UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI'I
HONOLULU DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Respondent - Plaintiff,	)	USDC Case No. 1:14-cv-090-SOM
	)	
v.	)	USDC Case No. 1:06-cr-080-SOM-5
	)	
ETHAN MOTTA,	)	Hon. Susan Oki Mollway
	)	United States District Court Judge
Petitioner - Defendant.	)	
	)	

PRO SE MEMORANDUM OF LAW WITH APPENDED EXHIBITS IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(1), (2) & (6)

COMES NOW ETHAN MOTTA Petitioner *pro se* in the above styled and numbered cause and respectfully submits the following Memorandum of Law with Appended Exhibits in Support of his Rule 60(b), Federal Rules of Civil Procedure ("Fed. R. Civ. P."), Motion for Relief from Judgment, and submits as follows:

I.

A. PROCEDURAL DISCUSSION AND ANALYSIS

(1) Permissible Use of Rule 60(b), Fed. R. Civ.P.

The purpose of permitting substantive relief from a judgment or order is to allow the federal courts to strike the proper balance between too often conflicting principles that litigation must be brought to a final close and that justice must be done. See generally, *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005)(noting that Rule 60(b)'s "whole purpose is to make an exception to finality")). Because upsetting a settled judgment clashes with this finality object, the relief is considered "extraordinary" and generally is reserved for only exceptional circumstances. The rule provides five

specified reasons for which substantive relief may be granted and adds a sixth catchall category for reasons not otherwise specifically listed.

The Rule is plain and unambiguous on its face. Subdivision (b) was promulgated for the purpose of, and to obtain relief from judgments under certain circumstances. Two types of procedures to obtain relief from judgments are specified in the rules. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment which action may or may not be begun in the court that rendered the judgment. While conceded that in each case there is a limit upon the time within which resort to a motion is permitted, there remains an exception. If the right to make a motion is lost by the expiration of time limits fixed within the rules, the procedural remedy available is limited by laches or statutes of limitations. No such time limitations have attached to the instant Motion under any subsection, *e.g.* (b)(1), (b)(2) or (b)(6).

(a). <u>Subsection (b)(1) – Mistake, Inadvertence, Surprise or Excusable Neglect</u>

Rule 60(b)(1) authorizes this Court to give relief from a judgment, order, or proceeding for "mistake, inadvertence, surprise, or excusable neglect." The authority to give relief granted by Rule 60(b)(1) has been exercised in a wide variety of cases. Judgments have been set aside when they were based on a misunderstanding about appearance and representation by counsel, resulted from confusion over the trial date, and even because of a miscalculation about the date that a pleading or other documents were due. *Torres v. S. S. Pierce Co.,* 471 F.2d 473 (9th Cir. 1972). More generally, courts have held that a party *should not be deprived of the opportunity to present the merits of the claim because of a technical error* or slight mistake by the party's attorney. *Bateman v. U.S. Postal Service*, 231 F.3d 1220 (9th Cir. 2000). Similarly, judgments entered as a result of

settlements may be reopened when fraud or mutual mistake is shown. The determination of whether neglect is excusable is at bottom, an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Lemoge v. United States,* 587 F.3d 1188, 1192 (9th Cir.2009) (quotation marks omitted). At least four factors are considered: "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Id.* In some circumstances, the prejudice a denial would cause to the movant must also be considered. *Id.* at 1195. See also, *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1100 (9th Cir. 2010).

(b). Subsection (b)(2) – Newly Discovered Evidence

Relief from an order or judgment may also be granted on the basis of new evidence where: (1) the evidence has been newly discovered since trial, (2) the moving party was diligent in discovering the new evidence, (3) the new evidence is not merely cumulative or impeaching, (4) the new evidence is material, and (5) in view of the new evidence, a new trial would probably produce a different result. Implicit in these elements is the recognition that as here, the evidence must be evidence of facts that were in existence at the time of trial (though not discovered until after trial). time".

(c). Subsection (b)(6) – In the Interests of Justice

Finally, relief from a judgment or order may be permitted to further the interests of justice. This "catchall" category is generally reserved for extraordinary circumstances. See, e.g. *Gonzales v. Crosby*, 545 U.S. 524, 535 (2005), *Klapprott v. United States*, 335 U.S. 601 (1935). Although relief under this rule is "exceedingly rare" and seeking such relief also generally requires a showing of actual injury in the presence of circumstances beyond the petitioner's control that

prevented timely action to protect his interests. There is also authority for the conclusion that this rule is limited to setting aside a judgment or order (as requested here), and may not be used to grant affirmative relief. (See, *Delay v. Gordon*, 475 F.3d 1039, 1044-45 (9th Cir.2007)). This category, as well as each that precedes it, are mutually exclusive. If the reason for which relief is sought is within one of the specific categories (even though the facts fail to meet the prerequisites for that relief, *e.g.* the neglect is not truly excusable, the time period for seeking relief under that rule provision has passed, *etc.*), the catchall category will not permit relief. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). "Something more" is generally required and given the breadth of the reasons captured by Rule 60(b)(1) - (b)(5), there is an understandably thin volume of cases explaining when that "something more" will be present to warrant relief under (b)(6). In order to be granted relief under 60(b) the petitioner must "demonstrate that granting the relief will not in the end have been a futile gesture ..." Whether to grant relief under Rule 60(b) is concededly left to the sound discretion of this Court.

(d). <u>Summary of Rule 60(b) Relief</u>

Motta advances that the "unusual and extreme situations where principles of equity mandate relief" requirement of (b)(6) is applicable and germane to the instant action. Yet, it is also acknowledged that relief is generally circumscribed by public policy favoring finality of judgments and termination of litigation. Nonetheless, it may be advanced as here, that a change in decisional law and extra-ordinary circumstances merit relief under 60(b). Moreover, there is law that in the "exceptional case ... an action may be reinstated on account of an intervening change in the law" under 60(b) and that a supervening change in governing law that *calls into serious question the correctness of the court's judgment* may constitute an extraordinary circumstance justifying relief.

Such is the instant matter. [1]

It is also respectfully advanced that when contemplating the relevant time restrictions under Rule 60(b) it should be acknowledged that Petitioner is serving a life sentence in federal prison. Without formal education in the law, he has diligently and continuously pursued relief in his case as time permitted and in the restrictive environment of a United States Penitentiary. To the extent that "diligence" should play a role in determining Motta's commitment to this action and the issues addressed, or their timeliness, he respectfully reminds the court of the several and separate degrees of diligence when making such a determination. [2]

(2) Current Circuit Precedent

Under controlling precedent in this Circuit, analysis of the instant action by this Court appears relatively straightforward. The question whether Motta's motion is a disguised § 2255 is governed by the Supreme Court's decision in *Gonzalez v. Crosby*. (Although *Gonzalez* was limited to § 2254 cases, 545 U.S. at 529 n. 3, This Circuit has held that its analysis is equally applicable to § 2255 cases. *Buenrostro*, 638 F.3d at 722).

In *Gonzalez,* the Supreme Court considered a state prisoner's motion under Rule 60(b)(6)

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Relief from a judgment that is sought under (b)(6)(interests of justice), must be made "within a reasonable time" after entry of the judgment being challenged. Courts determine whether the time of filing is "reasonable"on a case-by-case basis. That determination, is not assessed merely by the length of time, but also consider length of delay, any resulting prejudice, any circumstances favoring relief, the nature of the case, and whether the public interest is implicated. To prevail under the catchall category of Rule 60(b)(6), the moving party must also generally demonstrate faultlessness in the delay. See, *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1363 (Fed. Cir. 2008).

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Due, common, extra-ordinary, great, high, low, necessary, ordinary, reasonable, slight, and special diligence.

(the catch-all provision) to reopen a federal district court's dismissal of the habeas petition he had filed under 28 U.S.C. § 2254. (See, 545 U.S. at 527–29). As here, the district court had dismissed the habeas petition as time-barred, based on its interpretation of the applicable tolling provisions. *Id.* at 527. The Supreme Court subsequently decided *Artuz v. Bennett,* 531 U.S. 4 (2000), which adopted a different interpretation of the applicable tolling provisions, under which Gonzalez's habeas petition would have been timely. *Gonzalez,* 545 U.S. at 527 (citing *Artuz,* 531 U.S. at 8–9). Gonzalez then filed a Rule 60(b)(6) motion asking the district court to reopen his case and reconsider the petition's timeliness in light of *Artuz. Id.* The district court denied the motion, and Gonzalez appealed. *Id.* The Eleventh Circuit, sitting en banc, held that the "petitioner's motion—indeed, any postjudgment motion under Rule 60(b) save one alleging fraud on the court under Rule 60(b)(3)—was in substance a second or successive habeas corpus petition." *Id.* at 528. Because it determined that "[a] state prisoner may not file such a petition without precertification by the court of appeals that the petition meets certain stringent criteria," and because Gonzalez's petition did not meet such criteria, the Eleventh Circuit affirmed the district court's denial of Gonzalez's Rule 60(b) motion. *Id.*

The Supreme Court disagreed with the Eleventh Circuit's *per se* rule. Instead, it directed courts to focus on the substance of each motion. *See id.* at 530–33. If the alleged Rule 60(b) motion asserts some "defect in the integrity of the federal habeas proceedings," it is a legitimate Rule 60(b) motion. *Id.* at 530, 532 & n. 5. On the other hand, if the motion presents a "claim," i.e., "an asserted federal basis for relief from a ... judgment of conviction," then it is, in substance, a new request for relief on the merits and should be treated as a disguised § 2255 motion. *Id.* at 530.

The Court gave a number of examples of such "claims," including: a motion asserting "that owing to 'excusable neglect,' the movant's habeas petition had omitted a claim of constitutional

error," *id.* at 530–31(citation omitted) (quoting Fed. R.Civ. P. 60(b)(1)(Not relevant here)); a motion to present "newly discovered evidence" in support of a claim previously denied, *id.* at 531 (citation omitted) (quoting Fed.R.Civ.P. 60(b)(2)(also, not relevant here because of no "merits" determination)); a contention "that a subsequent change in substantive law is a 'reason justifying relief' from the previous denial of a claim," *id.* (quoting Fed.R.Civ.P. 60(b)(6)); a motion "that seeks to add a new ground for relief," *id.* at 532; a motion that "attacks the federal court's previous resolution of a claim on the merits," *id.* (emphasis omitted)(not relevant here). According to the Court, if a pleading labeled a Rule 60(b) motion includes such claims, it "is in substance a successive habeas petition and should be treated accordingly." *Id.* at 531. Said otherwise, a motion that does not challenge "the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably," is raising a "claim" that takes it outside the purview of Rule 60(b). *Id.* at 532 n. 5, *accord Buenrostro,* 638 F.3d at 722–23. See also, *United States v. Washington*, 653 F.3d 1057, 1062-63 (9th Cir. 2011)

In Sum, Circuit precedent as well *Gonzalez* provides instructions for determining when a 60(b) motion raises a claim: 28 U.S.C. §2244 states in relevant part: (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed; (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed *unless:* (A) the application shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable: or (B)(I) the factual predicate could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a

whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, *no reasonable fact finder would have found the applicant guilty of the underlying offense.* (West, 2002)(Emphasis added). The Court explained further "*when no claim is presented there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application.*'" *Id.* at 533.(Emphasis Provided).

(3) Applied Actual Innocence Standard Defined

To obtain federal habeas review of a procedurally defaulted constitutional claim, the petitioner must establish either cause for the default and actual prejudice resulting from the alleged constitutional error, or that a fundamental miscarriage of justice will result if the claim is not reviewed. The fundamental miscarriage of justice exception requires a showing of "actual innocence". In *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court addressed the standard for demonstrating actual innocence to obtain habeas review of a defaulted challenge to a conviction and, and for the first time held that a petitioner had satisfied the actual innocence standard.

A petitioner seeking federal habeas review of a constitutional challenge to a conviction or sentence must satisfy certain procedural requirements before attaining such review. The Supreme Court has emphasized however, that demonstrating actual innocence is not itself a constitutional claim for habeas relief but, rather, simply a gateway to habeas review of a procedurally defaulted claim. The Court thus distinguishes the actual innocence standard for obtaining habeas review from a freestanding claim of actual innocence without an accompanying constitutional claim.

In order to satisfy the actual innocence standard and permit habeas review of a defaulted claim, the Supreme Court has indicated a petitioner must establish that a reasonable jury viewing all the evidence in light of new and reliable evidence, more probably than not, would not have found

the petitioner guilty beyond a reasonable doubt. The Court has specifically distinguished the "more probable than not" standard from the "insufficient evidence to sustain a conviction" standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Furthermore, the Supreme Court has created different standards of proof for demonstrating actual innocence when the underlying constitutional challenge is to a conviction rather than a sentence.

In *Schlup v. Delo*, 513 U.S. 298 (1995), The Court defined the actual innocence standard to establish the fundamental miscarriage exception for obtaining federal review of a procedurally defaulted constitutional claim challenging a conviction. The Court held that to demonstrate actual innocence, the petitioner has to establish that a reasonable juror viewing new and reliable evidence in light of all the evidence, more likely than not, would not have found the petitioner guilty beyond a reasonable doubt. The Court further explained that the fundamental miscarriage of justice exception to a procedural bar, seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case, as here, where an innocent person may have been convicted. Noting the two standards previously applied by the Court, the "more probable than not" standard set out in *Murray v. Carrier*,477 U.S. 477 (1986) and the "clear and convincing evidence" standard announced in *Sawyer V. Whitley*, 505 U.S. 333 (1992), the Court concluded that the proper balance exists with the standard requiring the petitioner to demonstrate that, *more probably than not*, a jury would not find him guilty considering the new evidence, as opposed to requiring the petitioner to demonstrate by clear and convincing evidence that no reasonable juror would have found her guilty. The Court stated that claims of actual innocence of a conviction pose less of a threat to the principles of finality,

comity and the conservation of judicial resources than do claims challenging a death sentence. [3] In *Dretke v. Haley*, 541 U.S. 386 (2004), the Supreme Court also held that actual innocence is not a gateway to habeas review of a procedurally defaulted claim if another avenue of habeas review of the same claim exists. The Court stated "a federal court faced with the allegations of actual innocence, whether of the sentence or the crime charged, must first address all non-defaulted claims for comparable relief and other grounds for cause to excuse the procedural default." *Id.*

Further, the *Schlup* Court has directed that a showing of actual innocence is credible only if supported by new reliable evidence, whether exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. The court went further by directing the district court addressing the actual innocence claim and charging it with determining the reliability and probative value of the new evidence. Which, the Court opined, "may require the district court to make assessments of the credibility of witnesses and the weight of the evidence." Thus, a district court may consider how the timing of the new evidence and the credibility of witnesses bear on the reliability of that evidence. Such considerations distinguish an actual innocence analysis from a summary judgment approach which does not allow a district court to make credibility or weight of the evidence determinations. Rather, the Court indicated, an actual innocence analysis requires a

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[3] In *Kuhlmann, v. Wilson*, 477 U.S. 436 (1986), the Supreme Court held that a habeas petitioner could obtain review of a successive federal habeas claim if he or she demonstrates that the ends of justice required review. The ends of justice standard the Court indicated, requires a colorable showing of factual innocence. In rare cases, a federal habeas corpus court may consider a procedurally defaulted claim absent a showing of cause when the constitutional violation has probably resulted in the conviction of one who is actually innocent. *Dretke v. Haley*, 541 U.S. 386 (2004).

district court to assess the reliability, probative value, and impact new evidence would have on a reasonable jury.

Additionally, in *Schlup*, the Supreme Court instructed that a federal habeas review of a procedurally defaulted claim is available absent a showing of cause, if a constitutional violation has probably resulted in the conviction of one who is actually innocent. This standard is met if the petitioner shows that, more likely than not, no reasonable jury would have convicted her in light of new evidence. The Court noted that a petitioner must make a stronger showing than one of prejudice, *i.e.*, that a constitutional violation affected the fairness of the trial. However the Court also noted, a petitioner need not demonstrate by clear and convincing evidence that, but for a constitutional violation, no reasonable juror would have convicted. The habeas court's conclusion, whether a petitioner has made the requisite actually innocent showing requires a probabilistic approach, wherein the district court must determine what a reasonable juror (one who has fairly considered all the evidence and consciously obeyed instructions on reasonable doubt) would do. This determination is not based upon discrete factual findings by the habeas court or the court's own subjective belief about

whether reasonable doubt exists.

(a). <u>Freestanding Claim</u>

A freestanding actual innocence claim is an attempt by a petitioner to prove his or her innocence outright. *House v. Bell*, 547 U.S. 518, 554-55 (2006). However, the Supreme Court has indicated a free-standing actual innocence claim cannot serve as grounds for habeas relief unless it is accompanied by a Constitutional violation claim that warrants habeas relief. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). This is because "a claim of 'actual innocence' is not itself a constitutional

claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404.

In *Herrera*, the Supreme Court left open the possibility that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim." 506 U.S. at 417. However, the Supreme Court has yet to explicitly recognize a claim of actual innocence in a capital case (see, *e.g. House*, 547 U.S. at 554-55) and declined to identify the burden that a hypothetical "freestanding claim" of "actual innocence" would require, but has indicated the showing for such a right would be high. In *House*, the Court again declined to identify the burden, yet indicated a freestanding claim of actual innocence would require more convincing proof of innocence than a gateway claim. *Id.* at 555.

(b). <u>Gateway Claim</u>

Where a habeas petitioner has procedurally defaulted a claim by failing to raise it on direct appeal, the claim may be raised if she demonstrates "cause" and actual "prejudice." *Murray v. Carrier*, 477 U.S. 478, 485 (1986). Alternatively, a gateway actual innocence claim may be used to overcome or avoid that procedural bar so the underlying claim may be raised in a habeas action. *House*, 547 U.S. at 536-37; *Bousley v. United States*, 523 U.S. 614, 622 (1998); *Carrier*, 477 U.S. at 485, 496. Notably, actual innocence in this context "means factual innocence and not mere legal insufficiency." *Bousley*, 523 U.S. at 623-24 (citing *Sawyer v. Whitley,* 505 U.S. 333, 339 (1992). Thus a credible gateway actual innocence claim must be substantiated with "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "To establish

the requisite probability, the petitioner must show that it is more likely than not no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327. This standard is not equivalent to the "insufficient evidence" standard in *Jackson v. Virginia*, 443 U.S. 307 (1979); *see, House*, 547 U.S. at 538; and *Schlup,* 513 U.S. at 330.

As discussed above, the Supreme Court's decision in *Herrera* begat a string of decisions which further defined its principles. However, none of these decisions expressly recognize an absolute right to federal habeas relief in a post-conviction claim of actual innocence. In *Schlup*, Justice Stevens distinguished *Herrera's* freestanding claim of actual innocence from a less robust claim of innocence resulting from constitutional error. When attached to a constitutional error, the convicted person's claim of innocence served as a gateway through which he had to pass so that an otherwise barred constitutional claim could be considered on the merits. In distinguishing the two claims, the Court articulated two standards of review. A *Herrera* claim of actual innocence results from a constitutionally error free trial where the execution [or punishment] of a factually innocent person would have to be so strong so as to render an execution [punishment] constitutionally intolerable even if the conviction was the product of a fair trial. The standard of review for a *Schlup* claim is not as harrowing. Here, Motta only has to present evidence to establish sufficient doubt about his guilt and show that the constitutional error probably resulted in the conviction of one who was actually innocent. Thus, *Schlup* established the precedent for a lower standard of review when as here the petitioner can show that newly discovered evidence was not available at trial. (Discussed below)

(4). <u>As Applied to Motta</u>

Motta does not advance one or more predicate "claims" new or otherwise; he does not seek

to "add a new ground for relief" (except as may be applied substantively or under 60(b)(2)) and does not "attack any of this Court's previous resolutions" of any of his prior claims which have been decided "*on the merits*".[4] Therefore his Motion is not an unauthorized attempt to bypass the gate-keeping requirements of 28 U.S.C. §2244(a) or (b). Motta seeks to avail himself of the procedural mechanism permitted via Rule 60(b), for relief from the judgment of this Court as enunciated in each of the afore noted subsections and as applied below to reopen that defective judgment.

II.

A. DISCUSSION AND ARGUMENT IN SUPPORT OF RELIEF

(1) This Court prejudicially time-barred Motta's 28 USC §2255 motion and failed apply equitable tolling and/or substantively rule on the "merits" of his claims and allegations save his grand jury issue which was withdrawn (DE #4 at p. 3):

Motta originally drafted his 2255 on a word processor. It remains undisputed that the printer for this word processor was unavailable during the week of February 16 - 23, 2014. (DE #1665, Order at 5-6). Motta submits this Court should have, but did not analyze the "stop clock" approach to tolling approved by the Ninth Circuit in *Gibbs v. LeGrand,* 767 F.3d 879 (9th Cir. 2014).

In *LeGrand,* the Ninth circuit held the statute of limitations clock stops running the day an impediment first develops, and resumes once the impediment ceases or Petitioner no longer reasonably pursues his avenue for relief. *Id.*, at 891-892. It goes then, "[a]ny period during which

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[4] The *Crosby* Court's "on the merits" definition informs: "[t]he term 'on the merits' has multiple usages." Yet is more correctly defined, *as here*, when a 60(b) motion attacks *some defect in the proceedings or when the motion asserts that a previous ruling, which precluded a merits determination was error.*

both extraordinary circumstances and diligence are shown does not count toward the statute of limitations..." *Luna v. Kernan*, 784 F.3d 640, 651 (9th Cir. 2015).

It is well established that the printer for the institutional word processor was unavailable for the relevant time period, beginning February 16, 2014. (DE #1665, 5-6). This Court had also determined that the deadline for which Petitioner could file his 2255 was February 19, 2014. (*Id.*, 4-5). Relevant to this Motion, it was accepted that Motta was attempting to print his motion from the word processor during this period from February 16, 2014 forward, but was unable to due to the unavailability of the printer. That Motta had already prepared his §2255 prior to this impediment is a factor which supports tolling. Absent the impediment, Motta *could* have filed his petition on time. It cannot be denied with certainty that Motta would not have filed within the statute of limitations had the printer been available at the time under scrutiny.

The "objective of the stop clock approach is to give petitioners one full year of unobstructed time to prepare a federal habeas petition." *Luna*, 784 F.3d, at 651. "[A] separate diligence-through-filing requirement appears to thwart that objective." *Id.*, (quoting *Lott v. Mueller*, 304 F.3d 918, 926-927 (9th cir. 2002)(McKeown, J., concurring). The clock should remain stopped for the period during which the impediment existed and Petitioner remained reasonably diligent. *Id.*

As here, arguments that a Petitioner was "precluded from filing his habeas petition because of his inability to utilize the prison's law library and other resources" has been sufficient for further development by the district court in assessing tolling. See, *Sossa v. Diaz*, 729 F.3d 1225, 1235 n.3 (9th Cir. 2015). This instant case has strong parallels with *Sossa*. In both cases the petitioner's claimed they were unable to meet the limitations period because of lack of access to institutional legal resources on the eve of the deadline. *Id.* Petitioner had been preparing his motion on the word

processor and only submitted it one-two days late, with the Court finding the printer was unavailable during the relevant time period. (*Id. at* 23).

At bottom it was the final draft that was unable to be properly produced in these cases. Further, last minute filings are not uncommon, if not the norm. Because a different version could have been submitted on time as opposed to being one-two day's late is not dispositive as in *Sossa* there was library access right before the deadline and he could have filed a petition before he did. *Sossa,* 729 F.3d, at 1236. Though Motta may not have known February 19 was the actual deadline and erroneously believed it was the 22nd, that alone does not undermine tolling as he nevertheless lacked the ability to print out his intended final version from the word processor *at least three days prior to the one year limitations period closing.*

Denial of access to institution legal provisions has been held an impediment serious enough to warrant tolling. See, *Estremera v. United States,* 724 F.3d 773, 776 (7th Cir. 2013)("Lack of law library access can, in principle be an 'impediment' to filing a collateral attack."). Though under §2255(f)(2), Circuit courts, including the Ninth circuit, have consistently held "lack of library access allows more time[.]". *Id.,* at 777; (citing *Whalem v. Earley*, 233 F.3d 1146 (9th Cir. 2000)(en banc)).

Materials are provided by the Bureau of Prisons for the specific purpose of preparing legal documents. For example, the word processor at this institution can only be obtained by showing proof of an imminent deadline. This is precisely why and how Petitioner possessed the word processor. The devices provided are a benefit to all parties involved in *pro se* prisoner litigation by at least allowing preparation of structured, legible legal documents. A petitioner should not be penalized for utilizing the Bureau's legal provisions. A legitimate three days of impediment is appropriate to employ the stop clock method and allow at least two days of vital tolling to hear the

merits of Motta's constitutional claims. Any other consideration chills the very judicial process by which Motta may have his constitutional claims evaluated on the merits.

(2). Newly Discovered Exculpatory Evidence Not Considered

On or about April of 2011, Motta received a package as a result of a private investigation conducted by Above and Beyond Investigations. The package contained Invoices from Gambler's General Store in Las Vegas, Nevada. The Invoice details a purchase in the familiar name of Kai Ming Wang from February 2005. Specifically, the Invoices list hundreds of various colored poker chips bearing the logo "868" and "787." (See, **Exhibit #1**; attached hereto and incorporated by reference herein).

These Invoices are exculpatory because the enterprise was alleged to exist at least until June of 2004. The Invoices show the purchase occurred in February, 2005. The poker chips were introduced as exhibits at trial as the *exclusive* physical evidence that the alleged enterprise engaged in or affected interstate commerce. An interstate or foreign nexus is an essential element of RICO and VICAR for jurisdictional purposes. *United States v. Feliciano*, 223 F.3d 102, 118 (2nd Cir. 2000)(VICAR "has a jurisdictional element requiring the Government in each prosecution to provide evidence of an effect on interstate or foreign commerce."). With the Invoice as impenetrable proof that the poker chips introduced at trial were procured after the life of the alleged enterprise, there remains no physical proof showing the requisite interstate nexus.

With the exculpatory Invoice underlying two of the constitutional grounds in the 2255: (1) a *Brady* violation by the Government, and (2) failure to investigate by Counsel, the materiality of this evidence to this case is clear. Applying liberal construction, Petitioner's constitutional grounds

sufficiently present a claim of actual innocence for this Court to explore the exculpatory evidence in evaluating tolling.

The new evidence provided effectively negates not just simple credibility of witnesses and the case against Motta, but goes to the subject matter jurisdiction. In any RICO prosecution, the government must prove beyond a reasonable doubt that the enterprise alleged had a substantial effect on interstate or foreign commerce. *United States v. Crenshaw,* 359 F.3d 977, 960 (8th Cir. 2004)("When Congress nears the end of its power under the Commerce Clause by regulating intrastate activity that may only affect interstate commerce, courts must apply the substantial effects test. Thus, a statute containing the *engaged in*, or the activities of which affect language can survive intact only if it satisfied the substantial effects test.")(citing United State sv. Torres, 129 F.3d 710, 717 (2nd Cir. 1997)(applying substantial effects test to VICAR statute).

The "substantial effects" test is applied to a RICO enterprise who's activities are wholly intrastate in nature. "The Constitutional requires a distinction between what is truly national, and what is truly local." *United States v. Morrison*, 529 U.S. 598, 617 (2000). Congress possesses the "power to regulate purely local activity s that are part of an economic class of activities that have a substantial effect on interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005).

With exclusively intrastate racketeering activity proven in this case, "the proper test requires an analysis of whether the regulated activity substantially effects interstate commerce. *Id.,* at 559. All the remaining racketeering activity alleged is purely local. Operating an illegal gambling operation does not require any effect on interstate commerce. The extortion predicate is simply misguided. The basis of the extortion here was the robbery of a competitor's gambling operation. However, the robbery was nothing more than a ploy to shut down the competition, not a form of

intimidation designed to encourage the competitor to pay some kind of operating tax to the Wang enterprise. And because competitor's games were strictly local operations, a Hobbs Act charge was not alleged nor could it be sustained following this scheme to close down competitors.

Without the poker chips and table felt, no other visual or physical evidence was provided to prove the alleged enterprise affected interstate commerce. The Invoice demonstrates the fact that the poker chips were manufactured and shipped from Las Vegas, Nevada. This may be sufficient to prove an interstate nexus had the chips and table felt been purchased within the time-frame alleged in the indictment. However, the Invoice proves this is not so. The gambling evidence was also central to the government's case-in-chief. The evidence was first admitted at trial by Detective Derrick Kiyotoki as Government Exhibit #3 (Gov.Ex. #3). Detective Kiyotoki described in detail the attributes of the poker chips including how the chips were "stamped" with numerical logos "868" and "787". The stamped logos were intended to prevent counterfeiting and were exclusive to Defendant Wang. No other physical evidence was presented at trial on the issue. In argument the Government repeatedly emphasized the chips in (Gov.Ex. #3) were used by the "Kalakaua" game from prior to June 2004. The veracity of such claims and the very presentation of these items at trial was improper and highly suspect.

Moreover, the Invoice shows that item #3506 were Lavender color poker chips #6 with "868" on both sides. The Invoice further provides information on Item #4250, which is a felt table top the government claimed was only available in Hong Kong, China, yet was in fact purchased in Las Vegas, Nevada in February of 2005. The Invoice proves such items were purchased by Defendant Wang outside the scope of the alleged enterprise. The items played a central role in proving the

requisite interstate nexus. Thus, this Court should find tolling is applicable and reach the merits of Motta's claims and allegations.

(3) McQuiggin v. Perkins

For the first time in almost a decade, and buttressing its line of actual innocence jurisprudence, a divided Supreme Court handed down *McQuiggin v. Perkins,* 569 U.S. ___ (2013). In *McQuiggin*, Justice Ginsburg for the majority reaffirmed that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar as in *Schlup v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2005), or expiration of the AEDPA statute of limitations, as in that case." The *McQuiggin* Opinion provided a fresh look at the "fundamental miscarriage of justice" exception where *Perkins*, who had waited nearly six years from the date he received a 2002 affidavit to file his petition, maintained that an actual innocence plea can overcome the AEDPA's one-year limitations period. The Court agreed and further instructed that a federal habeas court, faced with an actual innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, "not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown." 133 S.Ct at 1935-36. Thus, *McQuiggin* extends *Schlup* to apply to a type of procedural bar, namely, where a petitioner seeks to bring an out-of-time petition. Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup v. Delo*, 513 U.S. 298, and House v. Bell, 547 U.S. 518, or expiration of the AEDPA statute of limitations, as in this case.

Motta believes that the decision ushers in new considerations which must now be applied when a district court is faced with a colorable claim of actual innocence. Based on the compelling

evidence Motta has submitted this Court should exercise its authority and schedule an evidentiary hearing at once. (See, **Exhibit #1;** attached hereto and incorporated by reference herein).

(4) Holland v. Florida

In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court addressed the circumstances in which a federal habeas petitioner could invoke the doctrine of "equitable tolling. *Holland* held that "a [habeas] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. (internal quotation marks omitted).

Prior to *Holland* the Supreme Court had not decided whether AEDPA's statutory limitations period may be tolled for equitable reasons. See, *Lawrence,* 549 U.S. at 336; *Pace v. DiGuglielmo*, 544 U.S. 408, 418, n. 8 (2005). But, like all eleven Courts of Appeals to have considered the question, the Supreme Court held that§2244(d) (same applied to §2255), is subject to equitable tolling in appropriate cases. See, *Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); Smith v. McGinnis, 208 F.3d 13, 17 (2nd Cir. 2000) *(per curiam); Miller v. New Jersey Dept. Of Corrections,* 145 F.3d 616, 617 (3rd Cir. 1998)*; Harris v. Hutchinson,* 209 F.3d 325, 329-30 (4th Cir. 2000); *Davis v. Johnson,* 158 F.3d 806, 810 (5th Cir. 1998); *McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Calderon v. United States Dist. Ct. For Central Dist. Of Cal.*, 128 F.3d 1283, 1289 (9th Cir. 1997); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); and; *Sandvik v. United States,* 177 F.3d 1269, 1272 (11th Cir. 1999)*(per curiam).*

That conclusion was based on the following considerations. First, the AEDPA "statute of limitations defense ... is not 'jurisdictional.' " *Day v. McDonough*, 547 U.S. 198, 205 (2006). It does

not set forth "an inflexible rule requiring dismissal whenever" its "clock has run." *Id.,* at 208. See also *id.,* at 213 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d) without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture." We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a "rebuttable presumption" in *favor* "of equitable tolling." *Irwin,* 498 U.S. at 95-96; see also *Young v. United States*, 535 U.S. 43, 49 (2002)("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling" (quoting *Irwin*). In the case of AEDPA, the presumption's strength is reinforced by the fact that " 'equitable principles' " have traditionally " 'governed' " the substantive law of habeas corpus, *Munaf v. Geren,* 553 U.S. 674, 693 (2008), for we will "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' " *Miller v. French,* 530 U.S. 327, 340 (2000), (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)). The presumption's strength is yet further reinforced by the fact that Congress enacted AEDPA after the Supreme Court decided *Irwin* and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption. See, *e.g., Merck & Co. v. Reynolds*, 559 U.S. at 633.

III.

A. CONCLUSION

It appears from the foregoing, that this court faces at least two very important determinations. First, it must ascertain, surely over government objection, whether the facts and law of this case warrant the reopening of its habeas judgment. Second, in light of the attached evidence and Supreme Court precedence it must search its conscience and ask: if it knew then what it now knows, would it have purposely denied Motta any real chance for a post-conviction collateral attack for the sin of

being tardy by two-days when he clearly demonstrated his diligence? Or alternatively, consider – is the Court somehow predisposed with preventing Motta from litigitmately litigating his claims and allegations to a merits determination and how that could possibly serve the interests of justice.

B. RELIEF REQUESTED

WHEREFORE, premises considered, and for good cause shown, this Court should grant the instant motion, vacate and reopen its judgment and rightly permit Motta to litigate his claims and allegations to a merits determination.

Dated: June 13, 2016

Respectfully submitted,

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