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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Erasmio Lopez-Valencia,
Petitioner,
v.
USA,
Respondent.

No. CV-15-01954-PHX-SMM
No. CR-14-1153-01-PHX-SMM

ORDER

Pending before the Court is Movant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, filed on September 24, 2015. (Doc. 1.) The matter was referred to Magistrate Judge James F. Metcalf for a Report and Recommendation. On December 23, 2015, Respondent filed a Motion to Declare Attorney Client Privilege Waived. (Doc. 6.) Contrary to the Magistrate Judge's Order (Doc. 7), Movant did not respond. Movant was then ordered to show cause why this case should not be dismissed for failure to prosecute and failure to comply with Court orders. (Doc. 9.) Movant again failed to respond. The Magistrate Judge filed his Report and Recommendation, to which no objections have been filed.

STANDARD OF REVIEW

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C); see Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991). Parties have fourteen days from the service of a copy of the Magistrate's recommendation within which to file specific

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1 written objections to the Court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Failure to
2 object to a Magistrate Judge’s recommendation relieves the Court of conducting *de novo*
3 review of the Magistrate Judge’s factual findings and waives all objections to those
4 findings on appeal. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998). A failure
5 to object to a Magistrate Judge’s conclusion “is a factor to be weighed in considering the
6 propriety of finding waiver of an issue on appeal.” Id.

7 **DISCUSSION**

8 Having reviewed the Report and Recommendation of the Magistrate Judge, and no
9 Objections having been made by any party thereto, the Court hereby incorporates and
10 adopts the Magistrate Judge’s Report and Recommendation.

11 The standard for this Court to issue a Certificate of Appealability (“COA”) is
12 whether the applicant has “made a substantial showing of the denial of a constitutional
13 right .” 28 U.S.C. § 2253(c)(2); Rule 11(a) of the Rules Governing Section 2254 Cases.
14 “Where a district court has rejected the constitutional claims on the merits, the showing
15 required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that
16 reasonable jurists would find the district court’s assessment of the constitutional claims
17 debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). “When the district
18 court denies a habeas petition on procedural grounds without reaching the prisoner’s
19 underlying constitutional claim, a COA should issue when the prisoner shows, at least,
20 that jurists of reason would find it debatable whether the petition states a valid claim of
21 the denial of a constitutional right and that jurists of reason would find it debatable
22 whether the district court was correct in its procedural ruling.” Id. Because the Court’s
23 decision is procedural and the Court finds that jurists of reason would not find it
24 debatable whether this Court decided the matter correctly, a certificate of appealability
25 will be denied.

26 **CONCLUSION AND ORDER**

27 For the reasons set forth,

28 **IT IS HEREBY ORDERED** that the Court adopts the Report and

1 Recommendation of the Magistrate Judge filed on March 1, 2016. (Doc. 10.)

2 **IT IS FURTHER ORDERED** that Movant’s Motion to Vacate, Set Aside, or
3 Correct Sentence, filed September 28, 2015 (Doc. 1) be **DISMISSED WITHOUT**
4 **PREJUDICE** for failure to prosecute. The Clerk of Court shall enter judgment
5 accordingly.

6 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to
7 proceed *in forma pauperis* on appeal are **DENIED** because the dismissal was justified by
8 a plain procedural bar and jurists of reason would not find the procedural ruling
9 debatable.

10 **IT IS FURTHER ORDERED** that Petitioner’s Motion Under 28 U.S.C. § 2255
11 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 39 in
12 CR-14-1153-01-PHX-SMM) be **denied with prejudice**.

13 Dated this 29th day of March, 2016.

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Honorable Stephen M. McNamee
Senior United States District Judge