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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARRELL MILLER,
Petitioner,
v.
HEIDI M. LACKNER,
Respondent.

No. 2:15-cv-1056 KJM CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a California prisoner proceeding through counsel with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted by a jury in Sacramento County of second degree murder based upon a theory of aiding and abetting. The jury also made a “special finding” regarding firearm use which resulted in petitioner’s sentence being enhanced by one year; petitioner is serving an aggregate sentence of 21 years-to-life imprisonment. Petitioner’s only claim is that the evidence presented at trial is not constitutionally sufficient to support his conviction. For the reasons set forth below, the court recommends that the petition for writ of habeas corpus be denied.

I. Background

In an unpublished memorandum and opinion affirming petitioner’s judgment of conviction on appeal, the California Court of Appeal for the Third Appellate District provided the following factual summary:

1 Accused of aiding and abetting his putative stepfather's shooting of
2 a Crip gang member, defense counsel argued that not every
3 criminal act by a gang member is gang related, and defendant
4 Darrell Miller had no idea that his stepfather was going to fire at
5 three people walking down the street. The jury did not find him
6 guilty of the alleged gang enhancement, although he, his stepfather,
7 and his good friend, who was also an occupant of the car at the time
8 of the shooting, were all validated members of Blood gangs. On
9 appeal, he contends there is insufficient evidence to support his
10 conviction for second degree murder We disagree . . . and
11 affirm the judgment.

12

13 Eighteen-year-old defendant Darrell Miller grew up with the
14 prosecution's key witness Tyvone Allen. They were best friends,
15 like brothers. Codefendant Torrey Adams had been Miller's
16 mother's boyfriend for many years. Defendant thought of Adams
17 as his stepfather, although Adams proved to be a very poor role
18 model. Adams sold drugs, carried weapons, committed gang-
19 related assaults, and ultimately shot and killed the victim in this
20 case, Antonne Nelms. A gang expert for the prosecution testified
21 that defendant and Allen were validated members of the Oak Park
22 Bloods; Adams also was a Blood gang member but belonged to a
23 different clique.

24 The prosecution's theory that defendant aided and abetted the
25 shooting is based on circumstantial evidence rooted in several
26 events preceding the shooting that involved defendant. Indeed, the
27 prosecutor argued that this case is all about defendant Miller.
28 Defendant insisted it was all about codefendant Adams. Two
separate juries were impaneled to hear the case against each of
them.

Preliminarily, we must provide the relevant gang context. Before
his untimely demise, Robert Haynes was also a member of the Oak
Park Bloods. Defendant and Allen were close friends of Haynes.
A member of the Barksdale family founded the G-Mobb gang,
which does not claim either Blood or Crip affiliation and includes
cliques such as Guttah Boyz and Starz. In 2008 several Oak Park
Bloods, including Haynes, showed up at a G-Mobb party and a
shootout ensued. One of the Barksdale brothers, a Guttah Boyz
member, killed Haynes, and the killing sparked an increase in
unprovoked violence between the two gangs. Defendant has a
tattoo memorializing his friend.

On December 14, 2010, defendant went to a barbershop to get
dreadlocks and ran into two old friends. He saw a man approach
one of the barbers, and as the man pulled his pants up by the belt
loops, defendant saw he had a gun. As another Barksdale brother,
Marvion, approached, a gun battle erupted and defendant ran.
Defendant was wounded and Barksdale was killed.

Six days later defendant and Allen planned to visit Haynes' grave
site to commemorate his birthday. Adams arrived unexpectedly

1 and invited defendant and Allen to accompany him on a shopping
2 errand. When they got into Adams' car, Adams gave his gun to
3 defendant and defendant slipped it into his sling. At a shopping
4 center in South Sacramento, Adams made a payment on a watch.
5 Defendant then gave the gun back to Adams.

6 Adams drove to another shopping center in the middle of Starz
7 territory and purchased an Astros baseball hat, a hat associated with
8 the Starz gang. After leaving the shopping center, defendant
9 pointed out a man he had been in a fight with a year earlier. The
10 man, Eric Harris, was walking with his friends, Tushawn Cooks
11 and the victim, Antonne Nelms. All three were Crips. Adams
12 drove a little farther down the street, then abruptly backed into a
13 gated driveway. Allen saw a police car drive by just before Adams
14 opened fire on the trio. Nelms died at the scene.

15 Defendant would later describe his fight with Harris and its
16 aftermath in some detail. "Yeah. We fought. Well look it was
17 some stupid ass shit man. I'm at my girl house, um they - they
18 used to live right downstairs from her, you feel me. I was livin
19 with my bitch for a little bit. So me and her little brother on the balcony
20 cuz we drinking some Hennessy up, passing it back and forth.
21 They come - they come out and they like uh - like uh - he like - it
22 was some weird, some little black ass dude they use to kick it wit,
23 he was just running his mouth talking to my little brother. He like
24 uh - he like yeah bitch as nigga, wasn't you the one that uh - woo -
25 woo - woo. You know we can have words a minute though if I
26 come up, come to the front so we can fight or some shit. It's three
27 - the three of em and then it's two of us. I'm like nigga okay nigga,
28 fuck you niggas, we not gonna come out there so y'all can man,
whatever y'all gonna do. You know what I mean. So, look we wait
til the morning. You wake me up, they go out, I go - I go
downstairs for the - from the Slopes I go downstairs, they all
outside, ah blah rah rah ah bla bla bla. So, I'm just watchin, I'm
just watchin hard, ain't got nothing to do with y'all you feel me.
I'm just watchin. So they - they - it was three of em against my
little bro and my - and his big brother, they was gonna go try to
jump him so I rushed the dude with the dreads, woo. I fight wit
him, we start going back and forth and somehow uh he get on top of
me and kicked me in my face and I hit my head on the ground, you
feel me. So like a week - a week or two later them niggas copped a
little pistol or something, you feel me. They copped a little gun,
they - they was out there showing it off and shit. I don't know, I
guess they got it for us. We - it wasn't - it wasn't no - we wasn't
gonna take it that far, you feel me. It wasn't, fuck it we just fought,
so what. But why - why we gotta go to gun play, you feel me. I
told my big nigga like man, he heard about the shit. He heard the
dude kicked me in my face and you know I was out for a little bit
and he didn't like it. And that was that." (Transcript quoted
verbatim.)

After the shooting [of Nelms], defendant borrowed Adams' car to
drive to Haynes' grave site with Allen and defendant's twin sister.
Allen testified the car smelled like gunpowder, but other than
noticing the smell, they did not discuss the shooting. According to

1 Allen, who had entered into an agreement with the prosecution
2 whereby his maximum 13-year sentence would be reduced to 5
3 years, defendant later told him, "Just don't talk about it," and sent
4 him a text message that read, "Keep that shit in the car, bro."

5 Defendant, Adams, and Allen were arrested nearly two months
6 later. Adams was in possession of 5.36 grams of cocaine, \$3,500 in
7 currency, and six cell phones. During extensive interrogations,
8 defendant and Allen both told their interrogators that Adams was
9 the shooter. The prosecution mined the transcripts of the
10 interrogations for damning excerpts that defendant maintains were
11 misleading because they were presented out of order and out of
12 context. At a minimum, the transcripts are difficult to interpret
13 because they are full of lies and obfuscations, spoken in a
14 somewhat foreign vernacular. Suffice it to say, the jury could draw
15 many reasonable inferences from what defendant, Adams, and
16 Allen said to each other and to the interrogators.

17 For many hours, Adams denied defendant's and Allen's accusations
18 that he was the shooter. At the same, he did not want to accuse
19 either of them, which left him in a difficult situation. Ultimately,
20 however, he admitted shooting at the three men but denied he
21 intended to kill anyone. According to both Adams and defendant,
22 the killing was accidental.

23 What everyone did agree upon, including the participants as well as
24 the interrogators, was the painful fact that the killing was senseless.
25 The transcripts simply do not provide any clarity as to why the
26 victim was shot and killed. The prosecutor insisted that Adams, at
27 defendant's urging, shot at the three men, including Harris, in
28 retribution for the fight Harris had been in with defendant a year
earlier. In the prosecutor's view the entire incident was gang
related and part and parcel of the gang culture in which they
participated. Even Adams, the prosecutor contended, denied that
the shooting was totally random and resisted the notion that he was
some monster who shot people for no reason at all. He stated,
"[A]in't like, you know, we targeted them mother fuckers for any
old reasons."

We know now, of course that the jury could not agree that
defendant's conduct was gang related. Defendant points to other
statements Adams made during the interrogations to suggest that
Adams alone made the decision to shoot toward the group,
including the man defendant had identified as someone he had
fought a year earlier. Because the older Adams had a tortured past
himself from his involvement in gangs, he was afraid the young
"stepson" might have "the tendency maybe to do something." He
explained, "I wanted to kind of like, not to say, take all your stripes.
I didn't want 'ya all [*sic*] to go through that crap. I've been through
it already." As the interrogator paraphrased Adams' statements,
"[y]ou were protecting him from himself." Adams concurred. By
then, Adams had confessed, and reflecting on the special
relationship he had with defendant, he acknowledged that defendant
did not have to take responsibility for the shooting because he had
"man[ned] up" and taken responsibility himself. Adams expressed

1 remorse and said to defendant Allen, “I hope y’all don’t hold no ill
2 will towards me.”

3 People v. Miller, No. C071700, 2013 WL 6228649, at *1-3 (Cal. Ct. App, Dec. 2, 2013); Resp’t’s
4 Lodged Doc. No. 6 at 1-6.

5 II. Standards of Review Applicable to Habeas Corpus Claims

6 An application for a writ of habeas corpus by a person in custody under a judgment of a
7 state court can be granted only for violations of the Constitution or laws of the United States. 28
8 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
9 application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502
10 U.S. 62, 67-68 (1991); Park v. California, 202 F.2d 1146, 1149 (9th Cir. 2000).

11 Title 28 U.S.C. § 2254(d) sets forth the following limitation on the granting of federal
12 habeas corpus relief:

13 An application for a writ of habeas corpus on behalf of a person in
14 custody pursuant to the judgment of a State court shall not be
15 granted with respect to any claim that was adjudicated on the merits
16 in State court proceedings unless the adjudication of the claim -

17 (1) resulted in a decision that was contrary to, or involved an
18 unreasonable application of, clearly established federal law, as
19 determined by the Supreme Court of the United States;

20 or

21 (2) resulted in a decision that was based on an unreasonable
22 determination of the facts in light of the evidence presented in the
23 State court proceeding.

24 The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are different,
25 as the Supreme Court has explained:

26 A federal habeas court may issue the writ under the “contrary to”
27 clause if the state court applies a rule different from the governing
28 law set forth in our cases, or if it decides a case differently than we
have done on a set of materially indistinguishable facts. The court
may grant relief under the “unreasonable application” clause if the
state court correctly identifies the governing legal principle from
our decisions but unreasonably applies it to the facts of the
particular case. The focus of the latter inquiry is on whether the
state court’s application of clearly established federal law is
objectively unreasonable, and we stressed in Williams v. Taylor,

1 529 U.S. 362 (2000)] that an unreasonable application is different
2 from an incorrect one.

3 Bell v. Cone, 535 U.S. 685, 694 (2002).

4 “A state court’s determination that a claim lacks merit precludes federal habeas relief so
5 long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”
6 Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652,
7 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a
8 state prisoner must show that the state court’s ruling on the claim being presented in federal court
9 was so lacking in justification that there was an error well understood and comprehended in
10 existing law beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103.

11 The court looks to the last reasoned state court decision as the basis for the state court
12 judgment. Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011). The petitioner bears “the burden
13 to demonstrate that ‘there was no reasonable basis for the state court to deny relief.’” Walker v.
14 Martel, 709 F.3d 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98).

15 III. Petitioner’s Claim

16 A. State Court Decision

17 In the decision denying petitioner’s sufficiency of the evidence claim, the California Court
18 of Appeal reasoned as follows:

19 The question thus posed is whether there is substantial
20 circumstantial evidence to support the prosecution’s theory that
21 defendant aided and abetted the older Adams or whether the
22 inferences the jury drew were based on “‘suspicion alone, or on
 imagination, speculation, supposition, surmise, conjecture, or guess
 work.’” (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on
 other grounds in *In re Sassounian* (1995) 9 Cal. 4th 535, 543, fn 5.)

23 Defendant correctly points out “that in general neither presence at
24 the scene of a crime nor knowledge of, but failure to prevent it, is
25 sufficient to establish aiding and abetting its commission.” (*People*
26 *v. Campbell* (1994) 25 Cal.App.4th 402, 409.) “[A] person aids and
27 abets the commission of a crime when he or she, acting with (1)
28 knowledge of the unlawful purpose of the perpetrator; and (2) the
 intent or purpose of committing, encouraging, or facilitating the
 commission of the offense, (3) by act or advice aids, promotes,
 encourages or instigates, the commission of the crime.” (*People v.*
 Beeman (1984) 35 Cal.3d 547, 561.) An aider and abettor shares
 the perpetrator’s specific intent “when he or she knows the full

1 extent of the perpetrator's criminal purpose and gives aid or
2 encouragement with the intent or purpose of facilitating the
perpetrator's commission of the crime." (*Id.* at p. 560.)

3 Viewing the evidence in favor of the verdict, as we must, we agree
4 with the prosecutor that defendant Darrell Miller is at the center of
the case. The prosecutor presented substantial evidence that he had
5 the motive to aid and abet the shooting since he had been involved
in a fight with Harris, and Adams clearly shot in Harris's direction.
6 Moreover, defendant might have been particularly agitated since
people associating with the same people who had killed his good
7 friend, whose birthday he planned to commemorate that very day,
recently had shot him. Yet, he was compromised in his own ability
8 to shoot because his arm remained in a sling.

9 Moreover, the prosecution also introduced evidence that the jury
could reasonably infer constituted consciousness of guilt and the
10 suppression of evidence. Defendant, together with Adams,
instructed Allen not to talk to the police about the shooting, and he
11 sent him a text message that could be interpreted to mean Allen
should leave the gun in the car. He changed his clothing after he
12 realized he smelled like gunshot residue. In short, the jury could
infer that defendant aided and abetted the murder by holding the
13 gun before the shooting, identifying the victim, providing the
motive, and trying to conceal the weapon and convince Allen not to
14 talk to law enforcement after the shooting.

15 That is not to say the evidence is compelling. Defendant raises
credible arguments about the paucity of the evidence that he knew
16 Adams planned to shoot at Harris and his friends, and that he shared
his intent. There is no direct evidence that they had a conversation
17 in the car preceding the shooting. It was not unusual for Adams to
carry a gun, but there was no evidence he had ever shot anyone.
18 There is no evidence in the transcripts of the interrogations that
defendant, Adams, or Allen ever said anything that indicated
19 Adams was planning to fire, or that defendant suggested that he
should, or that a shooting was imminent. Simply put, the evidence
20 in this case is entirely circumstantial. That does not mean however,
that in viewing the evidence in the light most favorable to the
21 prosecution we can say it is not substantial.

22 Moreover, the prosecution argued at some length that both Adams
and Allen were minimizing defendant's involvement to protect him.
23 After admitting to the shooting, Adams also conceded that he had
treated defendant like a son and he did not want him to have to take
24 responsibility for the shooting. Allen testified that he and defendant
were like brothers. He placed all the blame on Adams, denying that
25 there had been any discussion about the shooting before it
happened. But the trial judge found that Allen had broken his
26 promise to tell the truth and he nullified the agreement Allen had
reached with the prosecution for a reduced sentence. Thus the jury
27 could reasonably find they had reason to lie and disbelieve what
they said, either to the interrogators or at trial.

28 ////

1 As we said at the outset, defendant bears a heavy burden in
2 demonstrating that the evidence is insufficient to support a jury
3 verdict. We do not believe the jury based its verdict on mere
4 speculation or conjecture rather than evidence. There is evidence,
5 albeit circumstantial. Restricted as we are by the limited scope of
6 appellate review, we cannot say that upon “no hypothesis whatever
7 is there sufficient substantial evidence to support [the [verdict]].”
8 (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Thus, we must defer
9 to the wisdom of the jury and affirm the judgment.

10 Miller, 2013 WL 6228649, at *4-5; Resp’t’s Lodged Doc. No 6 at 6-8.

11 **B. Applicable Legal Principles**

12 The Due Process Clause of the Fourteenth Amendment “protects the accused against
13 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the
14 crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). There is sufficient
15 evidence to support a conviction if, “after viewing the evidence in the light most favorable to the
16 prosecution, any rational trier of fact could have found the essential elements of the crime beyond
17 a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). “[T]he dispositive question
18 under Jackson is ‘whether the record evidence could reasonably support a finding of guilt beyond
19 a reasonable doubt.’” Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson,
20 443 U.S. at 318). In other words, “a reviewing court may set aside the jury’s verdict on the
21 ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.”
22 Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam).

23 Further, in conducting federal habeas review of a claim of insufficient evidence, “all
24 evidence must be considered in the light most favorable to the prosecution.” Ngo v. Giurbino,
25 651 F.3d 1112, 1115 (9th Cir. 2011). “Jackson leaves juries broad discretion in deciding what
26 inferences to draw from the evidence presented at trial,” and requires only that they “draw
27 reasonable inferences from basic facts to ultimate facts.” Coleman v. Johnson, 566 U.S. 650,
28 132 S. Ct. 2060, 2064 (2012) (per curiam) (citation omitted).

“Circumstantial evidence and inferences drawn from it may be sufficient to sustain a
conviction.” Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). Under
Jackson, the court need not find that the conclusion of guilt was compelled, only that it rationally
could have been reached. Drayden v. White, 232 F.3d 704, 709-10 (9th Cir. 2000). Sufficiency

1 of the evidence claims in federal habeas proceedings must be measured with reference to
2 substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. 324 n.16.

3 “A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging
4 the sufficiency of the evidence used to obtain a state conviction on federal due process grounds.”
5 Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). Additionally, as this case is subject to the
6 provisions of 28 U.S.C. § 2254(d) as described above, this court owes a “double dose of
7 deference” to the decision of the state court. Long v. Johnson, 736 F.3d 891, 896 (9th Cir. 2013)
8 (quoting Boyer v. Belleque, 659 F.3d 957, 964 (9th Cir. 2011)). See also Coleman, 132 S. Ct. at
9 2062 (“Jackson claims face a high bar in federal habeas proceedings because they are subject to
10 two layers of judicial deference.”); Kyzar v. Ryan, 780 F.3d 940, 943 (9th Cir. 2015) (same).

11 C. Analysis

12 The premature death of Antonne Nelms is senseless and tragic; the facts and
13 circumstances surrounding his death leave any rational person saddened by the sheer waste of
14 human life. Similarly disturbing is the waste of petitioner’s young life, sentenced at 18 years-old
15 to twenty-one years-to-life in prison. Resp’t’s Lodged Doc. No. 1 at 11. However, the California
16 Court of Appeal carefully reviewed the state law and the facts of the case, and concluded that the
17 evidence is sufficient to support petitioner’s conviction for the second degree murder of Nelms
18 under an aiding and abetting theory. While the court has struggled, as the Court of Appeal did,
19 with the senseless nature of the killing, the court must agree that there is sufficient evidence for
20 the jury to have concluded that petitioner is guilty of second degree murder.

21 Indeed, a review of the record supports the Court of Appeal’s observation that [petitioner]
22 “Darrell Miller is at the center of the case.” Miller, 2013 WL 6228649, at *4. The evidence
23 presented by the prosecution allowed the jury to infer that petitioner aided and abetted the murder
24 by “holding the gun before the shooting, identifying the victim, providing the motive, and in
25 trying to conceal the weapon and convince Allen not to talk to law enforcement after the
26 shooting.” Id.

27 As the Court of Appeal noted, the most difficult question presented herein is whether
28 sufficient evidence supports the finding that petitioner knew that it was Adams’ intent to shoot at

1 Harris. On that point, the court recognizes that “a federal habeas corpus court faced with a
2 record of historical facts that supports conflicting inferences must presume—even if it does not
3 affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the
4 prosecution, and must defer to that resolution.” See Jackson, 443 U.S. at 326. Further, as the
5 United States Supreme Court has instructed, “a federal court may not overturn a state court
6 decision rejecting a sufficiency of the evidence challenge simply because the federal court
7 disagrees with the state court.” Cavazos, 132 S.Ct. 2 at 4 (2011).

8 It is undisputed that immediately after petitioner identified Harris to Adams, Adams
9 “abruptly backed into a gated driveway,” allowing Adams a clear shot toward Harris and his
10 friends. Miller, 2013 WL 6228649, at *2. It was at that point that Adams opened fire. Id. From
11 this evidence, jurors were free to infer that Adams was aware of the details of petitioner’s fight
12 with Harris, including that Harris had kicked petitioner in the face and later brandished a gun in
13 front of petitioner. Additionally, the jury was free to consider the absence of evidence that
14 petitioner was surprised by Adams’ actions, or that he protested or tried to stop Adams, who he
15 knew was armed with a firearm, from shooting.

16 Finally, the court notes that the jury was equally entitled to credit, or not, the evidence of
17 petitioner’s close relationship with Adams, as well as the evidence of Adams’ twisted motivation
18 that he might prevent petitioner from coming to harm by resorting to violence himself.¹ The court
19 admits that Adams’ rationale merely underscores the senseless nature of this killing. Nonetheless,
20 the evidence was presented, and the jury was entitled to give it the credence and weight it felt
21 appropriate.

22 ////

23 ¹ To reiterate the Court of Appeal’s explanation, “[b]ecause the older Adams had a tortured past
24 himself from his involvement in gangs, he was afraid the young ‘stepson’ might have ‘the
25 tendency maybe to do something.’ He explained, ‘I wanted to kind of like, not to say, take all
26 your stripes. I didn’t want ‘ya all [*sic*] to go through that crap. I’ve been through it already.’ As
27 the interrogator paraphrased Adams’ [*sic*] statements, ‘[y]ou were protecting him from himself.’
28 Adams concurred. By then, Adams had confessed, and reflecting on the special relationship he
had with defendant, he acknowledged that defendant did not have to take responsibility for the
shooting because he had ‘man[ne]d up’ and taken responsibility himself. Miller, 2013 WL
6228649, at *3.

1 IV. Conclusion

2 Considering all of the evidence presented to the jury, it was reasonable for jurors to infer
3 petitioner's knowledge of Adams' intent, and petitioner's intent to aid and abet Adams' actions.
4 The court's obligation to determine "whether the record evidence could reasonably support a
5 finding of guilt beyond a reasonable doubt," Chein 373 F.3d at 982 (quoting Jackson, 443 U.S. at
6 318), has been satisfied and the court finds that there is sufficient evidence.

7 In any event, whether or not this court disagrees with the jury's conclusion that petitioner
8 is guilty of second degree murder, the court finds that the Court of Appeal's rejection of
9 petitioner's sufficiency of the evidence claim is not objectively unreasonable, thus precluding
10 relief under 28 U.S.C. § 2254(d).

11 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 12 1. Petitioner's application for a writ of habeas corpus be denied; and
13 2. This case be closed.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." In his objections petitioner
19 may address whether a certificate of appealability should issue in the event he files an appeal of
20 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
21 court must issue or deny a certificate of appealability when it enters a final order adverse to the
22 applicant). Any response to the objections shall be served and filed within fourteen days after
23 service of the objections. The parties are advised that failure to file objections within the
24 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
25 F.2d 1153 (9th Cir. 1991).

26 Dated: May 12, 2017

27 
28 CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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