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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Roderick Tyler Kamalo,

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No. CV 11-01138-PHX-FJM

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Petitioner,

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**ORDER**

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vs.

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Lance R. Hetmer, et al.,

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Respondents.

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The court has before it petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (doc. 1), respondents' limited answer (doc. 11), and the Report and Recommendation of the United States Magistrate Judge (doc. 13). No objections to the Report and Recommendation were filed and the time for doing so has expired.

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The magistrate judge concluded that petitioner presented a mixed petition, in that he presented exhausted and unexhausted claims. In this situation, we may dismiss the petition or grant a stay. A stay and abeyance is only appropriate if petitioner had good cause for his failure to exhaust and his claims are potentially meritorious. Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535 (2005). Petitioner has not filed a motion to stay and abey while he exhausts his claim of actual innocence. The magistrate judge found that petitioner did not have good cause for his failure to exhaust and his claim is not potentially meritorious. We agree, and decline to stay consideration of the petition.

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We "make a de novo determination of those portions of the [magistrate judge's] report

1 or specified proposed findings or recommendations to which objection is made." 28 U.S.C.  
2 § 636(b)(1). We must "review the magistrate judge's findings and recommendations de novo  
3 *if objection is made*, but not otherwise." United States v. Reyna-Tapia, 328 F.3d 1114, 1121  
4 (9th Cir. 2003). Since no objections have been made, we accept in whole the  
5 recommendations made by the magistrate judge.

6 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the  
7 "district court must issue or deny a certificate of appealability when it enters a final order  
8 adverse to the applicant." If a habeas petition is denied on procedural grounds without  
9 reaching the merits, a certificate of appealability "should issue when the prisoner shows, at  
10 least, that jurists of reason would find it debatable whether the petition states a valid claim  
11 of the denial of a constitutional right and that jurists of reason would find it debatable  
12 whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S.  
13 473, 484, 120 S. Ct. 1595, 1604 (2000). The magistrate judge found, and we agree, that  
14 jurists of reason would not find the correctness of our procedural ruling debatable.

15 **IT IS ORDERED** accepting the Report and Recommendation of the magistrate judge  
16 (doc. 13) and **DENYING** the petition under 28 U.S.C. § 2254 for a writ of habeas corpus  
17 (doc. 1).

18 **IT IS FURTHER ORDERED DENYING** a certificate of appealability.

19 DATED this 11<sup>th</sup> day of April, 2012.

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23 Frederick J. Martone  
24 United States District Judge  
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