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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Scott Lee DeShaw,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

No. CV-15-00892-PHX-JAT

ORDER

15 On December 21, 2016, this Court issued the following Order:
16

17 Pending before the Court is the Report and Recommendation
18 (“R&R”) from the Magistrate Judge recommending that this case be
19 dismissed for lack of jurisdiction. (Doc. 13). The R&R makes this
20 recommendation because the Petition in this case is a second or successive
21 petition filed without permission from the Court of Appeals to file another
22 case. (Doc. 13 at 3).

23 Prior to filing the Petition in this case, Petitioner filed a request for
24 leave to file a second or successive petition with the Ninth Circuit Court of
25 Appeals. (Doc. 13 at 3). The Ninth Circuit Court of Appeals appointed
26 Petitioner counsel for that case. His counsel in that case has now filed a
27 motion to be appointed as his counsel in this case and in any ancillary state
28 court proceedings. (Doc. 14).

29 In the motion for appointment, counsel correctly recounts that one
30 factor the court should consider in deciding whether to appoint counsel is
31 Petitioner’s likelihood of success on the merits. (Doc. 14 at 2). Counsel
32 then argues that Petitioner’s *Miller* claim is likely to succeed on the merits.
33 (Doc. 14 at 2-3). However, counsel makes no argument that this Court will
34 ever reach the *Miller* claim in this case. In other words, counsel makes no
35 argument that would overcome the R&R’s conclusion that this Court is
36 without jurisdiction to hear this case. Therefore, without expressing any
37 opinion on the substance of Petitioner’s *Miller* claim; the Court sees no
38 likelihood of success in this case.

Based on the foregoing,

1 **IT IS ORDERED** that the motion for appointment of counsel (Doc.
2 14) is denied in full.

3 **IT IS FURTHER ORDERED** that the motion for status conference
4 (Doc. 16) is denied.

5 **IT IS FINALLY ORDERED** that the motion for extension of time
6 (Doc. 15) is granted such that Petitioner has until January 6, 2017, to file
7 his objections to the R&R (Doc. 13).

8 (Doc. 17).

9 To date, Petitioner has not filed any objections to the R&R. Accordingly, the
10 R&R will be accepted and adopted.¹

11 However, it is unclear to the Court whether Petitioner received a copy of the
12 December 21, 2016 Order. Specifically, when counsel filed the motion for appointment,
13 he added himself to the docket as Petitioner’s counsel; rather than as a Movant, thereby
14 removing Petitioner himself from this Court’s mailing list for the distribution of Orders.
15 The Court assumes counsel mailed a copy of the Order to Petitioner, as counsel was
16 intercepting Petitioner’s mail from the Court; but the Court cannot be sure this occurred.
17 Therefore, to the extent Petitioner did not file objections solely because he never received
18 this Court’s December 21, 2016 Order, if Petitioner files a timely Rule 59 motion to set
19 aside the judgment, and contemporaneously files his objections to the R&R, the Court
20 will re-open this case for purposes of considering the objections and deem them to be
21 timely filed.

22 Accordingly,

23 ¹ This Court “may accept, reject, or modify, in whole or in part, the findings or
24 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that
25 the district judge must review the magistrate judge’s findings and recommendations *de*
26 *novo if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d
27 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263
28 F.Supp.2d 1219, 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes
that *de novo* review of factual and legal issues is required if objections are made, ‘but not
otherwise.’”); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d
1027, 1032 (9th Cir. 2009) (the district court “must review *de novo* the portions of the
[Magistrate Judge’s] recommendations to which the parties object.”). District courts are
not required to conduct “any review at all . . . of *any issue* that is not the subject of an
objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28
U.S.C. § 636(b)(1) (“the court shall make a *de novo* determination of those portions of
the [report and recommendation] to which objection is made.”).

1 **IT IS ORDERED** that the Report and Recommendation (Doc. 13) is accepted and
2 adopted. The Petition in this case is dismissed, without prejudice, and the Clerk of the
3 Court shall enter judgment accordingly.

4 **IT IS FURTHER ORDERED** that pursuant to Rule 11 of the Rules Governing
5 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
6 certificate of appealability because dismissal of the petition is based on a plain procedural
7 bar and jurists of reason would not find this Court's procedural ruling debatable. *See*
8 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

9 **IT IS FURTHER ORDERED** that, if counsel did not send Petitioner a copy of
10 the December 21, 2016 Order, Petitioner may timely file a Rule 59 motion and
11 contemporaneously file his objections to the R&R, and the Court will consider those
12 objections.

13 **IT IS FINALLY ORDERED** that the Clerk of the Court must update the docket
14 to reflect Petitioner's pro se status, and mail a copy of both this Order and Doc. 17 to
15 Petitioner.

16 Dated this 20th day of January, 2017.

