

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SHANE NEWMAN,
Petitioner,
v.
WARDEN,
Respondent.

Case No. CV 16-04198 BRO (RAO)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings, all of the records and files herein, and the Magistrate Judge's Report and Recommendation. Further, the Court has engaged in a *de novo* review of those portions of the Report and Recommendation to which Petitioner objected.

Petitioner argues for the first time in his Objections that he is entitled to equitable tolling of the AEDPA limitations period because he is actually innocent. (Objections at 1-2.) The Court is not required to consider allegations raised for the first time in objections. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). Notwithstanding Petitioner's failure to raise this claim in a timely manner, the Court determines that it is without merit, and Petitioner is not entitled to equitable tolling.

1 A petitioner may qualify for an equitable exception to AEDPA's limitations
2 period by proving actual innocence. *McQuiggin v. Perkins*, --- U.S. ---, 133 S. Ct.
3 1924, 1928, 185 L. Ed. 2d 1019 (2013). But the actual innocence exception has an
4 extremely high threshold requirement which is seldom met. *Id.* To be credible, a
5 petitioner's claim of actual innocence must be supported "with new reliable
6 evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness
7 accounts, or critical physical evidence—that was not presented at trial." *Schlup v.*
8 *Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1994). "[A] petitioner
9 does not meet the threshold requirement unless he persuades the district court that,
10 in light of the new evidence, no juror, acting reasonably, would have voted to find
11 him guilty beyond a reasonable doubt." *McQuiggin*, 133 S. Ct. at 1928 (alteration
12 in original) (citation omitted).

13 In support of his claim of actual innocence, Petitioner identifies two
14 witnesses, who were not called at trial by defense counsel, and states that "[h]ad
15 they testified, they would have sworn under oath to petitioner's innocence."
16 (Objections at 2.) Petitioner further states that his counsel knew of this evidence,
17 but did not present it. (*Id.* at 1.) Petitioner's conclusory statements in support of
18 his actual innocence claim are insufficient to meet the high threshold for qualifying
19 for this form of equitable tolling. While Petitioner identifies the two witnesses who
20 allegedly would establish his innocence, he fails to describe what their testimony
21 would have been had they testified, why the witnesses are reliable, or how their
22 testimony would necessarily show that, in light of this new evidence, no reasonable
23 juror would have convicted him when compared with the evidence presented at
24 trial. Accordingly, Petitioner has failed to carry his burden of showing that he is
25 entitled to equitable tolling based on actual innocence.


26 The Court accepts the findings and recommendations of the Magistrate
27 Judge.

28 ///

1 IT IS HEREBY ORDERED that Respondent's Motion to Dismiss the
2 Petition as untimely be granted and that judgment be entered denying the Petition
3 for Writ of Habeas Corpus and dismissing this action with prejudice.

4 IT IS SO ORDERED.

5
6 DATED: December 5, 2016

7 By: 
8 _____
9 Honorable Beverly R. O'Connell
10 United States District Court Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28