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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

O'SHAY JOHNSON,

Petitioner,

No. CIV S-08-496 MCE KJM P

vs.

D.K. SISTO,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 1993 Sacramento County conviction for attempted murder and other offenses. Respondent has filed a motion to dismiss, alleging that the action was filed beyond the statute of limitations. Petitioner has opposed the motion, and respondent has filed a reply.

I. Factual Background

As a backdrop to the issues raised by the instant motion, this court relies on the summary of the facts presented by the state Court of Appeal:

There are two large African American gangs, Crips and Bloods. Both are involved in the trafficking of narcotics and violent crimes such as robbery, drive-by shooting, and assault with deadly weapons. In Sacramento, Bloods predominate and mostly traffic in rock cocaine, which funds gang activities. A "set" is a segment of

1 Bloods or Crips, usually organized by neighborhood or street of
2 residence. One set of Bloods in the Del Paso Heights area is the
3 Militant Organized Brothers (MOB). . . . MOB adopted a policy
4 to control narcotics trafficking in its neighborhood, suppressing
5 competition of outsiders through robbery and other acts of
6 violence. . . . In October 1992, Arnold Butler, a MOB member,
7 was convicted of possession of rock cocaine for sale.

8 . . . Both defendants [petitioner and co-defendant Wayne Lewis]
9 were identified by the police as members of MOB . . . before the
10 shooting of Stanley Weaver.

11 In late May and June 1992, there was a lot of violence occurring on
12 the streets of Del Paso Heights between different gang sets. The
13 MOB had not been “getting along with” other sets of the Del Paso
14 Heights Bloods. A dispute arose between Anthony Weaver, a
15 member of the Elm Street Posse, a set of the Del Paso Heights
16 Bloods, and defendant Johnson. At the time Weaver made his
17 living by selling rock cocaine. Weaver testified that Johnson was
18 an ordinary gang member while Lewis was an “original gangster,”
19 a more senior member.

20 On the evening of June 21, 1992, Johnson hailed Weaver when
21 Weaver was riding home from the store on his bicycle. Weaver did
22 not reply, rather he sped away. Johnson chased him, firing two
23 shots. During the chase Johnson pulled a ski mask down over his
24 face. Weaver was armed with a pistol and fired it into the air.
25 Sometime that night after Weaver returned home, at 4004 Fell
26 Street, someone drove by and fired bullets into the house. A police
officer called to the scene soon after the shooting found a 9
millimeter bullet and shell casings in the street and 9 millimeter
slugs inside the house.

Shortly before 11 p.m. on the night of June 22, 1992, someone
fired gunshots from the street into the home of defendant
Johnson’s mother at 154 Estes Way. Defendant Johnson was not
home; however, his mother spoke with him that night after the
shooting.

Shortly before midnight on June 22, 1992, someone fired more
shots into the home of Weaver.

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1 Also on the evening of June 22, 1992, sometime after 10 p.m.
2 someone took Raymond Chess's brown Chevy station wagon It
3 was abandoned later that night in front of the home of Vincent
4 Bolton . . . a block from the home of Johnson's mother. Bolton saw
5 the people who abandoned it leave in a gray or blue four door car.
6 Defendant Johnson's latent fingerprint impressions were found on
7 the abandoned vehicle.

8 On the morning of June 23, 1992, shortly before 9:30 a.m. Stanley
9 Weaver, Anthony Weaver's father, was standing outside the Weaver
10 house chatting with a neighbor. A gray car pulled up, coming north
11 from the direction of North Avenue. In the car were three African
12 American men with ski masks on. The driver fired a shot at Stanley
13 Weaver; he turned to run and another shot hit him in the hip and he
14 fell down. The car then drove up on the Weavers' lawn. The men
15 continued to shoot at Stanley Weaver who, after being hit six times,
16 crawled under his neighbor's car. The driver pursued him while his
17 passengers shot at the Weaver house. The driver stuck his gun
18 underneath the car and shot Stanley Weaver repeatedly.

19 Lewis is similar in physique to the driver. Johnson is similar in
20 physique to the two smaller passengers.

21 Anthony Weaver came to the doorway of the Weaver home and
22 fired one shot; his gun jammed. The three men in ski masks ran
23 south on Fell Street and east on North Avenue. The abandoned gray
24 car had been stolen sometime after 6 p.m. the night before.

25 The first 911 call reporting the Weaver shooting incident was
26 received at 9:26 a.m. . . . At 9:34 a.m. another 911 call was
received from Gregory Augustus In the 911 call Augustus
reported that three African American males armed with guns were
in the backyard, one had no shirt on, and that they were the
"suspects" in the shooting on Fell Street. The men went through the
yard, around the side of the house.

Augustus was watering the grass when the men went by. At trial he
equivocally identified defendant Lewis as one of the three men;
before trial he had identified both defendants in a photographic
lineup.

LaShawn Williams was a passenger in a car being driven down
North Avenue toward Fell Street on the morning Stanley Weaver
was shot. She saw the defendants and another man hurry out of the
alley behind Huron Street and get into a brown car parked in front
of the alley. Defendant Johnson had no shirt on, he appeared to be
carrying an object wrapped up in a shirt or something.

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1 Jae Oney lives on North Avenue across from the Huron Street alley.
2 The evening before Stanley Weaver was shot Oney saw a brown car
3 parked blocking the alley. The morning of the Weaver shooting the
4 car was still there and Oney, concerned about fire truck access,
5 called the police department to complain. Officer Marlin Peterson
6 arrived at 8:50 a.m. that morning and found a brown Oldsmobile
7 partially blocking the Huron Street alley. The registered owner of
8 the car is defendant Johnson. Peterson left the scene at 9:08 a.m.
9 and returned at 10:08 a.m.; the car was no longer there.

6 Stanley Weaver suffered 11 gunshot wounds. He was shot through
7 the penis and lost a testicle; he received two shots to the foot
8 requiring repeated surgeries and has difficulty walking as a result.
9 A comparison of shell casings recovered on June 21st and on June
10 23d at the Weaver residence showed that two of the same guns were
11 used on each occasion.

10 After his arrest on June 23, 1992, defendant Johnson told a police
11 investigator he had spent the night before with a woman named
12 Talisha at her house and had not left her house until he drove to his
13 grandparent's [sic] house at noon.

12 Lodged Document (Lodg. Doc.) 2 at 3-7.

13 Among the issues in petitioner's federal habeas petition is a claim that he was
14 denied the effective assistance of counsel at trial in part because of multiple failures: a failure to
15 investigate and substantiate petitioner's alibi; a failure to impeach LaShawn Williams, the only
16 prosecution witness positively to identify petitioner; and a failure to investigate third party
17 culpability. Petition (Pet.) (Docket No. 1) at 32-37.¹ Petitioner supports this claim with three
18 declarations. The first is from petitioner's cousin, Joseph Marshall, who avers he told police he
19 did not steal a car and was not in a stolen car with petitioner, yet trial counsel never interviewed
20 him. Pet., Attach. C at 104. The second is from Joe Williams, who avers he was not with
21 LaShawn Williams on June 23, 1992, and did not see petitioner in Del Paso Heights that day.²
22 Joe Williams further avers he was not interviewed by law enforcement or by petitioner's counsel.
23 Id., Attach. C at 105. The third is from Freddie Marshall, who was present when his grandfather

24 ¹ The court relies on the page numbers assigned by the court's ECF system.

25 ² Although not mentioned in the Court of Appeal's factual recitation, petitioner asserts
26 that Joe Williams was driving the car in which LaShawn Williams was riding. Pet. ¶ 34.

1 Elisha Marshall told a defense investigator that petitioner had called Elisha Marshall's house the
2 morning of the day he was arrested. Id., Attach. C at 107. All of these declarations are dated
3 January 2008.

4 Petitioner has attached additional declarations to his opposition to the motion to
5 dismiss. It is not clear whether he is offering these other declarations as part of his underlying
6 habeas petition, or as information suggesting that he is actually innocent of the charges. One,
7 dated March 2005, is from Arnold Butler who avers he was not a member of the MOB, had no
8 knowledge of petitioner's membership in MOB, did not participate in any gang activities with
9 Johnson, and was not approached by petitioner's trial lawyer about this information. See Opp'n
10 (Docket No. 16) at 24. The second, dated February 2008, is from co-defendant Wayne Lewis,
11 who declares he and petitioner were not together on June 22 and 23, 1992, he was not aware of
12 petitioner's membership in the MOB, and he had been willing to testify about these subjects at
13 trial had petitioner's counsel asked him to do so. Id. at 25.

14 II. Procedural History

15 On May 7, 1993, petitioner was sentenced to a term of fifteen years, eight months
16 in prison followed by a term of life with the possibility of parole. Lodged Document (Lodg. Doc.)

17 1.

18 Petitioner appealed his conviction to the Court of Appeal for the Third Appellate
19 District, which affirmed his conviction on October 24, 1994. Lodg. Doc. 2. He sought review of
20 this determination in the California Supreme Court, which denied review on February 15, 1995.
21 Lodg. Docs. 3 & 4.

22 Petitioner embarked on a series of collateral attacks on his conviction, beginning in
23 1999, with a habeas petition filed in Sacramento County Superior Court on May 27, 1999. Lodg.
24 Doc. 5. This petition was denied on June 16, 1999. Lodg. Doc. 6. Petitioner filed a motion for
25 reconsideration on July 2, 1999; this motion was denied on July 28, 1999. Lodg. Docs. 7 & 8.

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1 On September 3, 1999, petitioner sought habeas relief in the Court of Appeal,
2 which rejected his petition on September 30, 1999. Lodg. Docs. 9 & 10.

3 Petitioner returned to Sacramento County Superior Court when he filed a second
4 petition for a writ of habeas corpus on April 20, 2006. Lodg. Doc. 11 (Superior Court Case No.
5 06F03701). This was denied on July 19, 2006. Lodg. Doc. 12. On November 7, 2006, petitioner
6 sought a writ of mandate from the Court of Appeal, asking it to order the Superior Court to issue
7 an order to show cause; this was construed as a petition for a writ of habeas corpus and denied on
8 November 30, 2006. Lodg. Docs. 18 & 19.

9 Petitioner filed a motion for reconsideration sometime in 2008, but respondent has
10 not provided a copy of this document. The order denying it, however, is dated April 18, 2008; it
11 refers to the fact that the motion was supported by the declarations of Joe Williams, Joseph
12 Marshall and Arnold Butler. Lodg. Doc. 13.

13 While the second petition, Case No. 06F03701, was pending, petitioner filed yet
14 another habeas petition in Sacramento County Superior Court, raising only sentencing issues; it
15 was filed as Case No. 06F05060. Lodg. Doc. 14. This petition was denied on September 8, 2006.
16 Lodg. Doc. 15. Petitioner pursued these sentencing issues in the Court of Appeal by filing a new
17 petition in that court on October 2, 2006. Lodg. Doc. 16. This petition was denied on October 5,
18 2006. Lodg. Doc. 17. Thereafter, petitioner sought substantive review of his habeas claims
19 attacking his conviction by filing a petition for a writ of habeas corpus in the Court of Appeal on
20 December 22, 2006. Lodg. Doc. 20. This petition was denied on February 8, 2007. Lodg. Doc.
21 21. He pursued these claims in the California Supreme Court, in a habeas petition filed March 2,
22 2007. Lodg. Doc. 27. This petition was denied on May 9, 2007. Lodg. Doc. 28.

23 On January 14, 2007, petitioner filed a habeas petition in the California Supreme
24 Court, raising the sentencing issues presented in Superior Court Case No. 06F05060. Lodg. Doc.
25 22. This was denied on October 10, 2007. Lodg. Doc. 23.

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1 Petitioner did pursue additional habeas relief, but these additional attacks flowed
2 from his attempts to correct information in his central file or his challenges to a denial of parole.
3 Lodg. Docs. 25, 26, 29-35.

4 III. Analysis

5 One of the changes the Antiterrorism and Effective Death Penalty Act (AEDPA)
6 made to the habeas statutes was to add a statute of limitations for filing a habeas petition:

7 (d)(1) A 1-year period of limitation shall apply to an application for
8 a writ of habeas corpus by a person in custody pursuant to the
9 judgment of a State court. The limitation period shall run from the
10 latest of–

11 (A) the date on which the judgment became final by the conclusion
12 of direct review or the expiration of the time for seeking such
13 review;

14 (B) the date on which the impediment to filing an application
15 created by State action in violation of the Constitution or laws of the
16 United States is removed, if the applicant was prevented from filing
17 by such State action;

18 (C) the date on which the constitutional right asserted was initially
19 recognized by the Supreme Court, if the right has been newly
20 recognized by the Supreme Court and made retroactively applicable
21 to cases on collateral review; or

22 (D) the date on which the factual predicate of the claim or claims
23 presented could have been discovered through the exercise of due
24 diligence.

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

27 28 U.S.C. § 2244.

28 A conviction is final for purposes of the AEDPA statute of limitations at the
29 expiration of the ninety day period for seeking certiorari. Bowen v. Roe, 188 F.3d 1157, 1159
30 (9th Cir. 1999).

31 The statute of limitations is tolled during the pendency of any “properly filed” state
32 collateral attack on the judgment. Nino v. Galaza, 183 F.3d 1003, 1006-07 (9th Cir. 1999).

1 However, a state petition filed after the limitations period has run will neither revive nor toll the
2 statute of limitations. Jimenez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001).

3 In this case, the AEDPA year began to run on May 17, 1995 and expired on May
4 20, 1996.³ Petitioner did not begin to file collateral attacks until 1999, long after the statute of
5 limitations expired. These petitions did not revive the federal statute of limitations.

6 Petitioner argues his federal petition is timely, in essence, because he obtained new
7 evidence in 2008 and that any untimeliness may be excused because he is actually innocent.
8 Opp’n (Docket No. 16) at 3-4; Decl. of O’Shay Johnson (Docket No. 22) (O. Johnson Decl.). He
9 also suggests he did not have access to his files or his transcripts for periods of time. Respondent
10 counters that petitioner is neither diligent nor innocent.

11 A. Equitable Tolling And Access To Transcripts And Files

12 Petitioner alleges that he received his trial transcripts from appellate counsel Lloyd
13 Riley in 1996, but that “much of [his] documents was lost” when he was placed in segregation in
14 1997. He also alleges that in 2003 he received “clarification” that both trial counsel Peter Sailors
15 and appellate counsel Lloyd Riley had died; around that time he sought Sailors’ “work product,
16 including documents of his investigation.” O. Johnson Decl. ¶¶ 13, 14. In addition, in 2003, his
17 family sent him police reports and investigative materials generated by his first appointed lawyer,
18 Mr. Kerbs. Id. ¶ 15. This material included reports showing that one of the guns used in the
19 attempted murder of Stanley Weaver was used hours later in an unrelated murder. Id.

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26 ³ The last day of the period, May 18, 1996, was a Saturday. See Fed. R. Civ. P. 6(a)(3).

1 The Ninth Circuit has held:

2 We will permit equitable tolling of AEDPA's limitations period
3 only if extraordinary circumstances beyond a prisoner's control
4 make it impossible to file a petition on time. When external forces,
5 rather than a petitioner's lack of diligence, account for the failure to
6 file a timely claim, equitable tolling of the statute of limitations may
7 be appropriate.

8 Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (internal quotations, citations omitted). It is
9 petitioner's burden to show he is entitled to equitable tolling. Espinoza-Matthews v. People of the
10 State of California, 432 F.3d 1021, 1026 (9th Cir. 2005). To meet his burden, he must
11 demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
12 circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

13 The Ninth Circuit has recognized that equitable tolling may be justified when,
14 through no fault of his own, a habeas petitioner was separated from his legal files and transcripts.
15 Thus, in Lott v. Mueller, 304 F.3d 918 (9th Cir. 2002), the court recognized that if petitioner was
16 able to bear his burden of showing he was deprived of his legal material for a period of eighty-two
17 days when he was away from the prison, he might be entitled to equitable tolling.

18 In United States v. Battles, 362 F.3d 1195 (9th Cir. 2004), the Ninth Circuit
19 considered the relationship between access to transcripts and timely filing under the AEDPA.
20 Battles alleged he had not timely filed his motion to vacate his sentence under 28 U.S.C. § 2255
21 because his appellate attorney did not send him his transcripts. The Ninth Circuit noted that when
22 an attorney refuses to provide a petitioner's file, the petitioner may be entitled to equitable tolling;
23 it found the reasoning equally applicable when the transcripts have been withheld. Id. at 1197-98;
24 but see Jihad v. Hvass, 267 F.3d 803, 806 (8th Cir. 2001) (lack of access to transcripts is not basis
25 for equitable tolling); Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir. 2001) (possession of a
26 transcript is not a condition precedent to filing a habeas petition); Lloyd v. Van Natta, 296 F.3d
630, 633 (7th Cir. 2002) (state's failure to provide complete transcript not a basis for equitable
tolling because it did not prevent filing).

1 In this case, however, plaintiff has not borne his burden of establishing his
2 entitlement to equitable tolling. He admits he received the transcripts in 1996, at the conclusion
3 of the direct appeal, but does not suggest that he began to prepare his collateral attacks upon their
4 receipt. O. Johnson Decl. ¶ 13. He does aver that “much” of his “documents” were lost when he
5 was placed in segregation, but does not specifically identify the “documents” as his appellate
6 transcripts or otherwise describe what portions of the transcripts were taken. He does not describe
7 any efforts he took to replace what was taken, but such efforts must have borne fruit (if indeed the
8 transcripts were lost) because petitioner attached portions of the clerk’s and reporter’s transcripts
9 in support of his initial habeas petition, filed May 27, 1999. See Lodg. Doc. 5, Ex. A. Finally, he
10 concedes that it was not until 2003 that he asked his family for the documents Attorney Riley had
11 sent them; his perusal of these materials led him to believe that Attorney Sailors had not
12 adequately investigated his case or prepared for trial. O. Johnson Decl. ¶ 15. Even if the court
13 could construe petitioner’s vague claims about the loss of his documents to constitute an
14 “extraordinary circumstance,” petitioner has not demonstrated that the transcripts were missing
15 after 1999 or that he was pursuing his rights with any measure of diligence. He is not entitled to
16 equitable tolling.

17 B. 28 U.S.C. § 2244 (d)(1)(D)

18 Petitioner also suggests that he is entitled to a different starting date for his
19 AEDPA year for several reasons. First, he asserts he did not receive the police reports and
20 investigative materials from Attorney Kerbs, first appointed to represent him, and thus did not
21 realize that Sailors had not undertaken sufficient investigation, until 2003. O. Johnson Decl.
22 ¶ 15.

23 Second, petitioner alleges he attempted to get declarations from witnesses, but that
24 many of these “didn’t want to be found.” Id. ¶¶ 17, 22. For example, although he talked to
25 Arnold Butler in 1997 and Butler agreed to give petitioner a declaration, Butler was then sent to
26 federal prison and did not resume contact with petitioner, through Butler’s wife, until 2005. Id.

1 ¶ 18.⁴ In addition, he was not able to obtain a declaration from Joe Williams until 2008, when he
2 learned that a cousin had married Williams’ step-son; Williams had not wanted to get involved
3 earlier even though he knew petitioner was looking for him. Id. ¶ 19. Petitioner did not speak to
4 his cousin Joe Marshall until after a death in the family in 2007; Marshall claimed he had not
5 wanted to get involved before because he was in and out of prison. Id. ¶ 20. Similarly,
6 petitioner’s “lady friend” contacted co-defendant Lewis on petitioner’s behalf at a time not
7 specified, in an “attempt to see would he come forward after all these years” and so it was only in
8 2008 that he was able to obtain Lewis’s declaration. Id. ¶ 21.⁵

9 Third, it was only after he found Sailors’ declaration in support of the motion to
10 continue trial that petitioner believed he had enough evidence to support his writ. Id. ¶ 23.

11 Under section 2244(d)(1)(D), a habeas petitioner must file his petition within one
12 year of “the date on which the factual predicate of the claim or claims presented could have been
13 discovered through the exercise of due diligence.” In Hasan v. Galaza, 254 F.3d 1150 (9th Cir.
14 2001), the Ninth Circuit noted that:

15 [T]o have the factual predicate for a habeas petition based on
16 ineffective assistance of counsel, a petitioner must have discovered
17 (or with the exercise of due diligence could have discovered) facts
suggesting both unreasonable performance *and* resulting prejudice.

18 Id. at 1154. In Hasan, the petitioner knew that juror Harris had had contact with Willie Mae
19 Bernard, a prosecution witness in a separate case and that his trial counsel had not interviewed
20 either Harris or Bernard at the time he filed a motion for new trial. Id. at 1152. In response to the
21 motion for a new trial, the prosecution claimed that Bernard had no connection to Hasan’s case.
22 Id. at 1154.

24 ⁴ The Butler declaration is not part of the petition, but rather is attached to the original
25 opposition to the motion to dismiss. See Opp’n at 24.

26 ⁵ As with Butler’s declaration, Lewis’s is attached to the opposition to the motion to
dismiss, not to the habeas petition. Opp’n at 25.

1 Sometime after the conclusion of his direct appeal, Hasan learned from another
2 inmate that Bernard had been involved in a romantic relationship with one of the chief
3 prosecution witnesses against him. Only then did he pursue habeas relief. Id. at 1153. The Ninth
4 Circuit observed that when Hasan learned about the relationship, he had “a good faith basis for
5 arguing prejudice—that is, that had his counsel investigated and brought this information before the
6 trial court, the trial court may have ordered a new trial.” Id. at 1154. The court concluded,
7 however, that the clock starts when the petitioner knows the facts themselves, not the legal
8 significance of those facts. Id. at 1154 n.3.

9 Moreover, this provision of section 2244 does not provide “an extended delay . . .
10 while a habeas petitioner gathers every possible scrap of evidence that might, by negative
11 implication, support his claim.” Flanagan v. Johnson, 154 F.3d 196 (5th Cir. 1998); Hereford v.
12 McCaughtry, 101 F.Supp.2d 742, 745 (E.D. Wis. 2000) (petitioner not entitled to rely on this
13 section when he knew the factual predicate at the time of trial; fact that he might not have had all
14 the evidence or understood legal basis not determinative). Nevertheless, the diligence required
15 under this section is not “the maximum feasible diligence” but rather “reasonable diligence in the
16 circumstances,” including physical confinement, which “can limit a litigant’s ability to exercise
17 due diligence.” Schlueter v. Varner, 384 F.3d 69, 74, 75 (3rd Cir. 2004) (internal quotations
18 omitted).

19 1. Police Reports And Investigative Materials

20 Petitioner suggests he did not realize that Sailors had not interviewed those
21 witnesses petitioner believed were vital to his defense until he received his files in 2003. O.
22 Johnson Decl. ¶ 15. He does not explain, however, why he waited until 2003 to ask his family to
23 send the materials; the record suggests that Attorney Riley sent them the materials in 1996. Id.
24 ¶ 13. He has not suggested he acted with any diligence, much less due diligence in discovering
25 this material.

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1 However, even if the court deems 2003 to be the triggering date, petitioner has not
2 timely filed: even his subsequent, potentially-tolling state petition was not filed until 2006. Lodg.
3 Doc. 11.

4 2. Sailors' Continuance Motion

5 In a request to continue trial, Attorney Sailors explained that he had not completed
6 his investigation of petitioner's case because of his trial schedule. Lodg. Doc. 11, Ex. B.
7 Petitioner claims he did not find this request until 2005 and so did not understand that Sailors had
8 not undertaken any investigation. O. Johnson Decl. ¶ 18. Sailors' motion was included in the
9 clerk's transcript, yet petitioner fails to explain why he did not find it earlier. These
10 circumstances do not provide a new triggering date under the AEDPA, as once again petitioner
11 has failed to show he acted with due diligence in locating this document.

12 3. Declarations From Butler, Lewis, Williams, Joseph And Freddie Marshall

13 Petitioner argues he had difficulties obtaining declarations from these five people
14 because of his incarceration and because these witnesses "didn't want to be found" or "didn't
15 want to get involved." O. Johnson Decl. ¶¶ 19, 20. To some extent, petitioner
16 "misapprehends the pertinent inquiry":

17 The critical determination under § 2244(d)(1)(D) is whether the
18 "factual predicate" for the claims (not their legal basis or all
19 evidence supporting the claims) could have been discovered through
the exercise of due diligence.

20 Hereford v. McCaughtry, 101 F.Supp.2d 742, 745 (E.D. Wis. 2000).

21 For example, petitioner claims that during trial he told Sailors that Butler would
22 testify on petitioner's behalf, but that counsel told him it was not necessary. O. Johnson Decl.
23 ¶ 10. Petitioner was thus aware of the factual predicate of this portion of the claim – that counsel
24 had neither interviewed Butler nor called him to testify and that Butler was willing to testify
25 favorably – at the time of trial. Moreover, even if the declaration constituted the factual predicate

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1 for, rather than the evidence supporting, the claim, it was signed in March 2005; petitioner's
2 exhaustion petition on ineffective assistance of counsel was not filed until April 2006.

3 The same is true concerning Freddie Marshall's declaration: at the time of trial,
4 petitioner knew he had an alibi for June 22 and 23 1992, told counsel about that alibi and knew
5 counsel had presented no witnesses supporting it. O. Johnson Decl. ¶ 8. Thus petitioner was
6 aware of the factual predicate for this claim even before the original statute of limitations began to
7 run. Freddie Marshall's declaration provides only the evidentiary support for this claim; it does
8 not trigger a new statute of limitations period.

9 Petitioner's declaration also shows that at the time of trial, he knew that Joe
10 Williams and Joe Marshall might have information helpful to the defense and that counsel had not
11 interviewed them nor called them as witnesses. *Id.* ¶ 9. Arguably, petitioner did not know what
12 Williams and Marshall would say until he secured his declarations, and he could not show
13 prejudice from the claimed ineffective assistance of counsel without showing that these witnesses
14 would have been willing to testify. *See Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000)
15 (burden of showing ineffective assistance of counsel cannot be met without affidavits showing
16 testimony of witnesses counsel failed to interview or call).

17 The date petitioner obtained the declarations does not trigger the renewed statute of
18 limitations, however, unless he could not have known of the proposed testimony even through the
19 exercise of diligence. In light of the fact that petitioner knew of the potential usefulness of Joseph
20 Marshall and Joseph Williams at the time of trial, his failure to secure their declarations earlier,
21 even given the limitations of incarceration, does not demonstrate due diligence. Petitioner avers
22 that Joe Marshall did not want to get involved before 2008 because he was in and out of prison,
23 but does not explain what attempts or how many attempts he made to secure Marshall's
24 declaration before then. Similarly, petitioner mentions in passing that he had been looking for
25 Williams without describing what efforts he made to contact Williams before the fortuity of his
26 cousin's marriage to Williams' step-son.

1 Finally, petitioner knew that Lewis’s willingness to testify that petitioner was not
2 with him on June 22 and 23, 1992 might be important, yet says only that he had not spoken to co-
3 defendant Lewis since sentencing. He does not claim he made any earlier attempts that were
4 rebuffed or otherwise describe difficulties in making contact with Lewis.

5 Petitioner has not borne his burden of showing that the factual predicate for his
6 claim of ineffective assistance of counsel could not have been known in the exercise of due
7 diligence.

8 C. Actual Innocence

9 In Schlup v. Delo, 513 U.S. 298, 314-15 (1995), the Supreme Court held that a
10 habeas petitioner who makes “a colorable showing of actual innocence” that would implicate a
11 “fundamental miscarriage of justice” may be entitled to have “otherwise barred constitutional
12 claim[s]” considered on the merits. The Ninth Circuit has suggested that a sufficient Schlup
13 showing might overcome the bar of the statute of limitations. Majoy v. Roe, 296 F.3d 770, 775-
14 76 (9th Cir. 2002). Ultimately, it is petitioner’s burden to demonstrate actual innocence.
15 Jaramillo v. Stewart, 340 F.3d 877, 883 (9th Cir. 2003).

16 The Supreme Court has recognized that this exception to the statute of limitations
17 is concerned with actual, as opposed to legal, innocence and must be based on reliable evidence
18 not presented at trial. Schlup, 513 U.S. at 324; Calderon v. Thompson, 523 U.S. 538, 559 (1998).

19 Once petitioner has presented such evidence, a court must consider the new
20 evidence in light of the evidence as a whole, and must determine whether in light of all the
21 evidence, it is more likely than not that no reasonable juror would have found petitioner guilty
22 beyond a reasonable doubt. Doe v. Menefee, 391 F.3d 147, 166 (2d Cir. 2004).

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1 In this case petitioner has not met the first hurdle, for he has not presented reliable
2 evidence of actual innocence. As the Supreme Court explained:

3 To be credible, such a claim requires petitioner to support his
4 allegations of constitutional error with new reliable
5 evidence-whether it be exculpatory scientific evidence, trustworthy
6 eyewitness accounts, or critical physical evidence-that was not
presented at trial. Because such evidence is obviously unavailable in
the vast majority of cases, claims of actual innocence are rarely
successful.

7 Schlup, 513 U.S. at 323. The court also cautioned that “timing of the submission and the likely
8 credibility of the affiants bear on the probable reliability of that evidence.” Id. at 332.

9 Apart from the affidavits petitioner has presented, he has suggested he is innocent
10 for two reasons. The first is his claim that LaShawn Williams, the only person to identify him
11 with certainty at trial, told him on the phone that she had perjured herself. O. Johnson Decl. ¶ 17.
12 The court does not consider petitioner’s self-interested account of this conversation, without any
13 corroboration, to be reliable.

14 The second is the fact that one of the weapons used to shoot Mr. Weaver was used
15 in a homicide after petitioner had been arrested. Opp’n ¶ 11; Pet. at 124. While this evidence is
16 more reliable, it is negative rather than positive evidence of petitioner’s innocence and is not
17 supported by additional evidence to make the full showing required.

18 Finally, there are the declarations. Freddie Marshall’s is based on hearsay: he
19 recounts what he remembers of his grandfather’s interview with the police, rather than his own
20 recollection of petitioner’s presence or call on June 23, 1992. Joseph Marshall’s is similarly not
21 reliable, for it simply recounts what he told police: that he knew nothing about stolen cars and was
22 not in a stolen car with petitioner. Opp’n at 23; Pet. at 104. He does not affirmatively say that he
23 and petitioner were not involved with any of the stolen cars tied to the crime scene. Butler’s
24 denial of gang membership undercuts his claim that petitioner was not a gang member; if Butler
25 was not a member, his claimed knowledge of petitioner’s membership status lacks a reliable basis.
26 Williams’ declaration is not reliable evidence of petitioner’s innocence: he denies seeing

1 petitioner emerge from an alley in Del Paso Heights on June 23, 1992, but as he does not clearly
2 say he was in the area at the time, the fact that he did not see petitioner on that day is meaningless.
3 Finally, Lewis's declaration, coming from one with an interest in exonerating himself – and
4 carefully phrased so as to distance himself as well as petitioner from the crime scene – at the
5 remove of sixteen years from the shooting does not constitute reliable evidence of petitioner's
6 innocence. Petitioner has not borne his burden of passing through the Schlup gateway.

7 IT IS THEREFORE RECOMMENDED that respondent's motion to dismiss
8 (docket no. 15) be granted.

9 These findings and recommendations are submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
11 days after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
14 shall be served and filed within five days after service of the objections. The parties are advised
15 that failure to file objections within the specified time may waive the right to appeal the District
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: September 10, 2009.

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19 
20 U.S. MAGISTRATE JUDGE