

1 Second, petitioner contends that the Court should have held an evidentiary
2 hearing on his claims to revisit the credibility of the witnesses. (Objections at 2.)
3 An evidentiary hearing would have been inappropriate because petitioner did not
4 meet his burden under 28 U.S.C. § 2254(d) of showing that the state court’s
5 decision resulted in a decision that was contrary to, or involved an unreasonable
6 application of, clearly established federal law; or resulted in a decision that was
7 based on an unreasonable determination of the facts. *See Cullen v. Pinholster*, 563
8 U.S. 170, 181-85 (2011). In any event, the credibility of the witnesses was not
9 central to any of petitioner’s three claims, which were (1) error in the admission of
10 evidence, (2) Eighth Amendment error, and (3) instructional error.

11 Third, petitioner claims that he was not guilty by reason of his mental and
12 physical defects. (Objections at 3-4.) This claim is surfacing for the first time in
13 petitioner’s Objections to the Report and Recommendation. Moreover, it is
14 unexhausted, unsupported by any competent evidence, and unrelated to any of
15 petitioner’s original three claims. Petitioner had the ability to exhaust and raise this
16 claim before his federal habeas proceeding ever began. Under these circumstances,
17 the Court declines to consider it. *See United States v. Howell*, 231 F.3d 615, 623
18 (9th Cir. 2000) (district court may decline to consider factual allegations raised for
19 the first time in objections to a magistrate judge’s report and recommendation
20 where the specific allegations were available before the magistrate’s proceedings
21 ever began); *Greenhow v. Secretary of Health & Human Services*, 863 F.2d 633,
22 638 (9th Cir. 1988) (“[A]llowing parties to litigate fully their case before the
23 magistrate and, if unsuccessful, to change their strategy and present a different
24 theory to the district court would frustrate the purposes of the Magistrates Act. We
25 do not believe that the Magistrate Act was intended to give litigants an opportunity
26 to run one version of their case past the magistrate, then another past the district
27 court.”), *overruled on other ground by United States v. Hardesty*, 977 F.2d 1347,
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1 1348 (9th Cir. 1992).

2 In sum, petitioner's objections are overruled.

3 The Court accepts the findings and recommendations of the Magistrate
4 Judge. IT THEREFORE IS ORDERED that (1) the Report and Recommendation
5 is accepted and adopted; and (2) Judgment shall be entered denying the Petition and
6 dismissing this action with prejudice.

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8 DATED: June 21, 2017

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11 VALERIE BAKER FAIRBANK
12 SENIOR U.S. DISTRICT JUDGE
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