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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

N. WALLACE,  
  
vs.  
  
LARRY SMALL, Warden,  
  
Petitioner,  
  
Respondent.

CASE NO. 08cv1146-LAB (POR)  
**ORDER ADOPTING REPORT  
AND RECOMMENDATION**

Petitioner Nathaniel Wallace, a state prisoner proceeding *pro se*, filed a First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on August 5, 2008. The Court referred the petition to Magistrate Judge Louisa Porter for a Report and Recommendation (“R&R”) pursuant to 28 U.S.C. § 636 and Civil Local Rule 72.1(d). After the petition was briefed on the merits, Judge Porter issued an R&R recommending that the Court deny it. The R&R ordered the parties to file any objections by January 3, 2011. Neither party filed objections, nor asked for additional time to do so.

In considering an R&R, a district judge “may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. § 636(b)(1). “[T]he court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). “[T]he

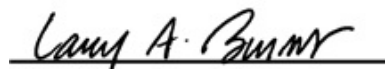
1 district judge must review the magistrate judge's findings and recommendations *de novo if*  
2 *objection is made, but not otherwise.*" *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121  
3 (9th Cir.2003) (en banc).

4 The Court has reviewed the R&R and finds it to be thorough and correct, particularly  
5 considering that Wallace failed to file any objections. The basis of Wallace's petition is that  
6 he was never sentenced to life imprisonment for attempted murder because the trial judge  
7 never actually *pronounced* a sentence on the proper count. The record and the R&R make  
8 abundantly clear, though, that the trial judge simply misspoke: after pronouncing a sentence  
9 for counts 1, 2, 3, 5, and 6, he said, "With respect to Count III, you are sentenced to life  
10 imprisonment." (R&R at 7.) He obviously meant to say "Count IV." In light of this, all of  
11 Wallace's habeas claims fail: (1) the trial court *did* impose a sentence of life imprisonment  
12 for the second attempted murder count; (2) the CDCR didn't sentence him as much as it  
13 determined his release date on the basis of his Abstract of Judgment; and (3) Wallace *did*  
14 receive the trial to which he has a constitutional right.

15 The Court **ADOPTS** the R&R. The petition is **DENIED** with prejudice. Wallace's  
16 request for counsel is **DENIED**; that right only attaches in the habeas context when  
17 "appointed counsel is necessary to prevent due process violations." *Chaney v. Lewis*, 801  
18 F.2d 1191, 1196 (9th Cir. 1986). Finally, the Court **DENIES** Wallace a certificate of  
19 appealability. The merits of his claims are not "debatable among jurists of reason" and do  
20 not "deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025  
21 (9th Cir. 2000) (internal quotations and citations omitted).

22 **IT IS SO ORDERED.**

23 DATED: February 15, 2011

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25 **HONORABLE LARRY ALAN BURNS**  
26 United States District Judge

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