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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN MITCHELL,
Petitioner,
v.
JEROME PRICE, Warden,
Respondent.

No. 2:14-cv-2258 TLN DAD P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss the petition as untimely. Petitioner has filed an opposition, and respondent has filed a reply.

BACKGROUND

A Sacramento County Superior Court jury found petitioner guilty of first-degree murder and possession of an assault weapon. Drive-by and gang enhancement allegations were also found by the jury to be true. As a result of that verdict, on January 3, 1997, petitioner was sentenced to twenty-five years to life plus nine years in state prison. On November 3, 1998, the California Court of Appeal for the Third Appellate District affirmed the judgment of conviction on appeal. On February 17, 1999, the California Supreme Court denied review. (Pet. at 2-4 & Resp’t’s Lodged Docs. Nos. 1-3.)

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1 On or about February 8, 2010, petitioner filed the first of nine post-conviction applications
2 for relief which he pursued in state court. The Sacramento County Superior Court, the California
3 Court of Appeal for the Third Appellate District, and the California Supreme Court denied all of
4 his petitions for a writ of habeas corpus and/or petitions for review as untimely and/or successive
5 or in summary fashion, except for his sixth state habeas petition which petitioner voluntarily
6 withdrew. (Resp't's Lodged Docs. Nos. 4-21.)

7 On September 25, 2014, petitioner commenced this action by filing a federal petition for
8 writ of habeas corpus. In that petition, petitioner claims that he is actually and factually innocent
9 of the charged offenses. In support of his actual innocence claim, plaintiff has submitted three
10 declarations, two of them from witnesses who testified at his trial. (Pet. at 6 & Attachs. (Parish
11 Decl., Brown Decl. & Stevenson Decl.)

12 ANALYSIS

13 I. AEDPA Statute of Limitations

14 On April 24, 1996, Congress enacted AEDPA which amended 28 U.S.C. § 2244 by
15 adding the following provision:

16 (d)(1) A 1-year period of limitation shall apply to an application
17 for a writ of habeas corpus by a person in custody pursuant to the
18 judgment of a State court. The limitation period shall run from the
latest of –

19 (A) the date on which the judgment became final by the
20 conclusion of direct review or the expiration of the time for seeking
such review;

21 (B) the date on which the impediment to filing an
22 application created by State action in violation of the Constitution
or laws of the United States is removed, if the applicant was
prevented from filing by such State action;

23 (C) the date on which the constitutional right asserted was
24 initially recognized by the Supreme Court, if the right has been
newly recognized by the Supreme Court and made retroactively
25 applicable to cases on collateral review; or

26 (D) the date on which the factual predicate of the claim or
27 claims presented could have been discovered through the exercise
of due diligence.

28 (2) The time during which a properly filed application for State
post-conviction or other collateral review with respect to the

1 pertinent judgment or claim is pending shall not be counted toward
2 any period of limitation under this subsection.

3 The one-year AEDPA statute of limitations applies to all federal habeas corpus petitions filed
4 after the statute was enacted and therefore applies to the pending petition. See Lindh v. Murphy,
5 521 U.S. 320, 322-23 (1997).

6 II. Application of § 2244(d)(1)(A)

7 As noted above, a Sacramento County Superior Court jury found petitioner guilty of first-
8 degree murder and possession of an assault weapon and found that drive-by and gang
9 enhancement allegations were true. On January 3, 1997, petitioner was sentenced to twenty-five
10 years to life plus nine years in state prison. On November 3, 1998, the California Court of Appeal
11 for the Third Appellate District affirmed petitioner’s judgment of conviction on appeal. On
12 February 17, 1999, the California Supreme Court denied review. (Pet. at 2-4 & Resp’t’s Lodged
13 Docs. Nos. 1-3.)

14 For purposes of federal habeas review, petitioner’s judgment of conviction became final on
15 May 18, 1999, ninety days after the California Supreme Court denied review. See Summers v.
16 Schriro, 481 F.3d 710, 717 (9th Cir. 2007); Bowen v. Roe, 188 F.3d 1157, 1158–59 (9th Cir.
17 1999). The AEDPA statute of limitations for petitioner to seek federal habeas relief began to run
18 the following day, on May 19, 1999, and expired one year later on May 18, 2000. Petitioner did
19 not file his federal habeas petition in this case until more than fourteen years later, on September
20 25, 2014. Accordingly, petitioner's federal petition for writ of habeas corpus is untimely unless
21 he is entitled to the benefit of tolling.

22 III. Application of § 2244(d)(2)

23 “The time during which a properly filed application for State post-conviction or other
24 collateral review with respect to the pertinent judgment or claim is pending shall not be counted”
25 toward the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2). In this case, petitioner is not
26 entitled to statutory tolling under § 2244(d)(2) because he did not file his first state post-
27 conviction challenge until on or about February 8, 2010, almost ten years after the one-year
28 statute of limitations for the seeking of federal habeas relief had expired. It is well established

1 that “section 2244(d) does not permit the reinitiation of the limitations period that has ended
2 before the state petition was filed.” Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).
3 Accordingly, petitioner is not entitled to statutory tolling of the applicable statute of limitations.

4 IV. Equitable Tolling

5 In his opposition to respondent’s motion to dismiss, petitioner summarily contends that he
6 is entitled to equitable tolling because he claims that he could not “until recent” obtain the
7 affidavit evidence in support of his actual innocence claim. (Pet’r’s Opp’n to Resp’t’s Mot. to
8 Dismiss at 2.)

9 A petitioner who seeks equitable tolling of AEDPA’s one-year statute of limitations must
10 show that (1) some “extraordinary circumstance” prevented him from filing on time, and (2) he
11 has diligently pursued his rights. Holland v. Florida, 560 U.S. 631, 649 (2010); Luna v. Kernan,
12 __ F.3d __, __, 2015 WL 1903794 at *10 (9th Cir. 2015) (discussing Gibbs v. LeGrand, 767 F.3d
13 879 (9th Cir. 2014) (“stop clock” approach) and Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003)
14 (requiring diligence through time of filing)); see also Curiel v. Miller, 780 F.3d 1201, 1205 (9th
15 Cir. 2015) (“equitable tolling is available . . . only when extraordinary circumstances beyond a
16 prisoner’s control make it *impossible* to file a petition on time and the extraordinary
17 circumstances were the *cause* of [the prisoner’s] untimeliness.”). The threshold showing for
18 equitable tolling is “very high.” Curiel, 780 F.3d at 1205.

19 In this case, petitioner has not demonstrated that he is entitled to equitable tolling of the
20 AEDPA statute of limitations. First, petitioner has not shown that any “extraordinary
21 circumstance” stood in his way of timing filing his federal habeas petition. Although he
22 summarily contends that he could not obtain the affidavit evidence that he has submitted in
23 support of his actual innocence claim until recently, he has not explained why such evidence was
24 not available to him for the ten years that elapsed between entry of his judgment of conviction
25 and his filing of his first state habeas petition. As discussed herein, both Ms. Arlisa Parish and
26 Mr. Richard Brown’s affidavits attest to matters that purportedly took place at the time of
27 petitioner’s arrest. (Parish Decl. & Brown Decl.) In this respect, petitioner’s affidavit evidence is
28 not new at all. See Pace v. DiGuglielmo, 544 U.S. 408, 419 & n.9 (2005) (rejecting equitable

1 tolling for a petitioner who waited years to assert his claims that allegedly cited “new” evidence
2 because the evidence was not new at all; it consisted of affidavits from the petitioner’s parents
3 and sibling regarding a meeting with petitioner’s counsel and petitioner years before he had filed
4 his habeas petition). Given the complete lack of a supporting showing in this case, the
5 undersigned concludes that petitioner has not demonstrated that any “extraordinary circumstance”
6 caused his untimely filing as required.

7 Moreover, petitioner has not established that he diligently pursued his rights. Specifically,
8 petitioner has not explained what measures he took to pursue his actual innocence claim or what
9 measures he took to obtain the affidavit evidence he now believes supports his claim of actual
10 innocence. As noted above, petitioner waited more than ten years to file his first challenge to his
11 judgment of conviction in state court. It strains credulity to suggest that a reasonable person who
12 is actually innocent of first-degree murder would sit on such a claim for more than a decade
13 without pursuing it. See Rudin v. Myles, 781 F.3d 1043, 1055 (9th Cir. 2015) (equitable tolling
14 requires reasonable diligence); Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir. 2011) (reasonable
15 diligence “requires the effort that a reasonable person might be expected to deliver under his or
16 her particular circumstances.”). Again, this is not an instance where petitioner’s “new evidence”
17 is actually new. Finally, as counsel for respondent points out, here petitioner further delayed even
18 as he pursued his many habeas petitions in state court. For example, there was an eight month
19 delay between petitioner’s first and second state habeas actions, nearly a two year delay between
20 his third and fourth state habeas actions, and five months of delay between his seventh and eighth
21 state habeas actions. (Lodged Docs. Nos. 5-6, 8-9 & 17-18). In light of these undisputed and
22 unexplained delays, the court finds that petitioner has not exercised the required diligence to
23 benefit from equitable tolling of the applicable statute of limitations.

24 In short, petitioner has not carried his “heavy burden” of showing that an extraordinary
25 circumstance stood in his way of filing a timely federal habeas petition or that he diligently
26 pursued his rights. Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010). See also Williams v.
27 Dexter, 649 F. Supp. 2d 1055, 1061-62 (C.D. Cal. 2009) (a petitioner is not entitled to equitable
28 tolling when the claimed entitlement to such tolling is “unsupported by competent evidence and is

1 grossly conclusory.”); Evans v. Adams, 423 F. Supp. 2d 1087, 1091 (C.D. Cal. 2006) (petitioner
2 not entitled to equitable tolling where he “has not even bothered to assert sufficient facts to
3 suggest equitable tolling might be warranted.”). Accordingly, petitioner is not entitled to
4 equitable tolling of the AEDPA statute of limitations in this case.

5 V. Actual Innocence

6 A. Legal Standard

7 The Supreme Court has long recognized that federal courts may reach the merits of an
8 otherwise procedurally barred habeas petition in a “narrow class of cases . . . implicating a
9 fundamental miscarriage of justice.” Larsen v. Soto, 742 F.3d 1083, 1088 (9th Cir. 2013)
10 (quoting Schlup v. Delo, 513 U.S. 298, 314-315 (1995)). “[A]ctual innocence, if proved, serves
11 as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . .
12 or, as in this case, expiration of the statute of limitations.” McQuiggin v. Perkins, ___ U.S. ___, ___
13 133 S. Ct. 1924, 1928 (2013). See also Stewart v. Cate, 757 F.3d 929, 937 (9th Cir. 2014)
14 (“When an otherwise time-barred habeas petitioner ‘presents evidence of innocence so strong that
15 a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the
16 trial was free of non-harmless constitutional error,’ the Court may consider the petition on the
17 merits.”) (quoting Schlup, 513 U.S. at 318).

18 The Supreme Court has cautioned, however, that tenable actual innocence claims are quite
19 rare. McQuiggin, 133 S. Ct. at 1928. See also Larsen, 742 F.3d at 1095-96 (9th Cir. 2013) (“The
20 Schlup standard ‘is demanding,’ and precedents holding that a habeas petitioner satisfied its
21 strictures have typically involved dramatic new evidence of innocence.”). A federal habeas
22 petitioner does not satisfy the threshold requirement “unless he persuades the district court that, in
23 light of the new evidence, no juror, acting reasonably, would have voted to find him guilty
24 beyond a reasonable doubt.” McQuiggin, 133 S. Ct. at 1928. Although not dispositive, the
25 timing of a petition bears on the reliability of evidence that purports to show actual innocence. Id.
26 In this regard, a district court, faced with an actual innocence claim, “should count unjustifiable
27 delay on a habeas petitioner’s part . . . as a factor in determining whether actual innocence has
28 been reliably shown.” Id.

1 B. Discussion

2 In this case, neither party disputes the factual background of this case. The California
3 Court of Appeal summarized those underlying facts as follows:

4 December 28, 1995

5 On December 28, 1995, Harry “Sonny” Polhill, a member of the Oak Park
6 Bloods, went to the Union Restaurant in Old Sacramento. He was looking
7 for defendant Johnson, a member of the rival gang, the Meadowview
8 Bloods, because Johnson had been driving through Oak Park and
9 “mugging” Sonny, i.e., giving him disrespectful looks. Instead, Sonny
encountered defendant Mitchell, also a member of the Meadowview
Bloods, outside the restaurant. Mitchell and Sonny began to argue, each
making derogatory remarks about the other’s respective neighborhoods.
Sonny punched Mitchell in the face, and Mitchell ran off.

10 December 30-31, 1995

11 On December 30, 1995, Bradley Hebert was shot and killed in an apparent
12 drive-by shooting on the corner of 33d Street and 9th Avenue in the Oak
13 Park neighborhood. Hebert was a friend of Sonny’s from Oak Park, and
14 was referred to as an “O.G.” “O.G.” refers to “original gangster” or “older
gangster.” Thirty-third Street and Ninth Avenue is an area frequented by
members of the Oak Park Bloods. Nine-millimeter shell casings and spent
nine-millimeter bullets were recovered at the scene.

15 On the night of the Hebert homicide, Mitchell’s girlfriend Arlisa Parish and
16 her best friend Akiea Sims talked on the phone for several hours. During
17 the course of the conversation, they learned that Hebert had been killed,
18 and Arlisa speculated as to Mitchell’s possible involvement. Shortly
thereafter, Mitchell called Arlisa and told her he had just done “some foul
shit.” Arlisa subsequently told Akiea that Mitchell had admitted killing
Hebert and had made jokes about it.

19 January 2, 1996

20 In the early morning hours of January 2, 1996, shots were fired at the home
21 of defendant Johnson. No one was injured, and no suspects were
apprehended.

22 Anticipating an escalation of the conflict between the Oak Park and
23 Meadowview Bloods, police conducted surveillance of Arlisa Parish’s
24 home, where Mitchell often stayed. That evening, a white GMC arrived
25 and three Black males began loading clothes and blankets into the car. A
short time later, two more Black males arrived in a white Monte Carlo.
About 20 minutes later, both vehicles left the house “in convoy fashion.”

26 Officers followed the GMC and the Monte Carlo in unmarked cars. Both
27 vehicles proceeded north on Center Parkway, and got in the left-turn lane at
28 Valley Hi. At that point, the GMC made a U-turn and proceeded south on
Center Parkway, while the Monte Carlo made the left turn and proceeded
west on Valley Hi. Officers following the GMC activated their lights, and
the vehicle immediately pulled over to the side of the road. Officers

1 observed a shotgun in plain view inside the vehicle. The GMC was
2 registered to a Richard Brown, who was driving the vehicle; defendant
3 Mitchell was in the passenger seat.

4 Officers following the Monte Carlo onto Valley Hi activated their sirens,
5 which precipitated a high speed chase through residential streets. During
6 the chase, officers observed the driver's side door open several times, and
7 they saw an empty red and white nine-millimeter ammunition box thrown
8 from the passenger side of the car. The chase ended when the Monte Carlo
9 crashed into a tree. Defendant Johnson, the driver, exited the Monte Carlo
10 on foot, discarding a loaded .22 semi-automatic handgun as he fled. He was
11 apprehended shortly thereafter. Defendant Couch, the front seat passenger,
12 and Dupree Allen, the back seat passenger, remained in the car and were
13 arrested.

14 Two ski masks were found inside the Monte Carlo, as well as a plastic
15 ammunition holder with .223-caliber Winchester ammunition bearing
16 fingerprints of defendant Mitchell and Allen. A Colt AR-15 semi-
17 automatic .223-caliber assault rifle was found along the path taken by the
18 Monte Carlo, as well as a magazine for the rifle and some loose
19 ammunition.

20 Richard Brown, the driver of the GMC, told detectives that Mitchell had
21 confided to him that he wanted to pay Sonny back for disrespecting him,
22 and that he was the shooter in the Hebert homicide.

23 (Resp't's Lodged Doc. 1 at 3-6.) See 28 U.S.C. § 2254(e)(1) (“a determination of a factual issue
24 made by a State court shall be presumed to be correct”).

25 Petitioner has submitted with his federal habeas petition three affidavits, dated between
26 March and July 2014, that he argues demonstrate that “no juror, acting reasonably, would have
27 voted to find him guilty beyond a reasonable doubt.” McQuiggin, 133 S. Ct. at 1928. First, Ms.
28 Arlisa Parish states in her 2014 declaration that “for years” she has wanted to tell someone that
the information she gave law enforcement concerning petitioner was an “involuntary statement
due to the fact I was young and intimidated [sic] by police to the point that I didn't know what to
do.” In that declaration, Ms. Parish also states as follows. Her original statement implicating
petitioner resulted from police intimidation and had no truth to it. Rather, the police coerced the
statement from her in order to charge petitioner with murder and close the case. Police told her
that they would charge her for the crime and mentioned her child. She knew she had to say
something to make the police let her go, but she also knew that the police had written a statement
that was untrue and coerced. She felt true fear when the police threatened her with life in prison.
(Parish Decl.)

1 Mr. Richard Brown states in his 2014 declaration that he never knew of anyone connected
2 to the alleged crime. Rather, everything he had heard about the crime was common knowledge
3 on the street and came from parties that knew nothing of the crime. In that declaration Mr.
4 Brown also states as follows. He informed the police that he knew nothing about the crime and
5 only stated what others had told him. Everything Mr. Brown said to law enforcement was
6 involuntary and coerced. At no time did petitioner tell Brown about his involvement in any
7 crime. Brown had no knowledge of anyone receiving information that petitioner had committed a
8 crime. The police forced him to implicate petitioner based on a rumor started by people who
9 “hated on” petitioner. Mr. Brown repeatedly informed police that he did not know anything about
10 the crime. In fact, the detectives informed him about the gun and details about the crime that he
11 never knew anything about until he was told by police. (Brown Decl.)

12 Ms. Yvonne Chapples Stevenson states in her 2014 declaration that she had a telephone
13 conversation roughly two years ago with a Ms. Akia Sims. Sims told her that she recently had
14 contact with petitioner at a correctional facility and felt bad about him getting “rolled up.” Sims
15 also told Stevenson that she was young “back then” and did not realize the impact she had in
16 petitioner’s case. Sims said she wanted petitioner to be able to have a chance to live his life as a
17 mature adult with his family. Sims also said she would be happy to help petitioner in his efforts
18 to be released from prison if it would not affect her career or family. (Stevenson Decl.)

19 The undersigned finds that the declarations submitted by petitioner in support of his claim
20 for relief do not meet the threshold requirement for presenting a cognizable claim of actual
21 innocence. The Supreme Court has made clear that a credible gateway claim requires “new
22 reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness
23 accounts, or critical physical evidence – that was not presented at trial.” House v. Bell, 547 U.S.
24 518, 537 (2006). The declarations submitted by petitioner, and summarized above, do not offer
25 new evidence. First, with respect to Ms. Arlisa Parish’s declaration, according to the transcript
26 from petitioner’s trial, Ms. Parish first recanted her statement to law enforcement during her

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1 extensive testimony at petitioner’s trial.¹ (Lodged Doc. 22 at 517, 539) At that trial Parish
2 testified that petitioner never told her that he killed anyone and that she gave a statement to law
3 enforcement because she was “trying to go home” and felt fearful and threatened by police. (Id.
4 at 506, 533 & 539) She also testified that she was only seventeen years old at the time she was
5 interviewed by police. (Id. at 533)

6 Similarly, with respect to Mr. Richard Brown’s declaration, he also recanted his statement
7 to law enforcement during his extensive testimony at petitioner’s trial. When initially
8 interviewed, Brown told law enforcement that petitioner told him that “they went over there and
9 took care of him” and that they knew “where he was outside or whatever, and shot him.”
10 (Lodged Doc. 22 at 1064-1065) Brown also told a detective that petitioner had confessed the
11 murder to him for the most part. (Id. at 1065) However, at petitioner’s trial, Brown testified that
12 he “was scared” and “afraid” at the time of his interview at the police station. (Id. at 1031, 1141,
13 1152) He further testified at trial that the detective interviewing him was forceful, hostile, and
14 threatening him. (Id. at 1033, 1036, 1152) Brown also testified that he gave an untruthful
15 statement to law enforcement regarding the shotgun, the homicide, and the night of the arrest
16 because the detective told him he “was going to go to jail for 25 to life” and that “If I can’t get the
17 big fish, I’m gonna take all the little fish down for anything and everything.” (Id. at 1054-55,
18 1124-25, 1204) Brown testified that he believed then that if he told the detective what he wanted
19 to hear, he would get to go home. (Id. at 1059) At petitioner’s trial, Brown emphatically denied
20 knowing details about the crime or that petitioner told him he shot somebody or killed somebody.
21 (Id. at 1153, 1156)

22 Finally, with respect to Ms. Yvonne Chapples Stevenson’s 2014 declaration, therein she
23 only attests to a conversation she allegedly had with Ms. Akia Sims. Stevenson’s declaration
24 clearly does not offer any “exculpatory scientific evidence, trustworthy eyewitness accounts, or
25 critical physical evidence.” House, 547 U.S. at 537. As counsel for respondent points out,

26 ¹ Of course, “[r]ecantation testimony is properly viewed with great suspicion. It . . . is very often
27 unreliable . . . , and most often serves merely to impeach cumulative evidence rather than to
28 undermine confidence in the accuracy of the conviction.” Dobbert v. Wainwright, 468 U.S. 1231,
1233-34 (1984).

1 although Akia Sims reportedly felt bad that petitioner had gotten “rolled up” in the murder, she
2 never told Stevenson that she gave false statements to law enforcement or testified falsely at
3 petitioner’s trial.

4 A reasonable jury could conclude that the original statements made by Parish and Brown
5 to police in which they implicated petitioner were consistent with the other evidence and were
6 therefore credible and that their recantations of those statements were not credible. Indeed, that is
7 what the jury at petitioner’s trial apparently did. In short, the three declarations submitted by
8 petitioner in support of his pending petition do not demonstrate that “it is more likely than not that
9 no reasonable juror would have convicted him in light of the new evidence.” McQuiggin, 133 S.
10 Ct. 1935. Thus, petitioner has failed to show that “this one of the ‘extraordinary’ cases where ‘a
11 court cannot have confidence in the outcome of the trial.’” Stewart, 757 F.3d at 940.
12 Accordingly, petitioner is not entitled under federal law to pass through the actual innocence
13 gateway on his time-barred petition.

14 VI. Evidentiary Hearing

15 In his opposition petitioner requests an evidentiary hearing “to establish what portions of
16 any of the affidavits submitted present probative value[.]” (ECF No. 21 at 8.) The undersigned
17 concludes that an evidentiary hearing is not necessary to resolve petitioner’s actual innocence
18 claim. Although in some instances, newly-presented evidence may raise questions about the
19 credibility of a trial witness, as discussed above, both Ms. Parish and Mr. Brown’s declarations
20 are consistent with their trial testimony in which they recanted their original statements to police
21 and therefore, the court does not need to make any further credibility assessments. Stewart, 757
22 F.3d at 941. Accordingly, the court finds that an evidentiary hearing is not warranted under these
23 circumstances.

24 CONCLUSION

25 Accordingly, IT IS HEREBY RECOMMENDED that:

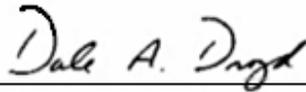
- 26 1. Respondent’s motion to dismiss (Doc. No. 17) be granted;
- 27 2. Petitioner’s petition for writ of habeas corpus be dismissed with prejudice as time-
28 barred; and

1 3. This action be closed.

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

10 In any objections he elects to file, petitioner may address whether a certificate of
11 appealability should issue in the event he files an appeal of the judgment in this case. See Rule
12 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
13 certificate of appealability when it enters a final order adverse to the applicant).

14 Dated: May 20, 2015

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17 DALE A. DROZD
18 UNITED STATES MAGISTRATE JUDGE

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