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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Dominique Daron Ewing,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-13-02571-PHX-JAT

**ORDER**

15 **I. Status of this case**

16 On December 17, 2013, Petitioner filed a Petition for Writ of Habeas Corpus. On  
17 October 16, 2014, the Magistrate Judge to whom this case was assigned issued a Report  
18 and Recommendation (R&R) recommending the Petition be denied and dismissed with  
19 prejudice. Doc. 22. Petitioner did not file objections to the R&R, and on November 20,  
20 2014, this Court accepted and adopted the R&R and denied and dismissed the Petition.  
21 Docs. 23 and 24.

22 Later, this Court discovered Petitioner may not have been receiving  
23 correspondence from the Court. Doc. 25. This Court permitted Petitioner to move to  
24 reopen the case and contemporaneously file his objections to the R&R by March 6, 2015.  
25 *Id.* On March 5, 2015, this Court received Petitioner's objections to the R&R. Doc. 26.  
26 The Court will construe this filing as both objections and a motion to reopen this case.

27 **II. Reopening case**

28 Consistent with this Court's February 5, 2015 Order (Doc. 25), the Court will

1 grant Petitioner’s motion to reopen and consider his objections de novo.

2 **III. Review of R&R**

3 As indicated above, pending before this Court is Petitioner’s Petition for Writ of  
4 Habeas Corpus and an R&R recommending the Petition be denied and dismissed with  
5 prejudice. This Court “may accept, reject, or modify, in whole or in part, the findings or  
6 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that  
7 the district judge must review the magistrate judge’s findings and recommendations *de*  
8 *novo if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d  
9 1114, 1121 (9<sup>th</sup> Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263  
10 F.Supp.2d 1219, 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes  
11 that *de novo* review of factual and legal issues is required if objections are made, ‘but not  
12 otherwise.’”); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d  
13 1027, 1032 (9<sup>th</sup> Cir. 2009) (the district court “must review *de novo* the portions of the  
14 [Magistrate Judge’s] recommendations to which the parties object.”). District courts are  
15 not required to conduct “any review at all . . . of *any issue* that is not the subject of an  
16 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28  
17 U.S.C. § 636(b)(1) (“the court shall make a *de novo* determination of those portions of  
18 the [report and recommendation] to which objection is made.”).

19 As indicated above, Petitioner has now filed objections to the R&R. Accordingly,  
20 the Court will review the portions of the R&R to which there is an objection de novo.

21 **IV. Petition**

22 **A. Factual Background**

23 In his objections, Petitioner states, “The petitioner concedes to the correctness of  
24 the factual background....” Doc. 26 at 1. Accordingly, this Court accepts and adopts the  
25 factual background from the R&R, which is as follows:

26 I. Procedural Background

27 A. Charges, Guilty Plea, and Sentencing

28 On November 10, 2010, Petitioner was indicted in the Maricopa  
County Superior Court on the following charges: (1) first-degree murder, a  
class one dangerous felony (Count One); (2) attempted armed robbery, a

1 class three dangerous felony (Count Two); (3) kidnapping, a class two  
2 dangerous felony (Count Three); (4) aggravated assault, a class three  
3 dangerous felony (Count Four); and (5) burglary in the first-degree, a class  
4 two dangerous felony (Count Five). (Doc. 17, Ex. A.) The State also  
5 alleged the following aggravating circumstances: (1) the offenses involved  
6 the infliction or threatened infliction of serious physical injury; (2) the  
7 offenses involved the use, threatened use, or possession of a deadly weapon  
8 or dangerous instrument during the commission of the crime (a gun); (3)  
9 the offenses involved the presence of an accomplice; (4) Petitioner  
10 committed the offenses as consideration for the receipt, or in the  
11 expectation of the receipt, of anything of pecuniary value; (5) the offenses  
12 caused physical, emotional, or financial harm to the victim's immediate  
13 family; and (6) if the jury convicted Petitioner of multiple counts not used  
14 to enhance his sentence, the State alleged that the offenses resulted in  
15 multiple convictions. [footnote omitted] (Doc. 17, Ex. B.)

16 On August 29, 2011, Petitioner entered into a plea agreement with  
17 the State. (Doc. 17, Ex. D.) The plea agreement provided that Petitioner  
18 would plead guilty to first degree murder, which carries a presumptive  
19 sentence of twenty-five years to life imprisonment. (*Id.* at 1.) The plea  
20 agreement also stated that Petitioner would be sentenced to the Arizona  
21 Department of Corrections and would pay restitution to the victims in an  
22 amount up to \$50,000. (*Id.*) In exchange for Petitioner's guilty plea, the  
23 State agreed to dismiss the other charges against him. (*Id.*) Paragraph six of  
24 the plea agreement provided that Petitioner waived "any and all motions,  
25 defenses, objections, or requests which he has made or raised or could  
26 assert hereafter to the court's entry of judgment against him and imposition  
27 of a sentence upon him consistent with this agreement." (*Id.* at 2.)  
28 Paragraph eleven of the plea agreement stated that Petitioner understood  
that by pleading guilty he was giving up "[his] right to remain silent, [his]  
privilege against self-incrimination, [and] presumption of innocence." (*Id.*)

On August 29, 2011, the court held a change-of-plea hearing. (Doc.  
17, Ex. E.) At the outset of the hearing, the court asked Petitioner's counsel  
whether he had any reason to believe that Petitioner was not competent to  
enter a guilty plea. (*Id.* at 4.) Defense counsel responded "no," and stated  
that Petitioner was "an intelligent young man." (*Id.*) In response to the  
court's questions, Petitioner confirmed that he had not taken any  
medication, consumed any alcohol, or used any drugs that interfered with  
his ability to understand the proceedings. (*Id.*) He stated that he had  
discussed the plea agreement with counsel before signing it, that he  
initialed each paragraph of plea agreement, that he understood the plea  
agreement, that no promises had been made to him other than those  
contained in the plea agreement, and that he was not forced or threatened to  
enter the plea agreement. (*Id.* at 5-6, 12.) He also stated that counsel had  
answered his questions about the plea agreement and that counsel had done  
"an excellent job." (*Id.* at 5-6.)

The court recited the charge to which Petitioner was pleading guilty,  
advised Petitioner of his sentencing exposure, and of the constitutional  
rights and appeal rights he was waiving by pleading guilty. (*Id.* at 7-8, 10-  
12.) The court also explained that Petitioner faced a sentence of twenty-five  
years to life imprisonment and that he would serve "every day" of that  
sentence and that he was not eligible for any early release. (*Id.* at 8-9.)  
Petitioner affirmed that he understood the charge and his potential sentence  
and that he agreed to waive his rights and plead guilty. (*Id.* at 7-8, 12.)  
Petitioner's counsel provided a factual basis for the guilty plea and

1 Petitioner affirmed that he had committed the acts contained in the factual  
2 basis. (*Id.* at 12-14.) The trial court found that Petitioner entered the guilty  
3 plea knowingly, intelligently, and voluntarily and accepted the guilty plea.  
4 (*Id.* at 14.)

5 The trial court held a sentencing hearing on October 14, 2011. (Doc.  
6 17, Exs. G, H.) During the sentencing hearing, defense counsel advised the  
7 court that Petitioner had no prior criminal record, he had earned his GED,  
8 and that, before the incident giving rise to his conviction, “he was in  
9 college” and had earned “two A’s and two B’s in his semester.” (Doc. 17,  
10 Ex. G. at 20.) Counsel also stated that Petitioner was “intelligent.” (*Id.* at  
11 20.) The court sentenced Petitioner to twenty-five years to life  
12 imprisonment, in accordance with the plea agreement. (*Id.* at 25; Doc. 17,  
13 Ex. H.) The court also ordered Petitioner to pay \$5,763.94 in restitution.  
14 (Doc. 17, Ex. G. at 25.)

#### 15 B. Post-Conviction Proceeding

16 On December 29, 2011, Petitioner filed a notice of post-conviction  
17 relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure.  
18 (Doc. 17, Ex. I.) On January 9, 2012, the court appointed the Office of the  
19 Legal Advocate to represent Petitioner and ordered transcripts. (Doc. 17,  
20 Ex. J.) The Office of Legal the Advocate moved to withdraw based on a  
21 conflict and, on February 27, 2012, the court appointed Robert Gaffney as  
22 counsel for Petitioner. (Doc. 17, Exs. K, L.) On May 29, 2012, Petitioner’s  
23 counsel filed a notice of completion of post-conviction review and advised  
24 the court that he was “unable to find a meritorious issue, including a claim  
25 of ineffective assistance of counsel, to justify the filing of a Petition in this  
26 matter.” (Doc. 17, Ex. M.) The court granted Petitioner forty-five days to  
27 file a pro se petition for post-conviction relief. (Doc. 17, Ex. N.) Petitioner  
28 filed a petition for post-conviction relief on August 23, 2012. (Doc. 17,  
Exs. O, P, Q.)

In his petition, Petitioner asserted that trial counsel was ineffective  
because counsel lied to him after he refused to sign a plea agreement that  
provided for a sentence of twenty-five years to life imprisonment. (Doc. 17,  
Ex. Q.) Petitioner argued that trial counsel told him and his family members  
that he would only serve fifteen years’ imprisonment because he would  
only have to serve eighty-five percent of his sentence. (*Id.*) He asserted that  
trial counsel told him that his plea agreement was more favorable than his  
co-defendant’s plea agreement. (*Id.*) Petitioner asked the post-conviction  
court to correct his sentence. (*Id.*)

The State responded to the petition and argued that Petitioner failed  
to assert a colorable claim for ineffective assistance of counsel. (Doc. 17,  
Ex. R at 6) The State noted that Petitioner had not included an affidavit  
from trial counsel or any witness who knew about the alleged “secret deal”  
regarding his sentence under the plea agreement. (*Id.*) The State also noted  
that Petitioner’s claims contradicted the statements he made during the  
change-of-plea hearing, including his statement that no promises had been  
made to him other than the promises contained in the plea agreement, and  
the trial court’s statement that Petitioner would serve twenty-five calendar  
years and would not be eligible for early release after serving only eighty-  
five percent of his sentence. (*Id.* at 6-7.)

Petitioner replied to the State’s response and requested an  
evidentiary hearing. (Doc. 17, Ex. S.) In his reply, he reiterated that trial  
counsel told him he would only have to serve eighty-five percent of his  
sentence. (*Id.*) Petitioner attached an affidavit from his aunt stating that  
Petitioner’s trial counsel had told her that he would not get a life sentence

1 and that he would be eligible for parole. (*Id.*)

2 On November 27, 2012, the trial court denied Petitioner's request for  
3 an evidentiary hearing and dismissed the petition for post-conviction relief.  
4 (Doc. 17, Ex. T.) The court found that Petitioner's allegations regarding  
5 trial counsel's statements to him "were in direct conflict with what  
6 [Petitioner] himself said at the change of plea proceeding." (*Id.* at 2.) The  
7 court also found that Petitioner's allegations were "not supported by any  
8 independent verification or any supporting affidavit as required by Rule  
9 32.5 [of the] Arizona Rules of Criminal Procedure." (*Id.*) The court further  
10 found that "[b]ecause there is no credible evidence of a secret deal, and  
11 [Petitioner] himself stated that he understood the sentence he now  
12 complains of, the Court does not believe that [Petitioner] can establish that  
13 his attorney was ineffective." (*Id.*) Petitioner did not petition the Arizona  
14 Court of Appeals for review of the denial of his petition for post conviction  
15 relief. (Doc. 1 at 5.)

16 Doc. 22 at 1-5.

## 17 **B. Claim in the Federal Habeas Petition**

18 Petitioner made one claim in his Petition: that his confession/statements to the  
19 police were inadmissible, and thus tainted his plea negotiations. Doc. 22 at 5. The R&R  
20 concludes that due to Petitioner's plea, this claim is not cognizable as a basis for federal  
21 habeas relief. Doc. 22 at 6-7. Alternatively, the R&R conclude that this claim is  
22 procedurally barred. Doc. 22 at 7-10.

23 In his objections, Petitioner purports to be objecting to the R&R's conclusion  
24 regarding his claim that his statements were illegally obtained. Doc. 26 at 1. However,  
25 in reality his objections are targeted to the issue he raised in his post-conviction relief  
26 petition in state court; specifically: that his attorney failed to explain to him the sentence  
27 he was facing under the plea agreement. Doc. 26 at 3.<sup>1</sup> Petitioner makes no legal or  
28 factual argument in his objections regarding his statements and/or confession.

Turning first to the claim raised in the Petition wherein Petitioner claims his  
statements were illegally obtained by law enforcement, the Court agrees with the R&R  
both that this claim is not cognizable on habeas as a result of Petitioner's plea agreement,  
and alternatively that this claim is procedurally barred. Accordingly, the R&R will be

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<sup>1</sup> One difference between the state court post-conviction relief proceedings and the objections is that in the state court proceeding, Petitioner claims his counsel told him he would serve 15 years, Doc. 22 at 4, but in his habeas Petition he claims his counsel told him he would serve 20 years, Doc. 26 at 3.

1 accepted and adopted as to this claim and relief will be denied.

2 Regarding Petitioner's "claim" raised in his objections (that counsel was  
3 ineffective for failing to advise him of the sentence he faced following the plea), the  
4 Court will construe the objections liberally as a request to amend his Petition to add a  
5 second claim. *See Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987). As discussed  
6 above, the claim was presented to the state court in Petitioner's petition for post-  
7 conviction relief.

8 Because this claim was exhausted before the state courts, under 28 U.S.C. §§  
9 2254(d)(1) and (2) this Court must deny relief on this claim unless the "state court  
10 decision [was] contrary to, or involved an unreasonable application of, clearly established  
11 Federal law" or was based on an unreasonable determination of the facts. *See Lockyer v.*  
12 *Andrade*, 538 U.S. 63, 71 (2003). Further, this Court must presume the correctness of the  
13 state court's factual findings regarding a petitioner's claims. 28 U.S.C. § 2254(e)(1);  
14 *Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998).

15 This Court has reviewed the state court's determination on post-conviction relief  
16 that Petitioner's claim that his counsel did not advise him thoroughly is so contradicted  
17 by the record of the trial court at the change of plea hearing that the claim lacks  
18 credibility. This Court finds that the state court's factual findings and legal conclusions  
19 are not contrary to nor an unreasonable application of federal law, nor did the state court  
20 unreasonably determine the facts.

21 Accordingly, Petitioner, if allowed to amend his Petition, would not be entitled to  
22 relief on this claim. Thus, construing the objections liberally as a request for leave to  
23 amend to add this theory of ineffective assistance of counsel,<sup>2</sup> the Court denies the  
24 request for leave to amend because it is futile.

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26 <sup>2</sup> Pursuant to 28 U.S.C. § 2242, a habeas petition may be amended "as provided in  
27 the rules of procedure applicable to civil actions." Rule 15(a) allows a party to amend his  
28 complaint by leave of the court, and such leave "shall be freely given when justice so  
requires." Fed. R. Civ. P. 15(a). However, the Ninth Circuit Court of Appeals has found  
that a district court was correct in denying leave to amend a habeas petition where  
allowing the amendments would be futile. *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir.  
1995).

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**V. Conclusion**

Based on the foregoing,

**IT IS ORDERED** that the motion to reopen (construed by this Court to be part of Doc. 26) is granted; accordingly, this Court’s prior Order and Judgment dismissing this case (Docs. 23 and 24) are vacated.

**IT IS FURTHER ORDERED** that the Report and Recommendation (Doc. 22) is accepted and adopted; the objections are overruled (Doc. 26); to the extent the Court construed the objections as seeking leave to amend, leave to amend is denied; accordingly, the Clerk of the Court shall enter judgment denying and dismissing the Petition, with prejudice.

**IT IS FINALLY ORDERED** that pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Dated this 4th day of June, 2015.

  
James A. Teilborg  
Senior United States District Judge