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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HENRY LEE FRAZIER, JR.,

 Petitioner,

 v.

WARDEN,

 Respondent.

No. 1:17-cv-00501-JLT (HC)

**ORDER TO SHOW CAUSE WHY
PETITION SHOULD NOT BE DISMISSED
FOR LACK OF JURISDICTION**

[TWENTY-ONE DAY DEADLINE]

Petitioner filed a federal habeas petition on April 5, 2017. He filed a First Amended
Petition on April 20, 2017. He challenges a December 30, 2010, conviction in Tuolumne County
Superior Court of felony diversion of construction funds. It appears Petitioner is no longer in
custody. Petitioner will be ordered to show cause why the petition should not be dismissed for
lack of jurisdiction.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.
The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of
habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to

1 dismiss, or after an answer to the petition has been filed. *Herbst v. Cook*, 260 F.3d 1039 (9th
2 Cir.2001).

3 **B. Lack of Jurisdiction**

4 Pursuant to 28 U.S.C. § 2254(a), the Court “shall entertain an application for a writ of
5 habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on
6 the ground that he *is in custody* in violation of the Constitution or laws or treaties of the United
7 States.” (emphasis added.) Thus, in order to obtain habeas relief under 28 U.S.C. § 2254(a), the
8 petitioner must demonstrate that he is “in custody” at the time the petition is filed. Spencer v.
9 Kemna, 523 U.S. 1, 7 (1998). If he is not “in custody,” the Court is without jurisdiction to
10 entertain the petition. Maleng v. Cook, 490 U.S. 488, 490 (1989) (per curiam); Williamson v.
11 Gregoire, 151 F.3d 1180, 1182 (9th Cir.1998). In addition to the petitioner being in custody when
12 the petition is filed, his claim must assert the right to be released. U.S. v. Kramer, 195 F.3d 1129,
13 1130 (9th Cir. 1999) (as amended). In addition to incarceration, a person who is on parole or
14 probation at the time he files his federal habeas petition satisfies the custody requirement. Jones
15 v. Cunningham, 371 U.S. 236, 240-43 (1963).

16 In this case, Petitioner states he was sentenced to sixty days with thirty actual days served
17 on March 9, 2011. He was also sentenced to five years’ probation. Because his petition was not
18 filed until April 5, 2017, it appears he has completed his sentence. In addition, he does not claim
19 immediate release from custody. Therefore, it appears that he is not in custody and that the Court
20 is without jurisdiction.

21 **ORDER**

22 Accordingly, the Court **ORDERS** Petitioner to SHOW CAUSE within twenty-one days
23 why the petition should not be dismissed for lack of jurisdiction.

24
25 IT IS SO ORDERED.

26 Dated: May 9, 2017

/s/ Jennifer L. Thurston
27 UNITED STATES MAGISTRATE JUDGE