



1 II. Legal Standards

2 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
3 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the  
4 petitioner is not entitled to relief in the district court. . . .” Id. The Court of Appeals for the Ninth  
5 Circuit has referred to a respondent’s motion to dismiss as a request for the court to dismiss under  
6 Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420  
7 (1991). Accordingly, the court reviews respondent’s motion to dismiss pursuant to its authority  
8 under Rule 4.

9 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which became  
10 law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of  
11 habeas corpus filed by state prisoners. This statute of limitations provides that,

12 A 1-year period of limitation shall apply to an application for a writ  
13 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 –

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

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

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

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

24 28 U.S.C. § 2244 (d)(1).

25 III. Chronology

26 1. On June 11, 2012, petitioner pled no contest to making criminal threats in El Dorado  
27 County Case No. P12CRF0264. (Respondent’s Lodged Document (“LD”) 1.) On October 4,  
28 2013, petitioner was sentenced to a determinate state prison term of eight months, to run

1 consecutive to the nine-year term previously imposed in a previous case, El Dorado County Case  
2 No. P12CRF0251.<sup>1</sup> (LD 1, 2.)

3 2. Petitioner filed an appeal. On July 29, 2014, the California Court of Appeal affirmed  
4 the judgment. (LD 2.)

5 3. Petitioner did not file a petition for review in the California Supreme Court.

6 4. On May 21, 2014,<sup>2</sup> petitioner filed a petition for writ of habeas corpus in the California  
7 Supreme Court. (LD 3.) On August 13, 2014, the petition was denied by the California Supreme  
8 Court. (LD 4.)

9 5. On July 31, 2014,<sup>3</sup> petitioner filed a petition for writ of habeas corpus in the El Dorado  
10 County Superior Court. (LD 5.) The petition was denied on August 14, 2014. (LD 6.)

11 6. On July 20, 2014, petitioner filed a petition for writ of habeas corpus in the California  
12 Court of Appeal, Third Appellate District. (LD 7.) On August 14, 2014, the petition was denied.  
13 (LD 8.)

14 7. On October 30, 2014, petitioner filed a petition for writ of habeas corpus in the El  
15 Dorado County Superior Court. (LD 9.) The petition was denied on November 6, 2014, citing In  
16 re Clark, 5 Cal. 4th 750, 797 (1993). (LD 10.)

17 8. On April 15, 2015, petitioner filed another petition for writ of habeas corpus in the El  
18 Dorado County Superior Court. (LD 11.) The petition was denied on April 22, 2015, citing In re  
19 Clark, 5 Cal. 4th 750, 797 (1993). (LD 12.)

20 9. On February 16, 2017, petitioner filed a petition for resentencing under Proposition 47  
21 in the El Dorado County Superior Court. (LD 13.) The petition was denied on March 28, 2017.

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23 <sup>1</sup> Following jury trial, on July 25, 2013, petitioner was convicted of driving under the influence  
24 in Case No. P12CRF0251, and the trial court found petitioner in violation of probation based on  
such convictions. (LD 1.)

25 <sup>2</sup> Unless otherwise indicated, petitioner's filings were given benefit of the mailbox rule. See  
26 Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir. 2010) (prisoners are entitled to the mailbox  
rule for both state and federal filings).

27 <sup>3</sup> Petitioner did not date the petition or the proof of service, so the filed date of July 31, 2014, is  
28 used. (LD 5.)

1 (LD 14.)

2 10. On May 7, 2017, petitioner filed a petition for writ of habeas corpus in the California  
3 Supreme Court. (LD 15.) The petition was denied on August 9, 2017. (LD 16.)

4 11. On November 25, 2013, petitioner filed a prior federal petition for writ of habeas  
5 corpus in which he challenged the same 2013 conviction. Dumont v. Price, No. 2:13-cv-2541  
6 CMK (E.D. Cal.) (ECF No. 1 at 7); (LD 17.) On April 3, 2017, the prior federal habeas petition  
7 was denied without prejudice based on petitioner’s failure to exhaust state court remedies. Id.  
8 (LD 18.)

9 12. The instant federal petition was filed on July 4, 2017. (ECF No. 1 at 7.) Petitioner  
10 raises three grounds in his federal petition: (a) ineffective assistance of counsel and denial of  
11 translator to read 8 pages of unlawful plea; (b) involuntarily-induced admission (no contest)  
12 because petitioner had no glasses (blind in one eye), no interpreter to explain the waiver; was  
13 medicated for pain and had psychiatric issues; and (c) unlawful enhancement.

#### 14 IV. Date Limitations Period Begins Running

15 Under 28 § 2244(d)(1)(A), the limitations period begins running on the date that  
16 petitioner’s direct review became final or the date of the expiration of the time for seeking such  
17 review. Id. Here, the California Court of Appeal affirmed petitioner’s judgment on July 29,  
18 2014. The time to seek direct review expired on September 7, 2014, forty days later. See Cal. R.  
19 Ct. 8.366(a)(1); 8.500(e)(1). Thus, the one-year statute of limitations began running the next day,  
20 September 8, 2014. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent tolling,  
21 the limitations period expired on September 8, 2015.

#### 22 V. Statutory Tolling

23 There is no statutory tolling of the limitations period “from the time a final decision is  
24 issued on direct state appeal [to] the time the first state collateral challenge is filed. . . .” Nino v.  
25 Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But when a petitioner properly files a state post-  
26 conviction application, the limitations period is tolled and remains tolled for the entire time that  
27 application is “pending.” 28 U.S.C. § 2244(d)(2). “[A]n application is ‘properly filed’ when its  
28 delivery and acceptance are in compliance with the applicable laws and rules governing filings.”

1 Artuz v. Bennett, 531 U.S. 4, 8 (2000). State habeas petitions filed after the one-year statute of  
2 limitations has expired do not revive the statute of limitations and have no tolling effect.  
3 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the  
4 reinitiation of the limitations period that has ended before the state petition was filed”); Jiminez v.  
5 Rice, 276 F.3d 478, 482 (9th Cir. 2001). Petitioner bears the burden of showing facts entitling  
6 him to statutory tolling. Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002), overruled on other  
7 grounds by Pace, 544 U.S. 408, 418 (2005); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.  
8 2002).

9 A. First Three State Petitions

10 Petitioner’s first three petitions for writs of habeas corpus filed in state courts were all  
11 resolved on or before August 14, 2014. Such petitions did not toll the limitation period because  
12 they were all filed and denied before the AEDPA limitation period commenced on September 8,  
13 2014, under § 2244(d)(1)(A); therefore, there was nothing to toll. See Waldrip v. Hall, 548 F.3d  
14 729, 735 (9th Cir. 2008) (state habeas petition filed and denied before effective date of  
15 petitioner’s conviction “had no effect on the timeliness of the ultimate federal filing” because the  
16 limitations period had not yet started to run).

17 B. Fourth & Fifth State Petitions

18 Respondent contends that petitioner is not entitled to statutory tolling for either the fourth  
19 or fifth state court petitions because both were denied with citations to In re Clark. (ECF No. 14  
20 at 4.) Petitioner does not address respondent’s argument. (ECF No. 17.)

21 Both rulings on petitioner’s fourth and fifth petitions denied the petitions with a citation to  
22 In re Clark, 5 Cal.4th at 797. The Supreme Court made clear that “[w]hen a postconviction  
23 petition is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2).”  
24 Pace, 544 U.S. at 414. In addition, the Supreme Court held that a citation to In re Clark signals a  
25 habeas petition has been denied as untimely. Walker v. Martin, 562 U.S. 307, 310 (2011). See  
26 also Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005), amended, 439 F.3d 993 (9th Cir.  
27 2006) (a petition denied as untimely is not properly filed and cannot toll the limitations period).  
28 An untimely state post-conviction petition is not considered “properly filed,” and does not afford

1 the petitioner statutory tolling of the AEDPA statute of limitations. See 28 U.S.C. § 2244(d)(2);  
2 Pace, 544 U.S. at 414. “Under Pace, if a state court denies a petition as untimely, none of the  
3 time before or during the court’s consideration of that petition is statutorily tolled.” Bonner, 425  
4 F.3d at 1149.

5 Because the fourth and fifth state court habeas petitions were denied with a citation to In  
6 re Clark, such petitions did not toll the statute of limitations, and the limitations period ran  
7 unabated until it expired on September 8, 2015. Petitioner filed the instant federal petition on  
8 July 4, 2017, over a year and nine months after the statute of limitations expired.

9 C. Sixth and Seventh Petitions

10 The sixth and seventh petitions were filed in state court on February 16, 2017, and May 7,  
11 2017, respectively, after the federal limitations period had expired. State habeas petitions filed  
12 after the one-year statute of limitations has expired do not revive the statute of limitations and  
13 have no tolling effect. Ferguson, 321 F.3d at 823; Jiminez, 276 F.3d at 482.

14 D. No Statutory Tolling

15 For the above reasons, the undersigned concludes that petitioner is not entitled to statutory  
16 tolling of the limitations period. The one-year statute of limitations period expired on September  
17 8, 2015. Absent equitable tolling, this action is time-barred.

18 VI. Prior Federal Habeas Petition

19 Petitioner filed a previous federal habeas petition challenging the same state court  
20 decision he challenges in the instant petition. No. 2:13-cv-2541 CMK. (LD 17-18.) However,  
21 the filing of a federal habeas petition does not toll the statute of limitations. Duncan v. Walker,  
22 533 U.S. 167, 181-82 (2001).

23 VII. Equitable Tolling

24 Petitioner seeks equitable tolling of the limitations period based on the death of his father  
25 in April of 2015, and subsequent death of his brother; extensions granted and delays in his prior  
26 federal habeas proceedings; a slip and fall accident he suffered on August 9, 2015, or September  
27 10, 2015, resulting in a spine re-injury just after having it surgically decompressed, and was  
28 thereafter prescribed medications for bipolar disorder, depression, and anxiety, and placed on the

1 CCCMS<sup>4</sup> level of mental health care; transfers to prisons in Soledad and Chino; a toolbox tipped  
2 and “side swiped his back on August 9, 2016;” his wife died on May 2, 2017; and he was hit in  
3 the face by a tree on July 10, 2017. (ECF No. 17 at 3-4.) Petitioner argues that these “unforeseen  
4 disastrous events” constitute extraordinary circumstances warranting equitable tolling. (ECF No.  
5 20 at 2.)

6 In his supplemental reply, petitioner claims he slipped and fell on August 16, 2015, and  
7 broke his jaw, but did not require surgery. (ECF No. 20 at 3.) He claims his brother-in-law,  
8 Richie Hall, died on July 15, 2016. (ECF No. 20 at 3.) In addition, his eyeglasses were broken  
9 on July 13, 2015, and again on July 5, 2017, and it took time for the glasses to be replaced. (ECF  
10 No. 20 at 4.) On July 12, 2017, petitioner was exposed to six-foot Russian thistle tumbleweeds,  
11 and was hospitalized for an allergic reaction. (ECF No. 20 at 5.)

12 Petitioner claims he has been diligent and timely, and could not “have filed any other way.  
13 The mixed confusion . . . is part of the manic ability.” (ECF No. 17 at 4.) Petitioner provided  
14 157 pages of exhibits, broadly identified as Exhibit A: medical records, accident reports, job-  
15 related injuries, doctor’s diagnoses, and dates of impairment, and Exhibit B: alleged proof of  
16 petitioner’s persistence, extensions by the state, delays by judge in prior habeas case, “show cause  
17 of father’s death,” “tolling extensions and refile of 2nd-3rd-4th habeas [petitions].” (ECF No.  
18 17 at 1.)

19 Respondent did not address the issue of equitable tolling in the motion, or file a reply.

20 “Equitable tolling may be available ‘[w]hen external forces, rather than a petitioner’s lack  
21 of diligence, account for the failure to file a timely claim.’” McMonagle v. Meyer, 802 F.3d  
22 1093, 1099 (9th Cir. 2015) (quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999)). “A  
23 petitioner who seeks equitable tolling of AEDPA’s one-year filing deadline must show that (1)  
24 some ‘extraordinary circumstance’ prevented him from filing on time, and (2) he has diligently  
25 pursued his rights.” Luna v. Kernan, 784 F.3d 640, 646 (9th Cir. 2015) (citing Holland v.

26 \_\_\_\_\_  
27 <sup>4</sup> CDCR’s Mental Health Services Delivery System Program Guide provides four levels of  
28 mental health care services: Correctional Clinical Case Management System (“CCCMS”);  
Enhanced Outpatient (“EOP”); Mental Health Crisis Bed (“MHCB”) and inpatient hospital care.  
Coleman v. Brown, 2013 WL 6491529, at \*1 (E.D. Cal. Dec. 10, 2013).

1 Florida, 560 U.S. 631, 649 (2010)). The diligence required for equitable tolling purposes is  
2 “reasonable diligence,” not “maximum feasible diligence.” Holland, 560 U.S. at 653; see also  
3 Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010). As to the extraordinary circumstances  
4 required, the Ninth Circuit has held that the circumstances alleged must make it impossible to file  
5 a petition on time, and that the extraordinary circumstances must be the cause of the petitioner’s  
6 untimeliness. See Bills, 628 F.3d at 1097, citing Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.  
7 2003).

8 “The threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the  
9 exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (citation  
10 omitted).

11 To apply the doctrine in “extraordinary circumstances” necessarily  
12 suggests the doctrine’s rarity, and the requirement that  
13 extraordinary circumstances “stood in his way” suggests that an  
14 external force must cause the untimeliness, rather than, as we have  
15 said, merely “oversight, miscalculation or negligence on [the  
16 petitioner’s] part, all of which would preclude the application of  
17 equitable tolling.

18 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.) (internal citation omitted), cert.  
19 denied, 130 S. Ct. 244 (2009); see also Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir.  
20 2003) (petitioner must show that the external force caused the untimeliness). It is petitioner’s  
21 burden to demonstrate that he is entitled to equitable tolling. Espinoza-Matthews v. California,  
22 432 F.3d 1021, 1026 (9th Cir. 2005).

23 Here, the relevant time frame, for purposes of analyzing whether petitioner is entitled to  
24 equitable tolling, commenced on September 8, 2014, and ended on July 4, 2017, when petitioner  
25 filed his federal habeas petition. See Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005)  
26 (focusing on the period of petitioner’s one-year statute of limitations in determining whether  
27 petitioner was entitled to equitable tolling), reh’g granted, opinion modified, 447 F.3d 1165 (9th  
28 Cir. 2006), cert. denied, 127 S. Ct. 979 (U.S. 2007); Leon v. Hedgpeth, 467 F. App’x 665, 666  
(9th Cir. 2012).

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1           A. Extraordinary Circumstances

2           Documents provided by petitioner reflect that on February 26, 2014, petitioner’s TABE  
3 score was 9.6, and he was housed in the general population, assigned to the CCCMS level of care.  
4 (ECF No. 17 at 29.) It appears that petitioner has worked while in prison, from September 4,  
5 2014, through and beyond March 11, 2016. (ECF Nos. 17 at 100; 20 at 38.) In his supplemental  
6 reply, petitioner states he has been in therapy from December 12, 2017, to April 15, 2018, and is  
7 not working, but “assigned to garage.” (ECF No. 20 at 4-5.) But he provided a summary of his  
8 ADA/EC History, which states: “Work/Vocation/ PIA Group Work: A1, start date 3/11/2016;  
9 status: Fulltime; XGAR Auto Mechanic.” (ECF No. 20 at 38.)

10                   1. Deaths of Family Members

11           As to the death of petitioner’s father in 2015,<sup>5</sup> such death fell within the critical time the  
12 limitations period was running. Petitioner’s brother-in-law, Richie Hall, died on July 15, 2016,  
13 and petitioner’s wife died in 2017, both after the limitations period expired. (ECF No. 20 at 3.)

14           However, the fact of a family death, although tragic, is not without more a basis for  
15 equitable tolling during the significant time period that petitioner must toll (over a year and a  
16 half) to render the instant petition timely. Mayer v. Marshall, 2009 WL 102809, at \*3 (C.D. Cal.  
17 Jan. 12, 2009) (prisoner’s father’s murder insufficient to provide equitable tolling for significant  
18 period of delay); see Chisholm v. Quarterman, 2007 WL 4190804 \*3 (S.D. Tex. 2007)  
19 (“Petitioner’s lack of familiarity with the legal system, uncorroborated medical problems,  
20 lockdown and family death or illness does not amount to the rare and exceptional circumstances  
21 necessary for equitable tolling.”). Petitioner makes no showing that his father’s death made  
22 petitioner incapable of preparing and filing a timely habeas petition while the limitations period  
23 was running. Petitioner also fails to demonstrate that the death of his wife in 2017, or his brother-  
24 in-law in 2016, made it impossible to file a timely habeas petition.

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27 <sup>5</sup> In this action, petitioner claims his father died in August of 2015. In his supplemental reply,  
28 petitioner states his father died on April 15, 2015. (ECF No. 20 at 3.) But in petitioner’s prior  
habeas proceeding, he claimed his father died in late February of 2015. Price, No. 2:13-cv-2541  
CMK (ECF No. 52 at 2).

1                   2. Mental Health

2                   It appears that petitioner also contends that his delay in filing his federal petition was the  
3 result of mental health issues. A sufficiently serious mental impediment may constitute an  
4 “extraordinary circumstance” beyond the petitioner’s control for purposes of equitable tolling.  
5 Bills, 628 F.3d at 1097 (“[W]e . . . have long recognized equitable tolling in the context of a  
6 petitioner’s mental illness.”). Under the case law in this circuit, the court may apply equitable  
7 tolling when a petitioner demonstrates the following:

8                   (1) First, a petitioner must show his mental impairment was an  
9 “extraordinary circumstance” beyond his control, . . . , by  
10 demonstrating the impairment was so severe that either

11                   (a) petitioner was unable rationally or factually to personally  
12 understand the need to timely file, or petitioner’s mental state  
13 rendered him unable personally to prepare a habeas petition and  
14 effectuate its filing.

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

20 Id. at 1099-1100 (citations omitted). In evaluating such a claim, “the district court must: (1) find  
21 the petitioner has made a non-frivolous showing that he had a severe mental impairment during  
22 the filing period that would entitle him to an evidentiary hearing; (2) determine, after considering  
23 the record, whether the petitioner satisfied his burden that he was in fact mentally impaired; (3)  
24 determine whether the petitioner’s mental impairment made it impossible to timely file on his  
25 own; and (4) consider whether the circumstances demonstrate the petitioner was otherwise  
26 diligent in attempting to comply with the filing requirements.” Id. at 1100-01. As to diligence,  
27 “the petitioner must diligently seek assistance and exploit whatever assistance is reasonably  
28 available.” Id. at 1101. “[A] petitioner’s mental impairment might justify equitable tolling if it  
interferes with the ability to understand the need for assistance, the ability to secure it, or the  
ability to cooperate with or monitor assistance the petitioner does secure. The petitioner therefore  
always remains accountable for diligence in pursuing his or her rights.” Id. at 1100.

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1 Here, it is unclear petitioner suffered a sufficiently serious mental impediment during the  
2 relevant period because in his opposition, he claims that he was not diagnosed as bipolar and  
3 medicated for same until after he suffered a slip and fall in 2015. (ECF No. 17 at 2-3.) In his  
4 supplemental reply, he argues that his “accidents, as well as anxiety and depression . . . disable[d]  
5 [him] from August 2, 2012, to about August 1, 2017.” (ECF No. 20 at 4.)

6 Yet some of the records provided by petitioner suggest he was on medication and assigned  
7 to the CCCMS level of care prior to August 9, 2015. For example, on November 4, 2012, it was  
8 noted that Rite Aid verified petitioner had been prescribed Effexor, an antidepressant, ostensibly  
9 before he was incarcerated. (ECF No. 17 at 49.) On October 16, 2013, petitioner was taking  
10 Tramadol and Elavil, drugs frequently prescribed for mental health issues. (ECF No. 17 at 13,  
11 17.) On February 26, 2014, he was assigned to the CCCMS level of care. (ECF No. 17 at 29.)

12 But petitioner’s allegations, even when taken as true, are inadequate to show that  
13 petitioner’s mental impairment caused the delay in filing his current petition. Petitioner has  
14 alleged no facts demonstrating a causal connection between his mental illness and his inability to  
15 file a timely petition. Furthermore, petitioner fails to include any medical records or other  
16 evidence that would suggest that his mental impairment was so severe that it kept him from filing  
17 his federal habeas petition during the relevant period. Cf. Henderson v. Allison, 2012 WL  
18 3292010, at \*7-9 (E.D. Cal. Aug. 13, 2012) (reviewing numerous mental health records in  
19 assessing the petitioner’s equitable tolling claim based on mental incompetence). Indeed, inmates  
20 designated to the CCCMS level of care “are those ‘whose symptoms are under control or in  
21 partial remission’” and can function in the general prison population, administrative segregation,  
22 or segregated housing unit. Coleman v. Brown, 28 F. Supp. 3d 1068, 1074 (E.D. Cal. 2014).  
23 CCCMS is the lowest level of care for mentally ill inmates. See Steward v. Sherman, 2016 WL  
24 3345308, at \*3 (N.D. Cal. June 16, 2016). “Without any allegation or evidence of how  
25 petitioner’s symptoms actually caused him not to be able to file despite his diligence, the court  
26 cannot find that he is entitled to equitable tolling.” Taylor v. Knowles, 2009 WL 688615, at \*6  
27 (E.D. Cal. March 13, 2009), aff’d, 368 Fed. App’x 796 (9th Cir. 2010) (no equitable tolling where  
28 petitioner failed to show his auditory hallucinations, severe depression, and anxiety “actually

1 caused him not to be able to file despite his diligence”); see Henderson, 2012 WL 3292010  
2 (denying petitioner’s equitable tolling argument based on mental incompetence because petitioner  
3 made no allegations demonstrating a causal connection between petitioner’s alleged depression  
4 and adjustment disorder and his inability to timely file a federal petition); see also Howell v. Roe,  
5 2003 WL 403353, \*4 (N.D. Cal. Feb. 20, 2003) (rejecting equitable tolling where petitioner’s  
6 suicidal nature and depression did not make him mentally incompetent). Moreover, the fact that  
7 petitioner filed four state court petitions, and litigated his prior federal habeas proceeding, during  
8 the period for which he seeks tolling demonstrates that his mental illness did not, in fact, make  
9 filing impossible. See Brown v. McKee, 232 F.Supp .2d 761, 768 (E.D. Mich. 2002) (rejecting a  
10 claim that mental illness and use of prescribed psychotropic medication warranted equitable  
11 tolling where the petitioner was able to file several actions during period of alleged mental  
12 incapacitation, and explaining that “[t]he exceptional circumstances that would justify equitable  
13 tolling on the basis of mental incapacity are not present when the party who seeks the tolling has  
14 been able to pursue his or her legal claims during the period of his or her alleged mental  
15 incapacity”). Even if petitioner required the assistance of other inmates to file those petitions, the  
16 availability of such assistance and petitioner’s apparent ability to use such assistance weigh  
17 against equitable tolling. See Bills, 628 F.3d at 1100-01.

18 For all these reasons, petitioner has not made a “good-faith allegation that would, if true,  
19 entitle him to equitable tolling” on the basis of his mental competency. Laws, 351 F.3d at 921.  
20 Therefore, further development of the record is not warranted. See Davis v. Farwell, 253 Fed.  
21 App’x 631, 632 (9th Cir. 2007) (distinguishing Laws, and denying the prisoner’s request for an  
22 evidentiary hearing “to demonstrate in better fashion just how his below-average intelligence  
23 caused his untimely filing,” reasoning that the petitioner had not made a “good-faith allegation  
24 that would, if true, entitle him to equitable tolling”), cert. denied, 552 U.S. 1286 (2008).  
25 Petitioner’s assertion of equitable tolling should be rejected.

### 26 3. Other Medical Issues

27 Petitioner has sustained numerous accidents during the relevant time frame, yet fails to  
28 show how his injuries from such accidents prevented him from earlier filing his habeas petition.

1 Indeed, most of the accidents took place long after the limitations period expired. Moreover, “the  
2 mere existence of a physical ailment and the taking of medication are not alone sufficient to  
3 warrant equitable tolling.” Lezine v. Singh, 2013 WL 1935360 (C.D. Cal. Feb. 25, 2013),<sup>6</sup> citing  
4 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (“the prisoner must show that the  
5 ‘extraordinary circumstances’ were the cause of his untimeliness” (citation omitted).) See also  
6 Lewis v. Warden, 2016 WL 8732467, at \*3 (C.D. Cal. Apr. 5, 2016) (prison medical records  
7 showed prisoner “received treatment and surgery for chronic back pain and related conditions;”  
8 failed “to convincingly demonstrate that this treatment made it impossible for him to file a habeas  
9 action during [the relevant] time;” and the medical issues “all occurred between 2007 and 2010[,]  
10 . . . well after [the limitations] clock expired in 2005.”) Here, petitioner similarly fails to show  
11 that any of his injuries sustained in these accidents prevented him from timely filing his federal  
12 habeas petition.

13 Importantly, despite petitioner’s medical issues, he could file multiple petitions for writ of  
14 habeas corpus. “[T]he actual filing may loom large in the final tolling determination for it might  
15 ultimately show that he was not actually delayed at all.” United States v. Battles, 362 F.3d 1195,  
16 1198 n.5 (9th Cir. 2004); see also Gaston, 417 F.3d at 1034 (rejecting prisoner’s argument that his  
17 physical and mental abilities constituted an “extraordinary circumstance” where he filed state  
18 habeas petitions both before and after the period in which he sought tolling, and he did not show  
19 that his condition was significantly worse during this interim time).

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22 <sup>6</sup> In Lezine, the court found that the prisoner

23 made no showing that his physical ailments or the taking of  
24 medications actually prevented him from filing his federal habeas  
25 petition within the deadline, nor do petitioner’s medical records  
26 support such a finding. While the medical records show that  
27 petitioner suffers from a number of physical ailments, including  
28 back and shoulder pain and asthma, nothing in petitioner’s medical  
records suggests that petitioner suffers from any diagnosed mental  
health condition, or that his physical ailments resulted in mental  
impairment such that it was impossible for him to file his federal  
habeas petition on time.

Id. at \*4.

1           Petitioner filed a prior federal habeas petition on November 25, 2013, before the instant  
2 limitations period expired. Price, No. 2:13-cv-2541 CMK. Subsequently, petitioner filed four  
3 petitions in state court in 2014, and one in April 2015, all before the instant limitations period  
4 expired. Such filings demonstrate that petitioner could have filed a timely federal petition.

5           But even assuming, *arguendo*, that petitioner was credited with a six-week recovery  
6 period for his broken jaw in 2015, it would be insufficient. Gibbs v. Legrand, 767 F.3d 879 (9th  
7 Cir. 2014) (under the stop-clock approach, the statute-of-limitations clock stops running when  
8 extraordinary circumstances first arise, but the clock resumes running once the extraordinary  
9 circumstances have ended or when the petitioner ceases to exercise reasonable diligence,  
10 whichever occurs earlier.) The clock would stop on the date petitioner broke his jaw, but would  
11 resume upon expiration of the six-week period. Thus, such additional tolling would not be  
12 sufficient to toll the over thirteen-month delay in bringing the instant action.

#### 13           B. Diligence

14           As set forth above, petitioner must also demonstrate he diligently pursued his rights  
15 throughout the relevant period. Luna, 784 F.3d at 646. The diligence required for equitable  
16 tolling purposes is “reasonable diligence,” not “maximum feasible diligence.” Holland, 560 U.S.  
17 at 653; see also Bills, 628 F.3d at 1096. Here, other than his statements concerning his diligence  
18 in his prior federal habeas action, discussed below, petitioner failed to provide any facts  
19 demonstrating his efforts to timely file a federal petition, or any efforts to obtain assistance in  
20 doing so.

#### 21           C. Delays in Prior Federal Habeas & Diligence Therein

22           Petitioner complains of delays incurred in his prior federal habeas proceeding. In his  
23 supplemental reply, petitioner argues that the court in his previous habeas case failed to notify  
24 petitioner “of the rub with two cases on one writ.” (ECF No. 20 at 4.) Review of the prior habeas  
25 case docket reflects that the case was subject to significant delays; however, the bulk of the delays  
26 occurring during the critical time the limitations period was running in this case were due to  
27 petitioner failing to comply with court orders, including a failure to raise all of his claims and  
28 supporting evidence in one pleading. Indeed, on July 24, 2015, the district court issued an order

1 to show cause why the case should not be dismissed based on petitioner’s failure to comply with  
2 court orders. No. 2:13-cv-2541 CMK (ECF No. 51). The contorted procedural history is set forth  
3 in detail in the August 12, 2015 order discharging the order to show cause. Id. (ECF No. 53 at 1-  
4 2.) Petitioner filed an amended pleading on August 18, 2015, and following one extension of  
5 time, the respondent filed a motion to dismiss on May 20, 2016. Id. (ECF No. 69.) By then, the  
6 limitations period had expired on petitioner’s 2012 conviction in No. P12CRF0264.

7 In addition, in the April 3, 2017 order granting the motion to dismiss, the court set forth  
8 petitioner’s options, found the petition was a mixed petition containing both exhausted and  
9 unexhausted claims, and identified a “potentially cognizable exhausted claim . . . only to the  
10 extent petitioner is attempting to directly challenge the constitutionality of the no-contest plea  
11 entered in case no. P12CRF0264.” No. 2:13-cv-2541 CMK (ECF No. 78 at 6.) Then, because  
12 the petition was a mixed petition and petitioner had not sought a stay-and-abeyance order, the  
13 court dismissed the petition without prejudice. Id. On May 4, 2017, under the mailbox rule,  
14 petitioner sought leave, post-judgment, to proceed on the potentially cognizable exhausted claim.  
15 (ECF No. 82.) On June 23, 2017, the court denied the motion to proceed on the exhausted claim  
16 without prejudice to raising such claim in a newly-filed petition. Id. (ECF No. 84.) In a footnote,  
17 the court stated that petitioner had the opportunity to seek a stay, but chose not to, noting the  
18 court was not required to consider a stay *sua sponte*. Id. at 2 n.1. On July 4, 2017, petitioner filed  
19 the instant federal petition again raising the potentially cognizable exhausted claim, but also  
20 including two other claims.

21 But after review of petitioner’s prior federal habeas, No. 2:13-cv-2541, the undersigned is  
22 concerned about issues of fundamental fairness. First, the court has an obligation to give liberal  
23 construction to the filings of pro se litigants. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir.  
24 1998) (noting that the Ninth Circuit has a “policy of liberal construction in favor of pro se  
25 litigants”).

26 Second, despite petitioner’s continued reference to multiple convictions, as well as his  
27 admitted mental impairment and the fact he was proceeding without benefit of counsel, at no  
28 point was petitioner advised that he must challenge different convictions in separate actions. Id.,

1 *passim*. Rule 2(e) of the Rules Governing Section 2254 Cases (“Habeas Rules”) provides that  
2 “[a] petitioner who seeks relief from judgments of more than one state court must file a separate  
3 petition covering the judgment or judgments of each court.” *Id.* Thus, a petitioner cannot  
4 properly challenge the judgments of two different tribunals in a single proceeding. Bianchi v.  
5 Blodgett, 925 F.2d 305, 308-11 (9th Cir. 1991). In the order granting the motion to dismiss, the  
6 court clearly identified both convictions, but did not address Rule 2(e). (ECF No. 78.)

7 Third, although a court is not required to *sua sponte* consider whether a petitioner should  
8 seek a stay, the record reflects that on August 18, 2014, under the mailbox rule, petitioner did file  
9 a request that the court construed as his request to stay consideration of the case pending  
10 exhaustion. No. 2:13-cv-2541 (ECF No. 33, 38 at 2.) Yet, the court denied the request for stay  
11 on October 30, 2014, as moot. (*Id.*, ECF No. 38 at 2.) Moreover, the denial was based on  
12 documents submitted by petitioner, which included the state superior court’s order explaining that  
13 petitioner had three criminal cases in El Dorado County, identifying No. P12CRF0264 as the case  
14 where petitioner pled to one count of criminal threats, and No. P12CRF0521 as the case where  
15 petitioner was convicted by jury of driving under the influence. (ECF No. 35 at 6-7.) Such  
16 documents clarified that petitioner was attempting to challenge two separate convictions in one  
17 action, and that petitioner had exhausted at least one claim in No. P12CRF0264. Indeed, as it  
18 turns out, petitioner had exhausted his challenge to the constitutionality of his plea in the  
19 California Supreme Court on August 13, 2014, before the relevant statute of limitations period  
20 began running. If petitioner had been advised by at least October 30, 2014, that he must  
21 challenge the conviction in No. P12CRF0264 in a separate action, petitioner would have had an  
22 opportunity to file a timely petition raising such claim. Or, in the alternative, rather than dismiss  
23 the entire case, the court could have dismissed the unexhausted claims and permitted petitioner to  
24 proceed on his exhausted claim in No. P12CRF0264, just as petitioner requested (ECF No. 84,  
25 addressing ECF No. 82).

26 Fourth, petitioner was also diligent in attempting to pursue his exhausted claim. On April  
27 3, 2017, the prior federal habeas was dismissed; petitioner filed his request to proceed with the  
28 exhausted claim on May 4, 2017. Price, 2:13-cv-2541 CMK (ECF Nos. 78, 82). Petitioner’s



1 request to pursue his exhausted claim in his prior federal habeas case was denied on June 22,  
2 2017 (id. (ECF No. 84), and petitioner filed the instant action on July 4, 2017, under the mailbox  
3 rule. In addition, he appended a copy of the order to his original petition. (ECF No. 1 at 8-9.)

4 Accordingly, the undersigned finds that petitioner should be granted equitable tolling as to  
5 his claim identified as “ground two” in his prior federal habeas proceeding, 2:13-cv-2541 CMK  
6 (ECF No. 56 at 7, 24-25). Although the court did not affirmatively mislead petitioner, the failure  
7 to inform petitioner, early on, that he must challenge different convictions in separate actions,  
8 misled petitioner by omission, and delayed his opportunity to timely challenge his conviction in  
9 No. P12CRF0264. Review of the record demonstrates that petitioner was perhaps over-diligent,  
10 filing multiple supplements and amended pleadings. But despite his multiple references to his  
11 convictions in two different cases, the differences highlighted by his plea in one, and jury trial in  
12 another, and ultimately clarified by his submission of the El Dorado County Superior Court’s  
13 order identifying the two convictions, the court failed to inform petitioner concerning Rule 2(e).  
14 This court finds that the failure to inform petitioner that he was required to challenge different  
15 convictions in separate actions as required by Rule 2(e) was an external force outside petitioner’s  
16 control that entitles him to equitable tolling.

#### 17 6. Equitable Tolling for Ground Two Only

18 For all the reasons discussed above, the undersigned finds that petitioner should be  
19 granted equitable tolling for a portion of the delay incurred in his prior federal habeas proceeding,  
20 but only as to the claim that his plea entered in No. P12CRF0264 was coerced or involuntary due  
21 to his blindness, medication, and alleged diminished capacity (identified as ground two).  
22 Petitioner is not otherwise entitled to equitable tolling because his other claims were not  
23 exhausted at that time.

24 Accordingly, respondent’s motion to dismiss the petition as barred by the statute of  
25 limitations should be partially granted. Grounds one and three are dismissed, and petitioner is  
26 granted leave to file an amended petition in which he raises only the arguments included in  
27 ground two of his amended petition filed on August 18, 2015, in No. 2:13-cv-2541 CMK (ECF  
28 No. 56 at 7, 24-25). The Clerk of the Court is directed to send petitioner a copy of those pages.

1           Petitioner is cautioned that he must file an amended petition on the court's form petition,  
2 challenging only the 2012 criminal threats conviction in El Dorado County Superior Court No.  
3 P12CRF0264, and raising only the arguments included in ground two of the operative petition  
4 filed in No. 2:13-cv-2541 CMK (ECF No. 56 at 7, 24-25). Official records of state court  
5 proceedings have been lodged with the court; therefore, petitioner shall file no copies of such  
6 records with his amended petition. Further, petitioner shall include no other grounds or claims,  
7 and he shall not refer to any other conviction. The sole issue in this action going forward is  
8 whether petitioner's no contest plea was coerced or involuntary based on the reasons petitioner  
9 set forth in ground two of his amended petition filed in No. 2:13-cv-2541 CMK (ECF No. 56 at 7,  
10 24-25).

11 IX. Conclusion

12           Accordingly, IT IS HEREBY ORDERED that:

13           1. Respondent's motion to dismiss (ECF No. 14) is granted in part:

14                   A. Petitioner's first and third claims are dismissed as barred by the statute of  
15 limitations;

16                   B. Petitioner is granted equitable tolling to pursue his second claim that his guilty  
17 plea was involuntary or coerced;


18           2. The petition is dismissed, and petitioner is granted thirty days in which to file an  
19 amended petition raising only ground two, as identified above; the amended petition must be filed  
20 on the court's form for filing a petition for writ of habeas corpus.

21           3. The Clerk of the Court is directed to send petitioner:

22                   A. The form for filing a petition for writ of habeas corpus; and

23                   B. A copy of pertinent pages from the operative petition filed in No. 2:13-cv-2541  
24 CMK, specifically ECF No. 56 at 7, 24-25.

25 Dated: June 5, 2018

26   
27 \_\_\_\_\_  
28 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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