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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTONIO GOMEZ,
Petitioner,
v.
ADELANTO DETENTION
FACILITY,
Respondent.

No. CV 12-9417 FFM
ORDER RE RESPONDENT’S MOTION
TO DISMISS AMENDED PETITION

I. PROCEDURAL HISTORY

On November 2, 2012, Petitioner Antonio Gomez (“Petitioner”) filed a Petition for Writ of Habeas Corpus in this Court pursuant to 28 U.S.C. § 2254. He filed an Amended Petition on March 6, 2013. The parties have consented to have the undersigned conduct all further proceedings in this case.

On April 22, 2013, Respondent Adelanto Detention Facility filed a motion to dismiss. Petitioner’s opposition to the motion to dismiss was initially due on May 23, 2013. Petitioner, however, did not file a timely opposition. Although Petitioner was granted an extension of time in which to file his opposition, Petitioner failed to do so. The matter, thus, stands submitted and ready for decision.

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1 **II. BACKGROUND**

2 On July 20, 2010, in Case No. NA077232, a Los Angeles County Superior
3 Court jury convicted Petitioner of three counts of dissuading a witness by force or
4 threat and two counts of making criminal threats. (Lodged Doc. No. 1 at 1-2.) He
5 was sentenced to state prison for a term of six years. (*Id.*) He began serving his
6 sentence on August 23, 2010. (Lodged Doc. No. 3 at 3.)

7 Less than one year later, on May 24, 2011, Petitioner was paroled. (*Id.*) He
8 was discharged from parole on July 12, 2012. (*Id.*) Two weeks later, on July 26,
9 2012, he was taken into federal custody for being in the country illegally. He
10 remains in federal custody to this day.

11 **III. DISCUSSION**

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13 In his Amended Petition, Petitioner challenges his 2010 state court
14 conviction and sentence. Respondent contends that the Amended Petition should
15 be dismissed because subject matter jurisdiction is lacking. Specifically,
16 Respondent asserts that Petitioner is no longer in custody. Because custody is a
17 prerequisite to maintain a habeas petition, Respondent concludes that the Petition
18 should be dismissed. As explained below, the Court agrees.¹

19 Subject matter jurisdiction under 28 U.S.C. § 2254 is limited to those
20 persons “in custody pursuant to the judgment of a State court.” 28 U.S.C. §
21 2254(a); *Brock v. Weston*, 31 F.3d 887, 889 (9th Cir. 1994). The “in custody”
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24 ¹ Although, as explained below, the Court holds that subject matter jurisdiction is
25 lacking, the Court also holds that dismissal is appropriate based on Petitioner’s
26 failure to oppose Respondent’s motion to dismiss. “The failure to file any required
27 document, or the failure to file it within the deadline, may be deemed consent to
28 the granting or denial of the motion.” Local Rule 7-12. In this case, the Court
deems Petitioner’s failure to oppose as consent to the granting of Respondent’s
motion to dismiss.

1 requirement of Section 2254, however, encompasses more than just physical
2 confinement in prison. *See Jones v. Cunningham*, 371 U.S. 236, 239-40, 83 S. Ct.
3 373, 9 L. Ed. 2d 285 (1963)). As is relevant here, the “in custody” requirement
4 includes individuals on parole or probation. *See id.* at 240-43 (parole satisfies “in
5 custody” requirement); *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005)
6 (probation satisfies “in custody” requirement). By contrast, a petitioner whose
7 sentence has fully expired is precluded from challenging that sentence because he
8 is no longer “in custody” for purposes of federal habeas review. *Maleng v. Cook*,
9 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989).²

10 Here, the Court lacks subject matter jurisdiction over this action because it
11 was initiated after Petitioner’s sentence had fully expired. Petitioner was
12 discharged from parole on July 12, 2012. He did not initiate this action until
13 nearly five months later, on November 2, 2012. Accordingly, he was not “in
14 custody” with respect to his state court conviction when he initiated this action.

15 Moreover, the fact that Petitioner was in federal custody when he initiated
16 this action (and is currently in federal custody) makes no difference in terms of
17 whether the Court has subject matter jurisdiction over Petitioner’s challenge to his
18 expired state sentence. “The collateral consequences of [a] conviction are not
19 themselves sufficient to render an individual ‘in custody’ for the purposes of a
20 habeas attack upon [the conviction].” *Maleng*, 490 U.S. at 492. And, as the Ninth
21 Circuit has held, immigration consequences of a state court conviction constitute
22 collateral consequences for purposes of determining whether or not

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25 ² The Supreme Court has recognized that, in extremely limited circumstances, a
26 state prisoner may challenge expired state convictions through federal habeas
27 corpus when the prior convictions are used to enhance a current state sentence.
28 *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 121 S. Ct. 1567, 149 L.
Ed. 2d 608 (2001). Because Petitioner is not currently serving a state prison
sentence, the *Lackawanna* exceptions are not relevant to this case.

1 subject matter jurisdiction is lacking. *Resendiz v. Kovenski*, 416 F.3d 952, 957
2 (9th Cir. 2005) (immigration detainee facing deportation because of state
3 conviction is not in state custody for purposes of § 2254), *abrogated on other*
4 *grounds by Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d
5 149 (2013). In reaching this holding, the Ninth Circuit reasoned that immigration
6 consequences “arise from the action of an independent agency—indeed, in the case
7 of a state conviction, an independent sovereign – and are consequences over
8 which the state trial judge has no control whatsoever.” *Id.* (citing *United States v.*
9 *Amador-Leal*, 276 F.3d 511, 515-16 (9th Cir. 2002)). That reasoning applies with
10 equal force in this case.

11 Finally, the Supreme Court’s recent decision in *Padilla v. Kentucky*, 559
12 U.S. 356, 130 S. Ct. 1473, 1481-82, 176 L. Ed. 2d 284 (2010), does not alter the
13 subject matter jurisdiction analysis. In *Padilla*, the Supreme Court held that a
14 defense counsel performed deficiently by failing to advise the defendant that his
15 guilty plea made him subject to automatic deportation. In so holding, the Supreme
16 Court expressed some reluctance to classify the possibility of deportation as a
17 collateral, as opposed to a direct, consequence of a criminal conviction. 130 S. Ct.
18 at 1482. The Supreme Court, however, did not resolve this question because it
19 had “never applied a distinction between direct and collateral consequences to
20 define the scope of constitutionally ‘reasonable professional assistance’ required
21 under *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d
22 674 (1984).” *Padilla*, 130 S. Ct. at 1481.

23 Because the Supreme Court has not determined whether immigration
24 consequences are direct or collateral consequences of a conviction, the Court is
25 bound to follow the existing Ninth Circuit precedent, which holds that they are
26 collateral consequences. *Resendiz*, 416 F.3d at 957; *but see King v. Sec., Dept. of*
27 *Corrs.*, 2013 WL 1149295, *1 n.2 (M.D. Fla. March 19, 2013) (assuming without
28 deciding that, in light of *Padilla*, possibility of deportation stemming from state

