

1
2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
5

6 RONALD J. MCINTOSH,

No. C09-00750 CRB

7 Plaintiff,

**TENTATIVE RULING & ORDER
DIRECTING PETITIONER TO
RESPOND**

8 v.

9 ERIC H. HOLDER JR., et al.,

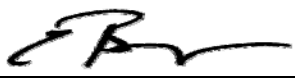
10 Defendant.
_____ /

11
12 The Court has determined that the alleged suppression of triggerman Drax
13 Quartermain's history of mental illness is a timely, stand-alone claim for relief under Brady
14 v. Maryland, 373 U.S. 83 (1963). See 28 U.S.C. § 2244(d)(1)(D). But because McIntosh
15 never presented this claim in state court, it is unexhausted.¹ See id. § 2254 (b)(1)(A). The
16 Court has also determined that his other claims, whatever their merit, remain untimely.

17 This leaves McIntosh with two options. First, he could voluntarily dismiss his new,
18 unexhausted Brady claim, which would allow the Court to rule on his Rule 60(b) motion as
19 to his other claims. See Dixon v. Baker, 847 F.3d 714, 720 (9th Cir. 2017). (The Court
20 would deny that motion.) Second, he could move to stay and abey these proceedings while
21 he exhausts state-court remedies.² Id. (The Court would grant such a motion.) The Court
22 ORDERS McIntosh to indicate within 30 days which of these two options he will pursue.

23 **IT IS SO ORDERED.**

24 Dated: April 7, 2017

25 
26 _____
27 CHARLES R. BREYER
28 UNITED STATES DISTRICT JUDGE

27 _____
28 ¹ The government has not waived the exhaustion requirement as to this claim.

² McIntosh may present to the state court not just his new claim but also new evidence regarding his remaining claims, subject of course to state-law procedural hurdles. See Cullen v. Pinholster, 563 U.S. 170, 206 (Breyer, J., concurring).