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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ,  
Petitioner,  
v.  
STATE OF CALIFORNIA, et al.,  
Respondents.

NO. EDCV 14-1493-GW (AGR)  
  
ORDER TO SHOW CAUSE

I.

**PROCEDURAL BACKGROUND**

On July 21, 2014, Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. On July 30, 2014, the court issued an order to show cause, returnable on August 29, 2014, why it should not recommend dismissal of the petition based on expiration of the statute of limitations. (Dkt. No. 4.) Petitioner did not file a response.

On September 8, 2014, Petitioner filed a first amended petition ("FAP"). The July 30, 2014 order to show cause (Dkt. No. 4) is DISCHARGED. However,

1 based on the FAP, it still appears that the one-year statute of limitations has  
2 expired.

3 In 1989 or 1990, a Los Angeles County jury convicted Petitioner of murder.  
4 (FAP at 2, 18.) The court sentenced him to 16 years to life. (*Id.* at 2.) The  
5 California Court of Appeal affirmed the conviction on June 4, 1992. California  
6 Appellate Courts Case Information in Case No. B044314. Petitioner did not file a  
7 petition for review in the California Supreme Court. (FAP at 3.)

8 In 2014, Petitioner filed three habeas petitions in the California Court of  
9 Appeal. All petitions were denied. See California Appellate Courts Case  
10 Information online docket in Case Nos. B255194, B256099 and B256347.

11 Petitioner lists five grounds in the instant petition. (FAP at 5-6.)

## 12 II.

### 13 STATUTE OF LIMITATIONS

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

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

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

24 The California Court of Appeal affirmed the judgment on June 4, 1992.  
25 Because Petitioner did not file a petition for review, his conviction became final 40  
26 days later on July 14, 1992. See *Gaston v. Palmer*, 417 F.3d 1030, 1033 (9th  
27 Cir. 2005).

1           Because the conviction became final before the AEDPA was enacted in  
2 1996, Petitioner had until April 24, 1997, to file a federal habeas petition. *Laws v.*  
3 *Lamarque*, 351 F.3d 919, 921 (9th Cir. 2003). Absent tolling, the petition is time-  
4 barred.

### 5                   **1.     Statutory Tolling**

6           The statute of limitations is tolled during the time “a properly filed  
7 application for State post-conviction or other collateral review with respect to the  
8 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Because  
9 Petitioner did not file his first state habeas petition until 2014, he is not entitled to  
10 statutory tolling. See *Welch v. Carey*, 350 F.3d 1079, 1081-84 (9th Cir. 2003)  
11 (state habeas petition filed after the limitations has expired does not revive the  
12 expired limitations period).

### 13                   **2.     Equitable Tolling**

14           “[T]he timeliness provision in the federal habeas corpus statute is subject to  
15 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130  
16 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he  
17 has been pursuing his rights diligently, and (2) that some extraordinary  
18 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting  
19 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669  
20 (2005)). “The diligence required for equitable tolling purposes is “reasonable  
21 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation  
22 marks omitted). The extraordinary circumstances must have been the cause of  
23 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this  
24 reason only when “extraordinary circumstances beyond a prisoner’s control  
25 make it *impossible* to file a petition on time” and “the extraordinary  
26 circumstances” were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*,  
27 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in original).

1           There is no indication in the FAP that Petitioner is entitled to equitable  
2 tolling.

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

4           In the context of an ineffective assistance claim, the statute of limitations  
5 may start to run on the date a petitioner discovered (or could have discovered)  
6 the factual predicate for a claim that his counsel’s performance was deficient, or  
7 on the date a petitioner discovered (or could have discovered) the factual  
8 predicate for prejudice, whichever is later. *See Hasan v. Galaza*, 254 F.3d 1150,  
9 1155 (9th Cir. 2001). Therefore, the statute of limitations begins to run on “the  
10 date on which the factual predicate of the claim or claims presented could have  
11 been discovered through the exercise of due diligence.” 28 U.S.C. §  
12 2244(d)(1)(D). The statute starts to run when the petitioner knows or through  
13 diligence could discover the important facts, not when the petitioner recognizes  
14 their legal significance. *Hasan*, 254 F.3d at 1154 n.3.

15           In Ground One, Petitioner alleges that his trial and appellate counsel were  
16 ineffective. (FAP at 5.) He alleges that his trial counsel “refused to hire an  
17 investigator to investigate police brutality in which the Rampart Police” detectives  
18 were involved. (*Id.* at 9.) He also alleges that trial counsel “acted as an advocate  
19 for the prosecution and waived [Petitioner]’s due process and equal protection  
20 rights to an affirmative defense.” (*Id.* at 10 (formatting omitted).) He alleges that  
21 counsel failed to investigate and prepare for trial, failed to file a motion to dismiss  
22 based on illegal arrest and the alleged breach of Petitioner’s right to a speedy  
23 trial. (*Id.*) Counsel also allegedly failed to object to “false testimony,” failed to  
24 challenge the prosecutor’s misconduct, and failed to exclude certain prospective  
25 jurors from the panel. (*Id.*) Petitioner does not elaborate on any ineffective  
26 assistance by appellate counsel.

1 All of issues alleged by Petitioner occurred before the end of trial.  
2 Therefore, Petitioner knew of the factual predicate before his conviction became  
3 final. The date of discovery does not assist Petitioner.


4 **III.**

5 **ORDER TO SHOW CAUSE**

6 IT IS THEREFORE ORDERED that, on or before **October 22, 2014**,  
7 Petitioner shall show cause why the court should not recommend dismissal of the  
8 petition based on expiration of the one-year statute of limitations.

9 **If Petitioner fails to respond to the order to show cause by the above**  
10 **deadline, the court will recommend that the petition be dismissed with**  
11 **prejudice based on expiration of the one-year statute of limitations.**

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14 DATED: September 22, 2014

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17 ALICIA G. ROSENBERG  
18 United States Magistrate Judge  
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