(HC) Williams v. Filson Doc. 9 1 2 3 4 5 6 7 8 9 UNITED STATES DISTRICT COURT 10 FOR THE EASTERN DISTRICT OF CALIFORNIA 11 12 MARCELL WILLIAMS, No. 2:18-cv-1305 KJM KJN P 13 Petitioner. 14 **ORDER** v. 15 TIMOTHY FILSON, 16 Respondent. 17 18 Petitioner, a state prisoner proceeding pro se, filed an application for a writ of habeas 19 corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge as 20 provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. 21 On September 17, 2018, the magistrate judge filed findings and recommendations, 22 which were served on petitioner and which contained notice to petitioner that any objections to the 23 findings and recommendations were to be filed within fourteen days. Petitioner has not filed 24 objections to the findings and recommendations. 25 The court presumes that any findings of fact are correct. See Orand v. United States, 26 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de 27 novo. See Robbins v. Carey, 481 F.3d 1143, 1147 (9th Cir. 2007) ("[D]eterminations of law by the

magistrate judge are reviewed de novo by both the district court and [the appellate] court . . . . ").

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DATED: March 5, 2019.

Having reviewed the file, the court finds the findings and recommendations to be supported by the record and by the proper analysis.

Regarding a certificate of appealability (COA), on the one hand the Ninth Circuit in unpublished decisions has held that denials of stay and abey motions are not final and therefore not immediately appealable. See Boyle v. Kernan, No. 16-56884, 2017 WL 6604072, at \*1 (9th Cir. Oct. 11, 2017) ("The collateral order doctrine does not apply in this case because appellant will be able to appeal the denial of the motion for stay and abeyance after the district court disposes of his pending petition."); Haithcock v. Veal, 310 F. App'x 121, 122 (9th Cir. 2009) (denial of a stay and abey motion is "not a final, appealable order under 28 U.S.C. § 1291"); but see Williams v. Walsh, 411 F. App'x 459, 461 (3d Cir. 2011) (stay and abey orders are final and appealable under the collateral order doctrine). Nonetheless, courts often include COA determinations in denying such motions, and the Ninth Circuit has issued COAs to decide whether denials were proper. Casillas v. Sec'y of Corr., No. 117CV00511LJOSKOHC, 2017 WL 1954251, at \*7 (E.D. Cal. May 11, 2017), report and recommendation adopted, No. 117CV00511LJOSKO, 2017 WL 2691558 (E.D. Cal. June 22, 2017) (declining to issue COA on denial of stay); Mena v. Long, 813 F.3d 907, 909 (9th Cir. 2016) (granting COA on whether district court's denial of stay and abey motion to establish rules for proper review without addressing whether the order was final). Having considered the question here, the court declines to issue a COA.

## Accordingly, IT IS HEREBY ORDERED that:

- 1. The findings and recommendations filed September 17, 2018, are adopted in full;
- 2. Petitioner's motion for stay (ECF No. 6) is denied, and petitioner is ordered to file an amended petition raising only his exhausted claims (1) and (5) within thirty days; petitioner is cautioned that his failure to comply with this order will result in the dismissal of this action; and
  - 3. The court declines to issue the certificate of appealability referenced in 28 U.S.C.

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