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## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALFONSO CERVANTES REYES,

Nos. C 10-05643 CW (PR)

C 10-05795 CW (PR)

Petitioner,

v.

KAMALA HARRIS, California  
Attorney General, J.C. HOLLAND,  
Warden, FCI-Ashland,ORDER DENYING MOTIONS FOR  
RECONSIDERATION; DENYING AS  
MOOT REQUEST FOR EXTENSION OF  
TIME TO SEEK LEAVE TO PROCEED  
IN FORMA PAUPERIS ON APPEALRespondents.  

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## BACKGROUND

Petitioner filed the above two pro se petitions for a writ of habeas corpus under 28 U.S.C. § 2254 challenging expired convictions and sentences imposed in the Santa Clara County Superior Court in 2005. On June 20, 2011, the Court dismissed the petitions on the ground that it lacked jurisdiction to consider Petitioner's challenges to his state convictions because Petitioner no longer is in custody under either conviction.

Further, because it appeared that Petitioner, who currently is incarcerated at the Federal Correctional Institution in Ashland, Kentucky, is facing deportation proceedings, the Court found that he is not in custody under the state convictions as a result of the immigration consequences of those convictions.

Additionally, the Court determined that Petitioner cannot challenge the validity of his federal immigration custody by attacking his state convictions in a habeas petition under 28 U.S.C. § 2241. Rather, the Court explained, until a habeas petitioner has successfully overturned his state conviction in an action against the State, federal immigration authorities are

1 entitled to rely on the conviction as a basis for custody and  
2 eventual deportation.

3 Based on the above, the Court dismissed the petitions and  
4 denied a certificate of appealability.

5 Petitioner then filed a motion for reconsideration of the  
6 Order of dismissal in each of his petitions, and also filed a  
7 request for a certificate of appealability from the Ninth Circuit  
8 Court of Appeals. On September 23, 2011, this Court granted  
9 Petitioner's request to proceed in forma pauperis on appeal.<sup>1</sup> The  
10 Ninth Circuit has not ruled yet on Petitioner's request for a  
11 certificate of appealability.

12 For the reasons discussed below, Petitioner's motions for  
13 reconsideration will be denied.

14 DISCUSSION

15 Petitioner moves for reconsideration on the following grounds:  
16 (1) the Court erroneously understood that Petitioner is in federal  
17 custody facing deportation proceedings when, in fact, Petitioner is  
18 in federal custody serving a sixteen-year sentence that was  
19 enhanced by the state convictions; (2) the Court was not aware that  
20 Petitioner had filed state habeas petitions attacking his state  
21 convictions while he was in custody under those convictions;  
22 (3) even though he was not in state custody when he filed the  
23 instant petitions, he should be excepted from application of the  
24 in-custody rule because the state courts refused, without  
25 justification, to rule on the merits of his petitions.

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26  
27 <sup>1</sup>Petitioner has filed a motion requesting an extension of time  
28 to apply for leave to proceed in forma pauperis on appeal. Because  
the Court already granted Petitioner leave to proceed in forma  
pauperis on appeal, the motion is DENIED as moot.

1           Additionally, the Court has obtained the following information  
2 relevant to Petitioner's motion which Petitioner did not provide in  
3 his moving papers: (1) the federal sentence he is serving was  
4 imposed after Petitioner, in 2008, plead guilty in this district in  
5 United States of America v. Alfonso Cervantes Reyes, Case No. CR  
6 05-00516 JF; (2) Petitioner currently is pursuing an appeal of his  
7 guilty plea and the sentence in that case; (3) Petitioner argues in  
8 the appeal that his federal sentence should not have been enhanced  
9 by the two state convictions at issue in the present petitions  
10 because the convictions are constitutionally infirm; (4) in  
11 response to the appeal, the Government has argued that Petitioner  
12 waived his right to appeal when he plead guilty and that he must,  
13 instead, proceed by way of a motion to vacate under 28 U.S.C.  
14 § 2255; (5) Petitioner's reply to the Government is due on November  
15 7, 2011. See United States of America v. Alfonso Cervantes Reyes,  
16 Case No. 10-10369.

17           Petitioner is correct that the newly-asserted facts that  
18 he is in federal custody serving a federal sentence rather than  
19 facing deportation proceedings, and that he challenged his state  
20 convictions when he was in state custody, change the Court's  
21 analysis concerning his challenge to his state convictions in the  
22 present petitions. For the reasons discussed below, however, the  
23 Court's conclusion that the petitions must be dismissed remains the  
24 same.

25           In the present petitions, Petitioner brings a direct challenge  
26 under 28 U.S.C. § 2254 to his expired state court convictions. As  
27 the Court previously determined, Petitioner cannot directly  
28 challenge the validity of those convictions because they have

1 expired and, therefore, Petitioner no longer is "in custody" under  
2 those convictions. See Maleng v. Cook, 490 U.S. 443, 492 (1989)  
3 (per curiam). In the instant motions, Petitioner argues he does  
4 meet the in-custody requirement because the state courts improperly  
5 refused to rule on the merits of his state habeas challenges to the  
6 convictions. In so doing, Petitioner cites to United States  
7 Supreme Court case law that discusses the in-custody requirement  
8 for challenges to expired convictions used to enhance later  
9 sentences.

10 Specifically, the Supreme Court has held that a petitioner  
11 challenging in habeas corpus the validity of an expired conviction  
12 which he maintains is being used as a predicate or enhancement to  
13 his current confinement or sentence satisfies the custody  
14 requirement, even if he no longer is in custody on the prior  
15 conviction. See Lackawanna County Dist. Attorney v. Coss, 532 U.S.  
16 394, 401-02 (2001). Importantly, however, the Supreme Court has  
17 clarified that, regardless of whether the custody requirement is  
18 met, concerns of easy administration and interest in promoting the  
19 finality of state court criminal judgments dictate that the expired  
20 conviction itself cannot be challenged in an attack upon the later  
21 sentence it was used to enhance. See Daniels v. United States, 532  
22 U.S. 374, 379-83 (2001) (prior state conviction cannot be  
23 challenged in § 2255 motion challenging current federal sentence  
24 enhanced by prior conviction); Coss, 532 U.S. at 402-03 (prior  
25 state conviction cannot be challenged in § 2254 petition  
26 challenging current state sentence enhanced by prior conviction).

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1 As explained by the Supreme Court:

2 If, however, a prior conviction used to enhance a federal  
3 sentence is no longer open to direct or collateral attack  
4 in its own right because the defendant failed to pursue  
5 those remedies while they were available (or because the  
6 defendant did so unsuccessfully), then that defendant is  
7 without recourse. The presumption of validity that  
8 attached to the prior conviction at the time of  
9 sentencing is conclusive, and the defendant may not  
10 collaterally attack his prior conviction through a motion  
11 under § 2255.

12 Daniels, 532 U.S. at 382; see Coss, 532 U.S. at 403-04 (accord,  
13 discussing collateral attack on expired conviction in § 2254  
14 petition). The only exception to this rule is for a claim that the  
15 prior conviction was unconstitutional because there was a failure  
16 to appoint counsel in violation of the Sixth Amendment right to  
17 counsel as set forth in Gideon v. Wainwright, 372 U.S. 335 (1963).  
18 See Daniels, 532 U.S. at 382; Coss, 532 U.S. at 404.

19 The Supreme Court also recognized that "there may be rare  
20 cases in which no channel of review was actually available to a  
21 defendant with respect to a prior conviction, due to no fault of  
22 his own." Daniels, 532 U.S. at 383; see Coss, 532 U.S. at 404  
23 (accord). In neither the Daniels nor Coss case, however, did the  
24 circumstances require the Supreme Court to determine whether, or  
25 under what circumstances, a petitioner might be able to challenge  
26 on such grounds the validity of an expired conviction used to  
27 enhance a current sentence. See Daniels, 532 U.S. at 383; Coss,  
28 532 U.S. at 405-06.

Petitioner relies upon the Supreme Court's statement  
concerning a possible "rare cases" exception to argue that  
reconsideration should be granted to allow him to show that he  
satisfies the in-custody requirement to challenge his expired

1 convictions in the present § 2254 petitions because the state  
2 courts improperly failed to consider his state habeas challenges to  
3 those convictions while Petitioner still was in custody on them.

4       This argument is unavailing for two reasons. First,  
5 Petitioner can meet the in-custody requirement to challenge his  
6 expired state convictions only if he is challenging their use to  
7 enhance his current federal sentence. As noted, in the instant  
8 petitions Petitioner is not challenging the enhancement of his  
9 federal sentence by the alleged invalid state convictions, nor can  
10 he do so. Accordingly, Petitioner must bring any such challenge in  
11 a direct or collateral challenge to his federal sentence.

12       Second, the "rare cases" exception that might allow review of  
13 an expired state conviction because the state courts improperly  
14 rejected a challenge to that conviction does not go to the question  
15 of custody. Rather, as the Supreme Court explained in Daniels and  
16 Coss, such exception is relevant to the question of the proper  
17 weight to be given to the state court criminal judgment relied upon  
18 to enhance the current sentence. Accordingly, to the extent  
19 Petitioner argues that the state courts improperly rejected his  
20 state habeas challenges to his expired convictions, Petitioner must  
21 raise such argument in the court reviewing his challenge to his  
22 federal sentence.

23       Based on the above, the Court concludes that Petitioner is not  
24 entitled to reconsideration because he does not meet the custody  
25 requirement for challenging his expired state convictions in § 2254  
26 petitions that seek only to invalidate those convictions. Instead,  
27 Petitioner may be able to meet the custody requirement by  
28 challenging the use of the expired state convictions to enhance his

1 current federal sentence, which he must do by way of a direct or  
2 collateral challenge to that sentence.

3 Accordingly, the motions for reconsideration are DENIED.

4 This Order terminates Docket no. 10 (Motion for  
5 Reconsideration) in Case No. 10-05643 CW (PR), and Docket Nos. 10  
6 (Motion for Reconsideration) and 17 (Motion for Extension of Time  
7 to File In Forma Pauperis Application) in Case No. 10-05795.

8 IT IS SO ORDERED.

9 Dated: 10/20/2011



CLAUDIA WILKEN  
UNITED STATES DISTRICT JUDGE

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 ALFONSO C REYES,

5 Plaintiff,

6 v.

7 JERRY BROWN et al,

8 Defendant.

Case Number: CV10-05643 CW

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
10 Court, Northern District of California.

11 That on October 20, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
14 in the Clerk's office.

15 Alfonso Cervantes Reyes 10337-111  
16 Federal Correctional Institution - Ashland  
17 P.O. Box 6001  
18 Ashland, KY 41105

19 Dated: October 20, 2011

20 Richard W. Wieking, Clerk  
21 By: Nikki Riley, Deputy Clerk  
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