



portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 635(b)(1).

Lucero's first objection is that Magistrate Judge Ostby erred in construing his petition as a § 2254 petition. He claims that § 2254 authorizes a prisoner to attack his *sentence*, and because he is attacking his *conviction*, § 2241, not § 2254, is the proper provision. Regardless, the Ninth Circuit Court of Appeals has expressly held that "28 U.S.C. § 2254 is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment." *White v. Lambert*, 370 F.3d 1002, 1009-1010 (9th Cir. 2004). Since the record clearly reflects that Lucero is incarcerated pursuant to the judgment of the Thirteenth Judicial District Court of Yellowstone County, Montana, this objection is not well-taken.

Lucero's second objection is that the Montana Supreme Court's decision that his habeas corpus petition filed in that court was procedurally barred "should be construed as new evidence." *Doc. 6*, p. 1. Specifically, Lucero alleges this decision is new evidence that his counsel provided ineffective assistance because he did not appeal issues which the Montana Supreme Court stated "were, or could have been raised, in his appeal." However, this possibility does nothing to change the fact that the current petition is Lucero's second or subsequent habeas petition.

For those reasons, this Court finds Magistrate Judge Ostby's Findings and Recommendation are well grounded in law and fact and adopts them in their entirety.

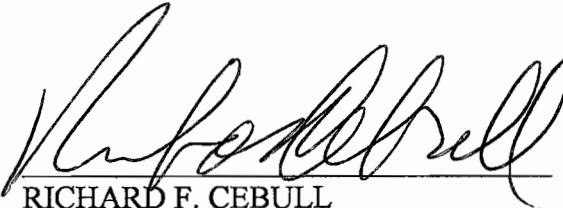
**IT IS HEREBY ORDERED** that:

- (1) Lucero's Petition (*Doc. 1*) is **DISMISSED**;
- (2) all pending motions (Docs 3 & 4) are therefore **MOOT**;
- (3) no certificate of appealability shall issue; and

- (4) the Clerk of Court is directed to enter, by separate document, a judgment of dismissal.

Finally, the Court notes that Lucero filed a notice of appeal along with his objections to the Findings and Recommendations. *Doc. 6-2*. That notice is premature. If Petitioner intends to appeal this decision he must file another notice of appeal after judgment is entered, as required by Rule 4(a) & (c) Fed.R.App.P.

Dated this 22<sup>nd</sup> day of September, 2008.

  
RICHARD F. CEBULL  
UNITED STATES DISTRICT JUDGE