

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

**KELLY J. VOSGIEN,**

Petitioner,

v.

No. 3:11-cv-134-ST  
OPINION AND ORDER

**GARY KILMER,**

Respondent.

Anthony D. Bornstein  
Federal Public Defender's Office  
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Attorney for Petitioner

John Kroger  
Attorney General  
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Attorneys for Respondent

**SIMON, District Judge:**

On April 4, 2012, the Honorable Janice Stewart, United States Magistrate Judge, filed Findings and Recommendation (“F & R”) (Doc. # 29). The matter is now before me pursuant to the Magistrates Act, 28 U.S.C. § 636(b)(1)(B), and Rule 72(b) of the Federal Rules of Civil Procedure. Under the Magistrates Act, the court may “accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate’s findings and recommendations, “the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.*; Fed. R. Civ. P. 72(b)(3); *Dawson v. Marshall*, 561 F.3d 930, 932 (9<sup>th</sup> Cir. 2009). De novo review means that the court “considers the matter anew, as if no decision had been rendered.” *Dawson*, 561 F.3d at 933.

Petitioner has filed timely objections to Judge Stewart’s recommendation that his Petition for Writ of Habeas Corpus (doc. # 1) be dismissed with prejudice as untimely, but that a Certificate of Appealability be issued on the question of whether Petitioner has made a showing of actual innocence sufficient to excuse the procedural deficiencies of his Petition. After de novo review, I adopt the F & R.

**PETITIONER’S OBJECTIONS**

Petitioner objects to the following findings and recommendations:

1. The finding that “it is difficult to conclude that petitioner’s case is one of the ‘extraordinary’ cases of innocence contemplated by *Schlup*.”
2. The findings that Petitioner failed to make the requisite showing for passing through the actual innocence gateway.

3. The finding that Petitioner “is unable to excuse his untimely filing through a showing of actual innocence.”

4. The recommendation that the habeas petition be dismissed.

Petitioner’s objections are not accompanied by arguments other than those made before the Magistrate Judge.

Upon de novo review, the court finds no error in Judge Stewart’s conclusions.

Accordingly, the court ADOPTS the Findings and Recommendation (doc. # 29).

IT IS SO ORDERED.

Dated this 7<sup>th</sup> day of May, 2012.



Michael H. Simon  
United States District Judge