



1 Petitioner then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in  
2 this Court.

3 On June 19, 2015, Magistrate Judge John Boyle issued a Report and  
4 Recommendation (“R&R”) finding the Court lacked subject-matter jurisdiction over  
5 Petitioner’s claims because he is not “in custody” for the conviction that is the subject of  
6 collateral attack – the 2003 DUI. Doc. 24 at 8. Petitioner filed objections to the R&R  
7 arguing that he is innocent of the 2003 DUI conviction without providing any supporting  
8 evidence. Doc. 25.

9 As Judge Boyle noted, in order for the Court to have jurisdiction over Petitioner’s  
10 habeas claims, he must be “‘in custody’ under the conviction or sentence under attack at  
11 the time his petition is filed.” *Maleng v. Cook*, 490 U.S. 488, 491 (1990). An exception  
12 exists for “petitions that challenge an enhanced sentence on the basis that the prior  
13 conviction used to enhance the sentence was obtained where there was a failure to  
14 appoint counsel in violation of the Sixth Amendment[.]” *Lackawanna Cnty. Dist.*  
15 *Attorney v. Coss*, 532 U.S. 394, 404 (2001). Petitioner is serving a sentence for the 2008  
16 conviction and challenges the 2003 DUI used to enhance his 2008 sentence. He argues  
17 that he did not knowingly and intelligently waive his right to counsel in the San Luis  
18 Municipal Court, and thus falls within the exception to the “in custody” requirement.

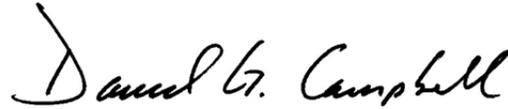
19 The Court agrees with Judge Boyle that Petitioner has failed to establish that he  
20 should have been appointed counsel in the 2003 DUI conviction. On August 26, 2003,  
21 Petitioner pled guilty to the offense telephonically, at which time the court reviewed the  
22 Waiver of Counsel form with him. Doc. 22-1 at 44. After entering his plea, Petitioner  
23 signed the waiver form in the presence of a notary and mailed it to the court. The form  
24 was entitled “Waiver of Counsel” and specifically stated: “DO NOT SIGN THIS FORM  
25 IF YOU WANT AN ATTORNEY.” *Id.* at 17. It also explained the benefits of counsel  
26 and stated: “After reading and understanding all of the above, I give up my right to an  
27 attorney in this case, and to have an attorney appointed for me if I cannot afford one.” *Id.*  
28 Petitioner does not argue the form was invalid, nor does he dispute that he signed it.

1 In light of the undisputed record, the Court finds Petitioner knowingly, voluntarily,  
2 and intelligently waived his right to counsel in the 2003 proceedings, that the municipal  
3 court therefore did not have an obligation to appoint counsel for him, and that the  
4 exception to the “in custody” rule therefore does not apply. The Court lacks subject-  
5 matter jurisdiction over the petition.

6 **IT IS ORDERED:**

- 7 1. Magistrate Judge John Boyle’s R&R (Doc. 24) is **accepted**.
- 8 2. Petitioner’s petition for writ of habeas corpus (Doc. 1) is **denied**.
- 9 3. A certificate of appealability and leave to proceed in forma pauperis on  
10 appeal are **denied** because Petitioner has not made a substantial showing of  
11 the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).
- 12 4. The Clerk shall **terminate** this action.

13 Dated this 7th day of August, 2015.

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18 David G. Campbell  
19 United States District Judge  
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