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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tyerel Darnel Luke,
Petitioner,
vs.
Dora B. Schriro; et al.,
Respondents.

No. CV 07-1713-PHX-JAT

ORDER

Pending before this Court is Petitioner’s Petition for Writ of Habeas Corpus (Doc. #1). On July 15, 2008, the Magistrate Judge issued a Report and Recommendation (Doc. #19) (R&R) recommending that this Court deny the Petition because it is barred by the statute of limitations under the Anti-Terrorism and Effective Death Penalty Act. Petitioner filed an “objection” to the R&R, which included a death threat against the undersigned.

Threats/Recusal

Pursuant to *United States v. Holland*, 519 F.3d 909 (9th Cir. 2008), when a death threat is made against the judge presiding over the case, the judge must determine both objectively and subjectively whether the judge should recuse off the case. Per *Holland*, the Court must first engage in the objective inquiry and recuse if “a reasonable third-party observer would perceive that there is a ‘significant risk’ that the judge will be influenced by the threat and resolve the case on a basis other than the merits.” *Id.* at 914. *Holland* goes on to say that the judge “must evaluate the threat itself to determine how much risk there is that it may be

1 carried out and how much harm there would be if it were.” *Id. Holland* then suggests
2 answering the following questions:

- 3 1. Has the defendant taken concrete steps to carry out the threat?
- 4 2. Does the defendant have a history of violence or has he been successful in
5 carrying out other threats?
- 6 3. Is he a member of a gang or does he have contacts who could carry out the threat
7 on his behalf?

8 *Id.* at 914-15.

9 First, the threat “death” is serious. Second, based on Petitioner’s state court
10 conviction that he now challenges, sexual assault and kidnaping, Petitioner has a history of
11 violence.

12 However, upon receiving this threat, the undersigned referred it to the U.S. Marshals
13 for investigation. Based on this investigation, the Court does not find recusal to be
14 necessary.¹ *Holland* goes on to suggest answering this next set of questions:

- 15 1. Was the threat made in a fit of passion or intended as a joke?
- 16 2. Was the defendant serious in carrying out the threat?
- 17 3. Does the judge have any prior dealings with the defendant that make the threat
18 more or less likely to be carried out?

19 *Id.* at 915.

20 The undersigned has had no prior dealings with this Petitioner. The remaining
21 questions focus on the subjective intent of Petitioner about which the undersigned has no
22 information. Thus, the Court does not find these questions require recusal. *Holland* then
23 suggests answering these final questions regarding the objective standard for recusal (to
24 ascertain the perceived purpose of the threat):

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26
27 ¹ Because this Order will be sent to Petitioner, the Court will not detail the findings
28 of this investigation.

- 1 1. Was the threat made in open court or did the judge become aware of the threat
- 2 only through the fortuity of law enforcement investigation?
- 3 2. Was the threat an attempt to force recusal and manipulate the judicial system?

4 *Id.*

5 Again based on the Marshals' investigation, the Court does not find recusal to be
6 necessary.

7 Next, the undersigned must apply the subjective test found in 28 U.S.C. § 455(b), to
8 determine whether I can be "truly impartial" when trying the case. *Holland*, 519 F.3d at 915.
9 I have considered my obligations under § 455(b) and I do not find recusal to be necessary.
10 Thus, having considered both the objective and subjective standard, I will not sua sponte
11 recuse in this case.

12 **Habeas Petition**

13 This Court "may accept, reject, or modify, in whole or in part, the findings or
14 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that the
15 district judge must review the magistrate judge's findings and recommendations *de novo* if
16 *objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
17 (9th Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219,
18 1126 (D.Ariz. 2003) ("Following *Reyna-Tapia*, this Court concludes that *de novo* review of
19 factual and legal issues is required if objections are made, 'but not otherwise.'). District
20 courts are not required to conduct "any review at all . . . of any issue that is not the subject
21 of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28
22 U.S.C. § 636(b)(1) ("the court shall make a *de novo* determination of those portions of the
23 [report and recommendation] to which objection is made.").

24 In this case, Petitioner has stated, "I object to all the report by David K. Duncan... ."
25 Objections at 1. Without deciding whether a general objection of this nature qualifies for *de*
26 *novo* review, the Court will give Petitioner the benefit of the doubt and review the Petition
27 *de novo*.

