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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NARINDER SINGH KHATKARH,
Petitioner,
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,
Respondent.

No. 2:14-cv-0079 KJM KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction

Petitioner is a former state prisoner, proceeding through counsel. Presently calendared for hearing on August 10, 2017, is respondent’s motion to dismiss this action for lack of jurisdiction. Pursuant to Local Rule 230(g), the court has determined that the matter is submitted on the papers without oral argument. Upon review of the motion and the documents in support and opposition, and good cause appearing therefor, the undersigned recommends that the motion to dismiss be denied, and respondent be directed to file an answer.

II. Background

On March 20, 2009, petitioner pled no contest to assault with a firearm. On April 24, 2009, the court sentenced petitioner to one year in jail, and three years’ probation. On August 6, 2009, petitioner filed a motion to modify the terms of his probation. On August 21, 2009,

1 petitioner's motion was granted, and the court reduced petitioner's jail term to 364 days. On
2 April 2, 2010, petitioner admitted that he violated a term of his probation, requiring that he obey
3 all laws, by driving with a blood alcohol content of 0.08% or greater, in violation of California
4 Vehicle Code § 23152(b). (ECF No. 1-3 at 29-36.) Petitioner was sentenced to three years in
5 state prison for violating probation. (Id.)

6 This action was filed on January 13, 2014. (ECF No. 1.)

7 On January 29, 2014, petitioner was released from parole. (ECF No. 38-1 at 3.)

8 III. Legal Standards

9 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
10 petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the
11 petitioner is not entitled to relief in the district court. . . ." Id. The Court of Appeals for the Ninth
12 Circuit has referred to a respondent's motion to dismiss as a request for the court to dismiss under
13 Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420
14 (1991). Accordingly, the court reviews respondent's motion to dismiss pursuant to its authority
15 under Rule 4.

16 IV. In Custody?

17 Subject matter jurisdiction over habeas petitions exists only where, at the time the petition
18 is filed, the petitioner is "in custody" as a result of the conviction being challenged in the petition.
19 See Maleng v. Cook, 490 U.S. 488, 490-91(1989) (per curiam); Carafas v. LaVallee, 391 U.S.
20 234, 238 (1968); see also 28 U.S.C. §§ 2241(c)(3), 2254(a). The "in custody" requirement of 28
21 U.S.C. § 2254(a) is satisfied where a petitioner has been placed on parole or probation. See
22 Maleng, 490 U.S. at 491; Jones v. Cunningham, 371 U.S. 236, 243 (1963); Chaker v. Crogan, 428
23 F.3d 1215, 1219 (9th Cir. 2005) ("[I]f a petitioner is in custody at the time he files his federal
24 habeas petition, his subsequent release from custody does not deprive the court of its
25 jurisdiction.").

26 Here, petitioner was on parole at the time he filed the instant petition on January 13, 2014.
27 (ECF No. 1-1 at 7.) While petitioner was subsequently discharged from parole supervision, after
28 the instant petition was filed, petitioner nevertheless satisfies the "in custody" requirement

1 because he was “in custody” at the time of filing. See Chaker, 428 F.3d at 1219; Tyars v. Finner,
2 709 F.2d 1274, 1279 (9th Cir. 1983) (explaining difference between “in custody requirement” and
3 mootness); see also United States v. Spawr Optical Research, Inc., 864 F.2d 1467, 1470 (9th Cir.
4 1988) (“district court’s jurisdiction over this motion is measured at the time of filing.”).

5 V. Has Petitioner’s Release from Parole Rendered this Action Moot?

6 Respondent concedes that petitioner proves his status (that he was in custody at time of
7 filing), and that petitioner suffers collateral consequences flowing from the challenged criminal
8 conviction. (ECF No. 41 at 2.) However, respondent argues this case must be dismissed because
9 petitioner’s release from custody and parole deprive petitioner of standing to pursue this action.
10 Respondent insists that because petitioner has been released from custody this court cannot
11 provide a remedy. Respondent contends that the only relief this court can offer petitioner is
12 “limited to (unconditional or conditional) release from the custody of a respondent”:

13 The power of a federal habeas court “lies to enforce the right of
14 personal liberty.” Fay v. Noia, 372 U.S. 391, 430, 83 S. Ct. 822, 9
15 L.Ed.2d 837 (1963), overruled on other grounds by Wainwright v.
16 Sykes, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977). As
17 such, a habeas court “has the power to release” a prisoner, but “has
no other power [.]” Id. at 431, 83 S. Ct. 822. “[I]t cannot revise the
state court judgment; it can act only on the body of the petitioner.”
Id.

18 Douglas v. Jacquez, 626 F.3d 501, 504 (9th Cir. 2010). (ECF No. 38 at 5.)

19 Petitioner argues that his habeas petition continues to present a live case or controversy
20 after his release because he suffers actual collateral consequences of removal: his conviction of
21 assault with a firearm constitutes an aggravated felony under California law, which subjects
22 petitioner to a final order of deportation and renders him permanently inadmissible. See 8 U.S.C.
23 § 8 1182(a)(4)(A)(i). Moreover, petitioner argues that if his habeas petition is granted, his
24 conviction will be vacated, providing a basis for him to move to reopen his removal case. (ECF
25 No. 39 at 3.) Petitioner argues that, based upon immigration counsel’s declaration, such a motion
26 to reopen the removal case would “almost assuredly” be granted, and petitioner would no longer
27 be removable. (ECF No. 39 at 3-4, citing ECF No. 39-2 (Declaration of Christopher Todd).)

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1 A habeas petition becomes moot if there is no longer a case or controversy following a
2 petitioner's release from custody. See Spencer v. Kemna, 523 U.S. 1, 7 (1998) ("once the
3 convict's sentence has expired . . . some concrete and continuing injury other than the now-ended
4 incarceration or parole -- some 'collateral consequence' of the conviction -- must exist if the suit
5 is to be maintained."). However, because 28 U.S.C. § 2254 contemplates remedies other than
6 release from custody, the petition does not necessarily become moot when petitioner is released
7 from physical custody prior to final adjudication of the habeas petition. See Carafas v. LaVallee,
8 391 U.S. 234, 237-40 (1968) (the petitioner's release from custody does not render petition moot
9 if petitioner remains subject to collateral consequences arising from the conviction); see also
10 Spawr Optical Research, Inc., 864 F.2d at 1470 (§ 2255 motion did not become moot because
11 despite completed term of probation, additional collateral consequences remained). Thus, as long
12 as there are collateral consequences of the conviction, a habeas action challenging the prisoner's
13 underlying conviction may be maintained even after a petitioner is released from custody.

14 Here, petitioner has demonstrated that he is subject to deportation and permanent removal
15 based on the challenged underlying conviction. (ECF No. 39 at 3.) As such, he remains subject
16 to collateral consequences of his conviction. See Chaker, 428 F.3d at 1219 (explaining that
17 because the petitioner may be subject to a harsher punishment as a result of his conviction, the
18 petition was not moot); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) (holding that
19 immigration consequences of a criminal conviction constitute collateral consequences); Park v.
20 California, 202 F.3d 1146, 1148 (9th Cir. 2000) ("Park's release from prison does not moot his
21 habeas petition[,] . . . [b]ecause he faces deportation, Park suffers actual consequences from his
22 conviction.")¹ Thus, the instant petition is not moot.

23 ¹ Even in cases where the prisoner was deported prior to the adjudication of the habeas petition,
24 courts have found that deportation does not moot the petition. Frimpong v. MacDonald, 2014
25 WL 1779492 at *7 (C.D. Cal. May 5, 2014) ("a deportation after the filing of a federal habeas
26 corpus petition does not deprive the court of jurisdiction or moot the petition, so long as the
27 petitioner was in custody when the habeas petition was filed and continues to suffer actual
28 collateral consequences of the removal that are redressable by success on the petition.") Zegarra-
Gomez v. INS, 314 F.3d 1124, 1127 (9th Cir. 2003) ("We also agree that the case or controversy
requirement is satisfied where the petitioner is deported, so long as he was in custody when the
habeas petition was filed and continues to suffer actual collateral consequences of his removal.");

1 Nevertheless, respondent argues that because petitioner is no longer in custody, he cannot
2 claim he is “in custody” in violation of the Constitution of other federal laws, as required under
3 section 2254(a)’s second use of the terms “in custody.” (ECF No. 41 at 2.) Respondent relies on
4 Bailey v. Hill, 599 F.3d 976, 980 (9th Cir. 2010) (challenge to restitution order, standing alone,
5 did not satisfy the “in custody” requirement for jurisdiction under § 2254).

6 In Bailey, the Ninth Circuit did point out that § 2254 contains two references to “in
7 custody.” Bailey, 599 F.3d at 978. However, the Ninth Circuit defined the second “in custody”
8 requirement as “explicitly requir[ing] a nexus between the petitioner’s claim and the unlawful
9 nature of the custody.” Bailey, 599 F.3d at 980. The Ninth Circuit addressed Bailey’s challenge
10 to a restitution order, and found that the former prisoner failed to demonstrate a nexus between
11 his restitution claim and the unlawful nature of his custody or underlying conviction. Id. There,
12 the prisoner’s habeas corpus petition did not challenge the lawfulness of his custody under federal
13 law, but rather challenged a restitution order. Id. Here, petitioner challenges the lawfulness of
14 his custody or conviction, and remains subject to the collateral consequence of being subject to a
15 deportation order based on the conviction challenged herein. Respondent points to no case where
16 a federal court applied Bailey to find the habeas challenge moot where the former prisoner
17 challenged his underlying conviction and suffered the collateral consequences of impending
18 deportation and permanent removal. Thus, the undersigned is not persuaded that Bailey deprives
19 this court of jurisdiction, or that this case no longer presents a viable case or controversy under
20 Article III, § 2.

21 The undersigned finds that respondent’s focus on redressability is similarly unavailing.

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24 Handa v. Clark, 401 F.3d 1129, 1132-33 (9th Cir. 2005) (where petition filed prior to deportation
25 asserted that the government had improperly applied Visa Waiver Program procedures --
26 effectively disputing the merits of the deportation order -- sufficient collateral consequences
27 remained to show a live case or controversy because the petitioner would be ineligible to apply
28 for reentry for ten years). See also Ferreira v. Ashcroft, 382 F.3d 1045, 1049 (9th Cir. 2004)
(where petitioner challenged characterization of conviction as an aggravated felony and faced
ineligibility to seek readmission to the United States for twenty years, case not mooted by his
deportation); Chong v. INS, 264 F.3d 378, 385 (3d Cir. 2001) (similar).

1 The “case-or-controversy requirement subsists through all stages of federal judicial
2 proceedings, trial and appellate. . . . The parties must continue to have a ‘personal stake in the
3 outcome’ of the lawsuit.” Lewis v. Continental Bank Corp., 494 U.S. 472, 477-78 (1990)
4 (citation omitted). “This means that, throughout the litigation, the plaintiff ‘must have suffered,
5 or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a
6 favorable judicial decision.’” Spencer, 523 U.S. at 7, quoting Lewis, 494 U.S. at 477. The
7 Supreme Court explained:

8 An incarcerated convict’s (or a parolee’s) challenge to the validity
9 of his conviction always satisfies the case-or-controversy
10 requirement, because the incarceration (or the restriction imposed
11 by the terms of the parole) constitutes a concrete injury, caused by
12 the conviction and redressable by invalidation of the conviction.
13 Once the convict’s sentence has expired, however, some concrete
14 and continuing injury other than the now-ended incarceration or
15 parole -- some “collateral consequence” of the conviction -- must
16 exist if the suit is to be maintained. See, e.g., Carafas, supra, at
17 237-238, 88 S. Ct., at 1559-60. In recent decades, we have been
18 willing to presume that a wrongful criminal conviction has
19 continuing collateral consequences (or, what is effectively the
20 same, to count collateral consequences that are remote and unlikely
21 to occur). See Sibron v. New York, 392 U.S. 40, 55-56, 88 S. Ct.
22 1889, 1898-99, 20 L.Ed.2d 917 (1968).

23 Spencer, 523 U.S. at 7-8 (emphasis added).² In 1968, the Supreme Court stated that “the [habeas]
24 statute does not limit the relief that may be granted to discharge of the applicant from physical
25 custody.” Carafas, 391 U.S. at 239. The Ninth Circuit repeated this in 1983:

26 The relief available under the statute is not limited to an order of
27 discharge from state custody. Id. at 239, 88 S. Ct. at 1560; 28
28 U.S.C. § 2243 (habeas court may “dispose of the matter as law and
29 justice require”).

30 Tyars, 709 F.2d at 1274. Indeed, in Chaker, the Ninth Circuit dismissed respondent’s standing
31 argument in a footnote:

32 ² In Carafas, the petitioner challenged his conviction in a habeas petition that he filed while he
33 was incarcerated, establishing the district court’s jurisdiction. Id. at 236. The petitioner’s
34 sentence, however, expired during the petitioner’s appeal. Id. The Court concluded that the case
35 was not moot because the petitioner, though no longer in custody, was still burdened by the
36 “consequences of his conviction,” id. at 237, and that jurisdiction was not defeated under those
37 circumstances, id. at 238.

1 The state also argues that Chaker lacks standing to attack his
2 conviction on First Amendment grounds. We disagree. Chaker has
3 shown “that the conduct of which he complains has caused him to
4 suffer an ‘injury in fact’ that a favorable judgment will redress.”
5 See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S.
6 Ct. 2301, 2308, 159 L.Ed.2d 98 (2004) (citations omitted).³

7 Chaker, 428 F.3d at 1219 n.4.⁴

8 Because this court is not limited to the remedy of discharging petitioner from physical
9 custody, petitioner’s release from custody does not deprive this court of the ability to fashion a
10 remedy should the instant habeas petition be granted. See, e.g., Santobello v. New York, 404
11 U.S. 257, 263 (1971) (“The ultimate relief to which petitioner is entitled we leave to the
12 discretion of the state court, which is in a better position to decide whether the circumstances of
13 this case require only that there be specific performance of the agreement on the plea, in which
14 case petitioner should be resentenced by a different judge, or whether, in the view of the state
15 court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to
16 withdraw his plea of guilty.”); Buckley v. Terhune, 441 F.3d 688, 669 (9th Cir. 2006), cert.
17 denied, 127 S. Ct. 2094 (2007) (*en banc*) (under the circumstances, specific performance was the
18 only viable remedy.).

19 VI. Conclusion

20 Accordingly, IT IS HEREBY ORDERED that the hearing date of August 10, 2017, is
21 vacated.

22 IT IS RECOMMENDED that:

- 23 1. Respondent’s motion to dismiss (ECF No. 38) be denied; and
- 24 2. Respondent be directed to file an answer within fourteen days of any district court
25 order adopting these findings and recommendations.

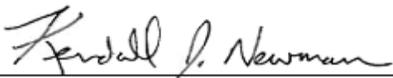
26 ³ Newdow was abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components,
27 Inc., 134 S. Ct. 1377 (2014).

28 ⁴ Even earlier, the Supreme Court held that the court retained jurisdiction over a habeas petition
where the prisoner was deported prior to the resolution of his underlying challenge to his
conviction. Fiswick v. United States, 329 U.S. 211, 223 (1946) (“To dismiss his case as moot
would permit the government to compound its error at Fiswick’s expense.”)

1 These findings and recommendations are submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
3 after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
6 objections shall be filed and served within fourteen days after service of the objections.

7 The parties are advised that failure to file objections within the specified time may waive
8 the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 Dated: August 9, 2017

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12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE

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