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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR MORALES,
Petitioner,
v.
STU SHERMAN, et al.,
Respondents.

No. 2: 12-cv-0544 TLN KJN P
ORDER and
FINDINGS & RECOMMENDATIONS

Introduction

Petitioner is a state prisoner, proceeding with counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 conviction for attempted murder and assault with a firearm, personal use and discharge of a firearm, and infliction of great bodily injury. Petitioner is serving a sentence of 32 years to life.

This action is proceeding on the amended petition filed August 22, 2012. (ECF No. 17.) The amended petition contains four claims: 1) the trial court erred by excluding evidence of third party culpability; 2) Brady error; 3) ineffective assistance of trial counsel; and 4) ineffective assistance of appellate counsel. (Id.)

On November 17, 2013, respondent filed a motion to dismiss on the grounds that this action is barred by the statute of limitations. (ECF No. 17.) On June 17, 2013, the undersigned recommended that respondent’s motion be granted. (ECF No. 31.)

1 On September 17, 2013, the Honorable Lawrence K. Karlton issued an order adopting the
2 June 17, 2013 findings and recommendations in part. (ECF No. 34.) Judge Karlton found that
3 claim one was not barred by the statute of limitations and denied respondent's motion to dismiss
4 this claim. (Id.) As for the remaining three claims, Judge Karlton granted the motion to dismiss
5 without prejudice to petitioner's right to seek reconsideration as set forth in the order. (Id.) In
6 particular, Judge Karlton referred this action to the Office of the Federal Defender for the purpose
7 of determining whether evidence existed to support a claim of actual innocence which would
8 overcome the statute of limitations bar. (Id.)

9 On June 6, 2014, petitioner filed a motion for an evidentiary hearing in support of his
10 claim for actual innocence and a motion for witness immunity. (ECF Nos. 45, 46.) Petitioner
11 moves for an evidentiary hearing as to his untimely ineffective assistance of counsel claim and his
12 related claim of actual innocence. In the amended petition, petitioner alleges that trial counsel
13 was ineffective for failing to conduct certain pretrial investigation. (ECF No. 17 at 5.) Petitioner
14 alleges that trial counsel failed to investigate the 911 call that was made after the shooting. (Id. at
15 8.) The 911 caller described the shooter as Black. (Id. at 7.) Petitioner is Hispanic. (Id.)
16 Petitioner argues that trial counsel's failure to investigate the 911 call deprived him of a third-
17 party defense. (Id. at 5.)

18 Also pending is petitioner's motion for witness immunity (ECF No. 46), filed in support
19 of his motion for an evidentiary hearing.

20 On November 20, 2014, a hearing was held regarding petitioner's pending motions.
21 David Porter and Heather Williams appeared on behalf of petitioner. Galen Farris appeared on
22 behalf of respondent. After carefully considering the record, the undersigned recommends that
23 petitioner's motion for an evidentiary hearing and motion for witness immunity be denied.¹

24 Good cause appearing, petitioner's motion for a one day extension of time to file his reply
25 brief (ECF No. 66) is granted.

26
27 ¹ The undersigned is troubled by petitioner's age when he committed the offenses (15 years old)
28 and his lengthy sentence (32 years to life). However, these circumstances may not be considered
in evaluating the pending motions or the merits of petitioner's actual innocence claim.

1 Factual Background

2 The opinion of the California Court of Appeal contains a factual summary. After
3 independently reviewing the record, the undersigned finds this summary to be accurate and
4 adopts it herein:

5 BACKGROUND

6 The People's case was straightforward: The victim had had a long-
7 running feud with the Morales family, and eventually defendant, a
8 younger son in that family, shot the victim. The defense theory was
9 that the victim was drunk and could not identify the person who
10 shot him, but used the occasion of being shot to blame defendant, as
11 part of that family feud. The only evidence that defendant was the
12 shooter came from the victim's statements and testimony, although
13 the victim's daughter made a statement corroborating defendant's
14 presence on the occasion of the shooting.

11 The victim testified he knew defendant, in part because defendant's
12 older brother Steven had had an affair with the victim's ex-wife,
13 which caused the victim and his ex-wife to divorce. This affair had
14 made the victim angry, and after the victim made criminal threats
15 against his wife, which he claimed were unrelated to the affair, she
16 obtained a restraining order, and their children went to live with the
17 Morales family for several months.

15 After the victim and his ex-wife reconciled for a time, Steven
16 Morales ran them off the road with his car, with the aid of his
17 brother, Johnnie Morales, as a result of which Steven Morales was
18 sent to prison. The victim's stepdaughter had had children with
19 Hector Morales, another brother of defendant, and the victim
20 disapproved of this relationship. The victim testified that about four
21 or five years prior, he got into a fistfight with several members of
22 the Morales family, but not with defendant, and that Steven
23 Morales "shot at me that day twice." The victim testified he was
24 "still feuding to this day" with the Morales family.

21 On the evening of January 25, 2006, the victim was on his porch,
22 drinking with friends, when defendant, a "Hispanic," arrived with a
23 group of about six or seven Black male teenagers. After words were
24 exchanged and the victim threatened to sic his dog on them, the
25 group left. However, defendant threatened to come back in 20
26 minutes and shoot the victim. The victim called his ex-wife and told
27 her defendant had threatened to shoot him and said, "If anything
28 happens to me, make sure my family gets justice." Later, defendant
returned and called out to the victim. The victim saw defendant had
his hands through the fence, holding something. The victim turned
away, and was shot in the back.

27 The victim testified that in the exchange of words he had with
28 defendant prior to the shooting, he referred to defendant's brother
Steven as defendant's "sister." He also testified that when he first
saw the group of teenagers, with one Hispanic standing alone, he

1 called out that he knew “that’s not Morales,” but he did not mean
2 he knew it was not defendant, he meant if that person was a
3 Morales family member, there would “be some problems right
4 there[.]”

5 The victim told the first officer on the scene that defendant was the
6 shooter, and the next day the victim identified defendant from a
7 photographic lineup. The victim described defendant to the officer
8 as a “male Hispanic, 14 to 15 years old, 120 pounds, wearing all
9 black clothing.” The victim also gave this officer a fuller statement
10 at the hospital, identifying defendant as the shooter and stating that
11 defendant, in the company of about five male Black juveniles, had
12 threatened to shoot him about 20 minutes earlier.

13 The victim testified he had had about two 40-ounce malt liquors
14 that evening, starting about 7:00 p.m. and ending when he was shot
15 about two hours later, but he later conceded, “It’s been so long.
16 Might have been the fourth one, might have been the fifth one. I
17 don’t know. I wasn’t counting them.” A doctor noted in the hospital
18 records that the victim was intoxicated.

19 The victim had seen one of the Black “kids” before: That youth had
20 been bothering Robert, one of the victim’s drinking companions,
21 and was a “troublemaker in the neighborhood.” On Thanksgiving
22 2006, after the shooting, the victim was visiting Robert, when
23 defendant’s brother Johnnie and his family pelted the victim’s car
24 with beer bottles and “[t]hey was kicking the doors, trying to pull
25 us out, scratching, screaming, hollering, all kind of stuff.”

26 The victim’s daughter testified she saw her father arguing with a
27 group of teenagers consisting of Blacks and one “Mexican.” She
28 heard one teenager say, “[W]e’re coming back with a nine
millimeter.” She had not identified any of the teenagers as
defendant, whom she knew, but her father told her defendant was
the one who threatened him. In part, her 911 call transcript reads
“my dad was arguing with some black guys. And they said that they
were gonna bring a .9mm and come and shoot him.” She testified
she said this because most members of the group were Black. A
peace officer testified that on the night of the shooting, the victim’s
daughter identified defendant as the lone Hispanic in the group.

Defendant did not testify at trial.

People v. Morales, 2010 WL 3245400 at *1-2 (2010).

Legal Standard for an Evidentiary Hearing

In assessing whether an evidentiary hearing is warranted, the court considers whether such a hearing “would produce evidence more reliable or more probative” with regard to petitioner’s assertion of actual innocence than the declarations before the court. Griffin v. Johnson, 350 F.3d 956, 966 (9th Cir. 2003).

1 Legal Standard for Actual Innocence

2 The Supreme Court has found that a federal court may entertain an untimely claim if a
3 petitioner makes a showing of actual innocence:

4 Actual innocence, if proved, serves as a gateway through which a
5 petitioner may pass whether the impediment is a procedural bar, ...,
6 or as in this case, expiration of the statute of limitations. We
7 caution, however, that tenable actual-innocence gateway pleas are
8 rare: “[A] petitioner does not meet the threshold requirement
9 unless he persuades the district court that, in light of the new
10 evidence, no juror, acting reasonably, would have voted to find him
11 guilty beyond a reasonable doubt.” Schlup, 513 U.S., at 329, 115
12 S.Ct. 851.

13 McQuiggin v. Perkins, 133 S.Ct. 1924, 1928 (2013).

14 A petitioner must support his claim of actual innocence “with new *reliable* evidence—
15 whether it be exculpatory scientific evidence, *trustworthy* eyewitness accounts, or critical
16 physical evidence—that was not presented at trial.” Schlup v. Delo, 513 U.S. 298, 324 (1995)
17 (emphasis added). The evidence need not be newly discovered, but it must be “newly presented.”
18 See Griffin v. Johnson, 350 F.3d 956, 961–63 (9th Cir. 2003). He must “show that it is more
19 likely than not that no reasonable juror would have convicted him in light of the new evidence.”
20 Schlup, 513 U.S. at 327.

21 In its inquiry, the reviewing habeas court “consider[s] all the evidence, old and new,
22 incriminating and exculpatory, admissible at trial or not.” House v. Bell, 547 U.S. 518, 538
23 (2006) (internal quotation marks omitted). And on this complete record, the court makes a
24 “probabilistic determination about what reasonable, properly-instructed jurors would do.” Id.
25 (quoting Schlup, 513 U.S. at 329).

26 “Unexplained delay in presenting new evidence bears on the determination whether the
27 petitioner has made the requisite showing.” McQuiggin, 133 S.Ct. at 1935. An eleventh hour
28 affidavit from a fellow inmate, friend or relative of the accused has limited probative value in
considering actual innocence. House, 547 U.S. at 552. In other words, new affidavits are not
simply accepted at face value. Smith v. Baldwin, 510 F.3d 1127, 1142 (9th Cir. 2007) (en banc).

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1 Petitioner's Declarations

2 In the motion for an evidentiary hearing, petitioner argues that the declarations set forth
3 herein undermine the confidence in the outcome of petitioner's trial because they directly
4 impeach Troy Herman's statements and testimony, which was the only evidence that petitioner
5 was the shooter. Petitioner seeks to call these three declarants and petitioner as witnesses at an
6 evidentiary hearing. The undersigned sets forth these declarations herein.

7 In his declaration, petitioner states as follows:

8 1. I am the defendant in the above case and the Petitioner in this
9 case. If called as a witness, I am competent to testify to the
information set forth in this declaration.

10 2. All matters here I would have testified to at my trial except my
11 lawyer Jo Ann Harris said for me not to testify even though I
wanted to, and I would testify the same to them now.

12 3. When Troy Herman, the victim in the case against me, was shot
13 on January 25, 2006, I was 15 years old (born December 1990) and
there was a probation violation warrant out for my arrest. Because I
14 knew the warrant was out, I did not want to be out after dark
because I thought it was more likely I would get stopped and
15 arrested.

16 4. In the afternoon of January 25, I was hanging out with my
cousin, Marquis McAfee, and Jaronn Lee, both a few years older
than me, and 2 other teenagers, one my age (I think his name is
17 Jeffrey Fulmer) and the other a year or two younger than me. All
the others are African-America; I am Hispanic. Marquis and Jaronn
18 were both on the football team at Kennedy High School. I was
wearing a black hoodie and was not much shorter than I am now. It
19 was rainy on that afternoon.

20 5. In the afternoon, Marquis and I walked to the mother of Jaron's
21 baby's house by Yreka Avenue. We connected up with the two
other teens and were walking south on Woodbine Avenue planning
22 to go to a fast food restaurant, like a Kentucky Fried Chicken, on
Florin Road. As we crossed Yreka Avenue and walked by a
23 wrought iron fence, I was walking in the street, almost to the other
side of the street. Three men came out from the house right on the
southeast corner, talking "trash." They seemed to know the boy I
24 think was Jeffrey Fulmer and said something like a troublemaker
about him. One of the men said something about touching his fence
25 – we weren't touching his fence. Then the man I later found out
was Troy Herman asked where my "little sister" was. Though I
26 have sisters, it didn't make sense and realized he was talking about
my brother Steven, and this was Troy Herman talking. My brother,
27 Steven, and Troy's wife, Tereza, had an affair which caused Troy's
and Tereza's divorce. Then Troy went to the gate and acted like he
28 was going to let his dogs out, and we all started running east on

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Yreka towards the light rail station.

6. That afternoon, I never said anything about a gun and never saw anyone I was with have a gun that day.

7. We took the light rail from the Florin Station to downtown by the K Street Mall. We went wandering around. Marquis called his then-girlfriend, Janay, and she was there at the Mall to take us home in her grey Toyota Rav4 –I was in the back seat with all the other guys except Marquis who was in the passenger seat. Janay took me to my mom’s at Willowick and Florin Road/Meadowview area, by Goethe Middle School. I stayed at my mom’s for a while, then, my brother Steven’s girlfriend Desiree, came to get me to take me where I was staying with her, Steven, and their baby in West Sacramento.

8. As Desiree was driving me from my mom’s house to where we were living, just as we got onto I-5, my mom called me on my cell phone to let me know the police had just been there and were looking for me about some shooting. After we hung up, I called Marquis on my cell phone and asked him if he knew what was going on. He said he had gone back to that area later and “Don’t worry about it.” I asked what he meant. He said something like, “I took care of it and I smacked him. Don’t worry. You’ll beat it.” I told him he needed to tell the truth whatever happened. That was the last time I ever talked with Marquis.

9. I was arrested in March 2006, about a month and a half later.

10. At no time during the events I describe here or that day did I say I was going to shoot anyone; I didn’t have any gun and I didn’t shoot anyone.

(ECF No. 45 at 30-33.)

In his declaration, Robert Byrd states,

2. I know Troy Herman [the victim]. I have known him for a long time.

3. On the day Troy was shot, in January 2006, I was with Troy. I stopped by his house at 7035 on Woodbine Avenue with my nephew, Paul Thomas, around 3:00 p.m. and started to drink with Troy.

4. Around 5:00 p.m., I remember a group of kids went by Troy’s house. One of the kids said something to Troy. I do not recall which kid spoke or what he said. There were a total of three kids. I think the kids might have been all African-American or Mexican. The group of kids had issues with Troy. I think the whole group had issues with Troy, not just one person in the group. I do not remember if any of the kids in the group used Troy’s name.

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1 5. One of the kids told Troy he would come back and shoot Troy's
2 ass. I do not know which kid said that to Troy. I do not know any
3 of the kids. I have not seen any of the kids around this
4 neighborhood. Their argument lasted a few minutes. The kids then
continued walking down Yreka Avenue. The kids did not run
away; they walked away.

5 6. Two hours later Troy was shot. It was dark when Troy was shot.
I am not sure if it was raining when Troy was shot.

6 7. Troy was standing by the pole on the front porch. Attachment C
7 # 1. Troy was leaning against the pole with his right shoulder.
Troy's back was to Yreka Avenue. Troy was holding a beer in his
8 hand before he was shot.

9 8. There was no warning before Troy was shot in the back. I did
10 not see Troy look over his shoulder. I did not see Troy move his
11 head. Troy was talking to both Paul and I before he was shot. I did
not hear Troy's name being called before Troy was shot; Troy was
just shot.

12 9. The shot came from the fence area on Yreka Avenue.
Attachment C, # 2. I knew it came from that area because that's
13 where the sound of the shot came from. Paul and I then went out to
14 the corner of Woodbine and Yreka Avenues and looked down the
street. I did not see the shooter. Whoever shot Troy was gone by
the time I looked down Yreka.

15 10. I have not spoken to Troy about what happened that night. I
16 only spoke [sic] him one time I think. He did not tell me much. I
do not think Troy wants to relive that night.

17 11. I drank about six 40 ounce beers that day. I was drunk when
18 the shot was fired. Troy drank about six to seven 12 ounce beers
that night. I am not sure how much Paul drank that night.

19 (Id. at 22-23.)

20 In his declaration, Paul Thomas states,

21 2. I do not know Troy Herman. My uncle, Robert Byrd, is friends
22 with Troy. Robert was with Troy the night Troy was shot, around
January 2006.

23 3. I was at Robert's house around noon the day Troy was shot.
24 Around 3:00 p.m., Robert and I went to Troy's house. I am not
sure where Troy lives. Troy lives near my uncle. My uncle lives
25 on 27th St in South Sacramento.

26 4. Around 5:00 p.m., 4 to 5 kids were walking down the street.
27 One of the kids said something to Troy about Troy's sister. Troy
told the kids to get lost. This lasted only a few minutes. I think the
kids were African-American.

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1 5. I do not remember if any of the kids said something to Troy as
2 they walked away. The kids did not run away after the one kid
talked with Troy; the kids walked away.

3 6. Around 30 to 60 minutes later, one of the kids came back and
4 shot Troy.

5 7. Troy was about to sit down on the porch railing when he was
6 shot. Troy's back was to Yreka Avenue when he was shot about to
7 sit down on the railing. Attachment B, # 1. Troy was shot in the
8 back. I was sitting on the porch next to Troy. Attachment B, # 2.
9 Troy was to my left.

10 8. I did not hear any warning. I did not hear Troy's name being
11 called out before he was shot. I did not see Troy look over his
12 shoulder before he was shot. Troy was just about to sit on the rail
13 when he was shot.

14 9. After the shot, I then ran inside and told Troy's daughter,
15 Sabrina, to call 911. I was on parole and I was not supposed to
16 drink, so I took off. I was caught by the police on Woodbine a few
17 blocks from Troy's house.

18 10. I did not see the shooter. Before I left, I did try to see which
19 direction the shooter ran, but I did not see anyone running away.

20 11. I have not spoken to Troy about that night. Troy is friends with
21 my uncle, not me.

22 (Id. at 26-27.)

23 In his declaration, Jerome Day states,

24 2. On January 25, 2006, the day Troy Herman was shot, I was
25 living at 7044 Woodbine Ave, Sacramento, California, 95822.

26 3. I know Troy Herman. Troy was my neighbor and friend in
27 January 2006. We lived across the street from each other.

28 4. I was at Troy's house at 7035 Woodbine Avenue when he was
shot in the back.

5. I was drinking with Troy for about 90 minutes before Troy was
shot. During those 90 minutes, Troy told me about an argument he
had with some kids. Troy told me the argument happened three to
four hours before I showed up. Troy told me that one of the kids he
had a problem with earlier that day said he would come back and
shoot Troy. I am not sure if he told me which person in that group
said that to him. He probably did tell me but I cannot remember.

6. I was standing in front of Troy when he was shot. I was standing
on the lawn. Attachment A, # 1. Troy was leaning against a pole
on the front porch. Attachment A, # 2. Troy's back was to Yreka
before he was shot. My back was to Woodbine Avenue.

1 7. Before Troy got shot, I remember hearing something. I do not
2 recall what was said.

3 8. I do not recall if Troy's name was said before Troy was shot.

4 9. I do not recall if Troy looked over his shoulder towards Yreka
5 before Troy was shot.

6 10. Now, eight years later, I am not sure who shot Troy. The
7 information I gave to the police dispatcher right after Troy was shot
8 could be correct. I called 911 right after Troy was shot. I told the
9 dispatcher the shooter was African-American. I know the person
10 was not white. I told the dispatcher the person was African-
11 American because the area by where I think the shot came from
12 was dark. Attachment A, # 3. I only saw the shooter from the
13 corner of my eye.

14 11. Before I called the dispatcher, I ran out to the corner of Yreka
15 and Woodbine and I looked east down Yreka. The person who shot
16 Troy ran down that street. By the time I was at the corner, the
17 person I believe shot Troy was 500 feet away and I could not see
18 any more where that individual was running. Yreka Avenue was
19 very dark.

20 12. I recognize my voice on the recording you played. The
21 recording is of me calling the police dispatcher the night that Troy
22 was shot in the back.

23 ***

24 14. I drank about two to three 40 ounce beers in the 90 minutes
25 before Troy was shot. I did not keep tabs on how much Troy was
26 drinking.

27 15. Troy had another friend over that night. I do not know who
28 that friend was.

(ECF No. 60-1 at 1-2.)

Relevant Trial Testimony

In order to put petitioner's declarations in context, the undersigned sets forth the following relevant trial testimony.

The victim, Troy Herman, testified that on January 25, 2006 at approximately 8:45 to 9:00 p.m., he was sitting on his front porch with his friends, Robert and Paul. (RT at 90.) At around that time, he saw the group of six or seven teenagers walking toward his house. (Id. at 92-93.) One of the teenagers was Hispanic and the rest were Black. (Id. at 93.) Petitioner later identified the Hispanic teenager as petitioner. (Id. at 100.) Petitioner and Herman started arguing. (Id. at

1 103.) When petitioner ran away, petitioner shouted, “I’m going to come back and shoot you in
2 twenty minutes.” (Id. at 108, 112.) The group of teenagers ran toward the light rail station. (Id.
3 at 109.) Five minutes after the teenagers left, petitioner called his ex-wife, Tereza, who had been
4 married to petitioner’s brother. (Id. at 109, 113.) Herman told her that petitioner had threatened
5 to come back and shoot him in twenty minutes. (Id. at 111.) Herman then went back to the
6 porch. (Id. at 113.) Herman’s friend Jerry had joined the group. (Id. at 114.)

7 Herman later heard petitioner call out his name. (Id. at 118.) When Herman heard the
8 voice, Herman was standing on the corner of his porch, facing Woodbine. (Id.) Herman heard
9 the voice coming from the right. (Id.) Herman looked over his shoulder toward the voice then
10 turned back to get away. (Id. at 119.) Herman saw petitioner at the corner of the fence line. (Id.
11 at 119-20.) Herman heard a loud noise and was shot. (Id. at 123.) Herman testified that the
12 shooting occurred between 30 and 40 minutes after the first incident. (Id. at 220.)

13 Sabrina Herman, Herman’s daughter, testified that around 9:00 p.m. on the night of the
14 shooting, she was with a friend who lived next door to Herman. (Id. at 268.) Sabrina was sitting
15 in a car parked in the driveway. (Id. at 269.) She heard Herman arguing with other people. (Id.
16 at 270.) Sabrina looked over her shoulder to see the people arguing and saw “I think like ten
17 people” near Herman’s house. (Id. at 271.) Sabrina testified that the group was probably
18 teenagers. (Id. at 272.) One of the teenagers was Hispanic and the rest were Black. (Id.) She
19 heard one of the teenagers say that they were coming back with a nine millimeter. (Id. at 275.)

20 After the group of teenagers left, Sabrina went to Herman’s house. (Id.) Herman told
21 Sabrina that Oscar Morales had just threatened his life then he went back outside. (Id. at 275-76.)
22 Sabrina called her mother, Tereza Nieves (petitioner’s ex-wife), who told Sabrina to go inside.
23 (Id. at 275.) Sabrina then heard gunshots. (Id. at 276.) Sabrina testified that approximately ten
24 minutes passed between the time she went back into the house after returning from visiting her
25 friend until she heard the gunshot. (Id. at 277.) Sabrina then called 911. (Id. at 279.)

26 The 911 dispatcher asked Sabrina who did it. (Id. at 281.) Sabrina responded that her dad
27 was arguing with some black guys. (Id.) At trial, Sabrina testified that she said did not mention
28 the Hispanic teenager to the dispatcher because the majority of the group was Black and she was

1 shaken up. (Id. at 282.)

2 Herman’s ex-wife, Tereza Nieves, testified that on the night of the shooting, she received
3 a call from Herman in which he told her that petitioner had threatened his life. (Id. at 378.)

4 Herman told Nieves that petitioner said he had a nine millimeter for him. (Id. at 402.) Later,
5 Nieves received a telephone call from her daughter, Sabrina. (Id. at 380.) Nieves testified that
6 Sabrina told her that Herman had been arguing with kids outside and one of them was petitioner.

7 (Id. at 381.) Nieves testified that Sabrina called her again about fifteen minutes later. (Id. at
8 382.) In the second phone conversation, Sabrina told Nieves that Herman had been shot. (Id.)

9 Sacramento Police Officer Davis testified that he spoke with Sabrina Herman at about
10 9:50 p.m. on the night of the shooting. (Id. at 452.) She told Officer Davis that as she was sitting
11 in the car next door to her dad’s house, she saw a group of about ten teenagers arguing with her
12 dad. (Id. at 452-54.) Sabrina Herman told Officer Davis that there were nine Black teenagers and
13 one Hispanic teenager. (Id. at 454.) Sabrina Herman told Officer Davis that the Hispanic
14 teenager was petitioner. (Id. at 454-55.)

15 Sacramento Police Officer Gunter testified that he personally heard the shooting at 9:30
16 p.m. (Id. at 513.)

17 Newly Presented Evidence

18 In the opposition to petitioner’s motion for an evidentiary hearing, respondent argues that
19 the statements in the declarations set forth above do not qualify as “new evidence” under the
20 actual innocence exception. Respondent argues that only evidence that was either wrongly
21 excluded at trial or became available after the trial completed qualifies as new evidence under the
22 actual innocence exception. Respondent argues that the information in the declarations set forth
23 above was available before trial. The undersigned addresses this argument herein.

24 Respondent argues that the declarations of Robert Byrd, Jermone Day and Paul Thomas
25 are not “new evidence” because trial counsel was aware that they were witnesses to the shooting
26 prior to trial. Respondent cites trial counsel’s motion for bail, filed May 2, 2006, where she cites
27 the statements given by Byrd, Day and Thomas to the police. (Respondent’s Lodged Document
28 10 at 48-50.) The motion for bail gives a synopsis of the statements by Byrd, Day and Thomas:

1 Statement of Robert Byrd to Police

2 Mr. Herman, Paul, and Mr. Byrd had an argument with about five
3 to six males with *medium complexion, possibly black teenagers*
4 [emphasis in original], about one hour before the shooting occurred.
5 The reason why Mr. Herman, Paul and Mr. Byrd got into an
6 argument with them was because they were disrespecting an older
7 lady up the street.

8 “We confronted them in the middle of the street, and they started
9 doing all kinds of gang signs at us.” Mr. Byrd had no idea what the
10 symbol meant and does not remember the signs they displayed.
11 About an hour later, Mr. Byrd saw “the flare” of a gunshot and saw
12 that Mr. Herman was shot. “*I didn’t see the shooter* [emphasis in
13 original] and can’t identify any of the kids if I saw them again
14 today.”

15 Statement of Jermone Day to Police

16 January 25, 2006

17 Mr. Day was standing outside with Mr. Herman, having some beers
18 when a shot from a gun went off. Mr. Day only saw it from the
19 corner of his eye, and saw that it was “*a dark complected and dark*
20 *clothed man.*” [Emphasis in original.] “The man” ran eastbound
21 on Yreka from Woodbine. Mr. Day did not get a good look at him
22 and would not be able to identify him, if Mr. Day saw him again.
23 The reason Mr. Day was out drinking [in] Mr. Herman’s yard
24 because “he” had a conflict with someone earlier in the day and
25 “they” told Mr. Herman that “they” would come back with guns.
26 Mr. Herman just said that he had “had problems with some
27 Mexican kids.” Mr. Herman did not tell Mr. Day the details of the
28 problems.

Statement of Paul Thomas to Police

January 25, 2006

Sacramento Police Officer Mr. Young, badge 0521 interviewed Mr.
Thomas. Officer Young stated that Thomas had been drinking and
Thomas’ statement “was general and vague.”

Mr. Thomas was at the shooting scene when the shooting occurred.
About thirty minutes before police interviewed Mr. Thomas, he was
sitting on the front porch of Mr. Herman’s home. “[Mr. Thomas]
had been drinking beer for a while.” “About six, what appeared to
be *black juveniles* [emphasis in original], were in front of the house.
They were talking a bunch of trash to Troy. They were saying
something about someone’s girlfriend or something. Troy was
yelling back at them. He said something like, ‘Well, what are you
going to do?’ One of the kids, I’m not sure which one, said
something about a gun. They all took off walking [eastbound] on
Yreka.” About twenty to thirty minutes later, while Mr. Thomas
“was still hanging out on the porch,” Mr. Thomas heard a gunshot.
Mr. Thomas did not see who shot or where it came from [emphasis

1 in original], but Mr. Herman fell down on the ground. Mr. Thomas
2 could tell Mr. Herman had been shot. Mr. Thomas stayed a little
while and then left, because he is a wanted parolee.

3 (Respondent's Lodged Document 10 at 48-50.)

4 Respondent also cites the preliminary hearing transcript where defense counsel attempted
5 to cross-examine Sacramento Police Officer Michael Gunter about his contact at the scene with a
6 few individual who were present, although neither Byrd, Thomas or Day are identified by name.
7 (Id. at 76-78, 83, 87, 95.) Respondent also observes that Robert Byrd was listed on the
8 prosecutor's witness recognition forms dated September 14, 2006, August 14, 2008, September 8,
9 2008, October 22, 2008 and November 5, 2008. (Id. at 147, 157, 160, 161, 469.) Paul Thomas
10 was listed on the prosecutor's witness recognition forms dated October 8, 2008, October 22,
11 2008, November 5, 2008, and November 17, 2008 (Id. at 158, 160, 161, 179.)

12 In Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003), Justice Wallace addressed whether
13 "newly discovered" or "newly presented" evidence qualifies as new evidence under the actual
14 innocence exception to procedural default. 350 F.3d at 961-63. Justice Wallace concluded that
15 "habeas petitioners may pass Schlup's test by offering 'newly presented' evidence of actual
16 innocence." 340 F.3d at 963.

17 Respondent argues that cases decided after Griffin "confirm the view" that evidence
18 submitted in support of a showing of actual innocence must either have been wrongly excluded at
19 trial or became available only after trial, i.e., newly discovered rather than newly presented. In
20 support of this argument, respondent cites McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), Lee v.
21 Lampert, 653 F.3d 929 (9th Cir. 2011), James v. Ratman, 2013 WL 5840278 at * 8 (C.D. Cal.
22 Oct. 28, 2013), and Chestang v. Sisto, 522 Fed.Appx. 389 (9th Cir. 2013).

23 At the outset, the undersigned finds that Perkins did not address or resolve the issue of
24 whether "newly discovered" versus "newly presented" evidence qualifies under the actual
25 innocence exception. As will be discussed in more detail herein, in Lee v. Lampert, the Ninth
26 Circuit also did not address this issue.

27 In Chestang v. Sisto, the Ninth Circuit found, in relevant part, that a declaration did not
28 constitute "new evidence" of actual innocence:

1 And while Mann’s declaration may have been new as of 2004, it
2 concerns events that took place in 1993 and that were within
3 Chestang’s knowledge. That is, if Mann, not Chestang, shot the
4 victims, Chestang knew that fact on the night of the murders. He
5 nonetheless told his friends he was the shooter, turned himself in,
6 pleaded guilty, and served ten years of his prison sentence before
7 asserting that Mann was the shooter. See Perkins, 133 S.Ct. at 1935
8 (“Unexplained delays in presenting new evidence bears on the
9 determination whether the petitioner has made the requisite
10 showing.”) Assessing “how reasonable [factfinders] would react to
11 the overall, newly supplemental record,” Lee, 653 F.3d at 929, it is
12 not more likely than not that the trial court would have rejected
13 Chestang’s guilty plea or that, had Chestang gone to trial, every
14 juror would have reasonable doubt that Chestang was guilty.

15 522 Fed.Appx. 389 at * 391.

16 In Chestang, the Ninth Circuit did not explicitly find that the at-issue declaration was not
17 new evidence because the information was not discovered until after the trial. Instead, the Ninth
18 Circuit found that the petitioner’s delay in presenting the declaration rendered it unreliable.

19 The undersigned has also reviewed James v. Ratman, 2013 WL 5840278 (C.D. Cal.
20 2013), where the district court found that the petitioner had not presented “new evidence” under
21 the actual innocence exception. The district court in James v. Ratman acknowledged the Ninth
22 Circuit’s decision in Griffin, supra, noting that the issue before the Ninth Circuit in Griffin was
23 whether the petitioner had presented new evidence sufficient to overcome procedural default
24 rather than the statute of limitations. Ratman, at * 8. The district court stated that in Lee v.
25 Lampert, 653 F.3d 929 (9th Cir. 2011) (en banc), the Ninth Circuit found that the actual
26 innocence exception applies to claims barred by the statute of limitations. Id. The district court
27 noted that Lee did not mention Griffin. Id. The district stated that the Lee decision was founded
28 on the Supreme Court decision in Schlup, which applied the actual innocence exception to
procedurally defaulted claims based on “evidence claimed to have been wrongly excluded or to
have become available only after trial.” Id., quoting Schlup, 513 U.S. at 328. In other words, the
district court in James v. Ratman found that the Ninth Circuit in Lee applied the “newly
discovered” evidence test, versus the “newly presented” evidence test, to cases alleging the actual
innocence exception to time barred claims.

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1 In Lee, the Ninth Circuit considered three pieces of “new” evidence: 1) an expert opinion
2 prepared after the trial; 2) a police report that was apparently available at the time of trial; and 3)
3 “other evidence” about a witness and another person related to the case. 653 F.3d at 943.
4 Regarding the police report, the one piece of “new evidence” available at the time of trial, the
5 Ninth Circuit stated, “Even assuming, arguendo, that the police report constituted ‘new reliable
6 evidence ... that was not presented at trial,’ Schlup, 513 U.S. at 324; Sistrunk, 292 F.3d at 673 n.4,
7 we must assess its likely impact on reasonable jurors in light of the complete record.” Id. at 945.

8 In Lee, the Ninth Circuit did not consider whether the “new” evidence was “newly
9 discovered” versus “newly presented,” as it was not required. Moreover, in the quote from Lee
10 above, the Ninth Circuit cited footnote 4 in Sistrunk v. Armenakis, 292 F.3d 669, 673 n.4 (9th
11 Cir. 2002), where the Ninth Circuit indicated that it followed the “newly presented” test:

12 Sistrunk makes a preliminary argument that the district court
13 improperly restricted the fundamental miscarriage exception by
14 concluding that the “new evidence” necessary to support a claim of
15 actual innocence under Schlup, 513 U.S. at 327, 115 S. Ct. 851,
16 must be newly available, rather than just newly presented. In
17 Schlup, the Court specifically stated that a claim of actual
18 innocence requires the introduction of “new reliable evidence-
19 whether it be exculpatory scientific evidence, trustworthy
20 eyewitness accounts, or critical physical evidence-that was not
21 presented at trial.” Id. at 324, 115 S. Ct. 851. Sistrunk's evidence is
all newly presented and, thus, may be considered in analyzing his
Schlup claim. It is true that the magistrate judge stated that only
newly-discovered evidence is properly submitted in support of a
Schlup claim. A close review of the magistrate judge's order,
however, discloses that the magistrate judge did, in fact, consider
all of the evidence offered by Sistrunk. Moreover, any
misapplication of the Schlup standard would not have affected the
outcome of this case because, as we discuss below, Sistrunk's claim
fails even considering all of the new evidence proffered.

22 292 F.3d at 673 n.4.

23 The undersigned is not persuaded by the District Court’s decision in Ratman to disregard
24 Justice Wallace’s discussion and ruling regarding this issue in Griffin.

25 Citing Griffin v. Johnson, 350 F.3d 956, 961-63 (9th Cir. 2003), in an unpublished case,
26 Walker v. McDaniel, 495 Fed.Appx. 796 (2012), the Ninth Circuit found that a letter sent to
27 defense counsel before trial constituted “new evidence” for purposes of the actual innocence
28 exception to the statute of limitations,

1 Walker was convicted of the attempted murder of David Dimas. His
2 newly presented evidence is an affidavit from his cousin Johnny
3 Walker, who actually shot Dimas. According to Johnny Walker's
4 affidavit, he sent Walker's attorney a letter before he and Walker
5 were tried. Johnny Walker avers that in his letter, he claimed sole
6 responsibility for shooting Dimas. This letter was not introduced
7 into evidence, and Johnny Walker did not testify, at Walker's trial.
8 Johnny Walker's affidavit is therefore "newly presented" evidence
9 for purposes of Schlup even though it may have been available at
10 the time of Walker's trial. See Griffin v. Johnson, 350 F.3d 956,
11 961–63 (9th Cir.2003).

12 Walker v. McDaniel, 495 Fed.Appx. 796 at *1 (9th Cir. 2012).

13 The Ninth Circuit's decision in Walker makes clear the intention of the Ninth Circuit to
14 consider "newly presented" evidence when applying the actual innocence exception to cases
15 involving time barred claims.

16 The undersigned is bound by the Ninth Circuit's decision in Griffin v. Johnson. For the
17 reasons discussed above, the undersigned finds that the declarations by petitioner, Robert Byrd,
18 Paul Thomas and Jerome Day are newly presented evidence pursuant to the actual innocence
19 exception. However, as noted above, a reviewing court does not automatically accept the newly
20 presented evidence. Instead, the case law provides for a "sliding scale" in evaluating this
21 evidence, including consideration of such factors as delays in presenting the newly presented
22 evidence and giving limited consideration to eleventh hour affidavits from friends or family of the
23 accused. See McQuiggin, 133 S. Ct. at 1935; House, 547 U.S. at 552.

24 Actual Innocence

25 *Byrd and Thomas Declarations*

26 The undersigned herein considers whether an evidentiary hearing would produce evidence
27 more reliable or more probative than the declarations by Byrd and Thomas.

28 Petitioner does not dispute that he was present with the group of teenagers who first went
to Herman's house. The declarations submitted by petitioner in support of the pending motion
seek to undermine Herman's testimony that petitioner was the person who shot him. Herman
was the only person to identify petitioner as the shooter.

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1 The declarations submitted by Byrd and Thomas contradict Herman's trial testimony
2 regarding hearing petitioner call his name, turning to see petitioner, then being shot as he turned
3 to walk away. In their declarations, both Byrd and Thomas state that they did not hear Herman's
4 name called before he was shot or see Herman look over his shoulder.

5 The problem with the Byrd and Thomas declarations, as noted by respondent, is that they
6 contain statements that are inconsistent with statements they made earlier to police as well as with
7 other evidence, which undermines their overall credibility. In his 2006 statement to police,
8 summarized in the motion for bail, Byrd stated that the initial argument involved five to six
9 males. In the declaration in support of the pending motion, Byrd now states that the initial
10 argument involved three males. In 2006, Byrd told police that the shooting occurred about one
11 hour after the initial incident. In his declaration, Byrd now states that the shooting occurred two
12 hours later.

13 Byrd's statement in his declaration that the initial incident occurred at 5:00 p.m. and the
14 shooting two hours later is also inconsistent with the credible evidence presented at trial.
15 Sacramento Police Officer Gunter testified that he personally heard the gunshot at 9:30 p.m. (RT
16 at 513.) Herman testified that the first incident occurred at between 8:45 and 9:00 p.m., and he
17 was shot 30 to 40 minutes later. Sabrina Herman also testified that the first incident occurred at
18 around 9:00 p.m., and she heard the shooting not long after that. Tereza Nieves testified that
19 approximately 15 minutes lapsed between the first call from her daughter and the second call
20 when her daughter reported that Herman had been shot. The testimony of Officer Gunter,
21 Herman, Sabrina Herman and Tereza Nieves regarding the timing of the first incident and the
22 shooting is consistent and credible.

23 The statements in Thomas's declaration regarding the number of individuals who first
24 came to Herman's house (four to five) is somewhat different from the statement he gave to the
25 police in 2006 (six). In his declaration, Thomas states that the first incident occurred at around
26 5:00 p.m., and the shooting 30 to 60 minutes later. In his 2006 statement to the police, Thomas
27 did not state when the first incident occurred, but that the shooting occurred about 20 to 30
28 minutes later. Thomas's approximation of events, i.e., the first incident occurred at 5:00 p.m. and

1 the shooting 20 to 60 minutes later, is inconsistent with the credible evidence regarding the timing
2 of events, as indicated above.

3 The undersigned also observes that Byrd's and Thomas's statements that the group of
4 teenagers walked away from Herman's house is inconsistent with Herman's testimony and
5 petitioner's statement in his declaration that the group of teenagers ran away.

6 Also, as noted by respondent, the credibility of both Byrd and Thomas is further
7 undermined by their intoxication on the night of the incident. In his declaration, Byrd admits that
8 he was drunk when Herman was shot. The officer who interviewed Thomas on the night of the
9 shooting stated that Thomas had been drinking and his statement was "general and vague."
10 While Herman had been drinking as well, as noted by respondent, the doctor who treated Herman
11 after the shooting testified that he showed no signs of disorientation or confusion. (RT at 334.)
12 In addition, Officer Gunter interviewed Herman at the hospital at 10:15 p.m. on the night of the
13 shooting. (Id. at 529.) Officer Gunter testified that he had no difficulty in communicating with
14 Herman because of his consumption of alcohol. (Id. at 535.)

15 For the reasons discussed above, the undersigned does not find that having Byrd and
16 Thomas testify at an evidentiary hearing would produce evidence more reliable or more probative
17 than their declarations. There is no indication that Byrd's or Thomas's testimony at an
18 evidentiary hearing would be significantly different from the statements in their declarations. The
19 undersigned need not hear the testimony of Byrd and Thomas at an evidentiary hearing in order to
20 evaluate the reliability and credibility of their statements. For this reason, petitioner's motion to
21 call Byrd and Thomas as witnesses at an evidentiary hearing is denied.

22 Turning to the merits of petitioner's actual innocence claim, for the following reasons the
23 undersigned cannot find that it is more likely than not that no reasonable juror would have
24 convicted petitioner in the light of the statements in the Byrd and Thomas declarations. First, for
25 the reasons discussed above, the Byrd and Thomas declarations have credibility problems.

26 Second, much of Herman's testimony regarding what happened before the shooting was
27 corroborated by other witnesses, including Byrd and Thomas. It is undisputed that petitioner was
28 with the group of teenagers who first went to Herman's house. Strong evidence was presented

1 that petitioner threatened to shoot petitioner during the first incident. Herman testified that
2 petitioner threatened to come back and shoot him during this first incident. In his declaration,
3 Byrd states that he heard one of the teenagers threaten to shoot Herman, although he could not
4 identify which one. Sabrina Herman testified that she heard one of the teenagers threaten
5 petitioner. Sabrina Herman testified that right after the first incident, Herman told her that
6 petitioner had threatened his life. Tereza Nieves also testified that petitioner called her shortly
7 after the first incident and told her that petitioner had threatened his life. In addition, petitioner
8 had a motive to shoot Herman, i.e., the family feud.

9 Taking into account Byrd's and Thomas's inconsistent statements, their intoxication,
10 Herman's consistent statements as well as the corroboration of his testimony regarding the other
11 events of the evening, and the evidence of petitioner's motive, the undersigned does not find that
12 it is more likely than not that no reasonable juror would have convicted petitioner had they heard
13 Byrd and Thomas testify.

14 The undersigned further notes that, as observed by respondent's counsel during oral
15 argument, the gravamen of petitioner's trial counsel's closing argument was to challenge
16 Herman's credibility on grounds that he was motivated to lie based on his feud with petitioner's
17 family:

18 Why are we here? This case is about a shooting, but this story is
19 about a love lost, betrayal, remorse and an effort to make amends.
20 This story is about two families torn apart. This story is about a
man whose heart was stricken with the grief because of the betrayal
of the marriage bed by his wife.

21 (RT at 760-61.)

22 After considering the evidence, the jury found Herman credible, rejecting the argument
23 and evidence that Herman was motivated to lie in revenge for his wife's betrayal. The addition of
24 the statements in the Byrd and Thomas declarations to the evidence presented would not have
25 sufficiently undermined the credibility of Herman's testimony regarding hearing and seeing
26 petitioner just before he was shot so as to change the outcome.

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1 *Day Declaration*

2 For the reasons discussed herein, the undersigned does not find that having Day testify at
3 an evidentiary hearing would produce evidence more reliable or more probative than his
4 declaration. There is no indication that Day’s testimony at an evidentiary hearing would be
5 significantly different from his statements in his declaration. The undersigned need not have Day
6 testify at an evidentiary hearing in order to evaluate the reliability or credibility of his statements.
7 In addition, for the reasons stated herein, the undersigned cannot find that it is more likely than
8 not that no reasonable juror would have convicted petitioner in the light of the statements in the
9 Day declaration.

10 Petitioner initially argued that his lawyer was ineffective for failing to investigate the 911
11 call where the caller identified the shooter as African American, thus preventing him from
12 pursuing a third party defense. In his declaration, Jerome Day states that he was the 911 caller.
13 Jerome Day also that he is not sure who shot Herman. His declaration indicates that while he
14 knows the shooter was not white, he cannot say for sure that the shooter was black. Because Day
15 could not identify the race of the shooter, it is not more likely than not that a reasonable juror
16 would have found petitioner not guilty had they heard Day’s statement clarifying his statements
17 in the 911 call.

18 The other statements in Day’s declaration do not really add much to petitioner’s actual
19 innocence claim. Day states that Herman told him that, during the first encounter, one of the
20 teenagers threatened to come back and shoot him, corroborating Herman’s testimony regarding
21 the threat. Day’s statements regarding what happened just prior to the shooting are vague and do
22 not undermine Herman’s testimony. Day stated that he heard “something” and does not recall
23 whether Herman looked over his shoulder just before being shot.

24 For the reasons discussed above, petitioner’s motion to call Day as a witness at an
25 evidentiary hearing is denied. In addition, as for the merits of petitioner’s actual innocence claim,
26 the undersigned does not find that it is more likely than not that no reasonable juror would have
27 convicted petitioner in the light of the statements in the Day declaration.

28 *////*

1 *Petitioner's Declaration*

2 For the reasons discussed herein, the undersigned does not find that having petitioner
3 testify at an evidentiary hearing would produce evidence more reliable or more probative than his
4 declaration. There is no indication that petitioner would offer additional information at an
5 evidentiary hearing. The undersigned need not hear petitioner testify in order to evaluate his
6 credibility. In addition, for the reasons stated herein, the undersigned cannot find that it is more
7 likely than not that no reasonable juror would have convicted petitioner in the light of the
8 statements in petitioner's declaration.

9 Petitioner's self-serving declaration that he did not shoot Herman does not constitute
10 sufficiently reliable evidence of his actual innocence. Schlup, 513 U.S. at 332 (court assessing
11 actual innocence claim may consider "how the timing of the submission and the likely credibility
12 of the affiants bear on the probable reliability of [the new] evidence"); see also, e.g., Abara v.
13 Palmer, 2013 WL 1182108, *9 (D.Nev. Mar.19, 2013) (rejecting self-serving assertions as not
14 bearing highest indicia of reliability in assessing claims of actual innocence); White v. Yates,
15 2010 WL 7765579, *10 (C.D.Cal. July 12, 2010) (rejecting self-serving letter from petitioner as
16 not sufficiently reliable to make a credible claim of actual innocence), adopted, 2010 WL
17 7765598 (C.D.Cal. Aug. 24, 2010).

18 Other than his own declaration, petitioner has presented no direct evidence of his actual
19 innocence. Petitioner has presented no evidence to support his claim that Marquis McAfee, or
20 anyone else, shot Herman. While Herman may have been the only witness to the shooting,
21 petitioner is the only person with direct evidence of his alleged non-involvement in the shooting.
22 Because the evidence against petitioner, as discussed above, was strong, the undersigned does not
23 find that it is more than not likely that a reasonable juror would have chosen to believe petitioner
24 over Herman and the evidence supporting Herman's testimony.

25 In addition, several statements in petitioner's declaration are not consistent with the more
26 credible evidence presented at trial. In his declaration, petitioner states that the first incident
27 happened during the afternoon. However, credible evidence at trial indicated that the first
28 incident happened at around 9:00 p.m. and the shooting at 9:30 p.m.

1 In addition, while petitioner states that he never said anything about a gun, it is undisputed
2 (as evidenced by the testimony of Herman and Sabrina Herman as well statements in Byrd's
3 declaration) that one of the teenagers at Herman's house during the first incident said something
4 about a gun, with the evidence strongly indicating that it was petitioner. Petitioner's failure to
5 address who made the statement regarding the gun undermines his credibility.

6 The undersigned also observes, as noted by respondent, that petitioner did not obtain the
7 declarations of Jaroon Lee, Jeffrey Fulmar, Janay or Desiree substantiating his whereabouts
8 during the time between the verbal altercation and shooting. Instead, he obtained the conflicting
9 declarations of petitioner's three inebriated friends, none of whom could identify the shooter.
10 The declarations submitted by petitioner from Byrd, Thomas and Day do not corroborate
11 petitioner's claim that he was not the shooter.

12 Finally, the record demonstrates that petitioner had a motive to shoot Herman. There is no
13 evidence that another person had a motive to shoot Herman.

14 For the reasons discussed above, petitioner's motion to testify at an evidentiary hearing is
15 denied. In addition, the undersigned cannot find that it is more likely than not that no reasonable
16 juror would find petitioner guilty beyond a reasonable doubt had it heard petitioner testify.

17 Schlup, 513 U.S. at 324.

18 Witness Immunity

19 In the motion for witness immunity, petitioner requests that the court grant immunity to
20 Marquis McAfee so that he may testify at the evidentiary hearing. In support of this motion,
21 petitioner states that on March 13, 2014, his present counsel and an investigator visited McAfee at
22 the California Department of Corrections Conservation Fire Camp # 45 in Santa Cruz, California.
23 McAfee has been in custody since December 2008. During this visit, McAfee refused to talk
24 about the circumstances of petitioner's case even after petitioner's counsel told him that the
25 statute of limitations had likely expired. The declaration of the Federal Defender's investigator
26 regarding his interview with McAfee states, in relevant part,

27 3. On March 14, 2014, at approximately 10:45 a.m., I interviewed
28 Marquis McAfee at the Bon Lomand Conservation Camp. Federal
Defender Heather Williams and Assistant Federal Defender David

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Porter were also present during McAfee's interview.

4. Prior to questioning McAfee, I introduced myself and explained briefly who Williams and Porter represented. Williams explained to McAfee the reason we were meeting with McAfee was Oscar Morales told us that McAfee was involved or knew who was involved in the Troy Herman shooting on January of 2006, that McAfee had a phone call with Morales after the shooting where McAfee said he had "Taken care of the situation and not to worry about the police because [Morales] would beat the charges."

5. McAfee stated Oscar, his cousin, spent that night at his house and he did not know why Morales was dragging his name into what occurred the night Herman was shot.

6. Williams then explained to McAfee that the statute of limitations on an attempted murder charge had expired and he should not worry about telling the truth about his involvement in the shooting.

7. McAfee asked us if Morales wanted him to lie about that night so Morales would not be in trouble any more. McAfee went on to say that he did not understand why we were asking him about what occurred the night Herman was shot in the back.

9. [the investigator's declaration omits a paragraph 8] I asked McAfee if he remembered the girl he used to date in 2006. McAfee stated he did not remember the girl. I advised him his girl's name was Janae, she drove a Toyota Rav4, and Janae had said something else about the night of the incident. McAfee stated Janae and him went all over the place in the Rav4 so he could not remember any specific night he was with Janae and Morales.

10. I then told McAfee his story about that night did not make any sense. I told him that several years ago he gave a statement to a public defender investigator about Morales spending the night at his house. I then read the statement to McAfee.

11. I asked McAfee why his story about the night Herman was shot did not match up with what Morales' family said occurred or what Morales told us. McAfee responded by saying Morales was his little cousin.

12. I asked McAfee why he gave Morales an alibi for the night Herman was shot in the back. McAfee stated again that Morales was his cousin. I asked McAfee what he meant, "Oscar, my cousin," when he responded to my questions as to giving Morales an alibi the night Herman was shot. McAfee then stated he did not want to talk anymore about the night Herman was shot.

13. I advised McAfee I had heard many stories about the night Herman was shot, that I wanted to hear from McAfee the truth about what happened. McAfee responded, "I do not want to say anything anymore."

14. I asked McAfee when the first time was that he heard Morales

1 was in trouble. McAfee told me he heard about it the next day.
2 McAfee stated Morales's mom called him and told him. I told
3 McAfee I knew he was lying about when he found out. I asked him
4 again when he found out and McAfee stated he no longer wanted to
5 talk about the incident anymore.

6 15. I asked McAfee his relationship with Morales before the night
7 Herman was shot. McAfee stated he would speak and hangout with
8 Morales about every other day.

9 16. I asked McAfee how often he hung out or spoke with Morales
10 after the night Herman was shot. Morales stated he did not
11 remember. McAfee said that it was not unusual he stopped
12 speaking to Morales after the night Herman was shot. I asked him
13 why he stopped talking to Morales. McAfee stated he did not have
14 a reason and he just stopped talking to Morales.

15 17. I asked him again how his relationship with his cousin was.
16 McAfee stated Morales was his little cousin, he always looked out
17 for him, and he wanted to help Morales anyway he could, but he
18 would not lie for Morales.

19 18. I told him some of the things he was telling me did not make
20 sense and for him to tell me the truth about what happened the night
21 Herman was shot, that I was getting the impression he did not want
22 to help his cousin out.

23 19. I then read the statements that he gave the public defender
24 investigator on October 16 and October 18. I told him the Morales
25 family and Morales had a different story about what had occurred
26 the night of the incident. I also told him that I spoke to Jeffrey
27 Fulmer and Jaronn Lee about the incident.

28 20. I told McAfee that he wanted to help Morales, he should tell
me what occurred the night Herman was shot. McAfee stated he
did not know all the stories people were saying about the night
Herman was shot and he did not want to discuss the incident
anymore.

21 I told McAfee again it made no sense to me that, if he wanted
22 to help his cousin out why he no longer wanted to talk about the
23 night Herman was shot. McAfee again stated he no longer wanted
24 to talk about the night Herman was shot.

25 22. McAfee talked several times throughout the interview that it
26 was better being at the Fire Camp than at the prison at Susanville.
27 He also mentioned several times how he was able to get out in less
28 than a year and he was looking forward to his release so he could
take care of his children.

(ECF No. 46-2.)

It is undisputed that respondent will not give McAfee witness immunity for an evidentiary hearing.

1 As a general rule, “[a] criminal defendant is not entitled to compel the government to
2 grant immunity to a witness.” United States v. Westerdahl, 945 F.2d 1083, 1086 (9th Cir. 1991).
3 However, under certain circumstances, immunity for defense witnesses might be “necessary to
4 protect and enforce a defendant’s due process right to a fair trial.” United States v. Lord, 711
5 F.2d 887, 892 (9th Cir. 1983). The Ninth Circuit has identified those circumstances:

6 For a defendant to compel use immunity the defendant must show
7 that: (1) the defense witness’s testimony was relevant; and (2)
8 either (a) the prosecution intentionally caused the defense witness
9 to invoke the Fifth Amendment right against self-incrimination with
10 the purpose of distorting the fact-finding process; or (b) the
11 prosecution granted immunity to a government witness in order to
12 obtain that witness’s testimony, but denied immunity to a defense
13 witness whose testimony would have directly contradicted that of
14 the government witness, with the effect of so distorting the
15 factfinding process that the defendant was denied his due process
16 right to a fundamentally fair trial.

13 United States v. Straub, 538 F.3d 1147, 1162 (9th Cir. 2008); see also United States v. Wilkes,
14 744 F.3d 1101, 1104–09 (9th Cir. 2014) (applying Straub).²

15 *Relevance*

16 The relevance requirement is “minimal.” Straub, 538 F.3d at 1157. “The defendant ‘need
17 not show that the testimony sought was either clearly exculpatory or essential to the defense.’”
18 Id. (citations omitted). It is relevant, for example, if it raises credibility questions about a key
19 prosecution witness. Id.

20 Petitioner argues that McAfee’s refusal to discuss with petitioner’s investigator and
21 present counsel what happened on the night of the shooting renders relevant any testimony he
22 may give. In other words, petitioner argues that McAfee’s refusal to discuss the night of the

23 ² Petitioner’s motion for witness immunity does not indicate whether he is requesting use or
24 transactional immunity for McAfee. Testimony obtained in use immunity may not be used to
25 prosecute the witness. Washington v. Driver, 2014 WL 1154067 at *2 (D. Alaska 2014).
26 Transactional immunity prohibits the prosecution for any offense about which the witness is
27 compelled to testify. (Id.) At oral argument, petitioner’s counsel argued that McAfee should be
28 granted use immunity. The Ninth Circuit has applied the same test in considering claims for use
and transactional immunity. See U.S. v. Croft, 124 F.3d 1109, 1116 (9th Cir. 1997).

1 shooting suggests that he has relevant information.

2 For the reasons stated herein, the undersigned finds that petitioner has not demonstrated
3 that McAfee's testimony would be relevant. According to petitioner's investigator, McAfee did
4 not admit being the shooter. McAfee also asked if petitioner wanted McAfee to lie so that
5 petitioner would not be in trouble anymore. McAfee made no statement to the investigator
6 suggesting that he had any relevant testimony.

7 During pretrial investigation, petitioner's trial counsel did not uncover any evidence of
8 McAfee's involvement in the shooting. In a motion to exclude evidence of third party culpability,
9 the prosecutor discussed petitioner's third party defense claim, which did not point the finger at
10 Marquis McAfee:

11 In pretrial discussion and investigations, the defendant has denied
12 his involvement in this attempted murder and offered many
13 different "theories" as to the identity of the perpetrator. Several of
14 these "theories" revolve around the defendant being in the presence
15 of a group of between six to eight black male juveniles
16 approximately thirty to forty minutes prior to the shooting. The
17 defense contends that the victim "falsely or recklessly accused the
18 defendant of being the shooter" due to a history of animosity
19 between the victim and the Morales family and that the actual
20 perpetrator was one of the black male juveniles present during the
21 exchange.

17 A. Marquis McAfee

18 Under one theory, the defense alleges that one or more members of
19 the black male juveniles made good on their threat and returned
20 after the argument and shot the victim. The defense had made
21 attempts to identify the black male juveniles who were present
22 during the exchange with the victim. Defense witness Marquis
23 McAfee identified himself and JaRonn Lee as being present at the
24 verbal exchange between the victim and the group of juveniles on
25 the day of the shooting. The defense filed a Petitioner for
26 Disclosure of Juvenile Records pursuant to Welfare and Institutions
27 Code section 827 seeking information about Marquis McAfee. To
28 date, the People have been provided with one statement relating to
Marquis McAfee. The information contained within that statement
does not contain any information about Mr. McAfee's involvement
in these crimes other than the fact he was present by his own
admission with the defendant during the verbal exchange with the
victim. The defendant fails to establish any direct or circumstantial
evidence to support that Marquis McAfee actually committed the
crimes.

B. JaRonn Lee and Anthony Michael King, Jr.

1 As indicated above, Marquis McAfee identified JaRonn Lee as
2 being present during the verbal exchange with the victim. The
3 defense then went to the alleged "Myspace" webpage of JaRonn
4 Lee which shows pictures of JaRonn Lee with someone identified
5 as his brother. JaRonn Lee's "brother" is allegedly throwing a gang
6 sign in the picture. The defense further alleges that the person in
7 the photo with JaRonn Lee is Michael Anthony King, Jr. Both
8 JaRonn Lee and Anthony Michael King, Jr. are black male
9 juveniles. The defense was provided information by the People that
10 Michael Anthony King Jr. has been validated as a blood gang
11 member by the Sacramento Police Department. In addition, the
12 defense asserts that Michael Anthony King Jr. gave the name of
13 JaRonn Lee during an arrest and was subsequently charged with a
14 violation of Penal Code section 148.9.

15 The defense filed a Petition for Disclosure of Juvenile Records
16 pursuant to Welfare and Institutions Code section 827 seeking
17 information about both JaRonn Lee and Anthony Michael King, Jr.
18 To date, the People have not been presented with any statements or
19 other discovery relating to JaRonn Lee or Michael Anthony King
20 Jr. or any possible connection either of them may have to the case
21 except that JaRonn Lee may have been present during the verbal
22 exchange with the victim. The defendant fails to establish any
23 direct or circumstantial evidence to support that JaRonn Lee or
24 Anthony Michael King Jr. actually committed the crime.

25 C. James Fulmer

26 An additional theory purported by the defense is that James Fulmer
27 is a black male juvenile who was at the same address where the
28 defendant encountered JaRonn Lee on the date of the shooting.
According to the defense, James Fulmer's sibling had a intimate
relationship with JaRonn Lee and admits knowing JaRonn Lee. The
defense filed a Petition for Disclosure of Juvenile Records pursuant
to Welfare and Institutions Code section 827 seeking information
about James Fulmer. To date, the People have not been provided
with any statements or other discovery relating to James Fulmer or
any possible connection he may have with this case. Again,
defendant fails to establish any direct or circumstantial evidence to
support that James Fulmer actually committed the crime.

29 D. Other Unknown Black Male Juveniles

30 According to the witnesses present during the verbal exchange
31 between the groups of juveniles and the victim, there were between
32 six to eight juveniles in the group. The People are unaware of the
33 identity of any of these juveniles except the defendant. To date, the
34 People have not received any statements or discovery, with the
35 exception of the statement of Marquis McAfee, relating to the
36 identity or the involvement of any of these male juveniles to the
37 commission of these crimes. The defendant has failed to establish
38 any direct or circumstantial evidence to support that any of the
unknown black male juveniles actually committed the crime.

1 (CT at 1169-70.)

2 Eight years later, McAfee still does not admit any involvement in the shooting. McAfee's
3 refusal to discuss what happened on that night of the shooting does not meet the relevance
4 requirement. McAfee's question to the investigator asking if petitioner wanted him to lie about
5 what happened so that petitioner would not be in trouble is a denial of involvement. Petitioner's
6 argument that McAfee might confess if given immunity is unsupported.

7 The undersigned also observes that the credible evidence does not support petitioner's
8 claim that McAfee shot Herman. The evidence that petitioner shot Herman, as discussed above,
9 is strong. In addition, based on the credible evidence regarding the timing of events, McAfee
10 could not have shot Herman based on petitioner's version of events. As discussed above,
11 Herman, his daughter and ex-wife offered credible testimony that the shooting occurred
12 approximately 20-30 minutes after the first incident. In his declaration, petitioner claims that
13 after the first incident, he and McAfee took the light rail from the Florin Station to downtown
14 where they "wandered around" for an unspecified amount of time. Petitioner claims that McAfee
15 then called his girlfriend who drove them to petitioner's mom's house in the Florin
16 Road/Meadowview area. Petitioner and McAfee's light rail ride, wandering around the
17 downtown mall and then riding to petitioner's mother's house clearly took longer than 20 to 30
18 minutes. Based on petitioner's version of events, McAfee could not have shot Herman.

19 For all of the reasons set forth above, the undersigned finds that petitioner has not
20 demonstrated that McAfee has relevant testimony.

21 *Prosecutorial Misconduct*

22 The second prong of the witness immunity test "is that the prosecution refused to grant
23 witness use immunity with the deliberate intention of distorting the fact-finding process." *Id.*,
24 quoting Williams, 384 F.3d at 600.³ "As of the first of the two alternative methods, the

25 ³ In his motion for witness immunity, petitioner cites Virgin Islands v. Smith, 615 F.2d 964 (3d
26 Cir. 1980) for the standards for granting witness immunity. In Straub, the Ninth Circuit discussed
27 the history of its case law regarding witness immunity, noting its adoption of the standards in
28 Smith:

In Lord, our earliest case to develop a test for compelled use

1 defendant may satisfy this prong by showing ‘that the prosecutor intentionally caused a defense
2 witness to invoke the Fifth Amendment right against self- incrimination.’” Id., quoting Williams
3 v. Woodford, 384 F.3d 567, 600 (9th Cir. 2004). The government’s actions “need to amount to
4 something akin to prosecutorial misconduct.” Id.

5 Undue prosecutorial interference in a defense witness's decision to
6 testify arises when the prosecution intimidates or harasses the
7 witness to discourage the witness from testifying, for example, by
8 threatening the witness with prosecution for perjury or other
9 offenses.... The prosecution’s conduct must amount to a substantial
interference with the defense witness's free and unhampered
determination to testify before the conduct violates the defendant's
right to due process.

10 immunity, we adopted the Third Circuit's rule that “[t]he defendant
11 must be prepared to show that the government's decisions were
12 made with the deliberate intention of distorting the judicial fact [-
13]finding process.” 711 F.2d at 890 (quoting United States v.
Herman, 589 F.2d 1191, 1204 (3d Cir. 1978)). Lord also adopted
14 the Third Circuit's subsequent developments of this rule, in Virgin
Islands v. Smith, 615 F.2d 964 (3d Cir.1980). As Lord describes
Smith, the refined test was:

15 whether the federal prosecutor, in refusing to consent to
16 extending immunity to the defense witness, acted with a
deliberate intention of distorting the fact-finding process....
17 If the district court found that prosecutorial misconduct had
prevented the defense witness from giving relevant
18 testimony, then the court was directed to acquit the
defendant unless the prosecutor granted use immunity to the
defense witness.

19 711 F.2d at 891 (citations omitted). Thus, Lord required
20 prosecutorial misconduct as an element of the test. However, Lord
did not consider selective denial of immunity that was admittedly
21 not prosecutorial misconduct but that had the alleged effect of
distorting the fact-finding process. Lord only considered a claim
22 under the other method of showing prosecutorial misconduct-
intentionally causing a defendant to take the Fifth. The dispositive
23 fact was that the defense witness “testified that before trial the
prosecutor told him that whether he would be prosecuted depended
24 on his testimony.” Id. Lord remanded for “further clarification of
the prosecutor's pre-trial comments” to the defense witness. Id.

25 U.S. v. Straub, 538 F.3d at 1158-59.

26 The Ninth Circuit’s decision in Straub contains the standard for evaluating petitioner’s
27 motion for witness immunity.

28 Petitioner also cites several California state law cases in support of his motion for witness
immunity. Again, the undersigned finds that the Ninth Circuit’s decision in Straub contains the
relevant standard for evaluating petitioner’s motion.

1 Williams v. Woodford, 384 F.3d at 601-02.

2 The alternative way that a defendant may satisfy the second prong of the immunity test is
3 by showing that “that the prosecution granted immunity to a government witness in order to
4 obtain that witness’s testimony, but denied immunity to a defense witness whose testimony would
5 have directly contradicted that of the government witness.” Williams, 384 F.3d at 600.

6 In the motion for witness immunity, petitioner does not argue that McAfee should be
7 granted immunity because the prosecution granted immunity to other prosecution witnesses.
8 Instead, petitioner argues that the government’s failure to grant McAfee immunity distorts the
9 fact finding process. Petitioner contends that the government has no valid reason not to grant
10 McAfee witness immunity because the statute of limitations has run and he cannot be prosecuted.
11 Petitioner admits that he is not aware of any prosecutorial misconduct leading McAfee to refuse
12 to testify.

13 The logical extension of petitioner’s argument is that every defendant could challenge
14 their conviction by seeking witness immunity for someone willing to confess to the crime after
15 the statute of limitations had run. The credibility of a witness granted immunity under these
16 circumstances is severely undermined.

17 However, in the opposition to petitioner’s motion, respondent states that McAfee could
18 still be prosecuted for premeditated attempted murder. Respondent states that the statute of
19 limitations for premeditated attempted murder has not run. There is no limitation period for the
20 commencement of prosecution for a crime punishable by death or life imprisonment. Cal. Penal
21 Code, §§ 799, 800. The punishment for premeditated attempted murder is life in prison with the
22 possibility of parole. Cal. Penal Code § 664(a).⁴

23 In the reply to respondent’s opposition briefing, petitioner shifts gears and argues that the
24 state has now given the best reason for granting McAfee immunity, i.e., he could still be

25 ⁴ Respondent also argues that it is possible that Herman could succumb to his injuries, making it
26 possible that a murder or manslaughter prosecution could be pursued. The undersigned is less
27 persuaded by this argument. Respondent also argues that granting McAfee immunity would also
28 mean that if McAfee faced future unrelated allegations of committing a violent crime, granting
him immunity would preclude respondent from introducing in that case McAfee’s testimony here
that he was the shooter.

1 prosecuted. Petitioner argues that the state has known since before trial of petitioner's plan or
2 desire to present evidence of a third party's culpability, and had knowledge that McAfee was the
3 likely suspect or had information about the actual shooter.

4 Respondent's desire to prosecute McAfee if he shot Herman is not an improper motive for
5 failing to grant immunity. See Curtis v. Duval, 124 F.3d 1, 9–10 (1st Cir. 1997) (finding no
6 prosecutorial misconduct where “the prosecution's plausible assertion of a legitimate interest in
7 keeping the way clear for a possible future prosecution” of a defense witness is set forth);
8 Grochulski v. Henderson, 637 F.2d 50, 52–53 (2d Cir. 1980) (denying habeas corpus relief when
9 prosecutor declined to provide immunity to witness who was potential target of prosecution);
10 United States v. Mitchell, 886 F.2d 667, 669–70 (4th Cir. 1989) (“The government refused to
11 grant immunity to Williams because he was the subject of a criminal investigation, and we do not
12 think that this amounted to ‘prosecutorial misconduct or overreaching.’”).

13 Because the record shows no prosecutorial misconduct regarding the decision not to grant
14 McAfee use immunity, petitioner's motion for immunity should be denied.

15 *Fundamental Fairness*

16 Petitioner goes on to argue that “fundamental fairness” requires the court to grant McAfee
17 use immunity. Petitioner quotes Straub, *supra*, in support of this claim:

18 Even where the government has not denied a defense witness
19 immunity for the very purpose of distorting the fact-finding
20 process, the government may have stacked the deck against the
21 defendant in a way that has severely distorted the fact-finding
22 process at trial. See Westerdahl, 945 F.2d at 1087 (“Previously, we
23 noted in dicta that where two eyewitnesses tell conflicting stories,
24 and only the witness testifying for the government is granted
25 immunity, the defendant would be denied ‘any semblance of a fair
26 trial.’”) (quoting Brutzman, 731 F.2d at 1452). In those cases where
27 the government has liberally used its discretion to grant immunity
28 to numerous witnesses, and the defendant's witness could offer
relevant testimony that would directly contradict that of an
immunized government witness, the trial may become so
fundamentally unfair that the defendant's due process rights are
implicated.

26 Straub, 538 F.3d at 1160.

27 In Straub, the Ninth Circuit considered whether the selective denial of immunity that was
28 admittedly not prosecutorial misconduct but that had the alleged effect of distorting the fact-

1 finding process could meet the second part of the prosecutorial misconduct test for use immunity.
2 The Ninth Circuit characterized this issue as the “purpose/effect” issue. Id. at 1159. In the
3 section of Straub quoted above, the Ninth Circuit discussed the purpose/effect issue as it applied
4 to the selective denial of immunity. In other words, the Ninth Circuit was not carving out a
5 separate fundamental fairness exception for granting immunity. Accordingly, to the extent
6 petitioner argues that there is a fundamental fairness exception for granting immunity, his
7 argument fails.

8 *Evidentiary Hearing Without Immunity*

9 During oral argument, petitioner’s counsel indicated that they would be willing to call
10 McAfee as a witness at an evidentiary hearing even if he were not granted immunity. After
11 considering this suggestion, the undersigned denies petitioner’s request to call McAfee as a
12 witness without a grant of immunity.

13 As discussed above, in assessing whether an evidentiary hearing is warranted, the court
14 considers whether such a hearing “would produce evidence more reliable or more probative” with
15 regard to petitioner’s assertion of actual innocence than the declarations before the court. Griffin
16 v. Johnson, 350 F.3d 956, 966 (9th Cir. 2003). Petitioner has presented no evidence
17 demonstrating that McAfee would testify regarding his involvement in the shooting or the
18 involvement of others in the shooting. The undersigned is not persuaded by petitioner’s argument
19 that McAfee might confess if he had to face petitioner in court during an evidentiary hearing.

20 The record indicates that that McAfee denies being involved in the shooting. The
21 evidence that petitioner shot Herman his strong. Other than his own self-serving declaration,
22 petitioner has presented no evidence that McAfee was involved in the shooting or knows if others
23 were involved. For these reasons, the undersigned finds that having McAfee testify at an
24 evidentiary hearing, without a grant of immunity, would not produce evidence more reliable or
25 probative with regard to petitioner’s assertion of actual innocence than the evidence before the
26 court. Accordingly, petitioner’s request to call McAfee as a witness at an evidentiary hearing,
27 without a grant of immunity, is denied.

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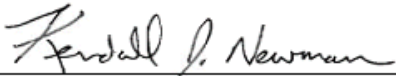
1 Accordingly, IT IS HEREBY ORDERED that petitioner’s motion for a one day extension
2 of time to file his reply brief (ECF No. 66) is granted; and

3 IT IS HEREBY RECOMMENDED that petitioner’s motions for an evidentiary hearing
4 (ECF No. 45) and witness immunity (ECF No. 46) be denied.

5 These findings and recommendations are submitted to the United States District Judge
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
7 after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
10 objections shall be filed and served within fourteen days after service of the objections. The
11 parties are advised that failure to file objections within the specified time may waive the right to
12 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

13 Dated: December 17, 2014

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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