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

ROBERT ZEPEDA,

Petitioner,

v.

F.E. FIGUEROA, *et al.*,

Respondents.

Case No. 11-cv-2350-BAS(RBB)

ORDER:

**(1) OVERRULING PETITIONER'S
OBJECTIONS;**

**(2) ADOPTING REPORT AND
RECOMMENDATION; AND**

**(3) DENYING FIRST AMENDED
PETITION FOR WRIT OF
HABEAS CORPUS**

[ECF No. 58]

On October 11, 2011, Petitioner Robert Zepeda, a state prisoner proceeding *pro se*, filed this Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 seeking relief from a 10-year stipulated sentence imposed on July 23, 2010 for robbery and assault upon another with a firearm with a gang enhancement. On March 22, 2012, Petitioner filed a First Amended Petition ("FAP"). On January 2, 2014, United States Magistrate Judge Ruben B. Brooks issued a Report and Recommendation ("Report") recommending that this Court deny the FAP. Petitioner filed objections to the Report.

For the following reasons, the Court **OVERRULES** Petitioner's objections, **ADOPTS** the Report in its entirety, and **DENIES** the FAP.

1 **I. LEGAL STANDARD**

2 The Court reviews *de novo* those portions of the R&R to which objections are
3 made. 28 U.S.C. § 636(b)(1). The Court may “accept, reject, or modify, in whole or
4 in part, the findings or recommendations made by the magistrate judge.” *Id.* But “[t]he
5 statute [28 U.S.C. § 636(b)(1)(c)] makes it clear that the district judge must review the
6 magistrate judge’s findings and recommendations *de novo if objection is made*, but not
7 otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
8 banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,
9 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district court
10 had no obligation to review the magistrate judge’s report). “Neither the Constitution
11 nor the statute requires a district judge to review, *de novo*, findings and
12 recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328
13 F.3d at 1121. This rule of law is well-established in the Ninth Circuit and this district.
14 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) (“Of course, *de novo*
15 review of a R & R is only required when an objection is made to the R & R.”); *Nelson*
16 *v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting report
17 in its entirety without review because neither party filed objections to the report despite
18 the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157 (S.D.
19 Cal. 2004) (Benitez, J.).

20
21 **II. ANALYSIS¹**

22 Petitioner asserts five claims in his FAP: (1) Ineffective Assistance of Counsel;
23 (2) “Guilty Plea Coerced”; (3) “Guilty Plea Not ‘Intelligent’”; (4) “Sentence in Excess
24 of Statutory Maximum not based on Jury Findings”; and (5) “Withdrawal / Vacate
25 Plea.” In a thorough Report, Judge Brooks found that all of Petitioner’s claims lacked
26 merit and recommended that this Court deny the FAP in its entirety. Petitioner objects
27

28 ¹ The Court adopts and incorporates by reference all portions of the Report that Petitioner does not object to. That includes the factual background presented in the Report.

1 to Judge Brooks’ findings and recommendations as to all claims raised in his FAP.
2 Respondent did not file a reply.

3
4 **A. Claim One: Ineffective Assistance of Counsel**

5 Petitioner presents three arguments in his objections in response to Judge
6 Brooks’ recommendation that the Court deny Petitioner’s first claim: (1) Judge Brooks
7 overlooked the affidavit of Elizabeth Ochoa, Petitioner’s sister, in reaching his
8 conclusion; (2) Judge Brooks erred in not allowing an evidentiary hearing; and (3) the
9 state court failed to properly apply the “two-pronged ‘cause and prejudice standard,’
10 of *Strickland*,” thus Judge Brooks’ reliance on that opinion is erroneous. (Pet’r’s
11 Objections 1:24–4:15.) Upon reviewing Petitioner’s claim *de novo*, the Court finds that
12 Petitioner’s arguments lack merit.

13 Beginning with Judge Brooks’ consideration of Ms. Ochoa’s affidavit, Petitioner
14 is mistaken that the affidavit was not considered. In the Report, Judge Brooks
15 identified Ms. Ochoa’s affidavit and found that the state court of appeals “weighed the
16 evidence”—including Ms. Ochoa’s statements—and rejected Petitioner’s claim.
17 (Report 16 n.5, 20:13–21:3.) He further found that the factual determinations by the
18 state courts were not objectively unreasonable. (*Id.* at 20:13–21:23.) Judge Brooks’
19 references to Ms. Ochoa’s statements demonstrate that he considered their impact in
20 reaching his conclusion. Therefore, Petitioner fails to persuade this Court that Ms.
21 Ochoa’s affidavit was not properly considered by Judge Brooks.

22 Judge Brooks also addressed Petitioner’s request for an evidentiary hearing,
23 concluding that Petitioner fails to carry his burden under *Townsend v. Sain*, 372 U.S.
24 273 (1963). Petitioner’s argument appears to presume that Ms. Ochoa’s statements
25 need to be produced through an evidentiary hearing, but Judge Brooks was aware of
26 her statements stating that she saw Petitioner sign a blank plea agreement form. (*See*
27 Report 26:22–27:4.) Judge Brooks also noted that Ms. Ochoa’s statements conflict
28 with the rest of the evidence in the record. (*Id.*) Given that the substance of Ms.

1 Ochoa's statements were known, Petitioner fails to show a compelling need for an
2 evidentiary hearing, but more importantly, fails to demonstrate that Judge Brooks'
3 conclusion was erroneous.

4 Finally, in arguing that Judge Brooks failed to properly apply a standard under
5 *Strickland*, Petitioner actually attacks the validity of the state court of appeals' opinion.
6 He contends that because the state court of appeals' opinion was "fundamentally
7 flawed," Judge Brooks' reliance on it was erroneous. (Pet'r's Objections 4:5–16.)
8 Petitioner fails to direct this Court to anything in the record that shows that the state
9 court's reasoning was based on faulty reasoning. Thus, the Court rejects this argument
10 as well.

11 Accordingly, the Court agrees with Judge Brooks' sound reasoning that
12 Petitioner's first claim for habeas relief should be denied.

13 14 **B. Claim Two: Coerced Guilty Plea**

15 Petitioner contends that "it was clearly demonstrated that counsel had initially
16 proposed a '9-year deal' to petitioner that is clearly omitted and *not being taken into*
17 *consideration, in relation to the merits determination of the instant claim.*" (Pet'r's
18 Objections 4:17–5:16 (emphasis in original).) This contention suffers from the same
19 defect identified by Judge Brooks in the Report—that Petitioner "does not explain what
20 misrepresentations or coercive statements were made, or what terms counsel fails to
21 disclose." (See Report 23:23–24:2.) There is nothing flagrantly coercive about
22 initially presenting one deal, which after negotiation ultimately results in different
23 terms for a final agreement. Without further explanation, the Court cannot conclude
24 that there was any coercion in the development of Petitioner's plea agreement.

25 Therefore, the Court agrees with Judge Brooks' sound conclusion that
26 Petitioner's "coercion claim lacks the necessary specificity required to present a
27 federally cognizable claim." See *Foote v. Del Papa*, 244 F. App'x 74, 80 (9th Cir.
28 2007); *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995).

1 **C. Claim Three: Guilty Plea Not Intelligent**

2 Petitioner appears to argue that his guilty plea was not knowing and intelligent
3 because he was not advised of the “‘direct-consequences of the plea,’ in relation to the
4 ‘limitation of work-time credits, programs, registering as a gang-member, the denial
5 of probation, and the opportunity to have a probation interview.” (Pet’r’s Objections
6 5:18–6:24.) However, Petitioner fails to provide any legal authority that requires such
7 warnings. To the contrary, there is “no fixed colloquy, no set of sequence or number
8 of questions and answers, no minimum length of hearing, no Talismanic language that
9 the judge is required to use.” *Stewart v. Peters*, 958 F.2d 1379, 1384 (7th Cir. 1992);
10 *see also Dietrich v. Czerniak*, No. 01-498-TC, 2007 WL 3046481, at *7 (D. Or. Oct.
11 7, 2007).

12 “The longstanding test for determining the validity of a guilty plea is ‘whether
13 the plea represents a voluntary and intelligent choice among the alternative courses of
14 action open to the defendant.’” *Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (quoting *North*
15 *Carolina v. Alford*, 400 U.S. 25, 31 (1970)). Judge Brooks found that the record shows
16 that Petitioner “understood the length of time he might possibly receive, [and] he was
17 fully aware of his plea’s consequences.” (Report 31:12–33:8 (internal quotation marks
18 omitted).) Upon reviewing the facts, including the transcripts for the relevant hearings,
19 Judge Brooks’ conclusion is supported by the record, and Petitioner fails to direct this
20 Court to any evidence or factual allegations in the record that suggest otherwise.

21 Excluding this unsubstantiated challenge, Petitioner does not present any other
22 objections to Judge Brooks’ Report as to his third claim. Therefore, the Court agrees
23 with Judge Brooks’ conclusion that Petitioner’s third claim should be denied.

24
25 **D. Claim Four: Sentence in Excess of Statutory Maximum**

26 Petitioner argues that Judge Brooks failed to apply the appropriate relevant law.
27 (Pet’r’s Objections 7:18–23.) However, he fails to provide any analysis—either by
28 providing the relevant legal authority, evidence, or factual allegations—justifying that

1 conclusion. Thus, the Court rejects Petitioner’s argument as conclusory.

2 Petitioner also argues that he was “severely prejudiced” by his admission to the
3 “gang allegation,” suggesting that this alleged prejudice warrants habeas relief. (Pet’r’s
4 Objections 8:12–9:8.) But even assuming that Petitioner’s legal premise is
5 accurate—which is unclear if it is because he fails to provide relevant legal authority
6 stating as much—Petitioner nonetheless fails to direct this Court’s attention to any
7 evidence or factual allegations that establish any form of prejudice to Petitioner. (*See*
8 *id.*)

9 Accordingly, Petitioner fails to present any arguments that compel this Court to
10 reject Judge Brooks’ conclusion that Petitioner’s fourth claim should be denied.

11

12 **E. Claim Five: Choice of Counsel**

13 The entirety of Petitioner’s objection as to his fifth claim is as follows:

14 Again, petitioner contends that the magistrate has erred in
15 the evaluation of the aforementioned [sic] claim is clearly
16 erroneous, petitioner relies on the arguments as presented in
17 the initial writ petition, the traverse, and the attached
exhibits. [¶] Furthermore, the aforementioned error is
“*structural*” in nature, and is not subject to harmless-error
analysis.

18 (Pet’r’s Objections 9:10–19 (emphasis in original).) The Court interprets this as
19 Petitioner stating that he believes habeas relief is warranted on the same grounds as the
20 arguments that he presented for his other claims. In light of the fact that this Court
21 rejected those aforementioned arguments above, it must also necessarily reject this
22 argument.

23

24 **III. CONCLUSION & ORDER**


25 After considering Petitioner’s objections and conducting a *de novo* review, the
26 Court concludes that Judge Brooks’ reasoning in the Report is sound. In light of the
27 foregoing, the Court **OVERRULES** Petitioner’s objections (ECF No. 65), **ADOPTS**
28 the Report in its entirety (ECF No. 58), and **DENIES** the First Amended Petition (ECF

1 No. 7).

2 Moreover, because reasonable jurists would not find the Court's assessment of
3 the claims debatable or wrong, the Court **DENIES** a certificate of appealability. *See*
4 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, the Court **DENIES AS**
5 **MOOT** Petitioner's separate pending motion for a certificate of appealability. (ECF
6 No. 66.)

7 **IT IS SO ORDERED.**

8
9 **DATED: June 11, 2014**

10 
11 **Hon. Cynthia Bashant**
12 **United States District Judge**

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