



1 Judgment, Lodged Doc. (“LD”) 1.<sup>1</sup>) On April 3, 2008, the California Court of Appeal for the  
2 Third Appellate District affirmed the conviction. (Order in People v. Gomes Reynaldo, No.  
3 C054626 (LD 2).) Petitioner did not seek direct review in the California Supreme Court.

4 Petitioner filed one state habeas petition in the California Supreme Court on August 2,  
5 2009. (LD 3.) The California Supreme Court denied the petition on January 13, 2010. (LD 4.)

6 Petitioner filed the present federal petition on October 17, 2015. (ECF No. 1.)

7 On June 2, 2016, respondent moved to dismiss the petition on the grounds that it is  
8 untimely and petitioner failed to exhaust his state remedies. (ECF No. 14.) The document  
9 petitioner filed in response to respondent’s motion was entitled “Motion for Stay and Abeyance.”  
10 (ECF No. 20.) The court noted that a stay of the proceedings would be fruitless if the petition  
11 was untimely and the case should be dismissed. The court gave petitioner one final opportunity  
12 to file an opposition addressing respondent’s argument that the petition is untimely. (ECF No.  
13 21.) On November 21, 2016, petitioner filed an opposition to the motion to dismiss (ECF No. 23)  
14 and on February 8, 2017, respondent filed a reply (ECF No. 29).

### 15 **MOTION TO DISMISS**

16 Respondent seeks dismissal of the petition because petitioner failed to file it within the  
17 one year statute of limitations and failed to exhaust his state remedies. (See ECF No. 14.)  
18 Petitioner argues he should be entitled to equitable tolling of the statute of limitations because he  
19 is not mentally competent, has limited English language skills, and is unfamiliar with the law.  
20 (ECF No. 23.) In an apparent admission that his claim in the petition is not exhausted, petitioner  
21 also moves for a stay of these proceedings so that he may exhaust. (ECF No. 20.)

22 Below, the court addresses only the statute of limitations issue; issues of exhaustion and a stay  
23 will be addressed, if necessary, at a later date. In addition, the court addresses respondent’s  
24 contention, raised in a footnote to his motion, that petitioner’s claim is factually baseless.

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27 <sup>1</sup> On June 3, 2016, respondent lodged documents from petitioner’s state court proceedings. (See  
28 ECF No. 15.)

1           **I.       Legal Standards**

2           **A.       Standards for Motion to Dismiss**

3           Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
4 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the  
5 petitioner is not entitled to relief in the district court.” The Court of Appeals for the Ninth Circuit  
6 construes a motion to dismiss a habeas petition as a request for the court to dismiss under Rule 4.  
7 See O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). Accordingly, the court will review  
8 respondent's motion to dismiss pursuant to its authority under Rule 4.

9           In ruling on a motion to dismiss, the court “must accept factual allegations in the [petition] as  
10 true and construe the pleadings in the light most favorable to the non-moving party.” Fayer v.  
11 Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011) (quoting Manzarek v. St. Paul Fire & Marine Ins.  
12 Co., 519 F.3d 1025, 1030 (9th Cir. 2008)). In general, exhibits attached to a pleading are “part of  
13 the pleading for all purposes.” Hartmann v. Cal. Dept. of Corr. and Rehab., 707 F.3d 1114, 1124  
14 (9th Cir. 2013) (quoting Fed. R. Civ. P. 10(c)).

15           **B.       Statute of Limitations**

16           The habeas statute’s one-year statute of limitations provides:

17                   A 1-year period of limitation shall apply to an application for a writ  
18 of habeas corpus by a person in custody pursuant to the judgment of  
a State court. The limitation period shall run from the latest of—

19                           (A) the date on which the judgment became final by the  
20 conclusion of direct review or the expiration of the time for  
seeking such review;

21                           (B) the date on which the impediment to filing an  
22 application created by State action in violation of the  
Constitution or laws of the United States is removed, if the  
23 applicant was prevented from filing by such State action;

24                           (C) the date on which the constitutional right asserted was  
initially recognized by the Supreme Court, if the right has  
25 been newly recognized by the Supreme Court and made  
retroactively applicable to cases on collateral review; or

26                           (D) the date on which the factual predicate of the claim or  
27 claims presented could have been discovered through the  
exercise of due diligence.

28           28 U.S.C. § 2244(d)(1).

1 Under subsection (d)(1)(A), the limitations period runs from the time an appeal, petition for  
2 review to the California Supreme Court, or a petition for certiorari to the United States Supreme  
3 Court was due, or, if one was filed, from the final decision by that court. Lawrence v. Florida,  
4 549 U.S. 327, 339 (2007).

5 The limitations period is statutorily tolled during the time in which “a properly filed  
6 application for State post-conviction or other collateral review with respect to the pertinent  
7 judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). A state petition is “properly filed,” and  
8 thus qualifies for statutory tolling, if “its delivery and acceptance are in compliance with the  
9 applicable laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4, 8 (2000). “The period  
10 between a California lower court’s denial of review and the filing of an original petition in a  
11 higher court is tolled—because it is part of a single round of habeas relief—so long as the filing is  
12 timely under California law.” Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) (citing Evans v.  
13 Chavis, 546 U.S. 189, 191-93 (2006)); see also Carey v. Saffold, 536 U.S. 214, 216-17 (2002)  
14 (within California’s state collateral review system, a properly filed petition is considered  
15 “pending” under section 2244(d)(2) during its pendency in the reviewing court as well as during  
16 the interval between a lower state court’s decision and the filing of a petition in a higher court,  
17 provided the latter is filed within a “reasonable time”).

18 The limitations period may be equitably tolled if a petitioner establishes ““(1) that he has been  
19 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and  
20 prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v.  
21 DiGuglielmo, 544 U.S. 408, 418 (2005)). An extraordinary circumstance must be more than  
22 merely ““oversight, miscalculation or negligence on [the petitioner’s] part.”” Waldron–Ramsey v.  
23 Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting Harris v. Carter, 515 F.3d 1051, 1055  
24 (9th Cir. 2008)). Rather, petitioner must show that some “external force” “stood in his way.” Id.  
25 “The high threshold of extraordinary circumstances is necessary lest the exceptions swallow the  
26 rule.” Lakey v. Hickman, 633 F.3d 782 (9th Cir. 2011) (citations and internal quotation marks  
27 omitted).

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1           **II.     Analysis**

2           **A.     Timeliness**

3           There are two possible commencement dates for the statute of limitations. Under either  
4 commencement date, there is no question that petitioner filed his federal petition well outside the  
5 one-year statute of limitations. Under the general rule, the limitations period commenced upon  
6 the conclusion of direct review or the time for seeking such review. The state appellate court  
7 issued its opinion on April 3, 2008. Plaintiff then had forty days to seek review in the California  
8 Supreme Court. See Cal. Ct. R. 8.366(b) (Court of Appeal decision is final thirty days after it is  
9 filed), 8.500(e) (petition for review to the California Supreme Court must be filed within ten days  
10 after Court of Appeal decision is final). Therefore, the time to seek review in the California  
11 Supreme Court expired on May 13, 2008 and the statute of limitations began to run the next day  
12 on May 14, 2008.

13          A properly filed state habeas petition will toll the statute of limitations. In the present case,  
14 petitioner filed that state habeas petition on August 2, 2009, more than one year after the  
15 conclusion of direct review on May 14, 2008. Statutory tolling is unavailable because the state  
16 petition was filed after the statute of limitations expired. See Ferguson v. Palmateer, 321 F.3d  
17 820, 823 (9th Cir. 2003) (Once the federal limitations period has expired, it may not be reinitiated  
18 by the filing of a state habeas petition, even if that habeas petition was timely under state law.)  
19 Therefore, petitioner’s federal petition is untimely.

20          Even if the court considered petitioner’s state habeas petition to have tolled the statute of  
21 limitations, petitioner’s federal petition would still be untimely. The California Supreme Court  
22 denied the state habeas petition on January 13, 2010. Petitioner did not file his federal habeas  
23 petition until more than five years later.

24          The second possible commencement date for petitioner’s federal petition would be the date  
25 upon which he discovered the factual predicate of his claim. See 28 U.S.C. § 2244(d)(1)(D).  
26 Petitioner raises one claim – that he was sentenced to four years, but has served far more time  
27 than that. It is possible that petitioner was not aware of this problem until his four-year-sentence  
28 had expired and he remained incarcerated. Petitioner was sentenced on January 5, 2007. If he

1 was serving only a four-year sentence, it would have expired on January 5, 2011 and the statute of  
2 limitations would have commenced the following day, January 6, 2011. Under this alternative  
3 commencement date, the statute of limitations expired on January 6, 2012, more than three years  
4 before petitioner filed the present federal petition. Thus, under either calculation of the  
5 commencement of the limitations period, petitioner's federal filing is untimely.

### 6 **B. Equitable Tolling**

7 In his opposition, petitioner primarily makes new arguments that his conviction and/or  
8 sentence are unlawful. Petitioner does, however, briefly mention three grounds for equitable  
9 tolling. In addition, petitioner argues that where the judgment is "facially invalid, the collateral  
10 attack may be brought after one year." (ECF No. 23 at 2.) Petitioner cites no authority for this  
11 proposition and the court finds it does not create a basis for extending the statute of limitations.

12 With respect to equitable tolling, petitioner states that his "mental competence and his  
13 reliance upon nefarious assistance from his defense team, as well as 'jailhouse lawyers' resulted  
14 in creation of an extraordinary circumstance which prevented him from properly pursuing [this  
15 habeas] remedy." (*Id.* at 3-4.) Petitioner goes on to contend that "it has taken petitioner many  
16 years and many attempts to locate a person with sufficient legal acumen and bi-lingual skills to  
17 enlighten and competently assist petitioner in his quest for [a] remedy." (*Id.* at 4.)

18 In Bills v. Clark, 628 F.3d 1092, 1093 (9th Cir. 2010), the Ninth Circuit concluded that  
19 "equitable tolling is permissible when a petitioner can show a mental impairment so severe that  
20 the petitioner was unable personally either to understand the need to timely file or prepare a  
21 habeas petition, and that impairment made it impossible under the totality of the circumstances to  
22 meet the filing deadline despite petitioner's diligence." Thus, under Bills, petitioner must  
23 establish two things. First, that he had a severe mental impairment that made it impossible to  
24 meet the filing deadline. 628 F.3d at 1099. Second, that he was diligent "in pursuing the claims  
25 to the extent he could understand them." *Id.*

26 Petitioner simply states that his "mental competence" amounts to an extraordinary  
27 circumstance. The only evidence in the record before this court that supports petitioner's  
28 assertion of a mental impairment is a "classification committee chrono" dated January 8, 2015

1 that is attached to petitioner's federal petition. (ECF No. 1 at 17.) That document reflects that,  
2 for the time period from January 11, 2014 through January 10, 2015, petitioner "was reviewed  
3 under P.C. 2962 and meets the criteria for referral as a Mentally Disordered Offender."

4 California Penal Code §§ 2960-2981 is the Mentally Disordered Offenders law, which  
5 provides that prisoners with a "severe mental disorder that was one of the causes of, or was an  
6 aggravating factor in, the commission of the crime for which they are incarcerated . . . should be  
7 provided with an appropriate level of mental health treatment while in prison and when returned  
8 to the community." Cal. Penal Code § 2960. Under § 2962, a "severe mental disorder" is defined  
9 as

10 an illness or disease or condition that substantially impairs the  
11 person's thought, perception of reality, emotional process, or  
12 judgment; or which grossly impairs behavior; or that demonstrates  
13 evidence of an acute brain syndrome for which prompt remission,  
14 in the absence of treatment, is unlikely. The term "severe mental  
disorder," as used in this section, does not include a personality or  
adjustment disorder, epilepsy, mental retardation or other  
developmental disabilities, or addiction to or abuse of intoxicating  
substances.

15 Respondent argues petitioner's classification as a mentally disordered offender is only relevant to  
16 the time period described in the chrono - January 11, 2014, to January 10, 2015 – which is over  
17 four years after the limitations period expired. Respondent further argues that the document's  
18 authenticity is unverified because it is unsigned.

19 Respondent's arguments are, at this point, unhelpful. First, while the chrono only  
20 addresses a certain time period, the definition of a Mentally Disordered Offender is an inmate  
21 with a severe mental disorder "that was one of the causes of, or was an aggravating factor in, the  
22 commission of the crime for which they are incarcerated." Therefore, by definition, the severe  
23 mental disorder existed at the time of the commission of the crimes, and, it is reasonable to  
24 assume, thereafter.

25 Respondent's second argument, regarding the document's authenticity, is not well-taken.  
26 To meet his burden of showing he is entitled to equitable tolling at this point, petitioner need not  
27 "carry a burden of persuasion." Laws v. Lamarque, 351 F.3d 919, 924 (9th Cir. 2003). Rather,

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1 petitioner needs to show only that “further investigation into the merits of his argument for  
2 tolling” is merited. Id.

3 To demonstrate that petitioner was, in fact, sufficiently competent to have filed a federal  
4 petition, respondent points to the fact petitioner filed a state habeas petition on August 2, 2009  
5 and administrative appeals with the prison in March 2010, March 2013, and January 2014. While  
6 those filings are relevant to consideration of petitioner’s mental competence, they are not  
7 dispositive. The Ninth Circuit has made it clear that “a district court must take care not to deny a  
8 claim for equitable tolling before a sufficient record can be developed.” Biagas v. Walker, No.  
9 No. C 10-02429 SBA PR, 2013 WL 428640, at \*4 (N.D. Cal. Feb. 1, 2013) (citing Laws, 351  
10 F.3d at 924). Currently, the court has inadequate information about petitioner’s mental  
11 competence. For these reasons, if petitioner’s claim has a sufficient factual underpinning, as  
12 explained below, the court should order production of petitioner’s mental health records and  
13 permit respondent to renew his motion to dismiss.

#### 14 **C. Merits of Petitioner’s Claim**

15 In his brief, respondent states in a footnote that denial of petitioner’s claim on the merits is  
16 appropriate because petitioner’s claim is based on an incorrect factual statement. (See ECF No.  
17 14 at 4 n.3.) Petitioner’s sole claim is that he is unlawfully confined because he was sentenced to  
18 four years but has served far more time than that. Petitioner relies on a superior court minute  
19 order addressing a motion for discovery. (See Ex. 2 to Pet. (ECF No. 1 at 11).) Therein, the  
20 court notes “that Defendant was sentenced to serve four years in the California Department of  
21 Corrections and Rehabilitation for violation of Penal Code section 245(a)(1).” Respondent has  
22 provided the court with documents demonstrating that the superior court mistakenly failed to note  
23 petitioner’s full sentence in that order. Respondent provides copies of the Abstract of Judgment  
24 showing that petitioner was sentenced to fifteen years to life on the second degree murder  
25 conviction and four years on the assault with a deadly weapon conviction. (LD 1.) Respondent  
26 also provides a copy of the decision of the California Court of Appeal in People v. Gomes  
27 Reynaldo, No. C054626 (Apr. 3, 2008), in which the court describes petitioner’s sentence as  
28 fifteen years plus four years. (LD 2.)



1           The statute of limitations issue is not jurisdictional and courts may consider the merits of a  
2 habeas petition despite a timeliness issue if the merits may be more easily resolved. Day v.  
3 McDonough, 547 U.S. 198, 205, 210 (2006) (a district court has discretion to decide whether the  
4 administration of justice is better served by dismissing the case on statute of limitations grounds  
5 or by reaching the merits of the petition); Bruno v. Director, CDCR, No. CIV S-02-2339 LKK  
6 EFB P, 2010 WL 367538, at \*2 (E.D. Cal. Jan. 26, 2010) (“[T]he court elects to deny petitioner's  
7 habeas petition on the merits rather than reach the equitable tolling issues.”).

8           In the present case, this court finds petitioner has not been provided an opportunity to  
9 respond to respondent’s merits argument since that argument appears only in a footnote.  
10 Therefore, the court recommends giving petitioner an opportunity to do so.

11           To the extent petitioner is attempting to raise new claims in his opposition to the motion to  
12 dismiss, these claims are not relevant to the pending motion, which addresses only petitioner’s  
13 claim in his current petition regarding the length of his sentence. See Schneider v. Cal. Dep’t of  
14 Corrs., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“The ‘new’ allegations contained in the inmates’  
15 opposition motion . . . are irrelevant for Rule 12(b)(6) purposes.”); Dearwester v. Sacramento  
16 Cty. Sheriff’s Dep’t, No. 2:13-CV-2064 MCE DAD, 2015 WL 3705822, at \*3 (E.D. Cal. June 12,  
17 2015), findings & reco. adopted, 2015 WL 4478085 (July 21, 2015). If petitioner wishes to make  
18 new claims, he must seek to amend the petition. However, petitioner is warned that any new  
19 claims will likely also be subject to statute of limitations and exhaustion issues.


20           For the foregoing reasons, IT IS HEREBY RECOMMENDED as follows:

- 21           1. Respondent’s motion to dismiss (ECF No. 14) be denied without prejudice;
- 22           2. Petitioner’s motion for stay and abeyance (ECF No. 20) be denied without prejudice;
- 23           and
- 24           3. If these findings and recommendations are adopted, petitioner be ordered to file,  
25           within thirty days of the date of the adoption order, a brief addressing respondent’s  
26           argument that petitioner’s sentence is nineteen years to life, not four years as alleged  
27           in the petition.

28       ///  
29

1           These findings and recommendations will be submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
3 after being served with these findings and recommendations, any party may file written  
4 objections with the court and serve a copy on all parties. The document should be captioned  
5 “Objections to Magistrate Judge's Findings and Recommendations.” Any response to the  
6 objections shall be filed and served within seven days after service of the objections. The parties  
7 are advised that failure to file objections within the specified time may result in waiver of the  
8 right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In the  
9 objections, the party may address whether a certificate of appealability should issue in the event  
10 an appeal of the judgment in this case is filed. See Rule 11, Rules Governing § 2254 Cases (the  
11 district court must issue or deny a certificate of appealability when it enters a final order adverse  
12 to the applicant).

13 Dated: February 16, 2017

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16 DEBORAH BARNES  
17 UNITED STATES MAGISTRATE JUDGE  
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22 DLB:9  
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