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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARIO BORUNDA,<sup>1</sup>  
Petitioner,  
v.  
MARION SPEARMAN, Warden,  
Respondent.

NO. CV 14-5850-BRO (AGR)  
  
ORDER TO SHOW CAUSE

On July 28, 2014, Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **September 8, 2014**, why this court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

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<sup>1</sup> Petitioner is also known as Ignacio Gonzalez. (Petition at 1.)

I.

**PROCEDURAL BACKGROUND**

On February 2, 2007, Petitioner pled no contest to residential burglary. (Petition at 2.) Petitioner was sentenced to 22 years in prison. (*Id.*) He did not appeal. On the petition form, Petitioner states he appealed. However, the case he cites is a habeas petition that he filed on March 3, 2014 before the California Court of Appeal and that was denied on March 5, 2014. See Appellate Courts Case Information online docket in Case No. B254653. On April 10, 2007, the Superior Court denied Petitioner’s request for a certificate of probable cause. (Petition, Attachment 2.)

On October 2, 2007, Petitioner filed a habeas petition in the Superior Court, which was denied on November 6, 2007. (*Id.*, Attachment 4.) On August 31, 2010, the Superior Court denied another habeas petition filed by Petitioner on August 16, 2010. (*Id.*, Attachment 11.)

On February 11, 2008, Petitioner filed a habeas petition in the Court of Appeal, which was denied on February 14, 2008. Appellate Courts Case Information online docket in Case No. B205636.

On September 7, 2012, the Superior Court denied a writ of error coram nobis filed by Petitioner on August 9, 2012. (*Id.*, Attachment 14.) On October 12, 2012, the Court of Appeal received a notice of appeal from Petitioner. On January 11, 2012, the court dismissed the request as a “non-appealable order.” Appellate Courts Case Information online docket in Case No. B244470. On December 4, 2012, Petitioner filed a writ of error coram vobis in the Court of Appeal, which was denied on December 5, 2012. Appellate Courts Case Information online docket in Case No. B245404.

On January 28, 2014, the Superior Court denied Petitioner’s third habeas petition filed on December 11, 2013. (Petition, Attachment 17.)

1 On April 1, 2014, Petitioner filed a habeas petition in the California  
2 Supreme Court, which was denied on June 18, 2014. Appellate Courts Case  
3 Information online docket in Case No. S217532.

4 On July 23, 2014, Petitioner constructively filed the instant petition in this  
5 court in which he raises three grounds. (Petition at 5-6; back of envelope)

## 6 II.

### 7 STATUTE OF LIMITATIONS

8 The petition was filed after enactment of the Antiterrorism and Effective  
9 Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in  
10 reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138  
11 L. Ed. 2d 481 (1997).

12 The AEDPA contains a one-year statute of limitations for a petition for writ  
13 of habeas corpus filed in federal court by a person in custody pursuant to a  
14 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts  
15 running on the latest of either the date when a conviction becomes final under 28  
16 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

#### 17 **A. The Date on Which Conviction Became Final – § 2244(d)(1)(A)**

18 Because Petitioner did not appeal, his conviction became final 60 days  
19 after his conviction (February 2, 2007) on April 3, 2007. California Rules of Court  
20 8.308(a) (formerly Rule 30.1). The statute of limitations expired a year later on  
21 April 3, 2008. Absent tolling, the petition is time-barred.

#### 22 **1. Statutory Tolling**

23 The statute of limitations is tolled during the time “a properly filed  
24 application for State post-conviction or other collateral review with respect to the  
25 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

26 The court assumes for the purpose of this order that all of Petitioner’s  
27 collateral filings were “properly filed” and pertained to the judgment or claim.

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1           Petitioner's first habeas petition was filed in the Superior Court on October  
2 2, 2007, 182 days after his conviction became final and leaving him with 183 days  
3 in the limitations period. The habeas petition was denied on November 6, 2007.  
4 In addition, on February 11, 2008, Petitioner filed a habeas petition in the Court of  
5 Appeal, which was denied on February 14, 2008. Petitioner is entitled to  
6 statutory tolling for the entire period from October 2, 2007 to February 14, 2008.<sup>2</sup>

7           Petitioner did not file another habeas petition until August 16, 2010, when  
8 he filed a second petition in the Superior Court. The gap between February 14,  
9 2008, when the Court of Appeal denied his petition and this next filing (914 days)  
10 is unreasonable. *Evans v. Chavis*, 546 U.S. 189, 193, 126 S. Ct. 846, 163 L. Ed.  
11 2d 684 (2006); *Carey v. Saffold*, 536 U.S. 214, 224, 122 S. Ct. 2134, 153 L. Ed.  
12 2d 260 (2002); see *Gaston v. Palmer*, 447 F.3d 1165, 1167 (9th Cir. 2006) (gaps  
13 of 15 months, 18 months and 10 months between rounds of state habeas  
14 petitions are unreasonable). Petitioner is not entitled to statutory tolling for the  
15 914-day gap. The limitations period therefore expired on August 15, 2008  
16 (February 14, 2008 + 183 days).

17           Petitioner is not entitled to statutory tolling for his subsequent collateral  
18 filings. See *Welch v. Carey*, 350 F.3d 1079, 1081-84 (9th Cir. 2003) (state  
19 habeas petition filed after the limitations has expired does not revive the expired  
20 limitations period).

## 21           **2. Equitable Tolling**

22           "[T]he timeliness provision in the federal habeas corpus statute is subject to  
23 equitable tolling." *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130  
24 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he  
25 has been pursuing his rights diligently, and (2) that some extraordinary  
26 circumstance stood in his way' and prevented timely filing." *Id.* at 2562 (quoting

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27           <sup>2</sup> The court assumes that the gap between the two filings is reasonable for  
28 the purpose of this order.

1 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669  
2 (2005)). “The diligence required for equitable tolling purposes is “reasonable  
3 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation  
4 marks omitted). The extraordinary circumstances must have been the cause of  
5 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this  
6 reason only when “extraordinary circumstances beyond a prisoner’s control  
7 make it *impossible* to file a petition on time” and “the extraordinary  
8 circumstances” were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*,  
9 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in original).

10         Petitioner argues he was unable to file earlier because he had to obtain his  
11 court transcripts or his court file from his trial counsel but was unable to do so.  
12 (Petition at 1.1 to 1.2.) Assuming without deciding that Petitioner is entitled to  
13 equitable tolling until he received his case file from counsel, the petition remains  
14 time-barred. Petitioner received his file from counsel in a letter dated October 19,  
15 2010. (*Id.* at 1.3 & Attachment 13.) Yet, he did not file another request for  
16 collateral review in California until August 9, 2012, almost two years later, when  
17 he filed a writ of error coram nobis. Equitable tolling does not assist Petitioner.

18         **B.     Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)**

19         In the context of an ineffective assistance claim, the statute of limitations  
20 may start to run on the date a petitioner discovered (or could have discovered)  
21 the factual predicate for a claim that his counsel’s performance was deficient, or  
22 on the date a petitioner discovered (or could have discovered) the factual  
23 predicate for prejudice, whichever is later. *See Hasan v. Galaza*, 254 F.3d 1150,  
24 1155 (9th Cir. 2001). Therefore, the statute of limitations begins to run on “the  
25 date on which the factual predicate of the claim or claims presented could have  
26 been discovered through the exercise of due diligence.” 28 U.S.C. §  
27 2244(d)(1)(D). The statute starts to run when the petitioner knows or through  
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1 diligence could discover the important facts, not when the petitioner recognizes  
2 their legal significance. *Hasan*, 254 F.3d at 1154 n.3.

3 Petitioner alleges his trial counsel was ineffective based on his conduct  
4 during plea negotiations.

5 Petitioner was aware of the factual predicates of his claim of ineffective  
6 assistance of trial counsel by the time he pled guilty. Even if the court assumes  
7 Petitioner was unaware of the alleged “bribe” of a witness until as late as 2008  
8 (see Petition, Attachment 6), the date of discovery does not assist Petitioner.

### 9 **C. Actual Innocence**

10 “[A]ctual innocence, if proved, serves as a gateway through which a  
11 petitioner may pass . . . the impediment . . . of the statute of limitations.”

12 *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013).

13 “[T]enable actual-innocence gateway pleas are rare: ‘[A] petitioner does not meet  
14 the threshold requirement unless he persuades the district court that, in light of  
15 the new evidence, no juror, acting reasonably, would have voted to find him guilty  
16 beyond a reasonable doubt.’” *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329, 115  
17 S. Ct. 851, 130 L. Ed. 2d 808 (1995) and citing *House v. Bell*, 547 U.S. 518, 538,  
18 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (emphasizing that the *Schlup* standard is  
19 ‘demanding’ and seldom met)).

20 To satisfy the standard, a petitioner must present “‘new reliable evidence.’”  
21 *House*, 547 U.S. at 537. Based on all the evidence, both old and new, “the court  
22 must make ‘a probabilistic determination about what reasonable, properly  
23 instructed jurors would do.’” *Id.* at 538 (citation omitted). “The court’s function is  
24 not to make an independent factual determination about what likely occurred, but  
25 rather to assess the likely impact of the evidence on reasonable jurors.” *Id.*

26 Petitioner challenges the old evidence and argues there is new evidence of  
27 a “bribe of [a] witness.” (Petition at 3.2 & Attachment 17.)

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1           The court has reviewed the transcript of the preliminary hearing. (Petition,  
2 Attachment 16.) Susanna Koost, the victim of the burglary, testified first. On  
3 August 23, 2006, just before noon, Koost arrived home to her townhouse  
4 apartment on Tica Drive. She entered her home through the back door and  
5 noticed open drawers in her dining room. She also saw someone in her living  
6 room “ransacking the armoire.” She said, “Who’s here? Get out of here.” She  
7 ran out the back door, and the intruder ran out the front door. (*Id.* at 3.) She was  
8 not able to get a good look at the intruder’s face. However, she noticed he had a  
9 hat and a blue and white shirt on. She went back into her house and called 911.  
10 (*Id.* at 4.) She also noticed that some of her jewelry had been stolen. (*Id.* at 5.)  
11 She then ran back out the front door yelling, “That man just robbed me.” (*Id.* at  
12 4.) She saw her neighbor, Adam Lassy, who was just coming home when she  
13 screamed about the “robbery.” (*Id.* at 4-5.) She also noticed that the intruder  
14 was running toward the corner of her street, Tica Drive, and Los Feliz Boulevard.  
15 (*Id.* at 5.) When he arrived at the corner, he turned left onto Los Feliz Boulevard  
16 and his hat flew off. She also noticed that Lassy was chasing the intruder. (*Id.* at  
17 9.) Petitioner then “hopped on a bicycle.” (*Id.* at 10.)

18           About 20 minutes after she lost sight of the intruder, the police took Koost  
19 to another location where they had arrested Petitioner. The police had taken a  
20 knife and a ring from Petitioner’s pocket, and they showed them to Koost. Koost  
21 recognized the ring as one she had purchased the week before. (*Id.* at 6-7, 10.)

22           Lassy testified that when he arrived home, he noticed a man with a white  
23 plastic bag running from Koost’s apartment. He heard Koost scream that she had  
24 been robbed. (*Id.* at 12-13.) The man had a hat on and was wearing a blue or  
25 blue-striped shirt. Lassy did not “get a great look at his face.” Lassy started  
26 “after him.” The man turned the corner at Los Feliz Boulevard and got on a bike  
27 that was “propped up against an apartment building” and biked east on Los Feliz  
28 Boulevard on the wrong side of the road. Lassy stopped following the man when

1 he arrived at about Griffith Park Boulevard. (*Id.* at 13.) Lassy thought that he  
2 saw the hat fly off the man while he was cycling. (*Id.* at 14.) The man had his  
3 shirt on while he was cycling. (*Id.* at 17.)

4 Lucia Floridalma Lopez testified through a Spanish interpreter. (*Id.* at 19.)  
5 Lopez was a passenger in a car driving on Los Feliz Boulevard shortly after the  
6 time of the burglary. (*Id.* at 19-20.) She witnessed Lassy running and Petitioner  
7 on a bicycle. (*Id.* at 20, 22.) She saw Petitioner get off his bicycle, pick it up, and  
8 go up some stairs. (*Id.* at 21.) She was able to see Petitioner's face and  
9 identified him in court. (*Id.* at 21-22.) Petitioner was not wearing a hat but was  
10 wearing a blue and white striped shirt. (*Id.* at 22.) Lopez did not speak to any  
11 other witnesses because "I cannot communicate with them." (*Id.*) The police  
12 took Lopez to another location. Petitioner at that point did not have a shirt on.  
13 She identified Petitioner as the man she had seen on the bicycle. (*Id.* at 23-24.)

14 Detective Ronald Kitzmiller of the Los Angeles Police Department  
15 investigated the burglary. (*Id.* at 25.) He searched Petitioner right after the crime  
16 and found a white metal ring with a brown stone in Petitioner's pocket. (*Id.* at 26.)  
17 Petitioner told Kitzmiller he had found the ring "a few blocks away." (*Id.* at 27.)

18 The court found probable cause that Petitioner had committed first-degree  
19 burglary and remanded him to custody. (*Id.* at 28.)

20 Petitioner submits his declaration in support of his claim of actual  
21 innocence. He states that on August 23, 2006, he was in a car with two others  
22 "looking to buy drugs." They stopped so Petitioner could make a phone call  
23 because they were "lost." Before Petitioner exited the car, he took off his shirt  
24 because it was hot. The other two drove off and left him there.

25 Petitioner walked to the intersection of Silver Lake Boulevard and Madera  
26 Avenue.<sup>3</sup> There he found a white metal ring with a stone and put it in his pocket.

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27  
28 <sup>3</sup> Petitioner incorrectly names the two streets.

1 He then walked to Silver Lake Boulevard and Glenhurst Avenue (not Glenhurst  
2 Street). The police pulled up and arrested him. Officer Henderson (Kitzmillers  
3 partner) told Petitioner that he “had better tell him where I had hidden the ‘things’  
4 I had stolen because I was ‘bought and paid for.’” Petitioner’s counsel told  
5 Petitioner at the courthouse on February 2, 2007, that Koost had given Lopez a  
6 reward of \$300-500 as an eyewitness. (Petition, Attachment 17.)

7 Petitioner has not demonstrated actual innocence of burglary. His claim  
8 rests on his own version of what occurred coupled with an accusation that Koost  
9 “bribed” Lopez to falsely identify him. (*Id.*) There is no evidence of the money  
10 being a bribe. According to defense counsel, when he was informed on July 17,  
11 2008, that Petitioner was alleging that counsel was ineffective, he wrote a memo  
12 to his file about his recollection of the reward. Counsel stated that the district  
13 attorney told counsel before the plea that Koost had given Lopez a reward of  
14 between \$100 and \$500 “for the recovery of her ring.” Counsel told Petitioner  
15 that this information could be used at trial to “spin . . . to our advantage.”  
16 (Petition, Attachment 6.)

17 The evidence given at the preliminary hearing was compelling as to  
18 Petitioner’s guilt. Petitioner has failed to “persuade[] the . . . court that, in light of  
19 the [allegedly] new evidence, no juror, acting reasonably, would have voted to  
20 find him guilty beyond a reasonable doubt.” *McQuiggin*, 133 S. Ct. at 1928.

### 21 III.

#### 22 ORDER TO SHOW CAUSE

23 IT IS THEREFORE ORDERED that, on or before **September 8, 2014**,  
24 Petitioner shall show cause why the court should not recommend dismissal of the  
25 petition based on expiration of the one-year statute of limitations.  
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1           **If Petitioner fails to respond to the order to show cause by the above**  
2 **deadline, the court will recommend that the petition be dismissed with**  
3 **prejudice based on expiration of the one-year statute of limitations.**

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5 DATED: August 7, 2014  
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ALICIA G. ROSENBERG  
United States Magistrate Judge

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