



1 count of attempted, willful premeditated murder in violation of  
2 California Penal Code ("P.C.") §§ 664/187(a) (count 1), one count of  
3 attempted second degree robbery in violation of P.C. §§ 664/211 (count  
4 2), and one count of unlawful driving or taking of a vehicle in  
5 violation of California Vehicle Code § 10851(a)(3), and as to counts 1  
6 and 2, it was further charged that petitioner personally used a  
7 firearm within the meaning of P.C. § 12022.53(b), petitioner  
8 personally inflicted great bodily injury upon an individual not an  
9 accomplice within the meaning of P.C. § 12022.7(a), and the crimes  
10 were committed for the benefit and in association with a criminal  
11 street gang with the specific intent to promote criminal conduct by  
12 gang members within the meaning of P.C. § 186.22(b)(4). Lodgment no.  
13 8 at 1-5. On February 9, 1999, pursuant to a stipulated written plea  
14 agreement, petitioner pleaded guilty to, and was convicted of, the  
15 lesser-included offense of attempted murder without premeditation in  
16 violation of P.C. §§ 664/187 (count 1), and petitioner admitted that  
17 during the course of the offense he personally used a firearm and  
18 inflicted great bodily injury within the meaning of P.C. §  
19 12022.53(c). Lodgment no. 9 at 5:28-6:8. On March 11, 1999, the  
20 trial court sentenced petitioner to the stipulated total term of 29  
21 years in state prison, and suspended imposition of the sentence on the  
22 condition petitioner serve one year in the county jail (he was given  
23 credit for having served 331 days) and be on probation for five years.  
24 Lodgment nos. 1, 9 at 14:16-18:3. The petitioner did not appeal his  
25 conviction or sentence. Petition at 2.

26 //

27 \_\_\_\_\_  
28 8 at 1-5.

1 On October 24, 2000, petitioner admitted he violated probation,  
2 and the trial court revoked his probation and imposed the previously  
3 suspended sentence of 29 years in state prison. Lodgment no. 8 at 71,  
4 76-77.

5  
6 On or about June 16, 2008, petitioner filed a habeas corpus  
7 petition in the San Bernardino County Superior Court, claiming his  
8 plea bargain agreement was not honored, and on July 3, 2008, the  
9 Superior Court denied the petition. Lodgment no. 2. On July 16,  
10 2008, petitioner filed a habeas corpus petition in the California  
11 Court of Appeal, which denied the petition on August 13, 2008.  
12 Lodgment nos. 3-4. On August 21, 2008, petitioner filed a habeas  
13 corpus petition in the California Supreme Court, which denied the  
14 petition on February 11, 2009. Lodgment nos. 5-6.

15  
16 **DISCUSSION**

17 The Antiterrorism and Effective Death Penalty Act of 1996  
18 ("AEDPA") "established a one-year period of limitations for federal  
19 habeas petitions filed by state prisoners," Bryant v. Arizona Attorney  
20 Gen., 499 F.3d 1056, 1059 (9th Cir. 2007), as follows:

21  
22 (1) A 1-year period of limitation shall apply to an  
23 application for a writ of habeas corpus by a person in  
24 custody pursuant to the judgment of a State court. The  
25 limitation period shall run from the latest of -

26 (A) the date on which the judgment became final by the  
27 conclusion of direct review or the expiration of the  
28 time for seeking such review. . . .

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

4 (2) The time during which a properly filed application for  
5 State post-conviction or other collateral review with  
6 respect to the pertinent judgment or claim is pending shall  
7 not be counted toward any period of limitation under this  
8 subsection.

9  
10 28 U.S.C. § 2244(d).  
11

12 The petitioner did not appeal his conviction, sentence, or  
13 probation revocation to the California Court of Appeal, and the  
14 conviction became final no later than 60 days after petitioner's  
15 probation was revoked on October 24, 2000.<sup>2</sup> See former California  
16

---

17 <sup>2</sup> To the extent the pending habeas corpus petition  
18 challenges the trial court's judgment imposing probation, the  
19 statute of limitations began to run when the judgment imposing  
20 probation became final, Caldwell v. Dretke, 429 F.3d 521, 529-30  
21 (5th Cir. 2005), cert. denied, 549 U.S. 970 (2006) and 549 U.S.  
22 993 (2006), which occurred 60 days after petitioner was sentenced  
23 on March 11, 1999. However, to the extent the pending petition  
24 can be read as challenging the revocation of petitioner's  
25 probation, the limitations period did not begin to run until the  
26 probation revocation became final. Davis v. Purkett,  
27 296 F. Supp. 2d 1027, 1029-30 (E.D. Mo. 2003). Similarly,  
28 petitioner's claim of breach of plea agreement began to run no  
later than the date his probation revocation became final, since  
by that point, petitioner certainly could have discovered the  
factual predicate of his claim. 28 U.S.C. § 2244(d)(1)(D); see  
also Redd v. McGrath, 343 F.3d 1077, 1084 (9th Cir. 2003) ("[T]he  
date of the 'factual predicate' for [petitioner's] claim under  
§ 2244(d)(1)(D) . . . is determined . . . by inquiring when  
[petitioner] could have learned of the factual basis for his  
claim through the exercise of due diligence."); Connelly v.

1 Rules of Court, Rule 31(d) (2000);<sup>3</sup> Lewis v. Mitchell, 173 F. Supp. 2d  
2 1057, 1060 (C.D. Cal. 2001); People v. Coleman, 13 Cal. 3d 867, 871  
3 n.1, 120 Cal. Rptr. 384, 389-90 n.1 (1975) ("An order revoking  
4 probation is appealable as an order made after judgment affecting a  
5 defendant's substantial rights."). Thus, for petitioner, the statute  
6 of limitations began to run no later than December 27, 2000,<sup>4</sup> and  
7 expired no later than December 26, 2001. The instant action was not  
8 filed until more than seven years after the statute of limitations had  
9 run; thus, it is untimely.

10  
11 Since petitioner's recent state habeas corpus petitions were  
12 filed in 2008, after the statute of limitations expired, they neither  
13 toll nor revive the expired limitations period. Jiminez v. Rice, 276  
14 F.3d 478, 482 (9th Cir. 2001), cert. denied, 538 U.S. 949 (2003);  
15 Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000).

16  
17 There also is no basis for this Court to equitably toll the  
18 AEDPA's statute of limitations. A habeas petitioner is entitled to

19 \_\_\_\_\_  
20 Mendoza-Powers, 226 Fed. Appx. 679, 681 (9th Cir. 2007) (applying  
21 Section 2244(d)(1)(D) to petitioner's breach of plea agreement  
claim).

22 <sup>3</sup> Effective January 1, 2004, the substance of former Rule  
23 31(d) was moved to former Rules 30(b) and 30.1(a), Earls v.  
24 Hernandez, 403 F. Supp. 2d 985, 988 n.3 (C.D. Cal. 2005), and  
25 these rules were renumbered as Rules 8.304(b) and 8.308(a)  
effective January 1, 2007.

26 <sup>4</sup> December 23, 2000, the sixtieth day after October 24,  
27 2000, was a Saturday, and December 25, 2000, was a holiday, so  
28 December 26, 2000 was the final day for petitioner to timely file  
a notice of appeal. California Code of Civ. Proc. § 12a(a);  
former California Rules of Court, Rule 45(a) (2003); Lopez v.  
Felker, 536 F. Supp. 2d 1154, 1156-57 & n.3 (C.D. Cal. 2008).

1 equitable tolling "only if extraordinary circumstances beyond a  
2 prisoner's control make it impossible to file a petition on time."  
3 Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (citation and  
4 internal quotation marks omitted); Espinoza-Matthews v. People of the  
5 State of Cal., 432 F.3d 1021, 1026 (9th Cir. 2005). The petitioner  
6 bears the burden of proving: "(1) that he has been pursuing his rights  
7 diligently, and (2) that some extraordinary circumstance stood in his  
8 way." Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814,  
9 161 L. Ed. 2d 669 (2005); Mendoza v. Carey, 449 F.3d 1065, 1068 (9th  
10 Cir. 2006). Additionally, "the prisoner must show that the  
11 'extraordinary circumstances' were the but-for and proximate causes of  
12 his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.  
13 2003) (citations and internal quotation marks omitted); Roy v.  
14 Lampert, 465 F.3d 964, 969 (9th Cir. 2006), cert. denied sub nom.,  
15 Belleque v. Kephart, 549 U.S. 1317 (2007). Here, petitioner contends  
16 that despite his guilty plea, he is actually innocent of the crime of  
17 which he was convicted.<sup>5</sup> See Petition at 5.

---

18  
19 <sup>5</sup> Although petitioner pleaded guilty, he can nevertheless  
20 maintain an actual innocence claim. Bousley v. United States,  
21 523 U.S. 614, 623-24, 118 S. Ct. 1604, 1611-12, 140 L. Ed. 2d 828  
22 (1998); see also Lisker v. Knowles, 463 F. Supp. 2d 1008, 1040  
23 (C.D. Cal. 2006) ("[T]he mere existence of the guilty plea itself  
24 is not conclusive. The Supreme Court in Bousley specifically  
25 authorized consideration of a Schlup [v. Delo, 513 U.S. 298,  
26 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)] claim in the face of a  
27 guilty plea in determining whether petitioner can meet the Schlup  
28 standard. See Doe v. Menefee, 391 F.3d 147, 163 (2d Cir. 2004)  
("Schlup recognizes that the reviewing court must do more than  
reenact a trial of the petitioner; it must be free to evaluate  
independently all of the evidence, old and new, to . . . analyze  
the petitioner's potential innocence in light of the fact that  
the petitioner is essentially claiming that the criminal justice  
process has reached the wrong factual result, whether after a  
trial or a guilty plea."), cert. denied, 546 U.S. 961 (2005);

1 An actual innocence claim may constitute an "extraordinary  
2 circumstance" warranting equitable tolling, see, e.g., Souter v.  
3 Jones, 395 F.3d 577, 599 (6th Cir. 2005) ("[E]quitable tolling of the  
4 one-year limitations period based on a credible showing of actual  
5 innocence is appropriate."); Gibson v. Klinger, 232 F.3d 799, 808  
6 (10th Cir. 2000) ("Equitable tolling would be appropriate . . . when a  
7 prisoner is actually innocent. . . ."), or act as an exception to the  
8 statute of limitations. See United States v. Zuno-Arce, 339 F.3d 886,  
9 890 n.5 (9th Cir. 2003) (Petitioner's actual innocence claim "is not  
10 in itself a constitutional claim, but would serve only to remove the  
11 timeliness bar so that claims may be heard on the merits."), cert.  
12 denied, 540 U.S. 1208 (2004). In either event, "[t]o be credible, [an  
13 actual innocence] claim requires petitioner to support his allegations  
14 . . . with new reliable evidence . . . that was not presented at  
15 trial[,] and to "show that it is more likely than not that no  
16 reasonable juror would have found petitioner guilty beyond a  
17 reasonable doubt." Schlup, 513 U.S. at 324, 327, 115 S. Ct. at 865,  
18 867; Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1503,  
19 140 L. Ed. 2d 728 (1998); Griffin v. Johnson, 350 F.3d 956, 963 (9th  
20 Cir. 2003), cert. denied, 541 U.S. 998 (2004). Moreover, "'actual  
21 innocence' means factual innocence, not mere legal insufficiency."  
22 Bousley, 523 U.S. at 623-24, 118 S. Ct. at 1611.

23  
24 To support his actual innocence claim, petitioner proffers an

25  
26 \_\_\_\_\_  
27 cf. United States v. Anderson, 993 F.2d 1435, 1438 (9th Cir.  
28 1993) ("Statements made by a criminal defendant contemporaneously  
with his [guilty] plea should be accorded great weight because  
solemn declarations made in open court carry a strong presumption  
of verity." (citations and internal punctuation omitted)).

1 unsworn statement purportedly made in 1998 by the attempted murder  
2 victim, Jaime Marquez. Petition at 23-25. This document is not  
3 competent evidence, and it fails to raise a viable actual innocence  
4 claim. First, the document, which is not signed under penalty of  
5 perjury or notarized, is not reliable. See Doe, 391 F.3d at 161  
6 ("Because *Schlup* explicitly states that the proffered evidence must be  
7 reliable, the habeas court must determine whether the new evidence is  
8 trustworthy by considering it both on its own merits and, where  
9 appropriate, in light of the pre-existing evidence in the record.").  
10 Second, petitioner has not explained his lengthy delay in presenting  
11 this evidence to the Court. See Pace, 544 U.S. at 419, 125 S. Ct. at  
12 1815 ("Under long-established principles, petitioner's lack of  
13 diligence precludes equity's operation."); Welch v. Carey,  
14 350 F.3d 1079, 1083 (9th Cir. 2003) (en banc) ("Tolling accommodates  
15 effort, not inaction."), cert. denied, 541 U.S. 1078 (2004). Third,  
16 even setting these problems aside, and taking the document at face  
17 value, it does not establish petitioner's factual innocence since the  
18 victim merely states he does not know who shot him, but believes  
19 someone named "Mark" might have, and this clearly is "insufficient to  
20 satisfy the threshold showing under *Schlup*. . . ." Arthur v. Allen,  
21 452 F.3d 1234, 1246 (11th Cir. 2006), modified by, 459 F.3d 1310 (11th  
22 Cir. 2006), cert. denied, 549 U.S. 1338 (2007); see also Melson v.  
23 Allen, 548 F.3d 993, 1003 (11th Cir. 2008) (affidavit that does not  
24 exonerate petitioner is "unconvincing" and insufficient to satisfy  
25 *Schlup* threshold), pet. for cert. filed, (July 16, 2009); Hayman v.  
26 Commonwealth of Pa., 624 F. Supp. 2d 378, 394-95 (E.D. Pa. 2009)  
27 (petitioner does not demonstrate he is entitled to equitable tolling  
28 based on claim of actual innocence when he presents no new evidence



1 that would have altered his decision to plead guilty and does not  
2 explain why he waited over ten years before raising his claim on  
3 habeas corpus). For all these reasons, petitioner has not shown the  
4 statute of limitations should be equitably tolled, and his habeas  
5 corpus petition is determined to be untimely.

6  
7 **ORDER**

8 IT IS ORDERED THAT Judgment be entered dismissing the petition  
9 and action as untimely.

10  
11 DATE: October 2, 2009

/S/ ROSALYN M. CHAPMAN  
ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE

12  
13 R&Rs-MDOs\09-0627.mdo  
10/2/09

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28