

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GEVONTE DESHAWN GWIN,  
Petitioner  
  
v.  
MARTEL,  
Respondent.

Case No. CV 14-6083-MWF (GJS)

**ORDER ACCEPTING FINDINGS  
AND RECOMMENDATIONS OF  
UNITED STATES MAGISTRATE  
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition (“Petition”) and all pleadings, motions, and other documents filed in this action, the Report and Recommendation of United States Magistrate Judge (“Report”), and Petitioner’s Objections to the Report. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated.

In his Objections, Petitioner has made various new assertions and claims not previously presented in this action or in connection with the issues addressed by the Report. A district court has discretion, but is not required, to consider evidence or arguments presented for the first time in objections to a report and recommendation. *See Brown v. Roe*, 279 F.3d 742, 744-45 (9th Cir. 2002); *United States v. Howell*,

1 231 F.3d 615, 621-22 (9th Cir. 2000). The Court has exercised its discretion with  
2 respect to these new matters as discussed below.

3 Petitioner contends that he was entitled to de novo review of the claims raised in  
4 his state habeas proceedings simply because the California Supreme Court's Order  
5 denying relief was summary. (Objections at 2.) Petitioner is mistaken. *See*  
6 *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 98-100 (2011).

7 Petitioner asserts that the Petition raises a sufficiency of the evidence claim that  
8 is broader than the claim he exhausted in the state courts and raised through Ground  
9 Six of the Petition. (Objections at 2.) This assertion is factually incorrect. (*See*  
10 Petition at (6) and 6F-6F2.) Moreover, any such expansion now of the sufficiency  
11 of the evidence challenge to Petitioner's conviction would be unexhausted and  
12 likely untimely.

13 To the extent that Plaintiff is attempting to challenge the propriety of certain trial  
14 evidence regarding Petitioner's mail and recordings of telephone calls on the ground  
15 that such evidence was obtained illegally (Objections at 9 & n.2, 12 & n.4-5, 14),  
16 this is a new claim that was not raised in the Petition. Whether or not this claim is  
17 unexhausted (and Petitioner does not state that it is exhausted) and/or untimely,  
18 habeas claims must be raised in the Petition and before the Magistrate Judge in the  
19 first instance, and they are not properly brought before the Court in objections to a  
20 Magistrate Judge's report and recommendation. *See Greenhow v. Secretary of*  
21 *Health & Human Servs.*, 863 F.2d 633, 638-39 (9th Cir. 1988) ("allowing parties to  
22 litigate fully their case before the magistrate and, if unsuccessful, to change their  
23 strategy and present a different theory to the district court would frustrate the  
24 purpose of the Magistrate Act"), *overruled on other grounds by United States v.*  
25 *Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*) (*per curiam*); *see also* Rule  
26 2(c)(1) of the Rules Governing Section 2254 Cases in the United States District  
27 Courts (the petition "must" "specify all grounds for relief available to the  
28 petitioner"); *Greene v. Henry*, 302 F.3d 1067, 1070 n.3 (9th Cir. 2002) (declining to

1 consider three additional ineffective assistance of counsel claims and noting, “since  
2 they were not made in the federal petition, we need not consider them”). The same  
3 conclusion follows as to Petitioner’s attempted assertion of a new claim based on an  
4 “involuntary confession” (Objections at 14), namely, that this new claim is not  
5 properly presented for the first time in Objections to the Report and will not be  
6 considered.

7 The Court also declines to consider the other claims newly alleged in the  
8 Objections, including: a new claim of instructional error and unfair lessening of the  
9 burden of proof (Objections at 49-50); a new ineffective assistance of counsel claim  
10 related to Petitioner’s gang moniker (Objections at 69-70); and various ineffective  
11 assistance of trial and appellate counsel claims that were raised in the state courts  
12 but were not raised in the Petition (Objections at 15-17 & n. 8-10).

13 Finally, in connection with Ground One subclaim (3), a prosecutorial misconduct  
14 claim, in arguing that the Magistrate Judge erred, Petitioner now attempts to  
15 establish that the trial court incorrectly ruled that a recording of a telephone  
16 conversation was admissible, and he argues that this evidence should have been  
17 suppressed. Petitioner asks the Court to “exercise independent judgment to  
18 determine whether, on the facts found[,] a search conducted by wiretap was  
19 unreasonable under the Fourth Amendment and whether the wiretap was authorized  
20 and conducted in conformity with the federal and state statutes regulating such a  
21 search.” (Objections at 31.) Apart from the fact that this is a new (and likely  
22 unexhausted) claim that is not properly raised before the Court in Objections, any  
23 such claim appears to be barred under the doctrine established in *Stone v. Powell*,  
24 428 U.S. 465 (1976). Accordingly, the Court declines to consider this new claim.

25 The Court has carefully considered Petitioner’s Objections. Although the  
26 Objections are extremely lengthy and well-argued, the Court concludes that nothing  
27 set forth therein affects or alters, or calls into question, the analysis and conclusions  
28 set forth in the Report.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Having completed its review, the Court accepts the findings and recommendations set forth in the Report. Accordingly, **IT IS ORDERED** that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATE: February 6, 2017



---

MICHAEL W. FITZGERALD  
UNITED STATES DISTRICT JUDGE