

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

BEAU JAMES MUSACCO,

Petitioner,

v.

Civ. No. 14-683 MV/GBW

GERMAN FRANCO, *et al.*,

Respondents.

**ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSE FINDINGS AND
RECOMMENDED DISPOSITION**

THIS MATTER comes before the Court on Petitioner's Motion for Relief from Judgment re: Final Order and Order Adopting Report and Recommendations (*doc. 62*) and his Motion for an Order granting the aforementioned motion (*doc. 64*). On August 22, 2014, Petitioner filed a habeas petition under 28 U.S.C. § 2254 asking the Court to vacate his state convictions. *Doc. 3* at 1, 21. On August 3, 2016, Magistrate Judge Wormuth issued a Proposed Findings and Recommended Disposition (hereinafter "Habeas PFRD") that advised the Court to dismiss all of Petitioner's claims with prejudice. *Doc. 55* at 35. Petitioner did not file any objections. *Doc. 57* at 2. On December 4, 2017, the Court adopted the Habeas PFRD in full and issued a final order dismissing Petitioner's habeas petition with prejudice. *Id.* at 3; *doc. 58*.

On June 29, 2020, Petitioner filed the instant motion. *Doc. 62*. In it, he asks the Court to set aside its final order (*doc. 58*) and its judgment adopting the Habeas PFRD (*doc. 57*) pursuant to Rule 60(b)(6) and to grant him leave to file objections to the Habeas PFRD. *Doc. 62* at 3, 9. He asserts four grounds for doing so: (i) Magistrate Judge Wormuth's finding that he had enjoyed an opportunity to litigate his unlawful search and seizure claims fully and fairly in state court, *id.* at 5–7; (ii) Magistrate Judge Wormuth's refusal to hold oral argument on these claims,


id. at 5; (iii) the Court’s failure to assess whether the state court’s evidentiary rulings had violated his right to due process by rendering his trial fundamentally unfair, *id.* at 7; and (iv) the failure of his habeas counsel to object to the Habeas PRFD, apprise him of the need to do so, or give him accurate information about the status of his case, *id.* at 2, 8. A month later, Petitioner filed a Motion for an Order granting the instant motion based on Respondents’ failure to respond to it. *Doc. 64.* On August 10, 2020, Respondents filed their response to the instant motion. *Doc. 67.* Petitioner did not file a reply; rather, on September 21, 2020, he declared that briefing on the motion was complete. *Doc. 68.*

On October 30, 2020, Magistrate Judge Wormuth filed a Proposed Findings and Recommended Disposition for the instant motion (hereinafter “Rule 60(b)(6) PFRD”). *Doc. 71.* He recommended denying the motion. *Id.* at 31. He found that the Court lacked jurisdiction over Petitioner’s first claim because it is a second or successive habeas petition and that transferring it to the Tenth Circuit for consideration was not in the interest of justice. *Id.* at 9–20, 31. He also found, with respect to Petitioner’s remaining three claims, that “there is no evidence that preserving the Court’s final order and final judgment risks perpetuating an injustice [because] Petitioner has not demonstrated that reopening his habeas proceedings to allow him to file objections to [the Habeas] PFRD could result in a different determination as to the merits of his habeas petition.” *Id.* at 31. He therefore concluded that none of Petitioner’s three claims amounts to “an extraordinary circumstance that allows the Court to grant him the relief that he seeks.” *Id.*

Neither party has filed objections to this PFRD. Appellate review of these issues is therefore waived. *See United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1059–60 (10th Cir. 1996). Failure to object to a PFRD also waives the right to *de novo* review by the district

court. *See id.* at 1060; *Thomas v. Arn*, 474 U.S. 140, 149–150 (1985). Nevertheless, the Court has conducted a *de novo* review of Magistrate Judge Wormuth’s findings in this case. *See One Parcel*, 73 F.3d at 1061. It concurs with all of the factual and legal conclusions recited therein.

Wherefore, IT IS HEREBY ORDERED that Magistrate Judge Wormuth’s Rule 60(b)(6) PFRD (*doc. 71*) is ADOPTED in full. Petitioner’s Motion for Relief from Judgment re: Final Order and Order Adopting Report and Recommendations (*doc. 62*) and his Motion for an Order granting the aforementioned motion (*doc. 64*) are DENIED.



MARTHA WÁZQUEZ
UNITED STATES DISTRICT JUDGE