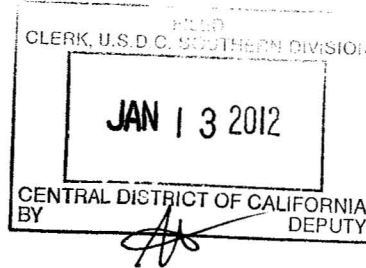


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2 I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY  
FIRST CLASS MAIL, POSTAGE PREPAID, TO ~~ALL COUNSEL~~ <sup>TP</sup>  
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF  
3 RECORD IN THIS ACTION ON THIS DATE.

4 DATED: 1/13/12  
Denise VO  
5 DEPUTY CLERK



10  
11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA

13 ROBERT EARL HURST III, ) Case No. EDCV 11-00594-DMG (RNB)  
14 Petitioner, )  
15 vs. )  
16 LELAND McEWEN, Warden, )  
Respondent. )  
ORDER DENYING PETITIONER'S  
APPLICATION FOR APPOINTMENT  
OF COUNSEL, AND ACCEPTING  
FINDINGS AND  
RECOMMENDATIONS OF UNITED  
STATES MAGISTRATE JUDGE

17 On September 26, 2011, the assigned Magistrate Judge issued a Report and  
18 Recommendation herein. The Magistrate Judge recommended that habeas relief be  
19 denied with respect to the three grounds for relief alleged in the Petition, and also that  
20 petitioner's request for an evidentiary hearing be denied. Following extensions of  
21 time, petitioner filed objections to the Report and Recommendation on December 21,  
22 2011. Concurrently, petitioner filed an Application for Appointment of Counsel.  
23 According to petitioner, he needs counsel in order to "locate potential witnesses (who  
24 have testimony crucial to both [his] innocence and the issues contained on habeas  
25 corpus)." Petitioner maintains that, if provided counsel, he can make a showing that  
26 he is "actually innocent."

27 To the extent that petitioner is requesting counsel for the purpose of further  
28 developing the record with respect to the three grounds for relief alleged in the

1 Petition, the Court notes that consideration of petitioner's claims is governed by the  
2 AEDPA standard of review set forth in 28 U.S.C. § 2254(d)(1) and that, as the  
3 Supreme Court recently held in Cullen v. Pinholster, - U.S. -, 131 S. Ct. 1388, 1398,  
4 179 L. Ed. 2d 557 (2011), review of state court decisions under § 2254(d)(1) "is  
5 limited to the record that was before the state court that adjudicated the claim on the  
6 merits."

7 To the extent that petitioner is requesting counsel for the purpose of locating  
8 witnesses to prove that he is "actually innocent," the Court notes that, under Herrera  
9 v. Collins, 506 U.S. 390, 400-01, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the  
10 existence merely of "new evidence" relevant to the guilt of a state prisoner is not a  
11 ground for federal habeas corpus relief. A claim of actual innocence is not itself a  
12 cognizable constitutional claim. See id. at 404. Rather, like the "actual innocence"  
13 claim of the petitioner in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d  
14 808 (1995), a federal habeas petitioner's "actual innocence" claim merely constitutes  
15 a possible gateway for the consideration of the petitioner's other substantive  
16 constitutional claims, to the extent that those claims might otherwise be procedurally  
17 barred (e.g., by the one-year limitation provision or the procedural default doctrine).  
18 See Herrera, 506 U.S. at 416-18; see also Coley v. Gonzales, 55 F.3d 1385, 1387 (9th  
19 Cir. 1995). Here, the Magistrate Judge has not found that any of petitioner's  
20 substantive federal constitutional claims is procedurally barred.

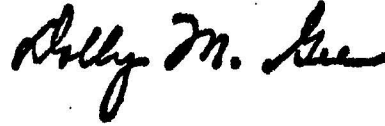
21 For the foregoing reasons, petitioner's application for the appointment of  
22 counsel is denied.

23 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the  
24 records and files herein, and the Report and Recommendation of the United States  
25 Magistrate Judge. Having made a de novo determination of those portions of the  
26 Report and Recommendation to which objections have been made, the Court accepts  
27 the findings and recommendations of the Magistrate Judge.

28 //

1 IT THEREFORE IS ORDERED that petitioner's request for an evidentiary  
2 hearing is denied; and that Judgment be entered denying the Petition and dismissing  
3 this action with prejudice.

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5 DATED: 1/12/12



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8 DOLLY M. GEE  
9 UNITED STATES DISTRICT JUDGE  
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