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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PAUL HUPP,  
  
Petitioner,  
  
v.  
  
SAN DIEGO SUPERIOR COURT, JOHN  
SARGENT MEYER, et al.,  
  
Respondents.

Civil No. 12-0274 WQH (JMA)

**ORDER DISMISSING CASE WITHOUT  
PREJUDICE AND WITH LEAVE TO  
AMEND**

On February 2, 2012, Petitioner, proceeding pro se, paid the \$5.00 filing fee and submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) The Court dismissed the case without prejudice and with leave to amend on February 8, 2012, because Petitioner had failed to satisfy the “in custody” requirement of 28 U.S.C. § 2254 and because Petitioner had failed to name the proper respondent. (ECF No. 2.) Petitioner was given until April 13, 2012, to file a First Amended Petition that cured the pleading deficiencies outlined in the Court’s Order. (*Id.*) On February 17, 2012, Petitioner filed a First Amended Petition. (ECF No. 4.)

**IN CUSTODY REQUIREMENT**

Petitioner has again failed to establish that he is currently in custody because he lists his current address as “965 Hidden Oaks, Beaumont, CA 92223.” (ECF No. 4 at 1.)

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1 Furthermore, Petitioner lists his sentence start date as January 3, 2012. and his release date as  
2 January 28, 2012. (*Id.* at 2.)

3 As the Court noted in its previous dismissal Order, “[s]ubject matter jurisdiction under  
4 the federal habeas corpus statute, 28 U.S.C. § 2254(a), is limited to those persons ‘in custody  
5 pursuant to the judgment of a State.’” *Brock v. Weston*, 31 F.3d 887, 889 (9th Cir. 1994); *see*  
6 *also* 28 U.S.C. § 2241(c)(3). It is a jurisdictional requirement that, at the time a habeas petition  
7 is filed, “the habeas petitioner be ‘in custody’ under the conviction or sentence under attack.”  
8 *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (citing 28 U.S.C. §§ 2241(c)(3) & 2254(a)); *see*  
9 *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

10 Here, Petitioner may not challenge the constitutional validity of his November, 2011,  
11 conviction via a § 2254 petition because he is no longer in actual custody pursuant to that  
12 conviction and does not allege he was in constructive custody (e.g., parole or probation) at the  
13 time he filed the Petition in this case on February 2, 2012. *See Brock*, 31 F.3d at 889. “[O]nce  
14 the sentence imposed for a conviction has completely expired, the collateral consequences of that  
15 conviction are not themselves sufficient to render an individual ‘in custody’ for the purposes of  
16 a habeas attack upon it.” *Maleng*, 290 U.S. at 490; *see Feldman v. Perrill*, 902 F.2d 1445, 1448  
17 (9th Cir. 1990) (stating that an expired conviction cannot satisfy the “in custody” requirement).

18 Petitioner states that he has a related case pending in this Court, case no. 11cv2909 IEG  
19 (RBB), and that he was in custody when he filed that case. (ECF No. 14.) Petitioner did file a  
20 habeas corpus petition in case no. 11cv2909 IEG (RBB) on December 14, 2011, together with  
21 a motion to proceed in forma pauperis. (ECF Nos. 1-2 in case no. 11cv2909 IEG (RBB).) The  
22 motion to proceed in forma pauperis was denied because petitioner had not provided the Court  
23 with the proper information required for the Court to determine Petitioner’s financial status.  
24 (ECF No. 7 in case no. 11cv2909 IEG (RBB).) The Court also dismissed the case without  
25 prejudice because Petitioner was not in custody at the time he filed the petition; rather, he was  
26 scheduled to begin serving his sentence on January 3, 2012. (*Id.* at 2.) In addition, Petitioner  
27 had not alleged that he had exhausted his state judicial remedies. (*Id.* at 2-3.) No leave to amend  
28 was granted in that case. Nevertheless, the Court accepted for filing a First Amended Petition

1 from Petitioner in case no. 11cv2909 IEG (RBB) on January 3, 2012. (ECF No. 11 in case no.  
2 11cv2909 IEG (RBB).) At that point, Petitioner was in custody. He had not, however,  
3 exhausted his state court remedies. Accordingly, the Court dismissed the First Amended Petition  
4 in case no. 11cv2909 IEG (RBB) for failing to allege exhaustion. Again, no leave to amend was  
5 granted. (ECF No 13 at 2-3.)

6 This case is not related to case no. 11cv2909 IEG (RBB). Petitioner was specifically told  
7 in 11cv2909 IEG (RBB) that the Court was dismissing the case “without prejudice to *refiling*  
8 *a new case once all state court post-conviction challenges have been completed.*” (ECF No. 13  
9 at 3 in case no. 11cv2909 IEG (RBB) (emphasis added).) Further, Petitioner must have been in  
10 custody *and* have exhausted his state judicial remedies at the time he filed his federal habeas  
11 corpus petition pursuant to 28 U.S.C. § 2254 in order to survive summary dismissal. Petitioner  
12 was not in custody when he filed his petition in case no. 11cv2909 IEG (RBB). He was in  
13 custody when he filed his First Amended Petition in that case but he had not demonstrated  
14 exhaustion. When he filed the original petition in this case, he was not in custody, but had  
15 demonstrated exhaustion. The same is true of his First Amended Petition in this case.  
16 Accordingly, because Petitioner is not currently in custody, nor was he in custody when the first  
17 petition in this case was filed, he has not satisfied the “in custody” requirement under 28 U.S.C.  
18 § 2254. *See Maleng*, 490 U.S. at 490-91; *Carafas*, 391 U.S. at 238.<sup>1</sup>

19 **CONCLUSION**

20 Based on the foregoing, the Court **DISMISSES** this action without prejudice. *See* 28  
21 U.S.C. §§ 2241(c)(3), 2254(a).

22 **IT IS SO ORDERED.**

23 DATED: February 27, 2012

24   
25 **WILLIAM Q. HAYES**  
26 United States District Judge

27  
28 <sup>1</sup> Petitioner is reminded that if he is in custody in the future and wishes to file a habeas corpus petition pursuant to 28 U.S.C. § 2254, he must name the officer having custody of him. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254).