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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Jose Luis Ramirez,
Petitioner
-vs-
Charles Ryan, et al.,
Respondents

CV-09-0685-PHX-NVW (JRI)

**REPORT & RECOMMENDATION
On Petition for Writ of Habeas Corpus
Pursuant to 28 U.S.C. § 2254**

I. MATTER UNDER CONSIDERATION

Petitioner, presently incarcerated in the Pinal County Jail in Florence, Arizona, filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on May 7, 2009 (#6). On July 10, 2009, Respondents filed their Answer (#10). Petitioner filed a Reply on September 2, 2009 (#20).

The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

In disposing of Petitioner's direct appeal, the Arizona Court of Appeals summarized the factual background as follows:

Mercedes B. and Ramirez [Petitioner] were in a relationship for nearly fifteen years and had four children together. Mercedes B. and Ramirez met Jose M. after responding to Jose M.'s advertisement in Arizona Connections magazine. Jose M. testified that Ramirez contacted him in March 2004 about a sexual fantasy that involved videotaping Ramirez' wife engaging in sexual activities with another

1 man. Thereafter, the three met four times over two months and
2 participated in the desired activities. Mercedes B. eventually left
Ramirez and later began dating Jose M.

3 On February 6, 2005, Mercedes B. and Jose M. were outside of
her apartment in the parking lot when they saw Ramirez' vehicle
4 approaching. As Ramirez pulled up behind Jose M.'s car, Ramirez'
window was rolled down and he was pointing a gun at Jose M. and
5 Mercedes B. Jose M. grabbed Mercedes B. and pulled her in front of
him down behind his car. Ramirez got out and walked towards the back
6 of his own vehicle. Jose M. ran away and jumped over a six-foot fence
that was located behind him and Mercedes B., and Ramirez fired a shot
7 in his direction. Mercedes B. testified that Ramirez pointed the gun a
little bit above the wall when he fired. Mercedes B. then got up and
8 tried to run, but with his forearm on her neck or chin, Ramirez pushed
her and she fell to the pavement.

9 (Exhibit L, Mem. Dec. at 2-3.) (Exhibits to the Answer, #10, are referenced herein as
10 "Exhibit ____.")

11
12 **B. PROCEEDINGS AT TRIAL**

13 Petitioner was charged with two counts of aggravated assault, and one count of
14 disorderly conduct. (*Id.* at 1-2; Exhibit A, R.T. 10/24/5 at 45.) Petitioner proceeded to a jury
15 trial, and was convicted on all three counts. He was sentenced to concurrent sentences of
16 five years, one year, and two and one-quarter years. (Exhibit L, Mem. Dec. at 3-4.)

17
18 **C. PROCEEDINGS ON DIRECT APPEAL**

19 Petitioner filed an untimely notice of appeal, which was dismissed on February 21,
20 2006. (Exhibit L., Mem. Dec. at 4.) Petitioner then filed a petition for post-conviction
21 relief pursuant to Rule 32.1(f) of the Arizona Rules of Criminal Procedure, arguing that he
22 was not at fault for failing to file a notice of appeal. (Exhibit F, PCR Pet.)

23 According to correspondence from appellate counsel, testimony at the hearing
24 reflected that retained trial counsel Alcock had delegated Petitioner's representation to an
25 attorney, Gavin, who he represented as an "associate." Alcock also testified that after trial
26 Alcock had advised Petitioner not to file a claim of ineffective assistance against Gavin,
27 arguing that there was no conflict in doing so because they were unassociated. (Amend Pet.,
28 #6, Letter 9/15/06.)

1 The superior court granted Petitioner’s motion to file a delayed appeal. (Exhibit G,
2 M.E. 9/1/6; Exhibit L., Mem. Dec. at 4.)

3 Counsel filed an Opening Brief (Exhibit H), pursuant to *Anders v. California*, 386
4 U.S. 738 (1967), asserting an inability to find an issue for appeal. The court ordered the
5 parties to brief the issue whether the trial court had erred in instructing the jury on one of the
6 aggravated assault charges. (Exhibit I Order, 6/4/07.)

7 Counsel then filed a Supplemental Brief asserting that Petitioner had been convicted
8 of a crime which did not exist and was not charged in the indictment. (Exhibit J.) The
9 Arizona Court of Appeals vacated Petitioner’s conviction on one of the aggravated assault
10 counts. The other two convictions and sentences were affirmed. (Exhibit L, Mem. Dec. at
11 12.)

12 Petitioner sought review with the Arizona Supreme Court (Exhibit M), arguing that
13 trial counsel had been ineffective for failing to object to the erroneous jury instructions, and
14 for failing to object to disparate versions of the facts. Petitioner also argued that appointed
15 counsel failed to appear for “half of my court’s including my sentence.” (Exhibit M, PFR
16 at 3.) That petition was summarily denied. (Exhibit N, Order 12/17/07.)

17
18 **D. PROCEEDINGS ON POST-CONVICTION RELIEF**

19 Petitioner filed a Notice of Post-Conviction Relief (Exhibit O). Counsel was
20 appointed, who filed a notice of inability to find issues for review. (Exhibit P.) Petitioner
21 then filed *pro per* a Petition for Post-Conviction Relief (Exhibit Q), arguing that counsel was
22 ineffective for failing to object to inconsistencies in the victim’s testimony, a discrepancy in
23 evidence about the bullets, and the facts underlying the order of protection obtained by the
24 female victim.

25 The petition was denied without a hearing, with the trial court finding that Petitioner
26 failed to establish ineffective assistance of counsel. (Exhibit S, M.E. 2/13/9.)

27 Petitioner did not seek review on this Petition. (Amend. Pet. #6 at 5.)
28

1 **E. PRESENT FEDERAL HABEAS PROCEEDINGS**

2 **Petition** - Petitioner commenced the current case by filing his original Petition for
3 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on April 2, 2009 (#1). That petition
4 was dismissed with leave to amend. (Order 4/14/9, #5.) On May 7, 2009, Petitioner filed
5 the instant Amended Petition (#7), which asserts the a single ground for relief, arguing that
6 trial counsel was ineffective as a result of a conflict of interest, having been retained by the
7 female victim’s sister, and having delegated Petitioner’s defense to an attorney with whom
8 he was not associated.

9 **Response** - On July 10, 2009, Respondents filed their Answer (#10), arguing that
10 Petitioner’s claims are procedurally defaulted.

11 **Reply** - On September 2, 2009, Petitioner filed a Reply (“Habeas Corpus Response
12 from Petitioner”) (#20). Petitioner argues the merits of his claim, and asserting that there
13 were discrepancies with respect to various evidence at trial.

14
15 **III. APPLICATION OF LAW TO FACTS**

16 **A. EXHAUSTION AND PROCEDURAL DEFAULT**

17 Respondents argue that Petitioner’s claim is unexhausted, now procedurally defaulted,
18 and thus barred from habeas review.

19
20 **1. Exhaustion Requirement**

21 Generally, a federal court has authority to review a state prisoner’s claims only if
22 available state remedies have been exhausted. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)
23 (*per curiam*). The exhaustion doctrine, first developed in case law, has been codified at 28
24 U.S.C. § 2254(b) and (c). When seeking habeas relief, the burden is on the petitioner to
25 show that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104
26 (9th Cir. 1981)(*per curiam*), *cert. denied*, 455 U.S. 1023 (1982).

27 **a. Proper Forum/Proceeding**

28 Ordinarily, “to exhaust one's state court remedies in Arizona, a petitioner must first

1 raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-
2 conviction relief pursuant to Rule 32.” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
3 1994). Only one of these avenues of relief must be exhausted before bringing a habeas
4 petition in federal court. This is true even where alternative avenues of reviewing
5 constitutional issues are still available in state court. *Brown v. Easter*, 68 F.3d 1209, 1211
6 (9th Cir. 1995); *Turner v. Compo*y, 827 F.2d 526, 528 (9th Cir. 1987), *cert. denied*, 489 U.S.
7 1059 (1989). “In cases not carrying a life sentence or the death penalty, ‘claims of Arizona
8 state prisoners are exhausted for purposes of federal habeas once the Arizona Court of
9 Appeals has ruled on them.’” *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir.
10 2005)(quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir.1999)).

11 **b. Fair Presentment**

12 To result in exhaustion, claims must not only be presented in the proper forum, but
13 must be "fairly presented." That is, the petitioner must provide the state courts with a "fair
14 opportunity" to apply controlling legal principles to the facts bearing upon his constitutional
15 claim. 28 U.S.C. § 2254; *Picard v. Connor*, 404 U.S. 270, 276-277 (1971). A claim has
16 been fairly presented to the state's highest court if the petitioner has described both the
17 operative facts and the federal legal theory on which the claim is based. *Kelly v. Small*, 315
18 F.3d 1063, 1066 (9th Cir. 2003) (overruled on other grounds, *Robbins v. Carey*, 481 F.3d
19 1143, 1149 (9th Cir. 2007)).

20 "Of course, a claim is exhausted if the State’s highest court expressly addresses the
21 claim, whether or not it was fairly presented." *Casey v. Moore*, 386 F.3d 896, 916 n. 18
22 (9th Cir. 2004) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)).

23 24 **2. Application to Petitioner’s Claims**

25 Petitioner’s sole ground for relief asserts ineffective assistance of trial counsel due to:
26 (a) a conflict of interest, counsel having been retained by the female victim’s sister, and (b)
27 having delegated Petitioner’s defense to an attorney with whom he was not associated.

28 **Not Fairly Presented on Direct Appeal** - Petitioner did not assert such a claim on

1 direct appeal to the Arizona Court of Appeals. (See Exhibit J, Suppl. Brief.) He did,
2 however, argue in his Petition for Review to the Arizona Supreme Court that “my counsel
3 may have represented my wife family by my sace took place, when I ask, he appointed a
4 new counsel Geral[d] T. Gaving who didn’t even show up to half of my courts including my
5 sentence.” (Exhibit M, PFR at 3.)

6 Presentation to the Arizona Supreme Court for the first time is not sufficient to
7 exhaust an Arizona state prisoner’s remedies. "Submitting a new claim to the state's highest
8 court in a procedural context in which its merits will not be considered absent special
9 circumstances does not constitute fair presentation." *Roettgen v. Copeland*, 33 F.3d 36, 38
10 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). In *Casey v. Moore*,
11 386 F.3d 896 (9th Cir. 2004), the court reiterated that to properly exhaust a claim, "a
12 petitioner must properly raise it on every level of direct review."

13 Academic treatment accords: The leading treatise on federal habeas
14 corpus states, “Generally, a petitioner satisfies the exhaustion
15 requirement if he properly pursues a claim (1) throughout the entire
direct appellate process of the state, or (2) throughout one entire
judicial postconviction process available in the state.”

16 *Casey*, 386 F.3d at 916 (quoting Liebman & Hertz, *Federal Habeas Corpus Practice and*
17 *Procedure*, § 23.3b (4th ed. 1998).

18 In Arizona, review of a petition for post-conviction relief by the Arizona Court of
19 Appeals is governed by Rule 32.9, Arizona Rules of Criminal Procedure, which clarifies that
20 review is available for “issues which were decided by the trial court.” Ariz. R. Crim. P.
21 32.9(c)(1)(ii). See also *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (Ariz.App.,
22 1980) (issues first presented in petition for review and not presented to trial court not subject
23 to review). Similarly, the Arizona Supreme Court does not grant review of claims not raised
24 below, absent special considerations. See *State v. Logan*, 200 Ariz. 564, 565, 20 P.3d 631,
25 632, n.2 (2001).

26 Moreover, Petitioner merely presented the facts of this claim, and failed to identify
27 the claim as a federal one. Indeed, while the petitioner need not recite “book and verse on
28 the federal constitution,” *Picard v. Connor*, 404 U.S. 270, 277-78 (1971) (quoting *Daugherty*

1 *v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)), it is not enough that all the facts necessary
2 to support the federal claim were before the state courts or that a “somewhat similar state law
3 claim was made.” *Anderson v. Harless*, 459 U.S. 4, 6 (1982)(per curiam). Indeed, Petitioner
4 made no reference to any federal law or authority.

5 A simple reference to ineffective assistance of counsel is not sufficient to fairly
6 present a federal claim under the Sixth Amendment. *Lyons v. Crawford*, 232 F.3d 666,
7 668-69 (9th Cir.2000), *as amended*, 247 F.3d 904 (9th Cir.2001). *See also Baldwin v. Reese*,
8 541 U.S. 27, 33 (2004) (discussing sufficiency of mere reference to "ineffective assistance");
9 *Galvan v. Alaska Dept. of Corrections*, 397 F.3d 1198, 1204 (9th Cir. 2005) (no fair
10 presentment where petitioner's state brief "did not say that she was deprived of her Sixth
11 Amendment right to the effective assistance of counsel").

12 **Not Fairly Presented on PCR Review** - In his PCR Petition, Petitioner did raise the
13 facts that trial counsel had been hired by the victim’s family, and refused to file a PCR
14 petition. (Exhibit Q, PCR Pet. at 6.) However, Petitioner did not identify his claim as one
15 for ineffective assistance. Indeed, he did not even mark the form portion of the Petition to
16 indicate he was asserting a “denial of the constitutional right to representation by a competent
17 lawyer.” (*Id.* at 2.)

18 Moreover, Petitioner did not seek review of the denial of his PCR petition in the
19 Arizona Court of Appeals. . (Amend. Pet. #6 at 5.)

20 **Summary** - Petitioner has failed to fairly present his federal claims to the Arizona
21 courts, and accordingly his state remedies on those claims were not properly exhausted.

22 23 **3. Procedural Default**

24 Ordinarily, unexhausted claims are dismissed *without prejudice*. *Johnson v. Lewis*,
25 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed to properly
26 exhaust his available administrative or judicial remedies, and those remedies are now no
27 longer available because of some procedural bar, the petitioner has "procedurally defaulted"
28 and is generally barred from seeking habeas relief. Dismissal *with prejudice* of a

1 procedurally barred or procedurally defaulted habeas claim is generally proper absent a
2 “miscarriage of justice” which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11
3 (1984).

4 Respondents argue that Petitioner may no longer present his unexhausted claims to
5 the state courts. Respondents rely upon Arizona’s preclusion bar, set out in Ariz. R. Crim.
6 Proc. 32.2(a), and its timeliness bar in Ariz. R. Crim. P. 32.4. (Answer, #10 at 14.)

7 **Remedies by Direct Appeal** - Under Ariz.R.Crim.P. 31.3, the time for filing a direct
8 appeal expires twenty days after entry of the judgment and sentence. The Arizona Rules of
9 Criminal Procedure do not provide for a successive direct appeal. *See generally*
10 Ariz.R.Crim.P. 31. Accordingly, direct appeal is no longer available for review of
11 Petitioner’s unexhausted claims.

12 **Remedies by Post-Conviction Relief** - Petitioner can also no longer seek review by
13 a subsequent PCR Petition. Ariz.R.Crim.P. 32.4 requires that petitions for post-conviction
14 relief (other than those which are “of-right”) be filed “within ninety days after the entry of
15 judgment and sentence or within thirty days after the issuance of the order and mandate in
16 the direct appeal, whichever is the later.” *See State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357
17 (App. 1995) (applying 32.4 to successive petition, and noting that first petition of pleading
18 defendant deemed direct appeal for purposes of the rule). That time has long since passed.

19 **Exceptions** - Rules 32.2 and 32.4(a) do not bar dilatory claims if they fall within the
20 category of claims specified in Ariz.R.Crim.P. 32.1(d) through (h). *See* Ariz. R. Crim. P.
21 32.2(b) (exceptions to preclusion bar); Ariz. R. Crim. P. 32.4(a) (exceptions to timeliness
22 bar). Petitioner has not asserted that any of these exceptions are applicable to his claims.
23 Nor, with one exception, does it appear that such exceptions would apply. The rule defines
24 the excepted claims as follows:

- 25 d. The person is being held in custody after the sentence imposed has
26 expired;
- 27 e. Newly discovered material facts probably exist and such facts
28 probably would have changed the verdict or sentence. Newly
discovered material facts exist if:
 - (1) The newly discovered material facts were discovered after the trial.
 - (2) The defendant exercised due diligence in securing the newly

1 discovered material facts.

2 (3) The newly discovered material facts are not merely cumulative or
3 used solely for impeachment, unless the impeachment evidence
4 substantially undermines testimony which was of critical significance
5 at trial such that the evidence probably would have changed the verdict
6 or sentence.

7 f. The defendant's failure to file a notice of post-conviction relief of-
8 right or notice of appeal within the prescribed time was without fault on
9 the defendant's part; or

10 g. There has been a significant change in the law that if determined to
11 apply to defendant's case would probably overturn the defendant's
12 conviction or sentence; or

13 h. The defendant demonstrates by clear and convincing evidence that
14 the facts underlying the claim would be sufficient to establish that no
15 reasonable fact-finder would have found defendant guilty of the
16 underlying offense beyond a reasonable doubt, or that the court would
17 not have imposed the death penalty.

18 Ariz.R.Crim.P. 32.1.

19 Paragraph 32.1 (d) (expired sentence) generally has no application to an Arizona
20 prisoner who is simply attacking the validity of his conviction or sentence. Where a claim
21 is based on "newly discovered evidence" that has previously been presented to the state
22 courts, the evidence is no longer "newly discovered" and paragraph (e) has no application.
23 Paragraph (f) has no application where the petitioner is not asserting relief from a failure to
24 file a timely notice of appeal or PCR petition of-right. Paragraph (g) has no application
25 because Petitioner has not asserted a change in the law. Finally, paragraph (h), concerning
26 claims of actual innocence, has no application to Petitioner's ineffective assistance claims.
27 *See State v. Swoopes*, 216 Ariz. 390, 404, 166 P.3d 945, 959 (App. 2007) (32.1(h) did not
28 apply where petitioner had "not established that trial error ...amounts to a claim of actual
innocence").

Accordingly, the undersigned must conclude that review through Arizona's direct
appeal and post-conviction relief process is no longer possible for Petitioner's unexhausted
claims. Accordingly, these unexhausted claims are procedurally defaulted, and absent a
showing of cause and prejudice or actual innocence, must be dismissed with prejudice.

4. Miscarriage of Justice

If the habeas petitioner has procedurally defaulted on a claim, he may not obtain

1 federal habeas review of that claim absent a showing of “cause and prejudice” sufficient to
2 excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984). Failure to establish cause may be
3 excused “in an extraordinary case, where a constitutional violation has probably resulted in
4 the conviction of one who is actually innocent.” *Murray v. Carrier*, 477 U.S. 478, 496
5 (1986) Here, Petitioner has offered no explanation to excuse his failure to exhaust. The
6 undersigned finds none.

7 Nor has Petitioner made any assertion that he is actually innocent. Petitioner does
8 attack various evidence adduced at trial. For example, he asserts that various testimony and
9 statements were contradictory, that the location of the bullets contradicted the testimony on
10 the direction he was shooting, that the female victim lied about she and Petitioner not being
11 married, etc. (Reply, #20 at 1-2.) Such quibbling over the evidence presented at trial is not
12 the equivalent of a showing of actual innocence.

13 A petitioner asserting his actual innocence of the underlying crime must show "it is
14 more likely than not that no reasonable juror would have convicted him in the light of the
15 new evidence" presented in his habeas petition. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).
16 A showing that a reasonable doubt exists in the light of the new evidence is not sufficient.
17 Rather, the petitioner must show that no reasonable juror would have found the defendant
18 guilty. *Id.* at 329. Moreover, a finding of "actual innocence" is not to be based upon a
19 finding that insufficient evidence to support the charge was presented at trial, but rather upon
20 affirmative evidence of innocence. *See U.S. v. Ratigan*, 351 F.3d 857 (9th Cir. 2003) (lack
21 of proof of FDIC insurance in a bank robbery case, without evidence that insurance did not
22 exist, not sufficient to establish actual innocence). Petitioner fails to make such a showing.

23 Accordingly, Petitioner’s claims must be dismissed with prejudice.

24 25 **IV. CERTIFICATE OF APPEALABILITY**

26 **Ruling Required** - Rule 11(a), Rules Governing Section 2254 Cases, requires that in
27 habeas cases the “district court must issue or deny a certificate of appealability when it enters
28 a final order adverse to the applicant.” Such certificates are required in cases concerning

1 detention arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C.
2 § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

3 Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention
4 pursuant to a State court judgment. The recommendations if accepted will result in
5 Petitioner’s Petition being resolved adversely to Petitioner. Accordingly, a decision on a
6 certificate of appealability is required.

7 **Applicable Standards** - The standard for issuing a certificate of appealability
8 (“COA”) is whether the applicant has “made a substantial showing of the denial of a
9 constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the
10 constitutional claims on the merits, the showing required to satisfy § 2253(c) is
11 straightforward: The petitioner must demonstrate that reasonable jurists would find the
12 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*
13 *McDaniel*, 529 U.S. 473, 484 (2000). “When the district court denies a habeas petition on
14 procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA
15 should issue when the prisoner shows, at least, that jurists of reason would find it debatable
16 whether the petition states a valid claim of the denial of a constitutional right and that jurists
17 of reason would find it debatable whether the district court was correct in its procedural
18 ruling.” *Id.*

19 **Standard Not Met** - Assuming the recommendations herein are followed in the
20 district court’s judgment, that decision will be on procedural grounds. The undersigned finds
21 that “jurists of reason” would not “find it debatable whether the district court was correct in
22 its procedural ruling.” Accordingly, to the extent that the Court adopts this Report &
23 Recommendation as to the Petition, a certificate of appealability should be denied.

24
25 **V. RECOMMENDATION**

26 **IT IS THEREFORE RECOMMENDED** that the Petitioner's Amended Petition for
27 Writ of Habeas Corpus, filed May 7, 2009 (6) be **DISMISSED WITH PREJUDICE**.

28 **IT IS FURTHER RECOMMENDED** that in the event this Report &

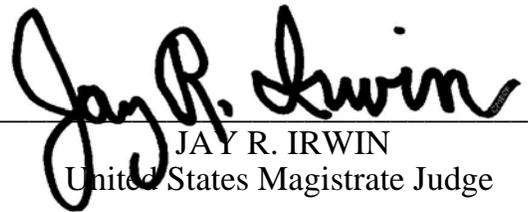
1 Recommendation is adopted, that a certificate of appealability **BE DENIED**.

2
3 **VI. EFFECT OF RECOMMENDATION**

4 This recommendation is not an order that is immediately appealable to the Ninth
5 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*
6 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

7 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall
8 have fourteen (14) days from the date of service of a copy of this recommendation within
9 which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing
10 Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to
11 file a response to the objections. Failure to timely file objections to any findings or
12 recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de*
13 *novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
14 Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the
15 findings of fact in an order or judgment entered pursuant to the recommendation of the
16 Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

17
18 DATED: January 8, 2010



JAY R. IRWIN
United States Magistrate Judge

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