

1 equitable tolling that includes a copy of his supporting mental health records. Petitioner's request
2 for appointment of counsel is denied without prejudice.

3 Petitioner's request to proceed in forma pauperis is not set forth on the proper form, does
4 not provide the required information, and fails to include the appropriate certification and
5 supporting documentation. Before this court can consider the merits of his petition for writ of
6 habeas corpus, petitioner must submit an appropriate and fully completed application to proceed
7 in forma pauperis OR the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a).

8 Significantly, petitioner concedes that his habeas petition is untimely filed, but attributes
9 the delay to his mental illness and related medications. Petitioner states that he was "[i]n and out
10 of the Mental Health Ward in 'CDCR' since 2011 intell (sic) 9-22-15." ECF No. 1 at 6; see also
11 id. at 7, 9, 10, 15, 16; ECF No. 5 at 1; ECF No. 6 at 3. Petitioner states that he is "no longer on
12 strong medication," ECF No. 1 at 16, and is now able to proceed with this petition. Petitioner
13 offers to forward a copy of his pertinent mental health records. See ECF No. 7. Review of the
14 dockets for petitioner's state court cases² indicates that the California Supreme Court denied
15 review on petitioner's direct appeal on February 15, 2012, and the remittitur was issued on
16 February 17, 2012. It does not appear that petitioner filed any petition for collateral review in the
17 state courts. Petitioner filed his petition for habeas corpus in this court on October 6, 2015,³ long
18 after expiration of the one-year statute of limitations established by the Antiterrorism and
19 Effective Death Penalty Act of 1996 (AEDPA). See 28 U.S.C. § 2244(d)(1).

20 Within the Ninth Circuit, a petitioner may be entitled to equitable tolling based on mental
21 impairment, although the test is stringent. See Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir.
22 2010) (setting forth two-part test); Yeh v. Martel, 751 F.3d 1075, 1078 (9th Cir. 2014)

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24 ² This court may take judicial notice of its own records and the records of other courts. See
25 United States v. Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004); United States v. Wilson, 631
26 F.2d 118, 119 (9th Cir. 1980); see also Fed. R. Evid. 201 (court may take judicial notice of facts
27 that are capable of accurate determination by sources whose accuracy cannot reasonably be
28 questioned).

³ Petitioner's filing date is based on application of the prison mailbox rule, pursuant to which a
document is deemed served or filed on the date a prisoner signs the document (or signs the proof
of service, if later) and gives it to prison officials for mailing. See Houston v. Lack, 487 U.S. 266
(1988) (establishing prison mailbox rule); Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.
2010) (applying the mailbox rule to both state and federal filings by prisoners).

1 (emphasizing the stringency of the test). As set forth in Bills, 628 F.3d at 1099-1100 (citations
2 and fn. omitted):

3 [E]ligibility for equitable tolling due to mental impairment requires
4 the petitioner to meet a two-part test:

5 (1) First, a petitioner must show his mental impairment was an
6 “extraordinary circumstance” beyond his control, by demonstrating
7 the impairment was so severe that either

8 (a) petitioner was unable rationally or factually to personally
9 understand the need to timely file, or

10 (b) petitioner’s mental state rendered him unable personally
11 to prepare a habeas petition and effectuate its filing.

12 (2) Second, the petitioner must show diligence in pursuing the
13 claims to the extent he could understand them, but that the mental
14 impairment made it impossible to meet the filing deadline under the
15 totality of the circumstances, including reasonably available access
16 to assistance.

17 To reiterate: the “extraordinary circumstance” of mental
18 impairment can cause an untimely habeas petition at different
19 stages in the process of filing by preventing petitioner from
20 understanding the need to file, effectuating a filing on his own, or
21 finding and utilizing assistance to file. The “totality of the
22 circumstances” inquiry in the second prong considers whether the
23 petitioner’s impairment was a but-for cause of any delay. Thus, a
24 petitioner’s mental impairment might justify equitable tolling if it
25 interferes with the ability to understand the need for assistance, the
26 ability to secure it, or the ability to cooperate with or monitor
27 assistance the petitioner does secure. The petitioner therefore
28 always remains accountable for diligence in pursuing his or her
rights.

Petitioner will be accorded the opportunity to develop this argument. Petitioner is
directed to file a separate request for equitable tolling that includes a copy of his supporting
mental health records.

Petitioner is also directed to file an amended petition for writ of habeas corpus. The
current petition fails to provide the decision dates of the California Court of Appeal and Supreme
Court in considering petitioner’s direct appeal. More importantly, the current petition fails to
clearly and succinctly articulate each ground upon which petitioner seeks relief in this court.
Petitioner’s federal claims should be the same as some, or all, of the grounds upon which
petitioner sought review in the California Supreme Court. This court cannot consider the merits

1 of any claim that was not presented to the California Supreme Court. See 28 U.S.C. § 2254(b).
2 Petitioner should review his petition for review submitted to the California Supreme Court, in
3 conjunction with his appellate brief submitted to the Third District Court of Appeal, in order to
4 identify the claims he exhausted in the state courts and clarify the grounds upon which petitioner
5 seeks relief in this court.

6 Finally, petitioner requests appointment of counsel. See e.g. ECF No. 1 at 16; ECF No. 5
7 at 3; ECF No. 6 at 3. Petitioner is informed that there is no absolute right to appointment of
8 counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996).
9 Although 18 U.S.C. § 3006A authorizes the appointment of counsel at any stage of a habeas
10 proceeding “if the interests of justice so require,” See Rule 8(c), Fed. R. Governing § 2254 Cases,
11 the court finds that the interests of justice do not require appointment of counsel in this case at the
12 present time. Petitioner’s request will be denied without prejudice to a renewal of the motion, if
13 appropriate, at a later stage of these proceedings.

14 Accordingly, IT IS HEREBY ORDERED that:

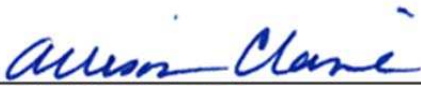
- 15 1. Petitioner shall, within sixty (60) days after service of this order, complete and submit
16 to this court the following matters:
 - 17 a. An amended and fully completed application to proceed in forma pauperis OR
18 payment of the required filing fee (\$5.00).
 - 19 b. An amended petition for writ of habeas corpus that conforms with court’s
20 instructions herein.
 - 21 c. A separate request for equitable tolling, in conformance with the test set forth in
22 Bills v. Clark, supra, 628 F.3d at 1099-1100, that includes a copy of petitioner’s pertinent
23 mental health records.
- 24 2. The Clerk of the Court is directed to send petitioner a copy of the forms used in this
25 district by prisoners seeking in forma pauperis status, and for pursuing a writ of habeas corpus
26 under 28 U.S.C. § 2254.
- 27 3. The Clerk of Court is also directed to substitute Warden Christian Pfeiffer as
28 respondent herein.

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4. Petitioner's request for appointment of counsel, made throughout his filings, is denied without prejudice.

5. Petitioner's failure to timely submit the above-identified matters to the court may result in the dismissal of this action.

DATED: March 24, 2016



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE