UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUAN VILLASENOR MARTINEZ *also known as* LARRY BELTRAN,

Petitioner,

vs.

F. JACQUEZ, Warden,

Respondent.

CASE NO. 09cv416-MMA (JMA)

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE;

[Doc. No. 19]

DENYING WITH PREJUDICE FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

[Doc. No. 7]

Petitioner Juan Villasenor Martinez, also known as Larry Beltran, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, superseded by a first amended petition [Doc. No. 7], challenging his state court sentence and judgment subsequent to pleading guilty on several drug related counts. Respondent filed an answer to the first amended petition [Doc. No. 14]. After requesting and receiving an extension of time in which to do so, Petitioner did not file a traverse [Doc. Nos. 16 & 17]. The matter was referred to United States Magistrate Judge Jan M. Adler for preparation of a Report and Recommendation under 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(d)(4).

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Judge Adler issued a well reasoned and thorough Report recommending the first amended petition be denied in its entirety. Objections to the Report and Recommendation were due no later than February 18, 2011. To date, Petitioner has not filed any objections.

Where, as here, the case has been referred to the magistrate judge pursuant to 28 U.S.C. § 636, a district judge "may accept, reject, or modify the recommended disposition." Fed. R. Civ. P. 72(b); see 28 U.S.C. § 636(b)(1). "[T]he court shall make a *de novo* determination of those portions of the [Report and Recommendation] to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b). "The statute makes it clear that the district judge must review the magistrate judge's findings and recommendations *de novo* if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114,1121 (9th Cir. 2003) (en banc). "Neither the Constitution nor the statute requires a district judge to review, *de novo*, findings and recommendations that the parties themselves accept as correct." *Reyna-Tapia*, 328 F.3d at 1121. Accordingly, a district court is entitled to adopt a magistrate judge's report and recommendation based on the lack of objections. Nonetheless, the Court has conducted a *de novo* review and agrees that the first amended petition should be denied with prejudice.

Accordingly, in the absence of objections and after conducting a *de novo* review, the Court **ADOPTS** the Report and Recommendation in its entirety and **DENIES WITH PREJUDICE** Petitioner's first amended petition.

CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11 foll. 28 U.S.C. § 2254. A petitioner may not seek an appeal of a claim arising out of state court detention unless the petitioner first obtains a certificate of appealability from a district judge or a circuit judge under 28 U.S.C. § 2253. Fed. R. App. P. 22(b). Under 28 U.S.C. § 2253(c)(1), a certificate of appealability will issue only if the petitioner makes a substantial showing of the denial of a constitutional right.

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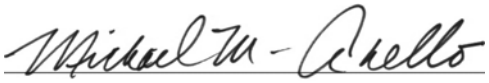
For the reasons set forth in the Report and Recommendation, Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should not issue in this action.

IT IS SO ORDERED.

DATED: May 17, 2011



Hon. Michael M. Anello
United States District Judge