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 9  
 10 Petitioner on April 20, 2015, by TS

FILED  
 CLERK, U.S. DISTRICT COURT  
 April 20, 2015  
 CENTRAL DISTRICT OF CALIFORNIA  
 BY: TS DEPUTY

8 UNITED STATES DISTRICT COURT  
 9 CENTRAL DISTRICT OF CALIFORNIA  
 10 WESTERN DIVISION

11	ROGELIO MARTINEZ,	} No. CV 15-2708-JLS (DFM)
12	Petitioner,	
13	v.	
14		
15	CYNTHIA TAMPKINS, Warden,	
16	Respondent.	} ORDER TO SHOW CAUSE

18  
 19 On April 13, 2015, Petitioner Rogelio Martinez filed a Petition for Writ  
 20 of Habeas Corpus by a Person in State Custody ("Petition") in this Court. On  
 21 October 17, 2011, Petitioner was convicted by a Los Angeles County Superior  
 22 Court jury of two counts of making criminal threats, one count of dissuading a  
 23 witness by force or threat of force or violence, one count of misdemeanor  
 24 cruelty to a child by inflicting injury, one count of child abuse, and one count  
 25 of misdemeanor battery. Petition at 2.<sup>1</sup> On November 30, 2011, Petitioner was  
 26 sentenced to 19 years in state prison. Id.

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 28 <sup>1</sup> All citations to the Petition are to the CM/ECF pagination.

1 **A. The Petition Is Facially Untimely**

2 Under the Antiterrorism and Effective Death Penalty Act of 1996  
3 (“AEDPA”), a one-year limitations period applies to a federal petition for writ  
4 of habeas corpus filed by a person in state custody. See 28 U.S.C. § 2244(d)(1).  
5 The limitations period runs from the latest of four alternative accrual dates. See  
6 28 U.S.C. § 2244(d)(1)(A)-(D). In most cases, including this one, the  
7 limitations period begins running from “the date on which the judgment  
8 became final by the conclusion of direct review or the expiration of the time for  
9 seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

10 Here, the California Supreme Court denied Petitioner’s petition for  
11 review on August 28, 2013. Petitioner does not appear to have filed a petition  
12 for writ of certiorari in the Supreme Court. Therefore, his conviction became  
13 final 90 days later, on November 26, 2013. See Bowen v. Roe, 188 F.3d 1157,  
14 1158-59 (9th Cir. 1999). Petitioner then had one year from the date his  
15 judgment became final on November 26, 2013, until November 26, 2014, to  
16 timely file a habeas corpus petition in this Court. See Patterson v. Stewart, 251  
17 F.3d 1243, 1247 (9th Cir. 2001). However, Petitioner did not file the instant  
18 action until April 13, 2015, more than four months too late.

19 From the face of the Petition, it does not appear that Petitioner has any  
20 basis for contending that he is entitled to a later trigger date under §  
21 2244(d)(1)(B). Nor does it appear that Petitioner has any basis for contending  
22 that he is entitled to a later trigger date under § 2244(d)(1)(C) because none of  
23 the claims alleged in the Petition appear to be based on a federal constitutional  
24 right that was initially recognized by the United States Supreme Court  
25 subsequent to the date his conviction became final and that has been made  
26 retroactively applicable to cases on collateral review. Finally, it does not  
27 appear that Petitioner has any basis for contending that he is entitled to a later  
28 trigger date under § 2244(d)(1)(D) because it appears from the face of the

1 Petition that Petitioner was aware of the factual predicate of all his claims at  
2 the time of his trial in 2011. See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th  
3 Cir. 2001) (statute of limitations begins to run when a prisoner “knows (or  
4 through diligence could discover) the important facts, not when the prisoner  
5 recognizes their legal significance”).

6 **B. It Does Not Appear that Petitioner Is Entitled to Sufficient Statutory**  
7 **Tolling to Make the Petition Timely**

8 Under AEDPA, “[t]he time during which a properly filed application for  
9 State post-conviction or other collateral review with respect to the pertinent  
10 judgment or claim is pending shall not be counted toward any period of  
11 limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The entire period of  
12 time for a full round of collateral review, from the filing of a first state habeas  
13 petition to the time the last state habeas petition is denied, may be deemed  
14 “pending” and tolled, so long as the state petitioner proceeds in a hierarchical  
15 order from one lower state court to a higher state court. See Carey v. Saffold,  
16 536 U.S. 214, 223 (2002). This includes so-called “gap tolling” for the periods  
17 of time between such state habeas petitions. Id.

18 As noted above, Petitioner’s conviction became final on November 26,  
19 2013. Petitioner filed his first state habeas petition in the California Supreme  
20 Court on September 11, 2014. See Petition at 3. Petitioner is not entitled to any  
21 gap tolling for the period between the date his conviction became final on  
22 November 26, 2013, and the date he filed his state habeas petition in the  
23 California Supreme Court on September 11, 2014, because this more than  
24 nine-month delay is not “reasonable.” See Evans v. Chavis, 546 U.S. 189, 191-  
25 92 (2006); see also Velasquez v. Kirkland, 639 F.3d 964, 968 (9th Cir. 2011)  
26 (finding that 30- to 60-day delays in seeking habeas relief from the next highest  
27 state court were “reasonable” under Chavis). Therefore, as of September 11,  
28 2014, 289 days in the one-year limitations period had elapsed, and Petitioner

1 had 76 days remaining in which to file a timely federal habeas petition.

2       Petitioner is entitled to statutory tolling from the date he filed his state  
3 habeas petition on September 11, 2014, until the California Supreme Court  
4 denied the petition on November 12, 2014. Therefore, as of November 12,  
5 2014, Petitioner had 76 days remaining in the one-year limitations period, or  
6 until January 27, 2015, in which to file a timely petition. However, Petitioner  
7 did not file his habeas petition in this Court until April 13, 2015, more than  
8 two months too late.

9 **C. Petitioner Does Not Appear to Be Entitled to Any Equitable Tolling**

10       The Supreme Court has held that AEDPA’s one-year limitation period is  
11 also subject to equitable tolling in appropriate cases. See Holland v. Florida,  
12 560 U.S. 605, 645 (2010). However, a habeas petitioner is entitled to equitable  
13 tolling only if he shows (1) that he has been pursuing his rights diligently; and  
14 (2) that “some extraordinary circumstance stood in his way.” See Pace v.  
15 DiGuglielmo, 544 U.S. 408, 418 (2005); see also Holland, 560 U.S. at 649.  
16 Here, Petitioner does not allege that any circumstances exist which would  
17 establish a right to equitable tolling.

18 **D. Conclusion**

19       A district court has the authority to raise the statute of limitations issue  
20 sua sponte when untimeliness is obvious on the face of the petition and to  
21 summarily dismiss a petition on that ground pursuant to Rule 4 of the Rules  
22 Governing Section 2254 Cases in the United States District Courts, so long as  
23 the court “provides the petitioner with adequate notice and an opportunity to  
24 respond.” See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v.  
25 Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

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1 IT THEREFORE IS ORDERED that, on or before May 18, 2015,  
2 Petitioner show cause in writing as to why the Court should not recommend  
3 that this action be summarily dismissed with prejudice on the ground of  
4 untimeliness.

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6 Dated: April 20, 2015



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8 DOUGLAS F. McCORMICK  
9 United States Magistrate Judge  
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