

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GEORGE NIMER MARTHA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA, et al.,

Respondent.

Case No. [18-cv-00785-SI](#)

ORDER OF DISMISSAL

The court issued an order to show cause on March 26, 2018, directing petitioner to address three apparent procedural problems with his petition for writ of habeas corpus challenging his 1994 conviction upon a guilty plea. Petitioner thereafter sent to the court several letters which, for the most part, provided no information responsive to the order to show cause. *See* Docket Nos. 6, 7, 8; *see also* Docket No. 6 in *Martha v. People*, No. 18-780 SI. Having provided petitioner an opportunity to address the issues, the court now reviews the procedural problems in this case.

First, the court ordered petitioner to explain how he satisfied the custody requirement under 28 U.S.C. § 2254, which requires both that there be a restraint on the petitioner’s liberty and that there be “a nexus between the petitioner’s claim and the unlawful nature of the custody.” Docket No. 5 at 2 (quoting *Bailey v. Hill*, 599 F.3d 976, 979-80 (9th Cir. 2010)). Petitioner did not provide any information in his three letters showing that there was any nexus between his claim regarding the guilty plea and the allegedly unlawful nature of his present custody. He does not show that he satisfies the custody requirement in § 2254 for his petition challenging his 1994 guilty plea.

Second, the court ordered petitioner to explain why his “petition challenging a 24-year old conviction should not be dismissed as barred by the [one-year] habeas statute of limitations.

1 Docket No. 5 at 3. Petitioner stated in a letter that he had a “212-C waiver since 1998 with (INS)
2 – ICE, to which allows [him] to appeal at any giv[en] time,” although that waiver was revoked last
3 year. Docket No. 6 in *Martha v. People*, No. 18-cv-780 SI. Even if petitioner had a § 212(c)
4 waiver,¹ such a waiver would concern his removability from the country and would not provide an
5 open-ended extension of the deadline to file an appeal or a habeas petition challenging a
6 conviction that might lead him to be removable. Any § 212(c) waiver would not excuse the two-
7 decade delay in filing a petition for writ of habeas corpus to challenge the 1994 conviction.
8 Petitioner has failed to show that his petition for writ of habeas corpus is not barred by the statute
9 of limitations in 28 U.S.C. § 2244(d).

10 Third, the court directed petitioner to state whether and when he presented his claim to the
11 California Supreme Court. Petitioner has failed to address this issue, and has failed to show that
12 he exhausted state court remedies for any claim.

13 In short, it appears that petitioner is not in custody on the conviction he is challenging, that
14 the petition is barred by the statute of limitations, and that petitioner has not exhausted state court
15 remedies for his claim. Because the lack of custody is a jurisdictional problem, that will be the
16 basis for the dismissal of this action.

17 Under 28 U.S.C. § 2254, a federal court may entertain a petition for a writ of habeas
18 corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the
19 ground that he is in custody in violation of the Constitution or laws or treaties of the United
20 States.” A petitioner must be in custody on the conviction or sentence under attack at the time the
21 petition is filed. *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). “A petitioner who files a habeas
22 petition after he has fully served his sentence and who is not subject to court supervision is not ‘in
23

24 ¹ Section 212 of the Immigration and Nationality Act of 1952, codified at 8 U.S.C. § 1182,
25 “excluded from the United States several classes of aliens, including those convicted of offenses
26 involving moral turpitude or the illicit traffic in narcotics.” *INS v. St. Cyr*, 533 U.S. 289, 294
27 (2001). Section 212(c) “grant[ed] the Attorney General broad discretion to admit excludable
28 aliens,” and was interpreted to allow certain aliens to apply for discretionary waiver of
deportation. *See St. Cyr*, 533 U.S. at 294-95. Although § 212(c) was repealed in 1996, relief
under § 212(c) “remains available for aliens . . . whose convictions were obtained through plea
agreements and who, notwithstanding those convictions, would have been eligible for § 212(c)
relief at the time of their plea under the law then in effect.” *St. Cyr*, 533 U.S. at 326.

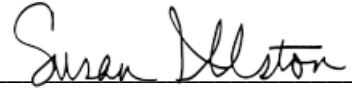
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

custody’ for the purposes of this court's subject matter jurisdiction” and his petition therefore properly is denied. *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990).

This action is DISMISSED for lack of jurisdiction because, at the time he filed his petition for writ of habeas corpus, petitioner was not in custody pursuant to the conviction he attacks in his petition. The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 23, 2018



SUSAN ILLSTON
United States District Judge