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DATED: 7-2-13

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JUL - 2 2013
CENTRAL DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW GJERSVOLD,) Case No. CV 13-0344-MWF (JPR)
)
) Petitioner,)
)
 vs.) MEMORANDUM OPINION AND ORDER
) GRANTING RESPONDENT'S MOTION TO
) DISMISS HABEAS PETITION AND
 JEFFREY BEARD,) DISMISSING ACTION WITH PREJUDICE
)
) Respondent.)

PROCEEDINGS

On January 17, 2013, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. On January 22, 2013, the Magistrate Judge issued an Order Requiring Response to Petition, noting that if Respondent filed a motion to dismiss the Petition, Petitioner would have 20 days from service of the motion to file any opposition to it. On April 17, 2013, after two extensions of time, Respondent filed a Motion to Dismiss the Petition and a supporting memorandum, arguing that (1) the Court lacked jurisdiction to decide the Petition because Petitioner was not in custody at the time it was filed and (2) the Petition was time barred under the one-year statute of limitations for filing federal habeas petitions.

1 On May 28, 2013, the Magistrate Judge issued a minute order
2 noting that Petitioner's opposition to Respondent's motion to
3 dismiss had been due on May 7, 2013, and that under Local Rule 7-
4 12, failure to file opposition to any motion "may be deemed
5 consent to the granting . . . of the motion." The Magistrate
6 Judge afforded Petitioner "one more opportunity" to file his
7 opposition, but she expressly warned him that failure to do so
8 within 14 days could result in the Court's granting Respondent's
9 motion on that basis. On June 3, 2013, the Magistrate Judge's
10 minute order was returned to the Court by the U.S. Postal Service
11 with a notation that there was "no authorization to receive mail
12 for this address." To date, Petitioner has not filed any
13 opposition to Respondent's motion or notified the Court of his
14 current address.¹

15 BACKGROUND

16 On August 23, 2010, Petitioner pleaded no contest to two
17 counts of possessing an assault weapon (Cal. Penal Code
18 § 12280(b) (2010)) and one count of possession of a deadly
19 weapon, specifically, a "billy," or police baton (Cal. Penal Code
20 § 12020(a) (2010)). (Pet. at 2; Mem. Supp. Pet. at 1; Lodged
21 Doc. 1 at 1, 3; Lodged Doc. 7.) On December 2, 2010, Petitioner
22

23 ¹ The Court may dismiss the Petition on these grounds
24 alone. See Local R. 7-12 ("The failure to file any required
25 document, or the failure to file it within the deadline, may be
26 deemed consent to the granting or denial of the motion."); Local R.
27 41-6 (court may dismiss action for want of prosecution when "mail
28 directed by the Clerk to a pro se plaintiff's address of record is
returned undelivered by the Postal Service" and "plaintiff fails to
notify, in writing, the Court and opposing parties of [his] current
address" within 15 days). The Court has nevertheless decided the
motion on the merits.

1 was sentenced to three years in state prison and granted 532 days
2 of presentence credit. (Pet. at 2; Mem. Supp. Pet. at 6; Lodged
3 Doc. 1 at 1; Lodged Doc. 7.)

4 On appeal, Petitioner's appellate counsel filed an opening
5 brief but did not raise any claims in it. (See Lodged Doc. 1 at
6 2.) On August 23, 2011, Petitioner filed pro se a brief raising
7 four claims of ineffective assistance of trial counsel. (See
8 id.) On September 11, 2011, Petitioner was released from prison
9 on parole. (Lodged Doc. 6 at 4.)

10 On November 14, 2011, the court of appeal found "no
11 evidence" that Petitioner had filed a certificate of probable
12 cause, as required by California Penal Code section 1237.5 and
13 Rule 8.304(b)(1) of the California Rules of Court.² (Lodged Doc.
14 1 at 4-5.) The court therefore "[did] not reach his claims that,
15 in effect, challenge the validity of his plea." (Id. at 5.) The
16 court noted, however, that it had "examined the entire record"
17 and was "satisfied that [Petitioner's] attorney has fully
18 complied with his responsibilities and that no arguable issues
19 exist." (Id. at 6.) On December 5, 2011, Petitioner was placed
20

21 ² Penal Code section 1237.5 provides that "[n]o appeal
22 shall be taken by the defendant from a judgment of conviction upon
23 a plea of guilty or nolo contendere" except when (1) the defendant
24 has filed with the trial court a written statement executed under
25 penalty of perjury that "show[s] reasonable constitutional,
26 jurisdictional, or other grounds going to the legality of the
27 proceedings" and (2) "[t]he trial court has executed and filed a
28 certificate of probable cause for such appeal with the clerk of the
court." Rule 8.304(b)(1) states that in order to appeal from a
superior court judgment after entering a plea, "the defendant must
file in that superior court with the notice of appeal . . . the
statement required by Penal Code section 1237.5 for issuance of a
certificate of probable cause."

1 on nonrevocable parole. (Lodged Doc. 6 at 4.)

2 On April 11, 2012, Petitioner filed a habeas petition in the
3 state superior court. (Lodged Doc. 2, Attach.)³ On May 1, 2012,
4 Petitioner was discharged from his nonrevocable parole. (Lodged
5 Doc. 6 at 4.) On May 7, 2012, the superior court denied the
6 petition because it "contain[ed] only vague, conclusory
7 allegations" and "failed to show a prima facie case for relief."
8 (Lodged Doc. 2, Attach.)

9 On July 2, 2012, Petitioner filed a habeas petition in the
10 state court of appeal, which summarily denied it on July 18,
11 2012. (Lodged Docs. 2, 3.) On September 27, 2012, Petitioner
12 filed a habeas petition in the state supreme court, which
13 summarily denied it on October 31, 2012. (Pet. at 4-5; Lodged
14 Doc. 4.)⁴

15 **PETITIONER'S CLAIM**

16 Trial counsel rendered constitutionally ineffective
17 assistance by "abandoning a motion to suppress without conducting
18 reasonable investigation." (Pet. at 5.)
19
20

21 ³ Respondent did not separately lodge Petitioner's April
22 11, 2012 superior court petition or that court's decision, but
23 copies of those documents were attached to the state court of
24 appeal petition Petitioner subsequently filed. (See Lodged Doc.
25 2.)

26 ⁴ Respondent's Notice of Lodging of Documents states that
27 lodged document five is "Minutes, dated October 31, 2012,
28 reflecting order denying petition for writ of habeas corpus in
California Supreme Court case number S205633," but that document
was not included in the documents lodged with the Court. The
Court's review of the California Appellate Courts' Case Information
website, however, confirms that the supreme court denied the
petition on October 31, 2012.

1 custody" for purposes of a habeas petition. Maleng, 490 U.S. at
2 492.

3 Petitioner was discharged from prison on September 11, 2011,
4 and completed his parole term on May 1, 2012. (Lodged Doc. 6 at
5 4.) Petitioner filed his federal Petition more than eight months
6 later, on January 17, 2013. Thus, Petitioner was not "in
7 custody" when he filed his federal Petition. See Tatarinov v.
8 Superior Ct., 388 F. App'x 624, 625 (9th Cir. 2010) (noting that
9 "a defendant is no longer 'in custody' once he is discharged from
10 probation or parole"); see also Maleng, 490 U.S. at 492 ("While
11 we have very liberally construed the 'in custody' requirement for
12 purposes of federal habeas, we have never extended it to the
13 situation where a habeas petitioner suffers no present restraint
14 from a conviction."). Although a petitioner may be "in custody"
15 if his petition challenges a more recent conviction on the ground
16 that its sentence was enhanced by virtue of the allegedly invalid
17 earlier conviction, see Lackawanna Cnty. Dist. Attorney v. Coss,
18 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001), here,
19 Petitioner has not alleged that he was subsequently convicted of
20 any offense. Indeed, he was not incarcerated at the time he
21 filed his federal Petition. (See Pet. at 1 (showing nonprison
22 address).) The Court therefore lacks jurisdiction to review the
23 Petition.⁵

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25
26
27 ⁵ Because the Court lacks jurisdiction to consider the
28 Petition, it does not address Respondent's argument that the
Petition is untimely under 28 U.S.C. § 2244(d).

ORDER

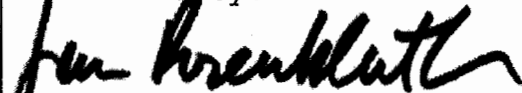
IT THEREFORE IS ORDERED that Judgment be entered granting Respondent's motion to dismiss and dismissing the Petition with prejudice.



DATED: July 1, 2013

MICHAEL W. FITZGERALD
U.S. DISTRICT JUDGE

Presented by:


Jean Rosenbluth
U.S. Magistrate Judge