



1 or Surety (District Judge Hearing Requested)” (Doc. 37). The Court will deny those  
2 motions.

3 **Report and Recommendation**

4 As a threshold matter, as to any new evidence, arguments, and issues that were not  
5 timely and properly raised before United States Magistrate Judge Ferraro, the Court  
6 exercises its discretion to not consider those matters and considers them waived. *See*  
7 *United States v. Howell*, 231 F.3d 615, 621-623 (9th Cir. 2000). In *Howell*, the United  
8 States Court of Appeals for the Ninth Circuit explained:

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10 [A] district court has discretion, but is not required, to consider  
11 evidence presented for the first time in a party’s objection to a  
12 magistrate judge’s recommendation.

13 . . . .

14 [I]n providing for a *de novo* determination rather than  
15 *de novo* hearing, Congress intended to permit whatever  
16 reliance a district judge, in the exercise of sound judicial  
17 discretion, chose to place on a magistrate judge’s proposed  
18 findings and recommendations. . . . The magistrate judge  
19 system was designed to alleviate the workload of district  
20 courts. To require a district court to consider evidence not  
21 previously presented to the magistrate judge would effectively  
22 nullify the magistrate judge’s consideration of the matter and  
23 would not help to relieve the workload of the district court.  
24 Systemic efficiencies would be frustrated and the magistrate  
25 judge’s role reduced to that of a mere dress rehearsal if a party  
26 were allowed to feint and weave at the initial hearing, and save  
27 its knockout punch for the second round. Equally important,  
28 requiring the district court to hear evidence not previously  
presented to the magistrate judge might encourage  
sandbagging. [I]t would be fundamentally unfair to permit a  
litigant to set its case in motion before the magistrate, wait to  
see which way the wind was blowing, and—having received  
an unfavorable recommendation—shift gears before the  
district judge.

29 *Id.* (internal citations and quotations omitted); *see also United States v. Reyna-Tapia*, 328  
F.3d 1114, 1122 (9th Cir. 2003) (“Finally, it merits re-emphasis that the underlying purpose

1 of the Federal Magistrates Act is to improve the effective administration of justice.”).<sup>2</sup>

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3 As to the objections filed by Petitioner, the Court has conducted a *de novo* review  
4 of the record. *See* 28 U.S.C. § 636(b)(1)(C) (“Within fourteen days after being served with  
5 [the Report and Recommendation], any party may serve and file written objections to such  
6 proposed findings and recommendations as provided by rules of court. A judge of the court  
7 shall make a *de novo* determination of those portions of the report or specified proposed  
8 findings or recommendations to which objection is made. A judge of the court may accept,  
9 reject, or modify, in whole or in part, the findings or recommendations made by the  
10 magistrate judge. The judge may also receive further evidence or recommit the matter to  
11 the magistrate judge with instructions.”).

12 In addition to reviewing the R&R and any objections and responsive briefing  
13 thereto, the Court’s *de novo* review of the record includes review of the record and  
14 authority before United States Magistrate Judge Ferraro which led to the R&R in this case.

15 Upon *de novo* review of the record and authority herein, the Court finds Petitioner’s  
16 objections to be without merit, rejects those objections, and adopts United States  
17 Magistrate Judge Ferraro’s R&R in its entirety. *See, e.g., United States v. Rodriguez*, 888  
18 F.2d 519, 522 (7th Cir. 1989) (“Rodriguez is entitled by statute to *de novo* review of the  
19 subject. Under *Raddatz* [447 U.S. 667 (1980)] the court may provide this on the record  
20 compiled by the magistrate. Rodriguez treats adoption of the magistrate’s report as a sign  
21 that he has not received his due. Yet we see no reason to infer abdication from adoption.  
22 On occasion this court affirms a judgment on the basis of the district court’s opinion.  
23 Affirming by adoption does not imply that we have neglected our duties; it means, rather,  
24 that after independent review we came to the same conclusions as the district judge for the  
25 reasons that judge gave, rendering further explanation otiose. When the district judge, after

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27 <sup>2</sup>Assuming, *arguendo*, that such matters were not subject to waiver, the Court (in  
28 the alternative) has nonetheless conducted a *de novo* review, and upon review of the record  
and authority herein, rejects these issues and adopts the R&R in its entirety.

1 reviewing the record in the light of the objections to the report, reaches the magistrate’s  
2 conclusions for the magistrate’s reasons, it makes sense to adopt the report, sparing  
3 everyone another round of paper.”); *see also Bratcher v. Bray-Doyle Independent School*  
4 *Dist. No. 42 of Stephens County, Okl.*, 8 F.3d 722, 724 (10th Cir. 1993) (“*De novo* review  
5 is statutorily and constitutionally required when written objections to a magistrate’s report  
6 are timely filed with the district court . . . . The district court’s duty in this regard is  
7 satisfied only by considering the actual testimony [or other relevant evidence in the record],  
8 and not by merely reviewing the magistrate’s report and recommendations. On the other  
9 hand, we presume the district court knew of these requirements, so the express references  
10 to *de novo* review in its order must be taken to mean it properly considered the pertinent  
11 portions of the record, absent some clear indication otherwise. Plaintiff contends . . . the  
12 district court’s [terse] order indicates the exercise of less than *de novo* review. . . .  
13 [However,] brevity does not warrant look[ing] behind a district court’s express statement  
14 that it engaged in a *de novo* review of the record.” (internal citations and quotations  
15 omitted.); *Brunig v. Clark*, 560 F.3d 292, 295 (5th Cir. 2009) (“Brunig also claims that  
16 the district court judge did not review the magistrate’s report *de novo* . . . . There is no  
17 evidence that the district court did not conduct a *de novo* review. Without any evidence to  
18 the contrary . . . we will not assume that the district court did not conduct the proper  
19 review.”); *Gonzales-Perez v. Harper*, 241 F.3d 633 (8th Cir. 2001) (“When a party timely  
20 objects to a magistrate judge’s report and recommendation, the district court is required to  
21 make a *de novo* review of the record related to the objections, which requires more than  
22 merely reviewing the report and recommendation. This court presumes that the district  
23 court properly performs its review and will affirm the district court’s approval of the  
24 magistrate’s recommendation absent evidence to the contrary. The burden is on the  
25 challenger to make a *prima facie* case that *de novo* review was not had.” (internal citations  
26 and quotations omitted)); *Murphy v. Int’l Bus. Machines Corp.*, 23 F.3d 719, 722 (2nd Cir.  
27 1994) (“We . . . reject Murphy’s procedural challenges to the granting of summary  
28 judgment . . . . Murphy’s contention that the district judge did not properly consider her

1 objections to the magistrate judge's report . . . lacks merit. The judge's brief order  
2 mentioned that objections had been made and overruled. We do not construe the brevity  
3 of the order as an indication that the objections were not given due consideration, especially  
4 in light of the correctness of that report and the evident lack of merit in Murphy's  
5 objections."').<sup>3</sup>

6 Before Petitioner can appeal this Court's judgment, a certificate of appealability  
7 must issue. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1). The district court that  
8 rendered a judgment denying the petition made pursuant to § 2254 must either issue a  
9 certificate of appealability or state why a certificate should not issue. See *id.* Additionally,  
10 § 2253(c)(2) provides that a certificate may issue "only if the applicant has made a  
11 substantial showing of the denial of a constitutional right." In the certificate, the court must  
12 indicate which specific issues satisfy this showing. See § 2253(c)(3). A substantial  
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15 <sup>3</sup>See also *Pinkston v. Madry*, 440 F.3d 879, 893-94 (7th Cir. 2006) (the district  
16 court's assurance, in a written order, that the court has complied with the *de novo* review  
17 requirements of the statute in reviewing the magistrate judge's proposed findings and  
18 recommendation is sufficient, in all but the most extraordinary of cases, to resist assault on  
19 appeal; emphasizing that "[i]t is clear that Pinkston's argument in this regard is nothing  
20 more than a collateral attack on the magistrate's reasoning, masquerading as an assault on  
21 the district court's entirely acceptable decision to adopt the magistrate's opinion instead of  
22 conducting an evidentiary hearing on its own. However, the law requires the district judge  
23 to do no such thing."); *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000) ("The  
24 district court's order is terse . . . However, neither 28 U.S.C. § 636(b)(1) nor Fed. R. Civ.  
25 P. 72(b) requires the district court to make any specific findings; the district court must  
26 merely conduct a *de novo* review of the record . . . It is common practice among district  
27 judges . . . to [issue a terse order stating that it conducted a *de novo* review as to  
28 objections] . . . and adopt the magistrate judges' recommended dispositions when they find  
that magistrate judges have dealt with the issues fully and accurately and that they could  
add little of value to that analysis. We cannot interpret the district court's [terse] statement  
as establishing that it failed to perform the required *de novo* review. We hold that although  
the district court's decision is terse, this is insufficient to demonstrate that the court failed  
to review the magistrate's recommendation *de novo*." (internal citations and quotations  
omitted)); *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995) ("The district court is  
required to conduct a *de novo* determination of those portions of the magistrate judge's  
report and recommendations to which objections have been filed. But this *de novo*  
*determination* is not the same as a *de novo hearing*. . . . [I]f following a review of the  
record the district court is satisfied with the magistrate judge's findings and  
recommendations it may in its discretion treat those findings and recommendations as its  
own.").

1 showing is made when the resolution of an issue of appeal is debatable among reasonable  
2 jurists, if courts could resolve the issues differently, or if the issue deserves further  
3 proceedings. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Upon review of the  
4 record in light of the standards for granting a certificate of appealability, the Court  
5 concludes that a certificate shall not issue as the resolution of the petition is not debatable  
6 among reasonable jurists and does not merit further proceedings.

7 **“Renewed Motion for Appointment of Counsel”**

8 Petitioner’s Renewed Motion for Appointment of Counsel is substantively a motion  
9 for reconsideration of Judge Ferraro’s June 16, 2021 Order (Doc. 28) denying his “Motion  
10 for Appointment of Counsel and/or an Investigator” (Doc. 26). Although the Federal Rules  
11 of Civil Procedure do not expressly allow for motions to reconsider, the Court will consider  
12 this a motion under Rule 60(b). Under Rule 60(b), a party may seek relief from a final  
13 judgment, order, or proceeding for the following reasons:

- 14 (1) mistake, inadvertence, surprise, or excusable neglect;  
15 (2) newly discovered evidence that, with reasonable diligence,  
16 could not have been discovered in time to move for a new trial  
17 under Rule 59(b);  
18 (3) fraud (whether previously called intrinsic or extrinsic),  
19 misrepresentation, or misconduct by an opposing party;  
20 (4) the judgment is void;  
21 (5) the judgment has been satisfied, released, or discharged; it  
22 is based on an earlier judgment that has been reversed or  
23 vacated; or applying it prospectively is no longer equitable; or  
24 (6) any other reason that justifies relief.

25 Rule 60(b) does not allow relief from an order simply because a party disagrees with the  
26 Court’s reasoning. *See United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982) (“Rule  
27 60(b) does not authorize a motion merely for reconsideration of a legal issue.”). Petitioner  
28 has not demonstrated any of the above reasons support reconsidering Judge Ferraro’s order  
denying his motion. Indeed, Judge Ferraro correctly noted the Petition was fully briefed

1 four months *before* Petitioner requested counsel.<sup>4</sup> Therefore, Petitioner was able to  
2 articulate his arguments and did not demonstrate justice required the appointment of  
3 counsel.

4 Nonetheless, to the extent Petitioner’s instant motion could be interpreted as  
5 requesting the Court to appoint counsel and/or an investigator at this stage of litigation, his  
6 request is moot, given the Court’s disposition of his Petition, and the Report and  
7 Recommendation, and Petitioner’s Objections. Therefore, this motion (Doc. 35) is denied.

8 **“Motion to Expand the Record Pursuant to Habeas Rule 7”**

9 Petitioner requests that the Court “expand the record with the proffered evidence  
10 pertaining to specific claims” pursuant to Rule 7 of the Rules Governing § 2254 Cases  
11 (“Habeas Rules”). (Doc. 36 at 1.) He also appears to request an evidentiary hearing  
12 pursuant to Habeas Rule 8. (*Id.*) Rule 7 provides: “If the petition is not dismissed, the  
13 judge may direct the parties to expand the record by submitting additional materials relating  
14 to the petition. The judge may require that these materials be authenticated.” And, Rule 8  
15 provides: “If the petition is not dismissed, the judge must review the answer, any transcripts  
16 and records of state-court proceedings, and any materials submitted under Rule 7 to  
17 determine whether an evidentiary hearing is warranted.” That is, both Rules 7 and 8 allow  
18 for expansion of the record and a hearing if the habeas petition is not dismissed. For the  
19 reasons explained above, the Petition in this case is dismissed. Therefore, the Court denies  
20 Petitioner’s requests to expand the record and set a hearing.

21 **“Motion to Release on Own Recognizance or Surety”**

22 Petitioner “requests that this Court order[] Petitioner’s release on his own  
23 recognizance or surety” and requests a hearing. (Doc. 37 at 1.) Given the dismissal of the  
24 Petition, this motion is also denied.

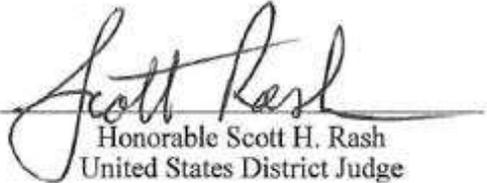
25 Accordingly, **IT IS HEREBY ORDERED** as follows:

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28 <sup>4</sup>Petitioner’s first request for appointment of counsel was before Judge Rosemary Márquez, and she properly denied that request as premature.

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- (1) United States Magistrate Judge Ferraro’s Report and Recommendation (Doc. 29) is **accepted and adopted** in its entirety.
- (2) Petitioner’s objections are overruled and rejected.
- (3) Petitioner’s § 2254 habeas petition (Doc. 1) is **DENIED** and this case is **DISMISSED with prejudice**.
- (4) Petitioner’s Renewed Motion for Appointment of Counsel (Doc. 35) is **DENIED**.
- (5) Petitioner’s Motion to Expand the Record (Doc. 36) is **DENIED**.
- (6) Petitioner’s Motion to Release on Own Recognizance or Surety (Doc. 37) is **DENIED**.
- (7) A Certificate of Appealability is denied and shall not issue.
- (8) The Clerk of the Court shall enter judgment and close the file in this case.

Dated this 8th day of September, 2021.



Honorable Scott H. Rash  
United States District Judge