

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

SC

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Arthur Gallegos,
Petitioner,
vs.
State of Arizona, et al.,
Respondents.

No. CV 10-0867-PHX-MHM (MHB)

ORDER

On April 19, 2010, Petitioner Arthur Gallegos filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and paid the filing fee.¹ (Doc.# 1.) In an Order filed May 6, 2010, the Court dismissed the Petition with leave to amend to name the proper respondent and to set forth facts to support that he was “in custody” with respect to the conviction for which he sought federal habeas relief. (Doc.# 3.) Petitioner has filed a First Amended Petition. (Doc.# 4.) Petitioner has also filed a motion for order to show cause. (Doc.# 5.) The Court will deny the motion and dismiss the First Amended Petition and this action for lack of jurisdiction.

¹ Petitioner has previously filed a federal habeas action concerning the conviction at issue in this case, which was dismissed for lack of jurisdiction. See Gallegos v. State of Ariz., No. 01-0686-PHX-MHM (MS) (D. Ariz. Nov. 21, 2001). Petitioner appealed that dismissal, but was denied a certificate of appealability. Id., doc.# 14. Petitioner’s appeal was subsequently dismissed. Id., doc.# 15. On April 7, 2010, Petitioner filed another request for a certificate of appealability in this case, which was denied on April 14, 2010. Id., doc.# 18.

1 **I. Background**

2 On April 21, 1989, Petitioner entered a nolo contendere plea to three counts of
3 vehicular manslaughter in Maricopa County Superior Court, case# CR88-05617 and was
4 sentenced to 10 years in prison followed by 5 years on probation. According to records
5 available on-line, Petitioner’s term of probation was terminated in 2001.² Petitioner states
6 that his probation was extended on June 1, 2000 for an additional three years.

7 **II. The “In Custody” Requirement of § 2254**

8 Federal habeas relief is available “only on the ground that [an inmate] is in custody
9 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
10 The United States Supreme Court has interpreted “the statutory language as requiring that
11 the habeas petitioner be ‘in custody’ under the conviction or sentence under attack at the time
12 his petition is filed,” although he need not be physically confined to challenge a sentence on
13 habeas corpus. Maleng v. Cook, 490 U.S. 488, 491 (1989) (an expired conviction can never
14 satisfy the “in custody” requirement, even if it is used to enhance a subsequent sentence);
15 Chaker v. Crogan, 428 F.3d 1215, 1219 (9th Cir. 2005) (petitioner was “in custody” while
16 he remained subject to probation under the conviction or sentence at the time he filed his
17 habeas petition); Fowler v. Sacramento County Sheriff’s Dep’t, 421 F.3d 1027, 1033 (9th
18 Cir. 2005). When a petition is on probation or parole, the proper respondents are his
19 probation or parole officer and the official in charge of the probation or parole agency or
20 state correctional agency. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996).

21 Petitioner seeks habeas relief as to his 1989 conviction for vehicular manslaughter.
22 In his First Amended Petition, Petitioner again fails to allege facts to support that he is, or
23 was when he filed this action, “in custody” with respect to the conviction for which he seeks
24 habeas relief. As discussed above, the Court lacks jurisdiction to grant habeas relief as to a
25 conviction for which a petitioner is not, or was not at the time filed, in custody. In Ground
26

27 ² See <http://www.courtminutes.maricopa.gov/docs/Criminal/012001/m0260071.pdf>.
28

1 Four of the First Amended Petition, Petitioner states that Probation Officer Patruno filed a
2 motion to extend Petitioner’s sentence in CR88-05617 for an additional three years on June
3 23, 2006. (Doc.# 4 at 9.) Under supporting facts, Petitioner states that his probation was
4 extended for an additional three years on June 1, 2000. (Id.) Even if both allegations are
5 accurate, Petitioner fails to allege facts to support that he was “in custody” in connection with
6 CR88-05617 on April 19, 2010, when he filed this case.

7 Petitioner has failed to allege facts to support that he was “in custody” in connection
8 with CR88-05617, when he commenced this case. The Court will therefore dismiss the First
9 Amended Petition and this action for lack of jurisdiction. The Court declines to issue a
10 certificate of appealability because reasonable jurists would not find the Court’s procedural
11 ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

12 **III. Motion for Order to Show Cause**

13 As noted above, Petitioner has filed a motion for order to show cause. In his motion,
14 Petitioner appears to seek an order from this Court to require the Respondents to show cause
15 for failing to respond to a state petition for habeas corpus filed on August 9, 2000.
16 Petitioner’s motion will be denied. This case is being dismissed for lack of jurisdiction due
17 to Petitioner’s failure to establish that he is, or was when he filed this action, “in custody”
18 with respect to the conviction or sentence being challenged. Respondents’ alleged failure to
19 resolve Petitioner’s state habeas petition is not properly before this Court.

20 **IT IS ORDERED:**

21 (1) The First Amended Petition (doc.# 4) and this action are **dismissed** for lack of
22 jurisdiction.

23 (2) Petitioner’s motion for order to show cause is **denied**. (Doc.# 5.)

24 (3) The Clerk of Court must enter judgment accordingly.

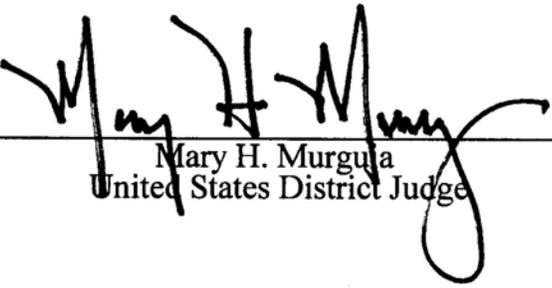
25 ///

26
27
28

1 (4) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event
2 Petitioner files an appeal, the Court declines to issue a certificate of appealability because
3 reasonable jurists would not find the Court's procedural ruling debatable. See Slack v.
4 McDaniel, 529 U.S. 473, 484 (2000).

5 DATED this 9th day of June, 2010.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Mary H. Murgula
United States District Judge