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5 **UNITED STATES DISTRICT COURT**
6 **CENTRAL DISTRICT OF CALIFORNIA**
7 **WESTERN DIVISION**
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9 ADRIAN MOON,)
10 Petitioner,)
11 v.))
12 P.L. VASQUEZ, et al.,)
13 Respondent.))
14 _____)

Case No. CV 11-10806-MLG
MEMORANDUM OPINION AND ORDER
DISMISSING PETITION FOR WRIT OF
HABEAS CORPUS; ORDER DENYING
CERTIFICATE OF APEALABILITY

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17 **I. Background**

18 On February 8, 2010, Petitioner was convicted by a Los Angeles
19 County Superior Court jury of perjury, in violation of California
20 Penal Code § 118.¹ (Pet. at 2.) On August 30, 2010, Petitioner was
21 sentenced to a total term of two years in prison, sentence suspended,
22 and placed on formal probation for three years, with conditions
23 including 677 days in jail with credit for 677 days served, as well
24 as \$200.00 restitution and a \$30.00 special assessment. (Respondent's
25 Motion to Dismiss, App. 1, pp. 22-24.)

26 In the interim, on May 18, 2010, Petitioner was convicted of
27 nineteen counts of procuring or offering false or forged documents
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¹ Los Angeles Superior Court Case No. BA362256.

1 to be filed in a public office; six counts of attempted grand theft;
2 six counts of forgery; three counts of preparing false documentary
3 evidence; and four counts of offering into evidence forged or
4 fraudulently altered documents.² (Cal. Penal Code §§ 115(a), 664/487,
5 470, 134, 132.) On September 9, 2010, Petitioner was sentenced to 20
6 years imprisonment³ on these thirty-eight charges.⁴ (Mot. to Dismiss,
7 App 3, pp. 55-80).

8 On September 9, 2010, the same date sentence was imposed on the
9 latter convictions, the trial court terminated probation in Case BA
10 332095, the perjury conviction which is the subject of the current
11 habeas corpus petition, and discharged Petitioner pursuant to Cal.
12 Penal Code § 1203.3.

13 Petitioner's appeal of the perjury conviction to the California
14 Court of Appeal was denied in a reasoned opinion on November 2, 2011.
15 *People v. Moon*, 2011 WL 5179593 (Cal. Ct. App. 2011). Petitioner
16 filed a petition for review in the California Supreme Court on
17 November 23, 2011, which was summarily denied on December 7, 2011.
18 (Pet. at 3.) A petition for writ of certiorari was denied by the
19 United States Supreme Court on May 14, 2012. *Moon v. California*, 2012
20 WL 1017454 (May 14, 2012).

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24 ² Los Angeles Superior Court Case Nos. BA332095, BA361029.

25 ³ On appeal, the conviction of one count was vacated and sentence
26 was stayed on six other counts, resulting in a total sentence of 16
years, 8 months. *People v. Moon*, 2011 WL 6187167 (Cal. Ct. App. 2011).

27 ⁴ These convictions are the subject of a separate petition for writ
28 of habeas corpus filed in this Court on March 21, 2012. *Moon v.*
Vasquez, Case No. CV 12-2456-RGK (MLG).

1 On December 29, 2011, Petitioner filed this petition for writ
2 of habeas corpus.⁵ The petition was dismissed with leave to amend on
3 January 5, 2012. On February 23, 2012, Petitioner filed a first
4 amended petition, raising five grounds for relief. The petition was
5 ordered served and on April 6, 2012, Respondent filed a motion to
6 dismiss the petition for lack of jurisdiction. Petitioner did not
7 file an opposition in the time allowed. The matter is ready for
8 decision.

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10 **II. The Court Lacks Jurisdiction over the Petition Because Petitioner**
11 **Was Not "In Custody" under the Challenged Conviction at the Time**
12 **He Commenced this Action, as Required by 28 U.S.C. § 2254(a)**

13 Respondent contends that the Court lacks jurisdiction to consider
14 the merits of Petitioner's habeas corpus petition because Petitioner was
15 not "in custody pursuant to the judgment of a state court" at the time
16 he filed this petition, as required by 28 U.S.C. § 2254(a). To obtain
17 federal habeas corpus review, 28 U.S.C. § 2254(a) requires that the
18 petitioner be "in custody under the conviction or sentence under attack
19 at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488,
20 490-491 (1989) (per curiam); *Bailey v. Hill*, 599 F.3d 976, 978-79 (9th
21 Cir. 2010) (citation and quotation marks omitted), *Allen v. State of*
22 *Oregon*, 153 F.3d 1046, 1048 (9th Cir. 1998). This requirement is
23 jurisdictional. *Bailey*, 599 F.3d at 978. The Supreme Court has
24 specifically held that the "in custody" requirement is determined by
25 examining whether the petitioner was in physical custody or under some
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27 ⁵ Both parties have consented to have a magistrate judge conduct
28 all proceedings in this case. See 28 U.S.C. § 636(c)(1). (Docket Nos.
5 and 7.)

1 other significant form of restraint at the time the petition was filed
2 in federal court. *Maleng*, 490 U.S. at 491-493. Other significant forms
3 of restraint include parole, probation, or release on bail or personal
4 recognizance. See *Hensley v. Mun. Ct.*, 411 U.S. 345, 348 (1973); *Maleng*,
5 490 U.S. at 491; *United States v. Spawr Optical Research Inc.*, 864 F.2d
6 1467, 1470 (9th Cir. 1988), cert. denied, 493 U.S. 809 (1989). Finally,
7 in defining the scope of the "in custody" requirement, the Supreme Court
8 has held that collateral consequences of a completely expired conviction
9 are, "not themselves sufficient to render an individual 'in custody' for
10 the purposes of a habeas attack upon it." *Maleng*, 490 U.S. at 492; see
11 also *Feldman v. Perrill*, 902 F.2d 1445, 1448 (9th Cir. 1990).

12 Here, Petitioner was sentenced to two years in prison, sentence
13 suspended, and placed on formal probation for three years, with 677 days
14 in jail and credit for 677 days on August 30, 2010. Incarceration under
15 the perjury conviction ended that day. It is undisputed that Petitioner
16 was discharged from probation on the perjury conviction on September 9,
17 2010. The discharge from probation terminated any significant restraint
18 on Petitioner arising from the perjury conviction.

19 While Petitioner is presently in state custody, his current
20 incarceration is related solely to criminal charges separate and
21 distinct from the perjury conviction. His current incarceration on
22 unrelated criminal charges does not meet the "in custody" requirement
23 of section 2254 on the expired perjury conviction. Accordingly, it is
24 clear that Petitioner was not "in custody" under the state court
25 judgment being challenged within the meaning of 28 U.S.C. § 2254(a) at
26 the time he filed this petition in December 2011, and the petition must
27 be dismissed for lack of subject matter jurisdiction.

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