

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Sergio F. Gonzalez-Barrera,

No. CV-15-08024-PCT-JJT

10 Petitioner,

ORDER

11 v.

12 Charles L. Ryan, *et al.*,

13 Respondents.
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15 At issue is Petitioner Sergio F. Gonzalez-Barrera's Petition under 28 U.S.C. §2254
16 for Writ of Habeas Corpus (Doc. 1). United States Magistrate Judge James F. Metcalf
17 issued a Report and Recommendation ("R&R") in the matter recommending denial and
18 dismissal of the Petition (Doc. 8). The time to object passed over five months ago and no
19 party has objected, timely or otherwise. The Court thus may accept the R&R without
20 further review. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). The
21 Court nonetheless has conducted its own review of the Petition, and for the reasons set
22 forth in the R&R, it will deny and dismiss the Petition.

23 In the R&R, Judge Metcalf thoroughly analyzed the issues involved in the instant
24 Petition, and because this Court will adopt the recommendations set forth in the R&R, it
25 will not restate those issues or their resolution here in detail. The R&R correctly
26 concluded that Petitioner failed to raise what he now presents as Ground Two in the
27 Petition—a federal due process claim attendant to the state court's alleged failure to
28 weigh mitigating and aggravating factors at sentencing—and thus that claim is

1 unexhausted and now procedurally barred. While Petitioner argues his federal claim was
2 obvious, Judge Metcalf correctly notes that “obviousness is not sufficient.” (Doc. 19 at p.
3 25.) *See Insyxiengmay v. Morgan*, 403 F.3d 657, 68 (9th Cir, 2005).

4 Petitioner’s Ground Three—arguing the prosecution violated the plea agreement
5 by emphasizing the sentence Petitioner would have received had he not accepted the plea
6 agreement and gone to trial—was properly exhausted but, as Judge Metcalf correctly
7 found, fails on its merits. The PCR court found that the prosecution had lived up to its
8 agreement in recommending, and continuing to recommend, a thirteen year sentence to
9 the sentencing judge. The Arizona Court of Appeals, in reviewing the PCR court’s
10 findings, endorsed and adopted them on this point. As Judge Metcalf found, Petitioner
11 has identified no mistake of fact in those findings, nor has he shown how the decision
12 was either contrary to or an unreasonable application of federal law. Ground Three will
13 be denied on the merits.

14 Petitioner’s Ground One—wherein he argues his sentence violated the Eighth
15 Amendment’s prohibition against cruel and unusual punishment—is also properly denied.
16 Judge Metcalf found in the first instance that Petitioner waived this claim in his plea
17 agreement. The Court has become aware of a fairly recent case, *Lemke v. Ryan*, which
18 potentially calls into question the validity of the waiver. 719 F.3d 1093 (9th Cir. 2013).
19 Nonetheless, Judge Metcalf also analyzed Ground One on the merits and concluded
20 correctly that, even absent a waiver, the claim failed. (Doc. 19 at pp. 33-42.) After
21 correctly concluding that the applicable standard of review on this issue was *de novo*, as
22 the state court decided the issue not on the merits but upon the application of a procedural
23 bar, Judge Metcalf applied a proportionality analysis as required under federal law. The
24 Eighth Amendment forbids sentences that are “grossly disproportionate” to the crime.
25 *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Upon a review of the circumstances of
26 the offense gleaned from the record on review, and also set forth in great detail in the
27 R&R, the Court agrees with Judge Metcalf that while the sentence in this matter is

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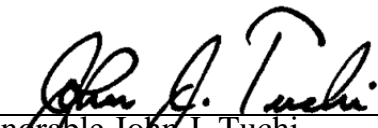
1 “substantial, and even arguably disproportionate....it is not grossly disproportionate.”
2 (Doc. 19 at p. 40.) Petitioner’s Ground One fails on the merits.

3 IT IS ORDERED adopting Magistrate Judge Metcalf’s R&R (Doc. 19) in its
4 entirety and incorporating same into this Order.

5 IT IS FURTHER ORDERED denying the Petition for Writ of Habeas Corpus
6 pursuant to 28 U.S.C. § 2254 (Doc. 1) and dismissing this matter with prejudice.

7 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
8 proceed *in forma pauperis* on appeal in this matter because the dismissal of the instant
9 Petition is justified by a plain procedural bar and jurists of reason would not find the
10 procedural ruling debatable.

11 Dated this 2nd day of September, 2016.

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15 Honorable John J. Tuchi
16 United States District Judge
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