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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JEFFERSON ARNOLD MCGEE,

No. 2:11-cv-2554-CMK-P

Petitioner,

vs.

ORDER

ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,

Respondent.

_____/

Petitioner, who does not appear to be a state prisoner, brings this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c) and no other party has been served or appeared in the action.

The court issued petitioner an order to show cause why this case should not be dismissed for lack of jurisdiction. The court informed petitioner that this court only has jurisdiction to hear a 28 U.S.C. § 2254 petition if the petitioner is in state custody and if he alleges he is in custody in violation of federal law, or the length of his sentence violates federal law. Petitioner is no longer in custody, nor does it appear that he is on probation or parole. Thus, he fails to meet the “in custody” requirement of 28 U.S.C. § 2254.

1 Petitioner has filed a response to the order to show cause. In his response,
2 petitioner states that he served respondent with a copy of his petition, and respondent failed to
3 file a responsive pleading objecting to his petition. He disputes the court’s determination that he
4 fails to meet the “in custody” requirement, thus divesting this court of jurisdiction, on the basis
5 that the respondent has not objected to his petition.

6 Rule 4 of the Federal Rules Governing Section 2254 Cases requires the court to
7 review any petitions filed to determine if it plainly appears from the petition and any attached
8 exhibits that petitioner is not entitled to relief. If the court determines that it does not plainly
9 appear that petitioner is not entitled to relief, the respondent is then directed to file a response to
10 petitioner’s petition. See id. The respondent is not obligated to file a response until the court so
11 orders. See id. Thus, the fact that respondent has not objected to petitioner’s filings has no
12 effect on the court’s jurisdiction.

13 As stated in the court’s prior order, petitioner has not presented the court with any
14 further information to render the determination that he fails meets the “in custody” requirements
15 of 28 U.S.C. § 2254 erroneous. The undersigned therefore finds this case must be dismissed.
16 See Maleng v. Cook, 490 U.S. 488, 490-91 (1989).

17 Pursuant to Rule 11(a) of the Federal Rules Governing Section 2254 Cases, the
18 court has considered whether to issue a certificate of appealability. Before petitioner can appeal
19 this decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c); Fed. R. App. P.
20 22(b). Where the petition is denied on the merits, a certificate of appealability may issue under
21 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a
22 constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of
23 appealability indicating which issues satisfy the required showing or must state the reasons why
24 such a certificate should not issue. See Fed. R. App. P. 22(b). Where the petition is dismissed
25 on procedural grounds, a certificate of appealability “should issue if the prisoner can show: (1)
26 ‘that jurists of reason would find it debatable whether the district court was correct in its

1 procedural ruling'; and (2) 'that jurists of reason would find it debatable whether the petition
2 states a valid claim of the denial of a constitutional right.'" Morris v. Woodford, 229 F.3d 775,
3 780 (9th Cir. 2000) (quoting Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000)).
4 For the reasons stated above, the court finds that issuance of a certificate of appealability is not
5 warranted in this case.

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. This action is dismissed;
- 8 2. The court declines to issue a certificate of appealability; and
- 9 3. The Clerk of the Court is directed to close this case.

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11 DATED: April 23, 2014

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13 **CRAIG M. KELLISON**
14 UNITED STATES MAGISTRATE JUDGE
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