction to consider Petitioner’s challenge to the restitution order imposed by the
28 trial court.

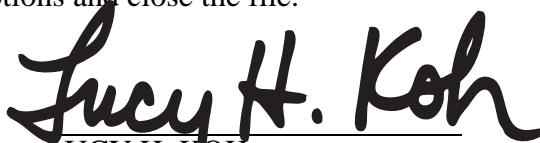
1 **CONCLUSION**

2 The instant habeas petition is DISMISSED. The federal rules governing habeas cases
3 brought by state prisoners require a district court that denies a habeas petition to grant or deny a
4 certificate of appealability (“COA”) in its ruling. See Rule 11(a), Rules Governing § 2254
5 Cases, 28 U.S.C. foll. § 2254. Petitioner has not shown “that jurists of reason would find it
6 debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack*
7 *v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

8 The clerk shall terminate any pending motions and close the file.

9 IT IS SO ORDERED.

10 DATED: 11/6/12

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12 LUCY H. KOH
13 United States District Judge
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