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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEARCEY JAMES STEWART,

Petitioner,

vs.

MATTHEW CATE, Secretary of the
California Department of Corrections and
Rehabilitation,

Respondent.

Civil No. 05cv1059-BTM (CAB)

ORDER:
**(1) GRANTING MOTION
TO EXPAND THE RECORD;**
**(2) DENYING MOTION
FOR LEAVE TO AMEND:**
**(3) GRANTING IN PART AND
DENYING IN PART MOTION FOR
DISCOVERY; AND**
**(3) DIRECTING RESPONDENT
TO SUBMIT DOCUMENTS FOR
IN CAMERA REVIEW**

Petitioner is a California prisoner proceeding pro se with a First Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his San Diego County Superior Court conviction of two counts of attempted murder. (Doc. No. 55.) The conviction arose from a drive-by shooting where Petitioner was identified as the driver and his co-defendant Richard Lee as the shooter, although Lee’s conviction was overturned on state habeas four years after the trial. Petitioner alleges in the First Amended Petition that the prosecution committed misconduct and failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963) and Giglio v. United States, 405 U.S. 150, 154 (1972), by failing to turn over exculpatory information which resulted in the overturning of Lee’s conviction. Specifically,

1 Petitioner contends the prosecution failed to turn over information regarding: (a) Darnell
2 Jackson, a member of Petitioner’s gang who apparently came forward after trial and provided
3 information that Petitioner was the driver but Lee was not the shooter; and (b) a witness named
4 William Allen, whom Petitioner contends made a statement impeaching prosecution witness
5 Kevin Brown who testified that Petitioner had confessed. Petitioner also alleges that the Court
6 can reach the merits of his claims irrespective of any procedural bar because he has satisfied the
7 “actual innocence” standard set forth in Schlup v. Delo, 513 U.S. 298, 315 (1995) (holding that
8 a claim of actual innocence is “a gateway though which a habeas petitioner must pass to have
9 his otherwise barred constitutional claim considered on the merits.”)

10 On May 30, 2008, the Court found that this action was untimely because it was filed after
11 expiration of the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1). (Doc. No.
12 54.) In that Order, the Court reserved ruling on whether dismissal of the First Amended Petition
13 was appropriate, and directed further briefing on Petitioner’s pending Motion for Discovery in
14 order to determine whether Petitioner could avoid dismissal by satisfying the Schlup standard.
15 (See 5/30/08 Order at 15-18.)

16 Respondent has filed an Opposition to Petitioner’s discovery motion. (Doc. No. 60.)
17 Petitioner has filed a Reply to the Opposition, as well as a Motion for Leave to Amend and a
18 Motion to Expand the Record. (Doc. Nos. 64-66.)

19 **I. Motion to Expand the Record**

20 Petitioner moves to expand the record to include a response to an order to show cause
21 filed by the San Diego County District Attorney in the state habeas proceedings of his co-
22 defendant Richard Lee, wherein the District Attorney did not oppose granting Lee partial habeas
23 relief. (Pet.’s Mot. to Expand [Doc. No. 65] Ex. A.) Petitioner contends this document shows
24 that the information he seeks through discovery exists because it was generated when the District
25 Attorney conducted an investigation into the “newly discovered” evidence exonerating Lee, and
26 therefore Respondent’s contention that no exculpatory information exists “is less than truthful.”
27 (Pet.’s Mot. to Expand Record at 2.) Such a document is permitted to be made part of the record
28 and considered by the Court under Rule 7 of the Habeas Rules. See Rule 7(b) of Rules

1 Following 28 U.S.C. § 2254 (providing that documents predating the filing of the Petition may
2 be included in the record). Thus, the Court **GRANTS** Petitioner’s Motion and **EXPANDS** the
3 record in this case to include this document.

4 **II. Motion for Leave to Amend**

5 As Petitioner correctly notes, this Court, in its May 30, 2008 Order, liberally construed
6 the First Amended Petition as arguing that the claims presented therein should be considered on
7 their merits notwithstanding the failure to present them within the statute of limitations because
8 Petitioner can fit through the Schlup gateway. (See 5/30/08 Order at 20.) The Court also
9 construed the First Amended Petition as presenting claims alleging that the prosecution
10 committed misconduct and failed to disclose exculpatory evidence in violation of Brady and
11 Giglio due to the failure to turn over exculpatory information regarding Darnell Jackson, the
12 witness who came forward after trial and apparently said that Petitioner was the driver but Lee
13 was not the shooter, and a witness named William Allen, whom Petitioner contends made a
14 statement impeaching prosecution witness Kevin Brown who testified that Petitioner confessed
15 to his involvement in the shooting. (Id.) The Court reserved ruling on the Schlup issue pending
16 further briefing on the pending discovery motion. (Id.)

17 Petitioner now seeks leave to amend the First Amended Petition in order to clarify that
18 his Schlup claim is based not only on his contention that Jackson was the driver, but on the
19 contention that the two victims, the Parish brothers, committed perjury when they testified that
20 Petitioner was the driver and Lee the shooter, and based on Allen’s statement impeaching
21 Brown. (Pet.’s Mot. to Amend at 3.) Under a liberal construction of the First Amended Petition,
22 these arguments are contained in Petitioner’s Schlup argument, and the Court will consider them
23 in ruling on whether Petitioner has fit through the Schlup gateway.

24 Petitioner also seeks leave to amend in order to raise a separate claim of perjury based
25 on the arguments presented in support of his Schlup contention. (Pet.’s Mot. to Amend at 2.)
26 A liberal construction of the First Amended Petition reveals that this claim is encompassed in
27 the prosecutorial misconduct claim alleging presentation of perjured testimony.

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1 Finally, Petitioner seeks leave to amend to include a claim alleging that the District
2 Attorney failed to adequately investigate the evidence which resulted in the exoneration of Lee,
3 and thereby failed to develop evidence exonerating Petitioner. (Pet.'s Mot. to Amend at 2.)
4 Such a claim is necessarily encompassed in the claims in the First Amended Petition alleging
5 that Petitioner's federal due process rights were violated in connection to the failure to provide
6 exculpatory evidence derived from the investigation leading to the vacating of Lee's conviction.
7 The Court will liberally construe the First Amended Petition as presenting such a claim.

8 Because the claims Petitioner seeks to add are already fairly encompassed in the First
9 Amended Petition, the Court **DENIES** Petitioner's Motion for Leave to Amend as moot.

10 **III. Motion for Discovery**

11 In his Motion for Discovery, Petitioner seeks an order directing Respondent to turn over
12 any exculpatory evidence in its possession, including but not limited to, Jackson's file regarding
13 his cooperation with the prosecution in this and other cases, and a report written by Investigating
14 Officer Wade at the request of the District Attorney summarizing the effect of Jackson's
15 statement on Wade's investigation into the shooting, and accounting for the wrongful conviction
16 of Lee. (Doc. No. 41.) Petitioner contends this information will assist him in presenting his
17 Brady/Giglio claims, in challenging the credibility of the victims' eyewitness testimony, and in
18 establishing his factual innocence by demonstrating that Jackson was the driver of the car, that
19 the Parish brothers, who were the victims, provided perjured testimony at trial when they
20 identified Petitioner as the driver and Lee as the shooter, and that Detective Wade, a brother-in-
21 law of the Parish brothers, pressured them to commit perjury. (Pet.'s Motion for Discovery at
22 2-8; Traverse [Doc. No. 31] at 14-15.)

23 Respondent opposes the discovery motion, contending that Petitioner's motion "is based
24 on nothing more than rank speculation," and that there is no justification for allowing Petitioner
25 to conduct discovery. (Resp.'s Opp. [Doc. No. 60] at 7.) Respondent contends that the evidence
26 presented at Petitioner's trial implicating Petitioner as the driver was not simply the eyewitness
27 identification by the Parish brothers, but also Petitioner's confession to Kevin Brown, and the
28 fact that the police found Petitioner on the night of the shooting in the driver's seat of the car

1 involved in the shooting. (Id. at 11-12.) Thus, Respondent argues, even if there was exculpatory
2 evidence provided by Jackson, Petitioner would still not satisfy the Schlup standard of actual
3 innocence. (Id.) Respondent argues that in any case the evidence presented by Jackson to the
4 District Attorney was not exculpatory but actually implicated Petitioner as the driver, that
5 Petitioner’s defense counsel was aware of that evidence and conducted his own investigation
6 without turning up any exculpatory evidence, and that there was no Brady obligation because
7 the evidence provided by Jackson was neither material nor exculpatory. (Id. at 14-17.)

8 Petitioner replies that he is not speculating but is seeking very specific evidence,
9 including the materials identified in the District Attorney’s response to the order to show cause
10 in Lee’s habeas case, namely, (1) the joint interview conducted by the District Attorney and
11 defense counsel with Darnell Jackson; (2) the interview with the Parish brothers; (3) the
12 interviews with the “numerous other witnesses,” one of whom Petitioner contends must have
13 been Detective Wade; (4) the summary of the investigation which was presented to the division
14 chief of the District Attorney’s office; and (5) the final determination as to why the District
15 Attorney decided not to oppose Lee’s habeas petition. (Pet.’s Reply [Doc. No. 66] at 1-2.)
16 Petitioner contends that, in addition to seeking discovery under the habeas rules, he has a post-
17 conviction due process right to this information under Brady, as that right has been interpreted
18 by the Ninth Circuit in Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992) and Osborne
19 v. District Attorney, 521 F.3d 1118, 1128-29 (9th Cir. 2008), pet. for cert. granted, 129 S.Ct. 488
20 (Nov. 3, 2008). (Pet.’s Reply at 2.) Petitioner also contends an evidentiary hearing is required
21 in order to develop the record regarding whether the investigation leading to the grant of habeas
22 relief to Lee was conducted in a manner calculated to not develop evidence exculpatory as to
23 Petitioner. (Id. at 5-6.) Attached to Petitioner’s Motion to Expand the Record is the District
24 Attorney’s response to the order to show cause in Lee’s case. Petitioner argues this document
25 demonstrates that the District Attorney’s office, in conducting the investigation which led to the
26 exoneration of Lee, obtained interviews with Jackson, Wade and the Parish brothers, and that
27 Respondent has an obligation to turn this information over to him. (Pet.’s Mot. to Expand the
28 Record at 2.)

1 Discovery under Rule 6(a) of the Rules Governing Section 2254 Cases is available only
2 “for good cause.” Hayes v. Woodford, 301 F.3d 1054, 1065 n.6 (9th Cir. 2002). The Court is
3 unable to determine whether good cause exists until it reviews the materials which were relied
4 upon by the District Attorney in the decision not to oppose Lee’s state habeas petition.

5 In the response order to show cause filed by the District Attorney, there is reference to
6 a 60-day investigation where numerous interviews were conducted, and “a package summarizing
7 the investigation was compiled.” (Pet.’s Mot. to Expand [Doc. No. 65] Ex. A at 3.) Respondent
8 is **DIRECTED** to submit to the Court in camera the “package summarizing the investigation”
9 referred to in the response to the order to show cause, any transcripts of the interviews conducted
10 during the investigation which led to the decision not to oppose Lee’s state habeas petition (or
11 documents reflecting the content of those interviews if transcripts are not available), as well as
12 any materials which cast doubt on the credibility of the eyewitness identifications made by the
13 Parish brothers in this case. The Court is mindful of the sensitive nature of such material and
14 will not order disclosure to Petitioner without first providing Respondent an opportunity to be
15 heard and to seek any appellate relief which might be available. The Court will defer the
16 determination whether an evidentiary hearing is necessary until after reviewing the material
17 submitted by Respondent.

18 Petitioner’s Motion for Discovery is **GRANTED** in part to the extent the Court has
19 determined it will review the materials in camera, and **DENIED** in part without prejudice to a
20 later determination whether the material will ordered to be disclosed to Petitioner.

21 **VI. Conclusion and Order**

22 Petitioner’s Motion to Expand the Record [Doc. No. 65] is **GRANTED**, Petitioner’s
23 Motion for Leave to Amend [Doc. No. 64] is **DENIED** as moot, Petitioner’s Motion for

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1 Discovery [Doc. No. 41] is **GRANTED** in part and **DENIED** in part, and Respondent is
2 **DIRECTED** to submit the material identified in this Order directly to chambers for in camera
3 review within thirty (30) days of the date this Order is filed.

4 **IT IS SO ORDERED.**

5 DATED: January 20, 2009

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7 Honorable Barry Ted Moskowitz
8 United States District Judge
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