

1 a Motion to withdraw the Notice of Appeal. The Court **GRANTS** Petitioner's Motion to
2 withdraw his notice of appeal, which was in any case ineffective because it was premature as a
3 final judgement had not been entered. See Serine v. Peterson, 989 F.3d 371, 372-73 (9th Cir.
4 1993) (holding that premature notice of appeal was not cured by subsequent entry of final
5 judgment).

6 The First Amended Petition incorporates the original Petition and is not complete in and
7 of itself without reference to the superseded pleading, and is therefore subject to dismissal. See
8 S. D. CAL. CIVLR 15.1. Furthermore, rather than curing the defects of pleading identified in the
9 Court's previous Order of dismissal, the First Amended Petition merely contains argument that
10 this Court was incorrect in dismissing the original Petition for lack of jurisdiction on the basis
11 that the original Petition challenged only a restitution hearing. (FAP at 2-5.) This Court is
12 bound by Ninth Circuit authority, which was cited in the Court's previous Order of dismissal,
13 and which provides that the Court lacks jurisdiction over this action. See Bailey v. Hill, 599
14 F.3d 976, 982 (9th Cir. 2010) ("§ 2254 does not confer jurisdiction over a state prisoner's in-
15 custody challenge to a restitution order imposed as part of a criminal sentence.")

16 In the instant case, Petitioner is challenging a May 14, 2013, restitution hearing arising
17 from his March 4, 2008, conviction in San Diego County Superior Court case number
18 SCD199072. Petitioner is currently challenging that same conviction in a habeas action pending
19 in this Court in Civil Case No. 11cv1086-H (PCL). But for the fact that the Court lacks
20 jurisdiction over the instant Petition, and but for the fact that it would appear to be futile for
21 Petitioner to seek leave in Civil Case No. 11cv1086-H (PCL) to present the restitution claim
22 presented here, the Court would have instructed the Clerk of Court to file the original Petition
23 in this case as a motion to amend the petition in Civil Case No. 11cv1086-H (PCL). See Woods
24 v. Carey, 525 F.3d 886 (9th Cir. 2008) (stating that a new pro se petition challenging the same
25 conviction as a pending petition, which is filed before the first petition is adjudicated, should be
26 liberally construed as an attempt to amend the pending petition rather than summarily dismissed
27 as second or successive).

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