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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Joseph Guy Stern,

Petitioner,

v.

Dora B Schriro, et al.,

Respondents.

No. CV-06-00016-TUC-DCB

ORDER

This matter was referred to Magistrate Judge Jacqueline M. Rateau on August 19, 2015, pursuant to the Rules of Practice for the United States District Court, District of Arizona (Local Rules), Rule (Civil) 72.1(a). On August 2, 2016, Magistrate Judge Rateau issued a Report and Recommendation (R&R). She recommends that the Court dismiss the Petition with prejudice. Subsequent to the Magistrate Judge issuing her R&R, the Petitioner filed *pro se* “emergency” motions seeking the withdrawal of his attorney and leave to file additional material in support of his Petition. Petitioner has been, represented by counsel through the duration of this case in this court, in the court of appeals, and in the state court subsequent to its remand and stay here to exhaust his claims there.

This Court appointed Brick Storts to serve as counsel for Petitioner on January 24, 2007, because Mr. Storts had represented him in his second Post-Conviction Petition and had done a good job. There is nothing in the record to suggest that Mr. Storts has not

1 continued to do a good job representing the Petitioner,¹ except for Petitioner’s complaints
2 about trial strategies during the evidentiary hearing held in the state court. Petitioner
3 accuses Mr. Stort’s of knowingly suppressing material/exculpatory evidence when he
4 refused to ask questions at the evidentiary hearing in the state proceeding, and therefore
5 failed to establish that medical science related to “shaken-baby syndrome (SBS)” has
6 changed. Petitioner also complains that his attorney, unbeknownst to him, entered into a
7 false stipulation that the state evidentiary hearing was “a sufficient record for review, and
8 the Petitioner received a full and fair hearing.” (Status Report (Doc. 187) at 2.)

9 The evidentiary hearing was held May 21, 2012. Mr. Storts was persuasive on the
10 question of new evidence. Petitioner attended the evidentiary hearing and, therefore, has
11 known its alleged deficiencies since then. The Status Report was filed on April 14, 2014.
12 Counsel for Petitioner would have kept him informed regarding the status of the case and
13 consulted him about the means for obtaining his objectives. Arizona Rules of
14 Professional Conduct, ER 1.4. The Court also notes that Petitioner would have received
15 a copy of the Reply filed September 8, 2014, to the Response to the Supplemental
16 Memorandum on Actual Innocence in Support of the Petition and a copy of the
17 Supplemental Memorandum filed June 11, 2014. Both of these documents reflect the
18 reliance in this case on the evidentiary record presented at the hearing in state court.

19 The Court finds no explanation for why Petitioner waited until the Magistrate
20 Judge issued the R&R on August 2, 2016, to complain about his attorney’s performance
21 in regard to these two matters—except perhaps because the R&R was unfavorable. The
22 R&R is fully briefed and ready for disposition by the Court. Pursuant to the
23 recommendation of the Magistrate Judge, the ruling on the R&R, not a trial, will resolve
24 this case. Petitioner’s motion to proceed pro se and to further brief his petition is
25 untimely. *Cf.*, LRCiv.83.3(b)(3) (no permission to withdraw after an action is set for
26 trial, unless new attorney is, or client has made arrangement to be, prepared for trial).

27
28 ¹ The state court, hearing the PCR, commended “both parties for a well pleaded
and argued case.” (State Response, Ex. AA: AZ Superior Court Ruling (Doc. 192-1) at
11.)

1 Before the Court will allow counsel to withdraw, it considers: (1) the reasons why
2 withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the
3 harm withdrawal might cause to the administration of justice; and (4) the degree to which
4 withdrawal will delay the resolution of the case. *Beard v. Shuttermart of Cal., Inc.*, 2008
5 WL 410694, at *2 (S.D. Cal. Feb. 13, 2008). Clearly granting Petitioner’s emergency
6 motions would delay resolution of the case and be highly prejudicial to the State. If the
7 Court were to grant Petitioner’s emergency motions, it would effectively reboot the case
8 to its post-remand status. The Court finds there is no good cause to delay the
9 administration of justice in this case.

10 The Court will deny Petitioner’s emergency motions. The Court accepts and
11 adopts the Magistrate Judge’s R&R as the findings of fact and conclusions of law of this
12 Court and dismisses the Petition, with prejudice. Petitioner may proceed pro se on appeal
13 in the event he files an appeal from this Order. The Court withdraws Brick Storts as
14 counsel of record in this case; Petitioner is returned to pro se status.

15 STANDARD OF REVIEW

16 The duties of the district court in connection with a R&R by a Magistrate Judge
17 are set forth in Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. §
18 636(b)(1). The district court may “accept, reject, or modify, in whole or in part, the
19 findings or recommendations made by the magistrate judge.” Fed.R.Civ.P. 72(b); 28
20 U.S.C. § 636(b)(1). Where the parties object to an R&R, “[a] judge of the [district]
21 court shall make a *de novo* determination of those portions of the [R&R] to which
22 objection is made.” *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (quoting 28 U.S.C. §
23 636(b)(1)).

24 This Court's ruling is a *de novo* determination as to those portions of the R&R to
25 which there are objections. 28 U.S.C. § 636(b)(1)(C); *Wang v. Masaitis*, 416 F.3d 992,
26 1000 n. 13 (9th Cir.2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th
27 Cir.2003) (*en banc*). To the extent that no objection has been made, arguments to the
28 contrary have been waived. Fed. R. Civ. P. 72; see 28 U.S.C. § 636(b)(1) (objections are

1 waived if they are not filed within fourteen days of service of the R&R), *see also McCall*
2 *v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980) (failure to object to Magistrate's report
3 waives right to do so on appeal); Advisory Committee Notes to Fed. R. Civ. P. 72 (citing
4 *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974) (when no
5 timely objection is filed, the court need only satisfy itself that there is no clear error on
6 the face of the record in order to accept the recommendation)).

7 The parties were sent copies of the R&R and instructed that, pursuant to 28 U.S.C.
8 § 636(b)(1), they had 10 days to file written objections. *See also*, Fed. R. Civ. P. 72
9 (party objecting to the recommended disposition has fourteen (14) days to file specific,
10 written objections). The Court has considered the objections filed by the Petitioner, and
11 the parties' briefs considered by the Magistrate Judge in deciding whether or not to
12 dismiss the Petition.

13 OBJECTIONS

14 The Petitioner objects to the Magistrate Judge's finding that he has not established
15 his actual innocence because this case is not like *Gimenez v. Ochoa*, 821 F.3d 1136
16 (2016), where alleged new evidence was essentially just different opinions among
17 experts, with other evidence in the record from which a reasonable juror could still
18 conclude he was guilty of murder. Petitioner argues that the Magistrate Judge
19 erroneously looked at whether sufficient evidence still existed in light of the new medical
20 evidence when she should have considered how reasonable jurors would react to the
21 overall evidence, including the new medical evidence, to find reasonable doubt or not.

22 The Court agrees *Gimenez* is distinguishable, but nevertheless helpful as a guide
23 for how to look at the totality of the evidence in the context of a claim of actual
24 innocence based on changes in scientific knowledge. *Gimenez* considered as a matter of
25 first impression whether new evidence surrounding SBS supports habeas relief under
26 2244(b)(2)(B)(ii) for a petitioner who is actually innocent of any crime. *Id.* at 1145
27 (noting that in *Cavazos v. Smith*, 132 S. Ct 2 (2012) (Ginsburg, J., dissenting)
28 (characterizing the shift in scientific opinions about SBS as being under challenge, not as

1 changed).

2
3 “The Supreme Court has never recognized ‘actual innocence’ as a constitutional
4 error that would provide grounds for relief without an independent constitutional
5 violation.” *Gimenez*, 821 F.3d at 1143. In *Gimenez*, the Ninth Circuit joined the “[t]hird
6 [c]ircuit in recognizing that habeas petitioners can allege a constitutional [due process]
7 violation from the introduction of flawed expert testimony at trial if they show that the
8 introduction of this evidence ‘undermined the fundamental fairness of the entire trial.’”
9 *Id.* at 1145 (quoting *Lee v. Glunt*, 667 F.3d 397, 167 (3rd Cir. 2012) (relying on *Murry v.*
10 *Carrier*, 477 U.S. 478, 494 (1986)). The trial must have been “‘so extremely unfair that
11 it [] . . . violate[d] fundamental conceptions of justice.’” *Id.* (quoting *Dowling v. United*
12 *States*, 493 U.S. 342, 352 (1990)).

13 In *Gimenez*, the court examined the evidence as a whole, 28 U.S.C. §
14 2244(b)(2)(B)(ii); *Jones v. Ryan*, 733 F.3d 825, 845 (9th Cir.2013), and concluded
15 *Gimenez* could not prove by “clear and convincing evidence” that “no reasonable
16 factfinder” would have found him guilty but for the introduction of purportedly flawed
17 SBS testimony, 28 U.S.C. § 2244(b)(2)(B)(ii); *Gage v. Chappell*, 793 F.3d 1159, 1168
18 (9th Cir.2015). “A juror could still have concluded that Priscilla was shaken to death
19 based on her numerous suspicious injuries, *Gimenez*’ inconsistent statements about
20 Priscilla’s torn frenulum and his admitted violent behavior. Even assuming the
21 prosecution’s experts couldn’t testify that the triad alone establishes SBS, the evidence
22 *Gimenez* presents isn’t enough to show by clear and convincing evidence that “no
23 reasonable factfinder” would have found him guilty.” *Gimenez*, 821 F.3d at 1145 (citing
24 *Jones*, 733 F.3d at 845; *Gage*, 793 F.3d at 1168).

25 The posture of Stern’s case is distinguishable. After the Ninth Circuit Court of
26 appeals, *en banc*, held that a valid claim of actual innocence can act as a gateway to
27 excuse an untimely filed habeas petition, *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011)
28 (applying *Schlup v. Delo*, 513 U.S. 298 (1995), the appellate court remanded Stern’s case

1 to determine whether the untimeliness of his Petition “is excused based on his assertion
2 of actual innocence due to newly discovered medical evidence invalidating the
3 prosecution’s theory of shaken baby syndrome or shaken impact syndrome.” (Mandate,
4 Order (Doc. 175-1) at 1-2.) After remand, the matter was stayed pending the Petitioner’s
5 exhaustion of this argument, which Petitioner had in the interim presented pursuant to a
6 fourth petition for Post-Conviction Relief (PCR), in the Arizona state courts. Rule
7 32.1(e)(1) (arguing newly discovered scientific evidence established “that shaken baby
8 syndrome (SBS) and thick-cushion shaken impact syndrome (SIS) could never cause
9 traumatic brain injury, but a lethal minor fall (LMF) could”). (R&R (Doc. 198) (citing
10 State Response, Ex. AA: AZ Superior Court Ruling (Doc. 192-1) at 3 (relying on Ex. FF:
11 Stern’s Legal Memorandum)). After an evidentiary hearing, the state court denied the
12 PCR Petition.

13 To obtain a new trial under Rule 32, Stern had to establish that the newly
14 discovered evidence is credible and also that the jury, considering all the other evidence
15 presented at the trial and the newly discovered evidence, probably would have resulted in
16 the acquittal of the accused if it had been produced at the trial. (State Response, Ex. AA:
17 AZ Superior Court Ruling (Doc. 192-1) at 10 (citing *State v. Serna*, 807 P.2d 1109, 1111
18 (Ariz. 1991) (en banc); *State v. Turner*, 455 P.2d 443, 445-46 (1969)).

19 The trial court found the newly discovered evidence was credible, but would not
20 result in an acquittal because it did not entirely dispel the old expert evidence, “and more
21 importantly, because the State [] presented significant non-medical evidence from which
22 the jury could find that Defendant intentionally hurt K.F. on the two occasions that she
23 passed out.” *Id.* The court found the newly discovered evidence probably would not
24 have changed the jury verdict. The Arizona Court of Appeals affirmed the trial court’s
25 ruling; the Arizona Supreme Court denied review.

26 Subsequently, this Court lifted the previously entered stay. The parties agreed to
27 proceed on the basis of the state evidentiary hearing with supplemental briefing on
28 Petitioner’s actual innocence gateway-exception claim. On August 2, 2016, the

1 Magistrate Judge issued the R&R. On August 12, 2016, the Petitioner filed his
2 Objection. The matter is ready for adjudication by this Court.

3 THE R&R: ACTUAL INNOCENCE GATEWAY CLAIM

4 The Magistrate Judge did not apply the wrong standard of review; she did not, as
5 Stern asserts, determine “whether sufficient evidence still exists to support a
6 determination of guilt beyond a reasonable doubt.” (Objection (Doc. 200) at 4.) This
7 Court is clear that “the gateway actual-innocence standard is ‘by no means equivalent to
8 the standard of *Jackson v. Virginia*, 443 U.S. 307 . . . (1979),” which governs claims of
9 insufficient evidence and looks at whether there is sufficient evidence to support the
10 verdict. *House v. Bell*, 547 U.S. 518, 538 (2006). Like the Petitioner, this Court looks to
11 *House*, which like this case was a *Schlup* inquiry, based on a fully developed record. *Id.*
12 at 538. There the Court emphasized several *Schlup* standards, which this Court repeats
13 here.

14 First, the Court finds that by conceding to rely on the evidentiary record presented
15 in the state PCR hearing, there is no dispute that Stern has presented credible new
16 evidence. In reviewing the merits of the *Schlup* inquiry, this Court considers “‘all the
17 evidence, old and new, incriminating and exculpatory, without regard to whether it would
18 necessarily be admitted under rules of admissibility that would govern at trial.’” *House*,
19 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 327–328 (further quotation omitted).
20 “Based on this total record, the court must make “a probabilistic determination about
21 what reasonable, properly instructed jurors would do.” *Id.* at 538 (citing *Schlup*, 513 U.S.
22 at 329). In other words, the court does not make an independent factual determination
23 about what likely occurred, but rather assesses the likely impact of the evidence on
24 reasonable jurors. *Id.*

25 As the Court in *House* did, this Court finds “it bears repeating that the *Schlup*
26 standard is demanding and permits review only in the ‘extraordinary’ case.” *Id.* (quoting
27 *Schlup*, 513 U.S. at 327 (quoting *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) and *see*
28 *also Schlup*, 513 U.S. at 324 (emphasizing that “in the vast majority of cases, claims of

1 actual innocence are rarely successful”). At the gateway stage, the *Schlup* standard does
2 not require absolute certainty about the petitioner's guilt or innocence, but Petitioner must
3 “demonstrate that more likely than not, in light of the new evidence, no reasonable juror
4 would find him guilty beyond a reasonable doubt—or, to remove the double negative,
5 that more likely than not any reasonable juror would have reasonable doubt.” *Id.*

6 Put another way, *Schlup* is not a trial do-over. *Lee v. Lampert*, 653 F.3d 929, 946
7 (9th Cir. 2011) (Kozinski concurring). To pass through the *Schlup* actual-innocence
8 gateway, Petitioner must persuade this Court that, “more likely than not,” “every juror
9 would have voted to acquit him.” *Id.*

10 After a *de novo* review of the record, this Court finds that Stern’s conviction was
11 based on testimony by experts that K.F. died due to abusive head trauma, which at the
12 time of the trial was referred to as SBS or SIS. While the medical terminology has
13 changed, the Court finds that SBS does not, and never did, apply in this case because it is
14 a syndrome found in infants, (TR 3 (Doc. 42-5) at 192-193), and K.F. was two years old.
15 Petitioner’s expert was wrong in understanding that SBS was the basis for Stern’s
16 conviction. (R&R at 14 (PCR EH (Doc. 192-3) at 125-126.) The trial testimony was at
17 all times, by all experts, that K.F. died from head trauma. *See e.g.*, R&R at 10 (TR 3
18 (Doc. 42-5) at 173-174, 187 (Dr. Thiersch describing injuries as blunt force trauma and
19 blunt impact to her head); R&R at 12 (TR 3 (Doc. 42-5) at 206, 208 (Dr. Schroeder
20 describing significant injuries caused by significant trauma and caused by an
21 acceleration/deceleration injury on the magnitude of an auto accident without a seat belt).

22 According to Petitioner’s expert Hanna, SIS is a misnomer because it is the impact
23 that produces the damage, not the shaking. (PCR EH (Doc. 192-2) at 13.) The correct
24 term now according to the American Academy of Pediatrics is abusive head trauma. *Id.*
25 at 71. He stated that in terms of SIS not much has changed in respect to the science
26 surrounding head trauma caused from hitting the head on a hard surface, where there is
27 some kind of external injury. *Id.* at 60-61.

28

1 Dr. Theodorou, the pediatrician who treated K.F. at the hospital after her injury
2 testified at the PCR evidentiary hearing that his opinion at the time of trial was abusive
3 head trauma, and it remained the same: “K.F.’s injuries were consistent with inflicted
4 rather than accidental trauma.” (State Response, Ex. AA: AZ Superior Court Ruling
5 (Doc. 192-1) at 5.) At the trial, Dr. Thiersch described two impact injuries to her head
6 area one on top of her head and one in her forehead, with the most recent blunt force
7 injury probably being the direct cause of death. (TR 4 (Doc. 42-6) at 68, 190 (Doc. 42-
8 7)). The Court finds there is new terminology, but no new evidence in respect to abusive
9 head trauma like the type that occurred here.

10 There is, however, new medical evidence regarding lethal minor falls (LMF).
11 Petitioner’s expert, Patrick Hannon, Ed. D, a biomechanics expert, testified about SBS,
12 SIS and LMF, generally. “He did not examine the specifics of this particular case.”
13 (PCR EH (Doc. 192-2) at 14.)

14 He explained it is now believed that minor falls from low heights of just a couple
15 of feet, like a bed or couch, can be lethal. He explained that in addition to the importance
16 of the height of the fall, it is also important whether the surface is carpeted or wood or
17 concrete. Equally or maybe more important is the position of the body, especially if the
18 child falls head first because of loading, meaning the weight of the child’s body increases
19 the force of the fall, *id.* at 29-32, 36, 42, 46, 50-54, 74-78, and has a pile-driver effect,
20 (PCR EH (Doc. 192-3) at 96. Tip-over falls increase the velocity of the fall. *Id.* at 98-99.
21 The likelihood of a LMF is one in a million as compared to the likelihood of death from a
22 peanut allergy which is one in two million, (PCR EH (Doc. 192-2) at 56-57), but he
23 admitted that in the context of short falls it is “very unlikely” that it will be lethal, (PCR
24 EH (Doc. 192-3) at 109), because you have to have a head tip-over fall and most short
25 falls involve a fall to the buttocks or shoulder and the hands come out to break the fall, *id.*
26 at 109-110. In respect to suffering head trauma from being slammed into a cushioned
27 chair or couch, he testified that it would not be possible because the chair back or cushion
28 would absorb the momentum—“no possibility for brain injury, period.” (PCR EH (Doc.

1 192-2) at 57-58, (PCR EH (Doc. 192-3) at 106-108). Except for referencing that in one
2 of the two LMF studies, the child had lived for a period of time until the morning of the
3 following night the child was found dead, (PCR EH (Doc. 192-2) at 36), Hannon did not
4 address Petitioner’s other new medical evidence: that following a head trauma the child
5 could have a lucid period where she acted normally.

6 For that evidence, the Court turns to Petitioner’s expert Dr. Stephens, a
7 pathologist, board certified in forensic pathology. (PCR EH (Doc. 192-3) at 120). He
8 did review the Petitioner’s case, *id.* at 126, and testified that to a medical certainty he
9 believed K.F. “died as a result of a short-distance fall from her bed onto a carpeted floor
10 which resulted in the onset of global brain swelling and subdural hemorrhage.” *Id.* at
11 127. He testified that by definition SBS would not apply because K.F. had evidence of
12 impact in her head, a history of apparent head impacts on probably more than one
13 occasion, including a car accident, and of course she was too old to be a victim of SBS.
14 *Id.* at 128-129. According to Dr. Stephens, the brain changes in K.F. were anywhere
15 from a day or two—or three days up to probably two weeks. *Id.* at 132. He admits that
16 aging and dating subdural hematomas based on microscopic examination or any medical
17 finding is extremely difficult and in most situations you cannot get closer than 24 to 48
18 hours and be absolutely reliable. *Id.* Instead, like the doctors who testified at Stern’s
19 trial, he looked at the iron positivity. *Id.* at 132. Again like the trial doctors, he testified
20 that iron is seen in the brain at a minimum of 72 hours, but he added that not much is
21 seen before five days. *Id.* at 133. He reported that if there were two or three impacts
22 within some say up to a year, there is a tendency for the brain to swell harder and faster
23 than it would with just only one single attack. (PCR EH (Doc. 192-4) at 140. He
24 explained that in a study of 160 cases of infant death, about 75 % developed their
25 symptoms within 24 hours of being brought to the emergency room in critical condition,
26 but 25% took up to three or four days to develop symptoms. *Id.* at 143-144. He noted
27 that studies reflect brain swelling may occur within as little as 20 to 30 minutes of the
28 injury or it may take up to 72 hours, and we don’t know in any given case which of those

1 two events is happening. *Id.* at 145. He rejected the idea that any injury could have been
2 caused from being thrown into the cushioned living room chair, and opined the injury
3 was more likely the result of K.F.'s fall onto the carpet covered concrete floor. *Id.* at
4 148-149.

5 On cross-examination Dr. Stephens agreed that at trial the testimony reflected the
6 top of the scalp showed positive for intracellular iron, which was consistent with his
7 opinion of an older, five-day, lesion and the scalp frontal reflected no intercellular iron
8 where the forehead was bruised and no iron at the bruise at the back of the head. *Id.* at
9 169. He believed the fatal head injury was caused by an accident based on a history of no
10 inflicted injury. *Id.* at 176.

11 At the PCR evidentiary hearing, Dr. Theodorou, MD, the treating physician who
12 testified at Stern's trial, responded to Petitioner's experts. Dr. Theodorou explained that
13 you look for a pattern of an abusive head trauma. (PCR EH (Doc. 192-6) at 15.) When
14 you have the SBS triad, which is a constellation of injury with subdural hematoma,
15 retinal hemorrhages, severe brain injury, and which existed here, and there is no history
16 to explain the injuries—then you look for other diagnoses that might explain the
17 symptoms or constellation of injury—which includes apnea, bruising especially on the
18 face and neck, and injuries of different ages. *Id.* at 17.) The more of these other findings
19 you have, the more likely that the pattern will represent abusive head trauma. *Id.* Here,
20 there were all these findings, plus when the autopsy was done it revealed subgaleal
21 hemorrhages, i.e., impact points corresponding to the bruising. *Id.* at 22. In his opinion,
22 short falls do not cause these types of injuries, *id.* at 29, and that even a headfirst fall off a
23 bed would not have caused the type of injury seen in K.F., *id.* at 38-30. The type of
24 injury seen in K.F.'s brain required significant force, which would be equivalent to being
25 dropped from 10 to 20 feet high. *Id.* 38. He agreed with Petitioner's experts, and it was
26 his testimony at trial, that being thrown into the cushioned living room chair would not
27 have caused K.F.'s injury. (TR (Doc. 42-9) at 103.)
28

1 Dr. Theodorou explained that a lucid interval, where the patient is okay and then
2 starts to deteriorate neurologically occurs in short distance falls, *id.* at 12, but not in an
3 injury with a subdural hematoma because then the mechanism of injury has caused injury
4 to the brain itself, not just to a blood vessel causing bleeding, *id.* at 13. If there is an
5 injury to the brain proper, you are altered from the onset. *Id.* As the brain swells from the
6 injury, the consequences progress, getting worse, and it would not be typical to be okay
7 and then deteriorate. *Id.* at 14.

8 Dr. Theodorou did not agree with the “sea of change” testimony from Petitioner’s
9 experts. He explained that changes have occurred in the terminology but not the overall
10 thinking. The change is to make sure that practitioners understand the pattern differences
11 between accident and abusive head injury. *Id.* at 21, 29.

12 Here, in his opinion the pattern reflected then and now: abusive head trauma. *Id.*

13 Because the Court finds that the only relevant new science is in the area of short
14 falls, the Court must consider the evidence in this case which would support a jury
15 finding that K.F. was injured by a short fall.

16 Joshua, Stern’s 17-year old teenage son, lived with Stern and Michelle Fernane,
17 K.F.’s mother. The Court begins with his testimony regarding the day K.F. was taken to
18 the hospital on Sunday, November 14, 1993.

19 Joshua and Michelle came home from the grocery store around mid-morning, to
20 find Stern, who had been left alone with K.F., in the living room giving mouth-to-mouth
21 resuscitation to K.F., who was unconscious. After Stern and Michele continued
22 unsuccessfully to try to revive her, Joshua finally said he was going to take her to the
23 hospital. (TR (Doc. 42-7) at 206- 213.) Stern told Joshua and Michele to tell the hospital
24 “that she fell from the bed and got knocked out.” *Id.* at 214.

25 At the hospital, K.F. presented on the verge of death, with apnea requiring a
26 breathing tube because there was minimal brain function, dilated pupils, slow heart rate
27 because her body was shutting down. (PCR EH (Doc. 192-6) at 19.) She would die the
28 next day. Working backwards, the Court assesses whether the new evidence about LMF

1 would “more likely than not” cause each juror, considering all the evidence then and
2 now, to find there was reasonable doubt and acquit Stern.

3 Joshua testified that on weekends, he usually watched the kids, including K.F.,
4 because he was around. On the Friday before K.F. died, his uncle, Stern’s brother, came
5 over and he and Stern went out, leaving Joshua to watch the kids because Michelle was
6 getting her hair done. Joshua described K.F. as acting sick on Friday. And on Saturday,
7 he had the kids outside playing and K.F. was acting sick. *Id.* at 201-202. She would just
8 sit there, wherever he sat her down. (TR (Doc. 42-7) at 203.) By Sunday morning, she
9 just kept laying down and falling asleep. *Id.* at 205. Mid-morning, she was taken to the
10 hospital near death.

11 Joshua testified that on Friday, “definitely a different Friday,” *id.* at 201, he
12 walked into the living room where he found Stern administering mouth-to-mouth
13 resuscitation. Stern and K.F. had been alone in the living room, and Stern told Joshua
14 that he had “tossed” K.F. into a cushioned living room chair and she passed out. Stern
15 asked Joshua to help him revive her by sprinkling cold water on her face. Stern told
16 Joshua to not tell anyone what had happened. Joshua testified that K.F. began acting sick
17 after this incident. *Id.* at 197-201.

18 Joshua testified that about a week before that, K.F. fell off of Joshua’s bed, but she
19 seemed fine after that. *Id.* at 194-197.

20 The evidence reflects that K.F. fell off Joshua’s bed 12 to 14 days prior to her
21 death, and she seemed fine after her fall. She was knocked unconscious by Stern 8 days
22 prior to her death, and began exhibiting symptoms of deterioration. She was found
23 unconscious while alone with Stern again on the day she was taken nearly dead to the
24 hospital. The new LMF evidence is that some short falls, in extremely rare
25 circumstances, can result in periods of lucidity which are generally 24 hours but can be
26 up to 72 hours, and then ultimately result in death. There is no credible evidence in the
27 record that there was any short fall within 72 hours prior to K.F.’s being taken to the
28 hospital on November 13, 1993, on the verge of death.

1 The lucid period, here, was approximately two weeks before K.F. presented near
2 death at the hospital, and the period of deterioration lasted approximately eight days.
3 Neither of these scenarios fits within the confines of Petitioner’s expert witnesses’
4 testimony for lucid intervals.

5 This case is like *Gimenez* because there is additional “damning” non-expert
6 testimony supporting the conclusion of guilt. (R&R (Doc. 198) at 22.) K.F. had
7 numerous suspicious blunt-force injuries to her brain, which were of different ages.
8 *Supra*. “The state presented evidence that Defendant was a verbally and physically
9 abusive parent.” (State Response, Ex. AA: AZ Superior Court Ruling (Doc. 192-1) at 2-3
10 (citing trial testimony)). The testimony reflected that Stern told several different
11 accounts of how K.F. was injured, *id.* at 3, and told Joshua to tell authorities different
12 untrue accounts of what happened, *Id.* at 4, including that she fell off the bed. *Supra*.
13 Stern was the only person with K.F. both time she was found unconscious. *Supra*.
14 Finally, the testimony reflected Stern did not want to take K.F. to the hospital. (State
15 Response, Ex. AA: AZ Superior Court Ruling (Doc. 192-1) at 2-3 (citing trial
16 testimony)). *Id.* at 3.

17 CONCLUSION

18 After de novo review of the issues raised in Petitioner’s Objections, this Court
19 agrees with the recommendation of the Magistrate Judge in her R&R to dismiss this
20 Petition, with prejudice. The Court finds that more probably than not in light of all the
21 evidence, including the new LMF evidence, no reasonable juror would have reasonable
22 doubt about Stern’s guilt. This Court is not persuaded that every juror would have voted
23 to acquit him based on this new evidence. The Court finds that Stern does not pass

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1 through the actual-innocence gateway to excuse his late filed Petition. Stern cannot avoid
2 dismissal of his Petition..

3 **Accordingly,**

4 **IT IS ORDERED** that after a full and independent review of the record, in respect
5 to the objections, the Magistrate Judge's Report and Recommendation is accepted and
6 adopted as the findings of fact and conclusions of law of this Court.

7 **IT IS FURTHER ORDERED** that the Petition is time barred by the AEDPA
8 statute of limitations, 28 U.S.C. § 2254(d)(1), and dismissed with prejudice.

9 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter Judgment
10 accordingly.

11 **IT IS FURTHER ORDERED** that the Motion for Extension of Time to File
12 Objection is DENIED AS MOOT.

13 **IT IS FURTHER ORDERED** that the Petitioner's two emergency motions (Doc.
14 201, 202) are DENIED.

15 **IT IS FURTHER ORDERED** that the Clerk of the Court shall remove Brick
16 Storts as counsel of record for Petitioner and let the docket reflect that Petitioner is now
17 proceeding pro se.

18 **IT IS FURTHER ORDERED** that in the event Petitioner files an appeal, he may
19 proceed *in forma pauperis* and the Court grants a certificate of appealability. *See Slack v.*
20 *McDaniel*, 529 U.S. 473, 484 (2000).

21 Dated this 20th day of September, 2016.

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25 Honorable David C. Bury
26 United States District Judge
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