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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JOE ANTHONY BARRIOS,	)	Case No. CV 18-7195-DOC (JPR)
	)	
Petitioner,	)	
	)	ORDER ACCEPTING FINDINGS AND
v.	)	RECOMMENDATIONS OF U.S.
	)	MAGISTRATE JUDGE
DEAN BORDERS, Warden,	)	
	)	
Respondent.	)	
	)	

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Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that Respondent's motion to dismiss be granted and judgment be entered denying the Petition as untimely and dismissing this action with prejudice. On June 11, 2019, Respondent filed Objections to the R. & R., disputing that the Court has subject-matter jurisdiction to hear the case. On July 1, 2019, Petitioner filed Objections, mostly simply repeating arguments from his opposition to the motion to dismiss.

Respondent complains that the Magistrate Judge erred in not finding that the Court lacks subject-matter jurisdiction because Petitioner was allegedly not "in custody" on the conviction he

1 challenges when he filed the Petition. (Resp't's Objs. at 2-3.)  
2 Respondent points out, correctly, that the burden is on  
3 Petitioner to show his entitlement to habeas relief. (Id. at 3  
4 (citing, among other cases, Silva v. Woodford, 279 F.3d 825, 835  
5 (9th Cir. 2002)).) But that does not relieve Respondent of  
6 supporting his motion with actual evidence showing that  
7 Petitioner was no longer in custody on the challenged conviction.  
8 See Arbors at Desert Hot Springs, LLC v. Fed. Deposit Ins. Corp.,  
9 No. CV 10-8504-VBF (DTBx), 2011 WL 13217780, at \*1 (C.D. Cal.  
10 Mar. 24, 2011) (noting that once moving party "presents evidence"  
11 to support motion to dismiss for lack of subject-matter  
12 jurisdiction, then opposing party must present his own evidence).  
13 Respondent presented no such evidence, nor did he cite to any in  
14 the record. (See Mot. Dismiss at 2.) He simply asserted that  
15 Petitioner was no longer in custody because his prison term had  
16 expired. (Id.) In response, Petitioner submitted some evidence  
17 tending to show that he still has a parole term left to serve  
18 (see generally Pet'r's Resp. to Suppl. Lodging), which as  
19 Respondent acknowledges would mean that he was still "in custody"  
20 (see Mot. Dismiss at 2). Had the Magistrate Judge not given  
21 Respondent an extra opportunity to submit actual evidence to  
22 support his motion, the Court could simply have denied it based  
23 on Petitioner's evidence, slim as it was.

24       Indeed, some of Petitioner's evidence is ambiguous, as  
25 Respondent argues (see Resp't's Objs. at 2-3), because it is not  
26 clear that it applies to the conviction challenged in the  
27 Petition, although it might. But the evidence Respondent finally  
28 submitted after being ordered to do so also raises more questions

1 than it answers, for the reasons discussed in the R. & R. (See  
2 R. & R. at 8-9.) Respondent's declarant, an acting case-records  
3 manager at Petitioner's prison, provided no explanation for her  
4 conclusion that "Petitioner was discharged from parole [on the  
5 attempted-murder convictions] on August 15, 2002" (Lodged Doc. 8  
6 at 1), and the document she submitted in support does not show  
7 that, as explained by the Magistrate Judge (see R. & R. at 8-9).  
8 In fact, the provision of it on which Respondent relies expressly  
9 refers only to Petitioner's prison sentence, not his parole term,  
10 which might be why Petitioner submitted the same document to  
11 support his position. (See Lodged Doc. 8 at 1 (relying on Legal  
12 Status Summary's "discharged" date of "08/15/2002" for "total  
13 time imposed" of "9y 0m 0d," length of Petitioner's prison  
14 sentence, not his parole term); see also Pet'r's Resp. to Suppl.  
15 Lodging, Ex. 1 (same Legal Status Summary).) Such a conclusory  
16 assertion does not establish that Petitioner had no parole term  
17 left on the relevant convictions when he filed the Petition. See  
18 Shakur v. Schriro, 514 F.3d 878, 887 (9th Cir. 2008) (refusing to  
19 give weight to prison official's "conclusory" affidavit  
20 describing costs of inmates' faith-based dietary requests); see  
21 also Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996)  
22 (factual disputes pertinent to subject-matter jurisdiction are  
23 viewed in light most favorable to nonmoving party).

24 Accordingly, the Magistrate Judge did not err in  
25 recommending that the Court assume jurisdiction because  
26 Petitioner might still have a parole term left to serve. See  
27 Murguia v. Martel, No. CV 09-3054-ODW(E)., 2009 WL 4980282, at  
28 \*2-3 (C.D. Cal. Dec. 16, 2009) (finding petitioner "in custody"

1 on challenged conviction when he had served prison sentence for  
2 it but had not yet served mandatory parole term and remained  
3 incarcerated on different conviction).

4 As for Petitioner's objections to the R. & R., he contends  
5 for the first time that he is entitled to equitable tolling  
6 because his attorney rendered ineffective assistance during his  
7 plea negotiations, his brother's counsel coerced him into  
8 accepting a plea deal by promising to file an appeal arguing his  
9 innocence after his brother was released from jail, and he was  
10 ignorant of the law. (See Pet'r's Objs. at 2-5.) But he raised  
11 each of these arguments to support his actual-innocence claim  
12 (see Opp'n at 3-5, 7), and he now simply reframes them as  
13 entitling him to equitable tolling (see Pet'r's Objs. at 2-5).  
14 In liberally construing Petitioner's filings, however, the  
15 Magistrate Judge already addressed whether these claims entitled  
16 him to equitable tolling and concluded that they did not. (See  
17 R. & R. at 12-13.) Indeed, as the Magistrate Judge noted, by  
18 accepting the plea agreement Petitioner got exactly what he  
19 bargained for: a more lenient sentence for his brother. (R. & R.  
20 at 23); see United States v. Yong, 926 F.3d 582, 591-92 (9th Cir.  
21 2019) (finding guilty plea made in exchange for third-party  
22 leniency to be voluntary). Petitioner adds nothing in the  
23 Objections to change that analysis.

24 Some of Petitioner's factual assertions in his Objections  
25 warrant a response. He claims that during a recess in his  
26 preliminary hearing the prosecutor threatened to "lock up"  
27 witness Davis if he didn't testify that Petitioner was the driver  
28 of the car involved in the drive-by shooting. (Objs. at 9; see

1 also Opp'n at 3 n.2 (Petitioner claiming, without evidentiary  
2 support, that "a couple of months after the preliminary hearing"  
3 someone told him he had "witnessed the pro[]secutor threaten  
4 Davis during the recess".) But he has never presented any  
5 evidence of these alleged threats, and as the Magistrate Judge  
6 noted, Davis's testimony changed after a recess requested by the  
7 defense, not the prosecution, and he was thoroughly cross-  
8 examined on why he changed his testimony. (See R. & R. at 7.)

9       Petitioner also objects to the Magistrate Judge's  
10 observation that his claim that the alleged actual driver is now  
11 in prison contradicted his assertion at his 2002 sentencing in  
12 another case that the driver was "dead." (See Objs. at 11  
13 (referring to R. & R. at 21).) He claims the "dead" perpetrator  
14 to whom he referred was as to a different prior crime of which he  
15 was also allegedly unjustly convicted. (Id.) Regardless,  
16 Petitioner still refuses to name the person he claims was the  
17 actual perpetrator in this case (see id. at 12), substantially  
18 undermining the strength of his "new evidence" of actual  
19 innocence.

20       Having reviewed de novo those portions of the R. & R. to  
21 which Petitioner objects, the Court agrees with and accepts the  
22 findings and recommendations of the Magistrate Judge. IT  
23 THEREFORE IS ORDERED that Respondent's motion to dismiss is  
24 granted and that judgment be entered denying the Petition as  
25 untimely and dismissing this action with prejudice.

26  
27 DATED: August 20, 2019

*David O. Carter*  
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DAVID O. CARTER  
U.S. DISTRICT JUDGE