

1 *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989)); *see also United States v. Reves*, 774 F.3d 562,
2 565 (9th Cir. 2014) (finding petitioner not “in custody” when probation ended one day before
3 § 2255 motion was filed). The custody requirement is meant to “preserve the writ of habeas
4 corpus as a remedy for severe restraints on individual liberty.” *Hensley v. Mun. Ct.*, 411 U.S.
5 345, 351 (1973). The Court must raise the issue of custody *sua sponte*, meaning that the Court
6 must determine whether the petitioner was “in custody” at the time he filed the § 2255 motion
7 even if the Government does not raise the issue. *See Tyars v. Finner*, 709 F.2d 1274, 1279 (9th
8 Cir. 1983) (addressing issue of custody even though respondent did not raise issue); *Williamson*
9 *v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) (stating that the “in custody” requirement is
10 jurisdictional and therefore must be considered first on appeal).

11 A petitioner on supervised release is “in custody” within the meaning of § 2255. *Matus-*
12 *Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002). It appears that Mr. Gates’s term of
13 supervised release may have ended before March 17, 2020—the date he filed his § 2255 motion.
14 (*See* Dkt. No. 1 at 12.) On February 14, 2017, Mr. Gates was sentenced to time served and three
15 years of supervised release. (*Id.* at 1.) *See also United States v. Gates*, Case No. CR15-0253-
16 JCC, Dkt. No. 104 at 2–3 (W.D. Wash. 2009).¹ If Mr. Gates’s term of supervised release began
17 on February 14, 2017, his term of supervised release would have ended approximately one
18 month before he filed his § 2255 motion. However, “a term of supervised release does not run
19 during any period in which the person is imprisoned in connection with a conviction for a
20 Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive
21 days.” 28 U.S.C. § 3624(e). Mr. Gates filed his § 2255 petition from King County Correctional
22 Facility, so it is not clear whether his supervised release was tolled before he filed the motion or
23 whether it had expired. (Dkt. No. 1 at 13.) The Court is therefore unable to determine from the
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25 ¹ On remand from the Ninth Circuit, the Court amended the judgment and imposed the same
26 sentence: time served with three years of supervised release. *Gates*, Case No. CR15-0253-JCC,
Dkt. No. 133 at 1–3.

1 current record when Mr. Gates's term of supervised release began and whether it has ended.

2 Accordingly, the Court requires further briefing.

3 For the foregoing reasons, the Court ORDERS Mr. Gates to show cause why the Court
4 should not dismiss this action for lack of subject matter jurisdiction because he was not "in
5 custody" at the time he filed his § 2255 motion. Mr. Gates's brief shall not exceed six pages and
6 shall be filed within 21 days of the date of this order. Mr. Gates's brief should explain whether,
7 when he filed his § 2255 motion, he was "in custody," including on supervised release, for the
8 conviction he attacks. The Court encourages Mr. Gates to attach any relevant exhibits showing
9 when his term of supervised release began and ended, if it ended. The Government may, but is
10 not required to, file a response not to exceed six pages within 10 days of the date Mr. Gates files
11 his brief. The Court DIRECTS the Clerk to RENE the Government's response to Mr. Gates's
12 § 2255 motion (Dkt. No. 7) and Mr. Gates's motion to amend his § 2255 motion (Dkt. No. 8) for
13 consideration on April 12, 2021.

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15 DATED this 12th day of March 2021.

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19 John C. Coughenour
20 UNITED STATES DISTRICT JUDGE