



1 15, 2009, a jury found Petitioner guilty of all counts and found both charged enhancements to be  
2 true.

3           Following his convictions, Petitioner escaped from jail. As a result, he was not sentenced  
4 until May 9, 2011, when the court imposed sentences in four separate cases. Petitioner received  
5 an aggregate sentence of 22 years and four months.  
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7           On May 9, 2011, Petitioner filed a timely notice of appeal. The California Court of  
8 Appeal affirmed on October 17, 2012. The California Supreme Court denied Petitioner's motion  
9 for review on January 3, 2013.

10           On September 16, 2013, Petitioner filed the above-captioned § 2254 petition. On October  
11 17, 2013, the Court issued an order to show cause why the petition should not be dismissed for  
12 failure to exhaust state remedies as to claim 2 of the petition. On January 13, 2014, Petitioner  
13 filed a motion to stay claim 1, which was exhausted, and to withdraw claim 2, which was not  
14 exhausted. On March 12, 2014, the Court dismissed claim 2 and conditionally granted a stay of  
15 the petition pursuant to *Kelly v. Small*, 315 F.3d 1063 (9<sup>th</sup> Cir. 2003), *overruled on other grounds*  
16 *by Robbins v. Carey*, 481 F.3d 1143 (9<sup>th</sup> Cir. 2007).<sup>2</sup> The Court found that Petitioner had satisfied  
17 the first two steps of the procedure prescribed in *Kelly*, but warned Petitioner that any claims to  
18 be exhausted in state court could be dismissed as untimely if they did not comply with the statute  
19 of limitations (28 U.S.C. § 2244(d)).  
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21           On October 29, 2013, Petitioner gave a state habeas petition to prison staff for mailing to  
22 the Merced County Superior Court. When Petitioner heard nothing from the Superior Court by  
23 March 19, 2014, he filed a notice and request for ruling. *See* Cal. Rules of Court, Rule  
24 4.551(a)(3)(B). The Superior Court did not respond.  
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27 <sup>2</sup> The stay order required Petitioner to file monthly status reports concerning his efforts to exhaust his claims. These  
28 status reports, included in the record as Docs. 16-21 are consistent with Petitioner's claims in response to the motion to dismiss.

1 In the California Supreme Court on July 7, 2014, Petitioner filed a state habeas petition  
2 alleging five grounds not raised on direct appeal. The California Supreme Court summarily  
3 denied the habeas petition on September 17, 2014.

4 On October 9, 2014, Petitioner filed the first amended petition in this court, consisting of  
5 the previously exhausted claim 1, and newly exhausted claims 2-5. On April 14, 2015,  
6 Respondent moved to dismiss claims 2-5 as untimely.  
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## 8 **II. Timeliness of Claims 2-5**

### 9 **A. Stay and Abeyance Under *Kelly***

10 *Kelly* sets forth a three-step stay and abeyance procedure under which “(1) the petitioner  
11 amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance  
12 the amended, fully exhausted petition, allowing the petitioner the opportunity to proceed to state  
13 court to exhaust the deleted claims; and (3) the petitioner later amends his petition and re-attaches  
14 the newly exhausted claims to the original petition.” *King v. Ryan*, 564 F.3d 1133, 1135 (9<sup>th</sup> Cir.  
15 2009) (citing *Kelly*, 315 F.3d at 1070-71). The *Kelly* procedure is risky. “A petitioner seeking to  
16 use the *Kelly* procedure will be able to amend his unexhausted claims back into his federal  
17 petition once he has exhausted them only if those claims are determined to be timely. And  
18 demonstrating timeliness will often be problematic under the now-applicable legal principles.”  
19 *King*, 564 F.3d at 1140-41.  
20

21 Respondent contends that newly exhausted claims 2-5 are untimely and must be dismissed  
22 from the first amended petition. Petitioner contends that he filed the habeas petition including the  
23 claims in the Merced County Superior Court on or about October 28, 2013. After the Superior  
24 Court failed to rule on the notice and a subsequently filed a request for ruling, Petitioner filed his  
25 petition in the California Supreme Court. Petitioner contends that when proper tolling of the  
26 pending actions is considered, claims 2-5 are timely.  
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1           **B. Statutory Limitations Period**

2           On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
3 1996 (AEDPA), which applies to all petitions for writ of habeas corpus filed after its enactment.  
4 *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA provides a one-year period of limitation in  
5 which a petitioner may file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). In this  
6 case, the limitations period is measured from the date on which the judgment became final by  
7 conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. §  
8 2244(d)(1).  
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10           Direct review in the State of California ended January 3, 2013, when the California  
11 Supreme Court denied the petition for review. The statutory limitation period began on April 4,  
12 2013, following the expiration of the 90-day period in which to file a petition for writ of certiorari  
13 in the United States Supreme Court. Absent tolling, the statute of limitations required Petitioner  
14 to exhaust his unexhausted claims and to file an amendment setting forth those claims no later  
15 than April 3, 2014.  
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17           **C. Tolling of the Limitations Period**

18           Petitioner contends that claims 2-5 are timely because the statutory limitations period was  
19 tolled when he filed the state habeas petition in the Merced County Superior Court on or about  
20 October 28, 2013. Respondent counters with documentation from the Merced County Clerk of  
21 Court reporting that no habeas petition was filed for Petitioner on or about October 28, 2013.  
22 Doc. 37 at 4.  
23

24           After referring the Court to the periodic status reports that he filed in compliance with the  
25 Court's order granting the stay, Petitioner further supports his argument with a copy of the legal  
26 mail log from Pleasant Valley State Prison showing that Petitioner's legal mail to Merced County  
27 Superior Court was mailed on October 29, 2013. Doc. 47 at 5-6. On March 19, 2014, when  
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1 Petitioner had heard nothing from the Merced County Superior Court regarding his state petition,  
2 he filed a notice and request for ruling pursuant to Cal. Rules of Court, rule 4.551(a)(3)(B). *See*  
3 Doc. 16. After the Merced County Superior Court did not respond, Petitioner filed a state habeas  
4 petition on July 7, 2014, alleging five grounds not raised on direct appeal with the California  
5 Supreme Court. *See* Doc. 20. The Supreme Court summarily denied the habeas petition on  
6 September 17, 2014. Doc. 25 at 35.

8 As a matter of policy, a *pro se* prisoner's notice of appeal is deemed "filed at the time  
9 [the] petitioner delivered it to the prison authorities for forwarding to the court clerk." *Houston v.*  
10 *Lack*, 487 U.S. 266, 276 (1988). The Supreme Court reasoned:

12 [W]hereas the general rule has been justified on the ground that a  
13 civil litigant who *chooses* to mail a notice of appeal assumes the  
14 risk of untimely delivery and filing, *see, e.g., [In re Bad Bubba*  
15 *Racing Products, Inc.,* 609 F.2d 815, 816 (5<sup>th</sup> Cir. 1980)], a *pro se*  
16 prisoner has no choice but to hand his notice over to prison  
17 authorities for forwarding to the court clerk. Further, the rejection  
18 of the mailbox rule in other contests has been based in part on  
19 concerns that it would increase disputes and uncertainty over when  
20 a filing occurred and that it would put all the evidence about the  
21 state of filing in the hands of one party. *See, e.g., United States v.*  
22 *Lombardo*, 241 U.S. 73, 78 . . . . (1916). These administrative  
23 concerns lead to the opposite conclusion here. The *pro se* prisoner  
24 does not anonymously drop his notice of appeal in a public  
25 mailbox—he hands it over to prison authorities who have well-  
26 developed procedures for recording the date and time at which they  
27 receive papers for mailing and who can readily dispute a prisoner's  
28 assertions that he delivered the paper on a different date. Because  
reference to prison mail logs will generally be a straightforward  
inquiry, making filing turn on the date the *pro se* prisoner delivers  
the notice to prison authorities for mailing is a bright-line rule, not  
an uncertain one. Relying on the date of receipt, by contrast, raises  
such difficult to resolve questions as whether delays by the United  
States Postal Service constituted excusable neglect and whether a  
notice stamped "filed" on one date was actually received earlier.  
These questions are made particularly difficult here because delays  
might instead be attributable to the prison authorities' failure to  
forward the notice promptly. Indeed, since, as everyone concedes,  
the prison's failure to act promptly cannot bind a *pro se* prisoner,  
relying on receipt in this context would raise yet more difficult to  
resolve questions whether the prison authorities were dilatory. The  
prison will be the only party with access to at least some of the  
evidence needed to resolve such questions—one of the vices the  
general rule is meant to avoid—and evidence on any of these issues

1 will be hard to come by for the prisoner confined to his cell, who  
2 can usually only guess whether the prison authorities, the Postal  
Service, or the court clerk is to blame for the delay.

3 487 U.S. at 275-76.

4 Although *Houston* Court addressed the timeliness of a prisoner's filing a notice of appeal in the  
5 federal district court, the same rule applies to filing habeas petitions in state and federal courts.  
6 *Huizar v. Carey*, 273 F.3d 1220, 1223 (9<sup>th</sup> Cir. 2001).

7 In *Huizar*, the Ninth Circuit applied "prison mailbox rule" approved in *Houston* to a case  
8 in which the *pro se* prisoner's state habeas petition was "never received or filed in the state  
9 court." 273 F.3d at 1222. The appellate court's reasoning echoed the Supreme Court's reasoning  
10 that a "prisoner's control of the filing of his petition ceases when he delivers it to prison  
11 officials." *Huizar*, 273 F.3d at 1223.

12 In cases in which the petition was not received or filed in state court, however,  
13 application of the mailbox rule requires that the prisoner "diligently follow[ed] up his petition  
14 once he . . . . fail[ed] to receive a disposition from the court after a reasonable period of time."  
15 *Id.* The Ninth Circuit found that *Huizar* had diligently followed up by first sending a letter of  
16 inquiry to the superior court two months after he mailed his petition, and by sending a second  
17 letter of inquiry by certified mail twenty-one months later. *Id.* at 1224. Petitioner's follow-up in  
18 this case was arguably more diligent in that it included a formal notice for request of ruling in  
19 compliance with state procedural rules and when that failed, the filing of a habeas petition  
20 directly with the California Supreme Court about four months later, as California law permits him  
21 to do.

22 The Court concludes that Petitioner filed his state petition when he delivered it to prison  
23 officials on October 29, 2013. As of October 29, 2013, 156 days of the statutory limitations  
24 period remained.<sup>3</sup> The statute of limitations was then tolled until the California Supreme Court  
25 denied the state petition on September 17, 2014, at which point the statute of limitations again  
26 began to run. When Petitioner filed his first amended petition on October 9, 2014, 134 days  
27 remained before the end of the limitations period.

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28 <sup>3</sup> The period from April 4, 2013, to October 29, 2013, consists of 209 days

1           **D.     Conclusion**

2           The first amended petition was timely filed.

3           **III.    Certificate of Appealability**

4           A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
5           district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*  
6           *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a  
7           certificate of appealability is 28 U.S.C. § 2253, which provides:

8                           (a) In a habeas corpus proceeding or a proceeding under section 2255  
9                           before a district judge, the final order shall be subject to review, on appeal, by  
10                           the court of appeals for the circuit in which the proceeding is held.

11                           (b) There shall be no right of appeal from a final order in a proceeding  
12                           to test the validity of a warrant to remove to another district or place for  
13                           commitment or trial a person charged with a criminal offense against the  
14                           United States, or to test the validity of such person's detention pending  
15                           removal proceedings.

16                           (c) (1) Unless a circuit justice or judge issues a certificate of  
17                           appealability, an appeal may not be taken to the court of appeals from—

18   (A) the final order in a habeas corpus proceeding in which the  
19   detention complained of arises out of process issued by a State court; or

20   (B) the final order in a proceeding under section 2255.

21   (2) A certificate of appealability may issue under paragraph (1)  
22   only if the applicant has made a substantial showing of the denial of a  
23   constitutional right.

24   (3) The certificate of appealability under paragraph (1) shall  
25   indicate which specific issues or issues satisfy the showing required by  
26   paragraph (2).

27           If a court denies a habeas petition, the court may only issue a certificate of appealability  
28           "if jurists of reason could disagree with the district court's resolution of his constitutional claims  
or that jurists could conclude the issues presented are adequate to deserve encouragement to  
proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Although the petitioner is not required to prove the merits of his case, he must demonstrate

1 "something more than the absence of frivolity or the existence of mere good faith on his . . .  
2 part." *Miller-El*, 537 U.S. at 338.

3 Reasonable jurists would not find the Court's determination that the first amended petition  
4 was timely filed to be debatable or wrong, or Respondent's motion to dismiss to be deserving of  
5 encouragement to proceed further. Accordingly, the Court declines to issue a certificate of  
6 appealability.  
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8 **IV. Conclusion and Order**

9 Respondent's motion to dismiss counts 2 through five of the first amended petition for  
10 writ of habeas corpus is hereby DENIED. The Court declines to issue a certificate of  
11 appealability.  
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14 IT IS SO ORDERED.

15 Dated: June 30, 2016

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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