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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID M. DAVIS,  
Petitioner,  
v.  
M. ELIOT SPEARMAN,<sup>1</sup>  
Respondent.

No. 2:16-cv-0733-JAM-EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding without counsel this petition for writ of habeas corpus under 28 U.S.C. § 2254. Respondent moves to dismiss the action as time-barred and partially unexhausted. ECF No. 15. For the following reasons, the petition, with appropriate equitable tolling, must be considered timely but nonetheless should be dismissed with leave to amend for failure to exhaust all claims in the state courts.

**I. Background**

Petitioner pleaded no contest to corporal injury to a child, corporal injury to a cohabitant, dissuading a witness, and assault with a deadly weapon (plus sentencing enhancements) in the

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<sup>1</sup> The respondent in this action was initially named as Clark Ducart, warden of Pelican Bay State Prison. Petitioner has since been transferred to High Desert State Prison, where M. Eliot Spearman is warden. The court hereby substitutes Mr. Spearman as respondent in this action, as he is the current custodian of petitioner. Rule 2(a), Rules Governing Section 2254 Cases.

1 criminal case underlying this petition. ECF No. 16, Resp't's Notice of Lodging Documents in  
2 Paper, Lodged Document (hereinafter "Lodg. Doc.") No. 1 at 3. The California Court of Appeal  
3 stated the underlying facts as follows:

4 Defendant David Marshall Davis and his stepson, 16 year-old D.W., were cleaning out a  
5 room in the family home when D.W. fell asleep. Defendant threw a plastic object at  
6 D.W., striking his right eye. Defendant also punched him in the ribs about 10 times. As a  
7 result, D.W. had a horizontal line across his field of vision which did not heal.

8 Later that week, defendant assaulted his cohabitant, D.W.'s mother Page G. He pushed  
9 her against the kitchen wall, hit her in the face with a closed fist, and threw her to the  
10 ground. Page G. was three months pregnant with defendant's child. While she was on the  
11 ground, defendant stomped on her stomach with his foot and yelled that he hoped she  
12 would miscarry. He also threatened to kill Page G. if she got law enforcement involved.  
13 D.W. distracted defendant by letting the dogs in, and then fled with his mother.  
14 In a search incident to defendant's arrest, officers found a marijuana growing facility in  
15 one of the rooms.

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17 While in jail, defendant called Page G. and instructed her to have D.W. testify that he  
18 made up the whole story because he was angry with defendant.

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20 A few days after being released from jail, defendant confronted D.W. and accused him of  
21 stealing some marijuana. D.W. denied stealing marijuana but admitted selling some while  
22 defendant was in jail. Defendant and Page G. told D.W. to leave the home; D.W. went to  
23 his girlfriend's residence. Defendant and Page G. drove D.W. home the following day.  
24 After Page G. and their other children left, defendant confronted D.W. in the room where  
25 the marijuana was grown. Defendant, armed with an aluminum baseball bat, told D.W. he  
26 would knock his head off if he said anything stupid. When D.W. continued to deny  
27 stealing the marijuana, defendant struck him in the shin with the bat. Defendant left the  
28 residence when Page G. and the children returned.

*Id.* at 1-3. Petitioner was sentenced to sixteen years.

## 21 **II. The Motion to Dismiss**

### 22 **A. Statute of Limitations**

23 Respondent argues that the petition is untimely. Under the Anti-terrorism and Effective  
24 Death Penalty Act ("AEDPA"), a one-year limitations period for seeking federal habeas relief  
25 begins to run from the latest of: (1) the date the judgment became final on direct review or the  
26 expiration of the time for seeking such review (or April 25, 1996, if the judgment became final  
27 prior to AEDPA's enactment), (2) the date on which a state-created impediment to filing is  
28 removed, (3) the date the United States Supreme Court makes a new rule retroactively applicable

1 to cases on collateral review, or (4) the date on which the factual predicate of a claim could have  
2 been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D); *Malcom*  
3 *v. Payne*, 281 F.3d 951, 955 (9th Cir. 2002).

#### 4 **1. Statutory Tolling**

5 No statute tolls the limitations period “from the time a final decision is issued on direct  
6 state appeal [to] the time the first state collateral challenge is filed . . .” *Nino v. Galaza*, 183 F.3d  
7 1003, 1006 (9th Cir. 1999). However, if a petitioner properly files a state post-conviction  
8 application prior to the expiration of the limitations period, the period is tolled and remains tolled  
9 for the entire time that application is “pending.” 28 U.S.C. § 2244(d)(2). “[A]n application is  
10 ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and  
11 rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). In California, a properly filed  
12 post-conviction application is “pending” during the intervals between a lower court decision and  
13 the filing of a new petition in a higher court if the second petition was filed within a “reasonable  
14 time” after the denial of the first. *Carey v. Saffold*, 536 U.S. 214, 221 (2002); *Stancl v. Clay*,  
15 692 F.3d 948, 956 (9th Cir. 2012); *see also Velasquez v. Kirkland*, 639 F.3d 964, 968 (9th Cir.  
16 2011) (finding that delays of ninety-one days and eighty-one days are “far longer than the  
17 Supreme Court’s thirty-to-sixty-day benchmark for California’s ‘reasonable time’ requirement,”  
18 and are, without adequate explanation, unreasonable under California law).

19 A federal habeas application does not provide a basis for statutory tolling, *Duncan v.*  
20 *Walker*, 533 U.S. 167, 181-82 (2001), nor does a state petition filed after the federal limitations  
21 period has expired, *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

22 A petitioner may be entitled to statutory tolling for the time that additional rounds of state  
23 habeas petitions are pending (provided they were filed prior to the expiration of the limitations  
24 period), although the time between rounds is not tolled. *Cross v. Sisto*, 676 F.3d 1172, 1178-79  
25 (9th Cir. 2012); *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010). For tolling to be applied  
26 based on a subsequent round, that subsequent set of petitions cannot be untimely or improperly  
27 successive. *Porter*, 620 F.3d at 958.

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**2. Equitable Tolling**

The limitations period may also be equitably tolled where a habeas petitioner establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631 (2010). Petitioner has the burden of showing facts entitling him to equitable tolling. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002); *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). The threshold necessary to trigger equitable tolling is very high, “lest the exceptions swallow the rule.” *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Equitable tolling may be applied only where a petitioner shows that some external force caused the untimeliness. *Id.*

**a. The Equitable Exception for Innocence**

In addition, the statute of limitations is subject to an actual innocence exception.<sup>2</sup> A petitioner may have her untimely filed case heard on the merits if she can persuade the district court that it is more likely than not that no reasonable juror would have convicted her. *McQuiggin v. Perkins*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1924, 1928, 1933 (2013); *Lee v. Lampert*, 653 F.3d 929, 937 (9th Cir. 2011) (en banc). “Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing.” *McQuiggin*, 133 S. Ct. at 1935. For example, the “court may consider how the timing of the submission and the likely credibility of a petitioner’s affiants bear on the probable reliability” of his evidence of innocence. *Id.*

**b. Analysis**

Petitioner’s appeal of his conviction was denied by the California Court of Appeal on September 9, 2013. Lodg. Doc. No. 1. Petitioner did not seek further direct review, but filed three state habeas petitions. The first was filed in the Sutter County Superior Court on June 1, 2014 and denied July 9, 2014. Lodg. Doc. Nos. 3, 4. The second was filed in the California

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<sup>2</sup> This exception is also known variably as the “miscarriage of justice” exception and the “*Schlup* gateway,” after *Schlup v. Delo*, 513 U.S. 298 (1995), in which the U.S. Supreme Court held that a habeas petitioner whose claims were procedurally barred could nevertheless obtain a determination on the merits of his petition if he made the requisite showing of actual innocence.

1 Court of Appeal on September 16, 2014 and denied on September 25, 2014. Lodg. Doc. Nos. 5,  
2 6. The last was filed in the California Supreme Court on October 17, 2014 and denied on April  
3 29, 2015. Lodg. Doc. Nos. 8, 9. This petition was filed on March 31, 2016. ECF No. 1.

4 Respondent correctly notes that petitioner had 40 days from the date the Court of Appeals  
5 denied his direct appeal (September 9, 2013) to seek review in the California Supreme Court and  
6 that his conviction became final on the expiration of that 40 days. *See* Cal. R. Ct. 8.366(b)(1)  
7 (“[A] Court of Appeal decision in a [criminal case], including an order dismissing an appeal  
8 involuntarily, is final in that court 30 days after filing.”); Cal. R. Ct. 8.500(e)(1) (“A petition for  
9 review must be served and filed within 10 days after the Court of Appeal decision is final in that  
10 court.”). Thus, the limitations period began October 20, 2013 – the day after the deadline for  
11 seeking direct review from the California Supreme Court expired. It ran until petitioner filed his  
12 first state habeas petition on June 1, 2014, for a total of 224 days.

13 The limitations period was then tolled for the pendency of petitioner’s state petitions.  
14 While respondent argues that the period should not be tolled between the ruling on his Superior  
15 Court petition on July 9, 2014 and the filing of his Court of Appeals petition on September 16,  
16 2014 because that 69 day period is unreasonable, the weight of authority in this circuit finds such  
17 delays—which are so near the presumptively-reasonable window of 60 days—to be reasonable  
18 where, as here, the petitioner has revised the petition during the break. *Compare* Lodg. Doc. No.  
19 3 *with* Lodg. Doc. No. 5; *Lucas v. Holt*, No. 2:14-cv-2357-WBS-EFB P, 2015 U.S. Dist. LEXIS  
20 113415, at \*10-12 (E.D. Cal. Aug. 26, 2015) (collecting cases). Accordingly, the limitations  
21 period began again on April 30, 2015, the day after the California Supreme Court denied the final  
22 petition.

23 Absent further tolling, the limitations period would expire 141 days later (added to the  
24 already-elapsed 224 days for a total of 365) – on September 18, 2015. Petitioner argues that two  
25 reasons justify equitable tolling of the limitations period, however. First, petitioner claims that he  
26 was “heavily sedated on psychotropic medications” between January 2015 and July 2015. ECF  
27 No. 21 at 2. The U.S. Court of Appeals for the Ninth Circuit has held that a “putative habeas  
28 petitioner’s mental incompetency is a condition that is, obviously, an extraordinary circumstance

1 beyond the prisoner's control" that justifies equitable tolling. *Laws v. Lamarque*, 351 F.3d 919,  
2 923 (9th Cir. 2003). But petitioner here has not shown that his mental illness, or the treatment he  
3 received for it, was such that it rendered him unable to file this petition. In fact, petitioner's  
4 evidence consists solely of a page entitled "Interdisciplinary Progress Notes- General Psychiatry"  
5 dated October 8, 2014 on which a psychiatrist noted: "Reports meds help and doing ok . . . .  
6 Depression better . . . . Eats and sleeps well, meds help; energy normal, jogs . . . ." ECF No. 21  
7 at 9. The psychiatrist wrote that petitioner was "stable" and had "no acute issues." *Id.* Thus, the  
8 court lacks a basis on which to find that petitioner's mental illness or medication rendered him  
9 unable to file his federal petition and tolling for that reason is inappropriate.

10 Second, according to petitioner and two items of evidence he has produced, his legal  
11 materials were among property that was lost during his transfer to Pelican Bay State Prison on  
12 July 30, 2015. ECF No. 21 at 2, 10, 11. While petitioner got some of his property back in  
13 November 2015, the legal materials were not returned, having been thrown in the trash. *Id.* The  
14 deprivation of legal materials by prison officials constitutes an extraordinary circumstance that  
15 justifies equitable tolling. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1027 (9th Cir. 2005).  
16 While respondent argues that petitioner has not shown how being deprived of his "transcripts"  
17 made him unable to file his petition, petitioner has shown that not only was he deprived of  
18 transcripts, but that the entirety of his legal materials was thrown out when he was transferred.  
19 Respondent also argues that petitioner was able to make his state filings without these materials  
20 (ECF No. 26 at 4) but the facts shown by petitioner are that the materials were thrown out on July  
21 30, 2015, after all his state cases had ended. Thus, petitioner has shown that he was denied his  
22 legal property from July 30, 2015 onward and that this deprivation constitutes an extraordinary  
23 circumstance. In addition, petitioner has shown that he was pursuing his rights diligently, as his  
24 evidence shows that he tried to obtain his legal materials through at least two administrative  
25 appeals following his transfer. These factors justify the tolling of the limitations period from that  
26 date until the filing of this petition on March 31, 2016.

27 On July 30, 2015 (the date of petitioner's transfer and the loss of his legal materials), 92  
28 additional days of the limitations period had elapsed (following the denial of his California

1 Supreme Court petition). Adding that number to the 224 days that passed between the finality of  
2 the conviction and the filing of petitioner’s state habeas petitions yields 316 days. Because, when  
3 statutory and equitable tolling principles are applied, less than 365 days elapsed between the  
4 finality of the conviction and the filing of this action, respondent’s motion to dismiss the petition  
5 as untimely should be denied.<sup>3</sup>

6 **B. Exhaustion**

7 **1. Governing Law**

8 A district court may not grant a petition for a writ of habeas corpus unless the petitioner  
9 has exhausted available state court remedies. 28 U.S.C. § 2254(b)(1). A state will not be deemed  
10 to have waived the exhaustion requirement unless the state, through counsel, expressly waives the  
11 requirement. 28 U.S.C. § 2254(b)(3).

12 Exhaustion of state remedies requires that petitioners fairly present federal claims to the  
13 highest state court, either on direct appeal or through state collateral proceedings, in order to give  
14 the highest state court “the opportunity to pass upon and correct alleged violations of its  
15 prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (some internal quotations  
16 omitted). “[A] state prisoner has not ‘fairly presented’ (and thus exhausted) his federal claims in  
17 state court unless he specifically indicated to that court that those claims were based on federal  
18 law.” *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d 904 (9th Cir.  
19 2000). “[T]he petitioner must make the federal basis of the claim explicit either by citing federal  
20 law or the decisions of federal courts, even if the federal basis is self-evident . . . .” *Id.* (citations  
21 omitted); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (“[A] claim for relief in  
22 habeas corpus must include reference to a specific federal constitutional guarantee, as well as a  
23 statement of the facts that entitle the petitioner to relief.”); *Duncan*, 513 U.S. at 365-66 (to  
24 exhaust a claim, a state court “must surely be alerted to the fact that the prisoners are asserting  
25 claims under the United States Constitution.”).

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26 <sup>3</sup> Petitioner also argues that he is entitled to the application of the actual innocence  
27 exception to the limitations period. Because the undersigned finds that the petition is timely, this  
28 argument need not be addressed here. The undersigned notes, however, that petitioner has made  
no showing supporting his assertion that newly discovered evidence establishes his innocence.

1 In addition to identifying the federal basis of his claims in the state court, the petitioner  
2 must also fairly present the factual basis of the claim in order to exhaust it. *Baldwin v. Reese*, 541  
3 U.S. 27, 29 (2004); *Robinson v. Schriro*, 595 F.3d 1086, 1101 (9th Cir. 2010). “[T]he petitioner  
4 must . . . provide the state court with the operative facts, that is, ‘all of the facts necessary to give  
5 application to the constitutional principle upon which [the petitioner] relies.’” *Davis v. Silva*, 511  
6 F.3d 1005, 1009 (9th Cir. 2008) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir.  
7 1958)). Where a claim included in a federal petition has not been exhausted, the petition must be  
8 dismissed with leave to amend and without prejudice to the filing of a fully-exhausted petition  
9 unless the petitioner has requested a stay. *Rhines v. Weber*, 544 U.S. 269 (2005). Petitioner has  
10 not requested a stay in this action.

## 11 **2. Analysis**

12 The petition presents four claims: (1) false testimony was presented against him at trial by  
13 witness DeAnthony Ward; (2) petitioner’s plea was not knowing and voluntary because he was  
14 not advised of his constitutional rights or the potential consequences of the plea; (3) the  
15 prosecutor withheld exculpatory evidence from the defense; and (4) trial counsel rendered  
16 ineffective assistance by representing that petitioner would get probation if he pleaded no contest  
17 and failing to investigate petitioner’s mental disability. ECF No. 1. Respondent argues that the  
18 third claim was not presented to the California Supreme Court. Petitioner does not dispute that he  
19 did not present the claim to that court, and review of his petition there accords with respondent’s  
20 position that the claim was not presented. Lodg. Doc. No. 7. Because petitioner has not  
21 presented his third claim to the California Supreme Court and has made no request to stay this  
22 action while he does so, respondent’s motion to dismiss the petition as partially unexhausted  
23 should be granted without prejudice and with leave to amend to give petitioner the opportunity to  
24 file an amended petition that contains only exhausted claims or to seek a stay under *Rhines*, 544  
25 U.S. at 277.<sup>4</sup>

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27 <sup>4</sup> Pursuant to *Rhines*, a district court stays a ‘mixed’ petition – that is one containing both  
28 exhausted and unexhausted claims – while the petitioner exhausts his unexhausted claim in state  
court. 544 U.S. at 277.



1           **III. Conclusion and Recommendation**

2           For the reasons presented above, respondent’s motion to dismiss the petition on timeliness  
3 grounds should be denied. However, petitioner has not presented all of the claims contained in  
4 the instant petition to the California Supreme Court, and it is therefore RECOMMENDED that:

- 5           1. Respondent’s June 10, 2016 motion to dismiss (ECF No. 15) be granted on  
6 exhaustion grounds and that the petition be dismissed without prejudice and with leave  
7 to amend.
- 8           2. Petitioner be granted leave within thirty (30) days of the date of any order adopting  
9 this recommendation to either (a) file an amended petition containing only the three  
10 claims that he has exhausted or (b) file a motion to stay pursuant to *Rhines*, 544 U.S.  
11 at 277.

12           These findings and recommendations are submitted to the United States District Judge  
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
14 after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
17 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
18 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: February 15, 2017.

20   
21 EDMUND F. BRENNAN  
22 UNITED STATES MAGISTRATE JUDGE  
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