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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS JAMES O'NEILL,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee.

No. 07-35280

D.C. No. CV-04-00012-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

Thomas James O'Neill appeals pro se from the district court's order denying his pro se motion entitled "Federal Question Pursuant to 28 U.S.C. § 1331." We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court properly declined to construe O’Neill’s pro se motion as a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, and properly denied the motion. *See United States v. Thiele*, 314 F.3d 399, 401 (9th Cir. 2002) (holding that § 2255 cannot be used to challenge the validity of a restitution order).

Even assuming that O’Neill’s challenge to his restitution order could be construed as a petition under 28 U.S.C. § 2241 or a petition for a writ of error coram nobis, O’Neill waived any objection to the validity of restitution order by failing to raise the issue on direct appeal. *See United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

O’Neill contends in his reply brief that the district court’s denial of his motion was improper because he sought only an answer to his federal question, rather than relief from the restitution order. However, federal courts are prohibited from rendering advisory opinions in the absence of a justiciable controversy. *See Benton v. Maryland*, 395 U.S. 784, 788 (1969).

All pending motions are denied as moot.

AFFIRMED.