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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Dwight Neil Rhone,

10 Petitioner,

11 v.

12 Vance Laughlin, et al.,

13 Respondents.
14

No. CV-12-01808-PHX-DGC

ORDER

15 On May 11, 2007, Dwight Neil Rhone (“Petitioner”) was indicted on charges of
16 possession of marijuana for sale and possession of drug paraphernalia. Doc. 19 at 2.
17 Petitioner was found guilty of both crimes in Maricopa County Superior Court. *Id.*
18 While serving his prison sentence, Petitioner was indicted in the United States District
19 Court for the District of Kansas on charges of conspiracy to distribute at least 1,000
20 kilograms of marijuana. *Id.* Petitioner was also convicted of this federal crime. *Id.*

21 On October 5, 2010, Petitioner finished his state prison term and was released by
22 the Arizona Department of Corrections, but placed immediately into federal prison to
23 serve his subsequent conviction. *Id.* at 2-3. He has been serving his federal sentence in
24 Washington, Mississippi since being released by Arizona. *Id.* at 3. On April 6, 2011,
25 Petitioner completed Arizona’s community supervision requirement. *Id.* Completion of
26 this requirement meant that Petitioner was unconditionally released by Arizona, though
27 he remained in federal custody. *Id.*
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1 Petitioner filed a petition for a writ of habeas corpus on October 24, 2012, to
2 attack the Arizona conviction. *Id.* This Court referred the case to Magistrate Judge
3 James F. Metcalf (Doc. 4), who issued his Report & Recommendation (“R&R”) on
4 June 25, 2013. Doc. 19. Judge Metcalf made three recommendations: (1) that
5 Respondent Warden Vance Laughlin be dismissed from the case, (2) that the petition for
6 writ of habeas corpus be denied with prejudice, and (3) that the certificate of
7 appealability be denied. *Id.* at 9. Pursuant to Rule 72(b)(2), Petitioner has filed written
8 objections to the R&R’s recommendations. Doc. 20. Having reviewed Petitioner’s
9 objections, the Court will accept Judge Metcalf’s recommendations.¹

10 **I. Legal Standard.**

11 A petitioner may file specific, written objections to an R&R within fourteen days
12 after being served with a copy of the R&R. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §
13 636(b)(1). The Court must undertake a de novo review of those portions of the R&R to
14 which specific objections are made. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S.
15 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).
16 The Court may accept, reject, or modify, in whole or in part, the findings or
17 recommendations made by the magistrate judge. *See* 28 U.S.C. § 636(b)(1).

18 **II. Petitioner’s Custody Objection.**

19 Petitioner objects to the R&R’s custody recommendation, arguing that collateral
20 consequences allow him to attack the Arizona conviction. Doc. 20 at 4. The right to
21 petition for a writ of habeas corpus extends to a prisoner when “he is in custody in
22 violation of the Constitution or law or treaties of the United States.” 28 U.S.C.
23 § 2241(c)(3). A petitioner must “be ‘in custody’ under the conviction or sentence under
24 attack at the time his petition is filed.” *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989).
25 The custody requirement can be fulfilled even when the petitioner is not in prison if his

26 ¹ Petitioner objects to a single phrase from the R&R’s recommendation on venue
27 (Doc. 20 at 3), but Judge Metcalf’s venue recommendation allowed Petitioner’s claim to
28 proceed (*see* Doc. 19 at 4-5). The Court will not consider the venue objection because
the recommendation favored Petitioner.

1 release is “explicitly conditioned on his reporting regularly to his parole office, remaining
2 in a particular community, residence, and job, and refraining from certain activities.” *Id.*
3 at 491. The “in custody” requirement does not extend to a petitioner whose sentence has
4 fully expired. *Id.* (holding that a previous conviction cannot be challenged where
5 petitioner has been released from prison and the only collateral consequence left from
6 that conviction is the lengthening of a subsequent sentence).

7 Petitioner argues that collateral consequences — overlap of evidence between the
8 state case and federal case — place him “in custody” under the Arizona conviction.
9 Petition cites *Carafas v. Lavallee*, 391 U.S. 234, 236 (1968), but that decision was
10 predicated on the fact that the petitioner filed the writ while still incarcerated under the
11 sentence he sought to attack. *See Maleng*, 490 U.S. at 491. The Court held, after
12 petitioner had been unconditionally released, that the case was not moot because he had
13 filed the writ while in custody under the sentence he was attacking. *Id.*

14 In this case, Petitioner finished his Arizona prison sentence on October 5, 2010,
15 and his sentence fully expired after completing community supervision on April 6, 2011.
16 Doc. 19 at 3. The writ was filed August 24, 2012, when Petitioner was no longer under
17 Arizona’s control. *Id.* The claimed collateral consequence does not allow Petitioner to
18 challenge the Arizona conviction because he was not “in [Arizona] custody” under 28
19 U.S.C. § 2241. Judge Metcalf’s recommendation to dismiss the writ of habeas corpus is
20 accepted.²

21 **III. Certificate of Appealability.**

22 Petitioner argues that Judge Metcalf’s recommendation to deny a certificate of
23 appealability should not be accepted because Petitioner’s constitutional rights were
24 violated. Doc 20 at 5. A certificate of appealability can be issued only if petitioner has
25 “made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
26 § 2253(c)(2). A substantial showing, when the district court’s decision to dismiss is

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28 ² The Court will not consider whether Respondent Vance Laughlin was properly
named because the custody finding is dispositive.

1 based on procedure, requires that “jurists of reason would find it debatable whether the
2 district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484
3 (2000). “Where a plain procedural bar is present and the district court is correct to
4 invoke it to dispose of the case, a reasonable jurist could not conclude either that the
5 district court erred in dismissing the petition or that the petitioner should be allowed to
6 proceed further. In such a circumstance, no appeal would be warranted.” *Id.*

7 The requisite “in custody” requirement needed to attack the Arizona conviction is
8 not present, a fact with which reasonable jurists could not disagree. Accordingly, Judge
9 Metcalf’s recommendation is accepted.

10 **IT IS ORDERED:**

- 11 1. Magistrate Judge James F. Metcalf’s Report & Recommendation (Doc. 19)
12 is **accepted**.
- 13 2. Petitioner Dwight Neil Rhone’s Petition for Writ of Habeas Corpus
14 (Doc. 1) is **denied**.
- 15 3. A certificate of appealability is **denied**.
- 16 4. The Clerk of Court shall **terminate** this action.

17 Dated this 26th day of July, 2013.

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21 David G. Campbell
22 United States District Judge
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