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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE MICHAEL MARCUS,

No. C14-03769 CRB

Petitioner,

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

v.

UNITED STATES OF AMERICA,

Respondent.

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Petitioner Michael Marcus, convicted after a bench trial in Santa Clara County Superior Court on four counts of sexual battery and one count of annoying or molesting a child, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Respondent, the United States of America, argues that the Petition must be dismissed because Marcus has failed to exhaust five of the claims advanced in his Petition. See MTD (dkt. 14) at 2. The Government further argues that three of Marcus’s claims must also be dismissed because they fail to state a federal constitutional claim. For the reasons set forth below, the Court GRANTS in part and DENIES in part the Government’s Motion to Dismiss.

**I. BACKGROUND**

Marcus is a dentist accused of inappropriately touching, and in one instance making inappropriate comments about, the breasts of several female patients during dental procedures. MTD Ex. 6 at 1. Marcus pled not guilty and waived his right to a jury. Pet. (dkt. 1) at 3. After a bench trial, the court found Marcus guilty of four counts of violating California Penal Code §§ 242–243.4(e)(1), Sexual Battery, and one count of violating California Penal Code § 647.6(a), Annoying or Molesting a Child. MTD Exs. 6, 3. The court denied Marcus’s motion for a new trial and sentenced Marcus to four months of county jail, three months of electronic monitoring, and three years of probation. Id. Ex. 4. The court also ordered Marcus to register as a sex offender, and

1  
2 prohibited him from practicing dentistry as of November 28, 2011. Id. Marcus has served his  
3 state court sentence and remains on probation. Pet. at 4, 12.

4 Marcus's appeal to the Appellate Division of the Santa Clara Superior Court was  
5 unsuccessful, and the judgment was affirmed on June 18, 2013.<sup>1</sup> MTD Ex. 6.

6 On July 23, 2013, the Appellate Division denied Marcus's petition for "Rehearing or in the  
7 Alternative to Transfer Matter to the Court of Appeal." Id. Ex. 7.

8 On August 2, 2013, Marcus filed a petition in the California Court of Appeal, asking to  
9 transfer his appeal, but the court denied it on August 19, 2013. Id. Ex. 8.

10 Marcus filed the instant Petition for habeas relief on August 19, 2014, challenging his  
11 conviction and sentence. See generally Pet. In his Petition, Marcus lists six issues in the "Issues  
12 Presented" section: (1) ineffective and incompetent assistance of counsel; (2) that Count Three  
13 violated the one year statute of limitations; (3) that counsel fraudulently induced Marcus to waive  
14 his right to a jury; (4) that the probation condition prohibiting Marcus from practicing dentistry  
15 violates his constitutional rights; (5) that the requirement that Marcus register as a sex offender  
16 violates the Equal Protection Clause; and (6) that the illegal physical touchings described by the  
17 complaining witnesses were ambiguous. Id. at 2–3.

18 Marcus then discusses seven claims in the "Points of Authorities" section of his Petition:  
19 (1) ineffective assistance of counsel for failing to investigate defense witnesses; (2) ineffective  
20 assistance of counsel for fraudulently inducing Marcus to waive a jury trial; (3) that the alleged  
21 touchings of the complaining witnesses were minimal; (4) that Count Three violated the statute of  
22 limitations; (5) that defense counsel failed to present expert evidence that Marcus was not a sexual  
23 predator; (6) that the probation requirement prohibiting Marcus from working as a dentist violates  
24 the law; and (7) that the trial court improperly ordered Marcus to register as a sex offender in  
25 violation of the Equal Protection Clause. Pet. at 15–30.

26 On August 21, 2014, Marcus filed a petition for a writ of habeas corpus in the California  
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28 <sup>1</sup> In California, appeals for misdemeanor cases are heard by the appellate divisions of superior courts rather than by the courts of appeal. See Cal. Pen. Code § 1466.

1 Supreme Court for the purposes of exhausting state remedies. MTD Ex. 9. Marcus presented the  
2 same six claims listed in the federal Petition’s “Statement of Issues.” See id. Ex. 8. However,  
3 Marcus thoroughly discussed only two claims in his state petition: (1) ineffective assistance of  
4 counsel for failing to investigate defense witnesses; and (2) ineffective assistance of counsel for  
5 fraudulently inducing Marcus to waive a jury trial. Id.

6 On October 22, 2014, the Supreme Court of California denied Marcus’s state petition for  
7 writ of habeas corpus, citing People v. Duvall, 9 Cal. 4th 464, 474 (1995) and In re Swain, 34 Cal.  
8 2d 300, 304 (1949). MTD Ex. 10.

9 On May 4, 2015, the Government filed a Motion to Dismiss the Petition. See generally  
10 MTD. The Government argues that the Petition is procedurally defective because Marcus has not  
11 exhausted state court remedies for five claims. Id. at 5. The Government further argues that three  
12 of Marcus’s claims fail to state a federal constitutional claim. Id. at 6. Marcus argues in his  
13 Opposition that the Government should have sought leave from the Court to file the Motion to  
14 Dismiss, that Marcus complied with Title 8 of the Appellate Rules, and that his claims are  
15 exhausted. See generally Opp’n (dkt. 15).<sup>2</sup> Alternatively, Marcus asks that if the Court finds any  
16 unexhausted claims, Marcus be given equitable tolling and leave to amend. Id. at 5. In its Reply,  
17 the Government argues against equitable tolling but agrees that Marcus should be allowed to  
18 amend his Petition. Reply (dkt. 16) at 8–9.

## 19 **II. LEGAL STANDARDS**

### 20 **A. Procedural Ground for Motion to Dismiss**

21 Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas  
22 Rules) allows a district court to dismiss a petition if it “plainly appears from the face of the petition  
23 and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . .”  
24 Habeas Rule 4. The Ninth Circuit allows respondents to file a motion to dismiss in lieu of an  
25 answer under certain circumstances. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.

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26  
27 <sup>2</sup> The Opposition brief is not a model of clarity. The Court was alarmed to note that the brief  
28 includes a paragraph referring to Marcus (a man) as “her” and discussing a murder count and exhaustion  
before the Illinois Supreme Court, neither of which are part of this case. See Opp’n at 4–5. Such  
briefing does Marcus a disservice.

1 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies);  
2 Gutierrez v. Griggs, 695 F.2d 1195, 1197–98 (9th Cir. 1983) (Rule 4 allows a district court to  
3 dismiss summarily claims that do not allege a deprivation of federal rights.).<sup>3</sup>

4 **B. Exhaustion of State Remedies**

5 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a  
6 petition for federal writ of habeas corpus must exhaust state court remedies before a federal court  
7 may consider granting habeas corpus relief. 28 U.S.C. § 2254(b)(1); O’Sullivan v. Boerckel, 526  
8 U.S. 838, 842 (1999). To satisfy the exhaustion requirement, the petitioner must fairly present his  
9 federal claims in the state courts to give the state the opportunity to pass upon and correct alleged  
10 violations of the prisoner’s federal rights. Duncan v. Henry, 513 U.S. 364, 365 (1995) (per  
11 curiam).

12 In California, a habeas petitioner must fairly present his claims in a petition to the  
13 California Supreme Court. See O’Sullivan, 526 U.S. at 845 (interpreting 28 U.S.C. § 2254(c));  
14 Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999) (applying O’Sullivan to California). A  
15 claim is fairly presented if the petitioner’s claim adequately describes the factual basis and  
16 identifies the federal legal basis for the claim. Henry, 513 U.S. at 365 (legal basis); Keeney v.  
17 Tamayo-Reyes, 504 U.S. 1, 7 (1992) (factual basis); Gatlin, 189 F.3d at 888.

18 To exhaust the factual basis for the claim, “the petitioner must only provide the state court  
19 with the operative facts, that is, ‘all of the facts necessary to give application to the constitutional  
20 principle upon which [the petitioner] relies.’” Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008)  
21 (alteration in original). It is not sufficient to raise only the facts supporting the claim; rather, “the  
22 constitutional claim . . . inherent in those facts” must be brought to the attention of the state court.  
23 See Picard v. Connor, 404 U.S. 270, 277 (1971). To exhaust the federal legal basis for the claim, a  
24 petitioner must specifically tell the state court that he is raising a federal constitutional claim.  
25 Henry, 513 U.S. at 365–66; Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999). State courts  
26 must be notified that prisoners are asserting claims under the United States Constitution to be

27  
28 <sup>3</sup> In this case, upon obtaining an extension to respond to the Petition by way of answer or motion, the Government filed this Motion to Dismiss. See generally Order Granting Extension (dkt. 13); MTD.

1 given the opportunity to correct alleged violations of federal rights. Henry, 513 U.S. at 365-66;  
2 see, e.g., Dye v. Hofbauer, 546 U.S. 1, 4 (2005).

3 The inclusion of both exhausted and unexhausted claims in a federal habeas petition  
4 renders it mixed and subject to dismissal without prejudice. See Rose v. Lundy, 455 U.S. 509,  
5 522 (1982).

### 6 **III. DISCUSSION**

#### 7 **A. Exhaustion**

8 Marcus argues that he exhausted his claims because he followed California Rule of Court  
9 8.508: “[a]fter decision by the Court of Appeal in a criminal case, a defendant may file an  
10 abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state  
11 remedies before presenting a claim for federal habeas corpus relief.” Opp’n at 3 (quoting Cal. R.  
12 Ct. 8.508(a)). According to that rule, Marcus needs only to have filed with the state court a  
13 statement that the petition is filed solely to exhaust state remedies for federal habeas purposes, a  
14 brief statement of the underlying proceedings, and a brief statement of the factual and legal bases  
15 of the claim. See Cal. R. Ct. 8.508(b)(3). Although Marcus might have meant to file “an  
16 abbreviated petition for review,” he filed Form MC-275 (“Petition for Writ of Habeas Corpus”),  
17 and the California Supreme Court processed his petition as a Writ for Habeas Corpus. See MTD  
18 Exs. 9–10. Even if Marcus’s filing was an “abbreviated petition for review,” though, it would  
19 have the same exhaustion requirement:

20 Subdivision (b)(3)(C) requires the petition to include a statement of the factual and  
21 legal bases of the claim. This showing is required by federal law: “for purposes of  
22 exhausting state remedies, a claim for relief [in state court] . . . must include reference  
23 to a specific federal constitutional guarantee, as well as a statement of the facts that  
24 entitle the petitioner to relief.” (Gray v. Netherland (1996) 518 U.S. 152, 162–63, citing  
Picard v. Connor (1971) 404 U.S. 270.) The federal courts will decide whether a  
petition filed in compliance with this rule satisfies federal exhaustion requirements, and  
practitioners should consult federal law to determine whether the petition’s statement  
of the factual and legal bases for the claim is sufficient for that purpose.

25 Cal. R. Ct. 8.508 (Advisory Committee Comments).<sup>4</sup>

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27 <sup>4</sup> Marcus’s Opposition states that this is a “pro per appeal.” Opp’n at 4. For purposes of  
28 exhaustion, pro per petitions in state court are sometimes read differently from counseled petitions.  
Peterson v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc). However, Marcus is represented  
by counsel.

1 This Court must therefore “independently . . . examine” Marcus’s state habeas petition to  
2 determine whether the claims were fairly presented to the California Supreme Court. See Kim v.  
3 Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986). The five claims the government challenges are:  
4 (1) that the alleged touchings of the complaining witnesses were minimal; (2) that Count Three  
5 violated the statute of limitations; (3) that defense counsel failed to present expert evidence that  
6 Marcus was not a sexual predator; (4) that the probation condition prohibiting Marcus from  
7 practicing dentistry violated state law; and (5) that the requirement that Marcus register as a sex  
8 offender was contrary to a California Supreme Court decision finding an equal protection  
9 violation. See MTD at 5.

10 **1. Alleged Touchings Were Minimal**

11 The first claim from the federal Petition that the Government argues is unexhausted is that  
12 the alleged touchings were minimal. MTD at 5. In Marcus’s state habeas petition, under the  
13 “Statement of Issues,” Marcus states, “[t]he illegal physical touchings the three complaining  
14 witnesses described Dr. Marcus committing are ambiguous. Although the government’s Evidence  
15 Code Section 1108 witnesses were more insistent that fondling occurred, there were many  
16 inconsistencies in their testimony.” Id. Ex. 9, Brief at 3. Marcus also addresses this issue later in  
17 the brief, stating, “There were three victims in the complaint who all testified that he brushed their  
18 breasts. However many of the stories had evolved since the time of the initial reports from  
19 ambiguous touching by Dr. Marcus to overt fondling, breast grabbing and squeezing.” Id. at 7.  
20 Marcus then gives an example: “Denise Doe’s daughter sat in the room but did not, according to  
21 Denise, notice Dr. Marcus grab her mother’s breast, but later the daughter, according to Denise’s  
22 mother Pamela, said that she did see it.” Id. Marcus’s discussion of the touchings appears under  
23 the heading, “Discussion of Important Question of Law, Validity of Defendant’s Waiver of Jury  
24 Trial; Ineffective Assistance of Counsel,” id. at 4, and specifically in a section about ineffective  
25 assistance of counsel based on Mr. Miller’s having convinced Marcus to waive a jury trial, id. at  
26 7–8. Marcus’s federal Petition similarly argues that Marcus’s counsel was ineffective because the  
27 case “could have been tried to a jury with the possibility of an acquittal because above all, the  
28 touchings alleged by the three complaining witnesses were minimal.” Pet. at 26–27.

1 The Government asserts that Marcus’s listing of this claim in the state petition’s statement  
2 of issues without any accompanying facts or argument was insufficient for exhaustion. Reply at 4.  
3 While factual statements alone are insufficient for exhaustion, Marcus’s discussion of the  
4 ambiguous touchings in the state petition takes place in the context of his ineffective assistance of  
5 counsel argument and is accompanied by multiple cites to Strickland v. Washington, 466 U.S. 668  
6 (1984), MTD Ex. 9 at 14–17, 20. This is sufficient to exhaust his claim. See Sanders v. Ryder, 342  
7 F.3d 991, 999–1001 (9th Cir. 2003) (finding ineffective assistance of counsel claim fairly presented  
8 to state court despite failure to mention federal constitution or federal case law in state petition,  
9 where petitioner was pro se, used the phrase “ineffective assistance of counsel” in his state  
10 petition—which was consistent with phraseology used for Sixth Amendment claim—and cited  
11 Strickland). Thus, this claim is exhausted.

## 12 2. Statute of Limitations

13 The second claim from the federal Petition that the Government argues is unexhausted is  
14 that Count Three violated the statute of limitations. MTD at 5. In Marcus’s state habeas petition,  
15 under the “Statement of Issues,” Marcus states, “Count III of the complaint violates the statute of  
16 limitations. Penal Code Section 802.” Id. Ex. 9, Brief at 2. In the accompanying text, however,  
17 Marcus only references this claim twice, both times in the context of ineffective assistance: (1) “Mr.  
18 Miller missed the statute of limitations issue, and generally threw his client under the bus,” id. at 8,  
19 and (2) “He did not object at the bench trial or argue the statue [sic] of limitations barred one of the  
20 victims. This would have decreased the evidence against his client,” id. at 11. In Marcus’s federal  
21 Petition, he devotes two pages to this claim:

22 At trial Latrice Doe, the alleged victim in Count III testified that the offense occurred  
23 in August, 2004. . . . The Complaint was filed August 18, 2005. The prosecution failed  
24 to meet its burden to prove that the offense occurred after August 18, 2004. . . . Since  
25 a dispute over the statute of limitation must be strictly construed in favor of Michael  
Marcus, the conviction in Count III must either be reversed or returned to the trial court  
for further consideration. . . . California Penal Code Section 802 prohibited this  
prosecution.

26 Pet. at 27–28. In the federal Petition, Marcus’s claim is not raised in the context of an ineffective  
27 assistance of counsel claim. This is a close question because of the jumbled nature of the state  
28 petition. However, as the federal claim seems to depend on a different legal theory than what was

1 argued in the state petition, this claim is not exhausted.<sup>5</sup>

2 **3. Expert Evidence**

3 The third claim from the federal Petition that the Government argues is unexhausted is that  
4 defense counsel failed to present expert evidence that Marcus was not a sexual predator. MTD at 5.  
5 Marcus raised this claim in the state petition as follows:

6 Mr. Miller did not consider raising defenses under the cases Stoll and McAlpin. Stoll  
7 is the case that said that you can present expert testimony to say that an individual does  
8 not fit the profile of somebody who would be a child molester or an adult molester . .  
9 . . Mr. Miller did not hire an expert witness to conduct a psychological profile of Dr.  
10 Marcus. Thus he could not present evidence at trial about his client’s lack of  
11 predilection to fondle women patients.

12 MTD Ex. 9, Brief at 9. The claim falls under the heading “Discussion of Important Question of  
13 Law, Validity of Defendant’s Waiver of Jury Trial; Ineffective Assistance of Counsel,” id. at 4, and  
14 in a section that also argues, “Arguably there is no way of knowing if the outcome of the trial could  
15 have been different, or if Mr. Miller’s abuses constituted harmless error but the government’s  
16 evidence arrayed against Dr. Marcus was less than overwhelming,” id. at 10. The state petition  
17 thus clearly raises the failure to present expert evidence as part of an ineffective assistance of  
18 counsel claim.

19 In the federal Petition, Marcus argued even more directly that counsel was ineffective for  
20 failing to present expert testimony. See Pet. at 28. Under “4. Failure to Explore or Present Stoll  
21 and McAlpin Evidence,” Marcus stated:

22 Defense Counsel’s failure to render effective assistance of counsel includes his failure to  
23 present evidence from an expert witness that the defendant was not a sexual predator.  
24 People v. Stoll . . . . Likewise counsel failed to present character evidence although  
25 defendant provided him with a host of character witnesses . . . as provided under People  
26 v. McAlpin . . . . The trial court would have allowed such testimony upon an adequate  
27 foundational showing . . . Counsel did not consult with any professional experts . . . and  
28 we know the Stoll evidence would have been favorable . . . .

Id. Marcus presented this ineffective assistance of counsel claim in state court, and the California  
Supreme Court was provided with a fair opportunity to pass on the claim. Thus, this claim is  
exhausted.

**4. Probation Condition Prohibiting Marcus from Practicing Dentistry**

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<sup>5</sup> The Court’s dismissal of this claim does not depend on whether the claim is exhausted,  
however, because, as discussed below, the claim also does not allege a violation of federal law.



1 The fourth claim from the federal Petition that the Government argues is unexhausted is that  
2 the probation condition prohibiting Marcus from practicing dentistry violated state law. MTD at 5.  
3 Marcus’s state habeas petition lists this claim in the “Statement of Issues,” stating, “the probation  
4 condition prohibiting Dr. Marcus from practicing dentistry violates his Constitutional rights, injures  
5 his patients, harms his family and must be tailored to protect the state interest in reformation and  
6 rehabilitation.” Id. Ex. 9, Brief at 3. The only other reference Marcus’s state petition makes to this  
7 claim is that he “has been stripped of his license to practice dentistry by the Dental Board of  
8 California.” Id. at 12. He provides no further specifics. However, in Marcus’s federal Petition, he  
9 provides more details:

10 At sentencing . . . the Judge imposed as a condition of probation that Appellant [sic] not  
11 practice as a dentist. Appellant has demonstrated that the test falls within the test  
12 established in People v. Burden (1988) 205 Cal.App.3d 1277. The court has the  
13 discretion to impose restrictive conditions. . . . A sentencing court’s discretion is broad.  
14 In re Bushman (1970) 1 Cal.3d 767, 776. . . . The court could limit his practice to male  
15 patients. People v. Keefer (1973) 15 Cal.App.3d 156, 168–69 involved a probation  
16 condition preventing defendant from engaging in the business of selling furnaces and  
17 thus is entirely distinguishable from Dr. Marcus’s case.

18 Pet. at 29.

19 Assuming that the factual description in the state petition is sufficient to meet the factual  
20 basis requirement, one cannot raise only the facts supporting his claim. “The constitutional claim .  
21 . . inherent in those facts” must be brought to the attention of the state court. See Picard, 404 U.S.  
22 at 277. Here, Marcus only made a general statement referencing “Constitutional rights.” See MTD  
23 Ex. 9 Brief at 3. General statements of broad constitutional principles are insufficient for  
24 exhaustion. Castillo v. McFadden, 399 F.3d 993, 999 (9th Cir. 2004). It is not even clear if Marcus  
25 is referring to the United States Constitution or the California Constitution. Therefore, he did not  
26 provide the California Supreme Court with the opportunity to pass on a federal claim. This claim is  
27 unexhausted.

### 28 **5. Requirement That Marcus Register as a Sex Offender**

The fifth claim from the federal Petition that the Government argues is unexhausted is that  
the requirement that Marcus register as a sex offender was contrary to a California Supreme Court  
decision. MTD at 5. Marcus’s state habeas petition lists this claim in the “Statement of Issues,”  
stating that “requiring a person convicted of sexual battery to register pursuant to Penal Code

1 Section 290 but not to require the same of one convicted of oral copulation with a minor violates  
2 the constitution’s Equal Protection Clause.” *Id.* Ex. 9, Brief at 3. Marcus references the sex  
3 offender registration three more times in his state petition: “Dr. Marcus had to go to trial because  
4 his license was at stake, due to conduct alleged and mandatory Penal Code Section 290  
5 registration,” MTD Ex. 9, Brief at 7; “Dr. Marcus has served his sentence but he is required to  
6 register as a sex offender under Penal Code Section 290 for life,” *id.* at 12; and “Petitioner is  
7 unlawfully sentenced . . . and must register as a sex offender for the rest of his life,” *id.* at 3. The  
8 first reference to Penal Code Section 290 is in the context of Marcus’s ineffective assistance of  
9 counsel claim based on his waiver of a jury trial. *Id.* at 7. The second and third references are in  
10 the context of Marcus’s sentence and do not cite a particular federal law that he alleges was  
11 violated. Nonetheless, Marcus did write on the state’s standard pleadings form (“MC-275 Petition  
12 for Writ of Habeas Corpus”), “14th ammendment [sic] violation of constitutional requirement of  
13 equal protection under the law re 290 registration.” MTD Ex. 9, MC-275 at 3.

14 The federal Petition also states “Requiring a person convicted of sexual battery to register  
15 pursuant to Penal Code Section 290 but not to require the same of one convicted or oral copulation  
16 with a minor violates the constitution’s Equal Protection Clause.” Pet. at 3. It further argues that  
17 “Petitioner Michael Marcus’s conviction . . . is unlawful and unconstitutional in violation of his  
18 constitutional rights guaranteed by the . . . Fourteenth Amendments to the United States  
19 Constitution.” Pet. at 12.

20 Because Marcus fairly presented to the California Supreme Court his claim that his sex  
21 offender registration violated the Fourteenth Amendment, it is exhausted.

22 **B. Failure to State Federal Constitutional Claim**

23 A federal court considering a habeas petition by a state prisoner is limited to violations of  
24 the federal Constitution or certain federal laws of the United States. 28 U.S.C. § 2254 (a). A  
25 federal habeas writ is unavailable for violations of state law or for alleged error in the interpretation  
26 or application of state law. *See Swarthout v. Cooke*, 131 S. Ct. 859, 861–62 (2011); *Estelle v.*  
27 *McGuire*, 502 U.S. 62, 67–68 (1991); *Peltier v. Wright*, 15 F.3d 860, 861–62 (9th Cir. 1994). The  
28 Government contends in this case that three of the five claims should be dismissed for failure to

1 state a federal constitutional claim: (1) that the alleged touchings of the complaining witnesses were  
2 minimal; (2) that Count Three violated the statute of limitations; and (3) that the probation  
3 condition prohibiting Marcus from practicing dentistry violated state law. MTD at 6. Marcus did  
4 not address this argument in his Opposition. See generally Opp’n; Reply to Opp’n at 9.

5 **1. Alleged Touchings Were Minimal**

6 In Marcus’s federal Petition, Marcus contends that the alleged touchings of the complaining  
7 witnesses were minimal. Pet. at 23–24. The Government asserts that Marcus did not cite the  
8 federal constitutional provisions in support of this claim, nor present any argument explaining how  
9 his federal constitutional rights were violated. MTD at 7. In light of the Court’s finding that this is  
10 a part of Marcus’s ineffective assistance of counsel claim, the Court concludes that it does raise a  
11 federal claim.

12 **2. Statute of Limitations**

13 Marcus’s federal Petition contends that Count Three violated the applicable one year statute  
14 of limitations. Pet. at 5. Specifically, Marcus argues that California Penal Code Section 802  
15 prohibited his prosecution because the statute of limitations had expired. Id. at 31. He also argues  
16 that the prosecution failed to meet its burden to prove that the offense occurred after August 18,  
17 2004. Id. at 30. Marcus, citing to a California state case, People v. Le, 82 Cal. App. 4th 1352 (Cal.  
18 Ct. App. 2000), asserts that the conviction for Count Three must be reversed or returned to the trial  
19 court because a dispute over the statute of limitations must be strictly construed in Marcus’s favor.  
20 Id. at 30–31.

21 Unlike the state petition, where Marcus complains about the statute of limitations in the  
22 context of ineffective assistance of counsel, MTD Ex. 9 at 8, 11, the federal Petition complains only  
23 about state law, see Pet. at 27–28. The Government is correct that habeas relief does not lie for  
24 errors of state law. Estelle, 502 U.S. at 67; see also Middleton v. Cupp, 768 F.2d 1083, 1085 (9th  
25 Cir. 1985) (finding federal habeas relief “unavailable for alleged error in the interpretation or  
26 application of state law”). It is not the province of a federal habeas court to reexamine state court  
27 determinations on state law questions. Estelle, 502 U.S. at 67–68. A state court’s interpretation of  
28 state law is accepted, and alleged errors in the application of state law are not cognizable in federal

1 habeas corpus. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1997). Because Marcus alleges a  
2 violation of state law and does not state how this claim violates a specific federal constitutional  
3 right, Marcus fails to raise a federal claim and the claim is DISMISSED.

4 **3. Probation Condition Prohibiting Marcus from Practicing Dentistry**

5 Marcus's federal Petition contends that the "probation condition prohibiting Dr. Marcus  
6 from practicing dentistry violates his Constitutional rights." Pet. at 5. Marcus does not explicitly  
7 state which "Constitutional rights" were violated and whether they are federal or state constitutional  
8 rights. Marcus does cite to three California cases which establish that California courts have broad  
9 discretion in imposing restrictive conditions to foster rehabilitation and to protect public safety. Id.  
10 at 32. People v. Burden, 205 Cal. App. 3d 1277, 1281. (Cal. Ct. App. 1988) discusses a  
11 "constitutional right" to employment, but it is referring to state constitutional rights.

12 Federal courts may intervene only to correct wrongs of federal constitutional dimensions.  
13 Smith v. Phillips, 455 U.S. 209, 221 (1982). Here, Marcus broadly uses the term "constitutional  
14 rights" and does not state specific provisions of the United States Constitution. A federal  
15 constitutional claim can be presented by citation to state cases analyzing the federal issue.  
16 Peterson, 319 F.3d at 1158. However, here the cases cited purely apply California state law.  
17 Alleged errors in the application of purely state law are not cognizable in federal habeas corpus,  
18 and therefore Marcus failed to raise a cognizable federal claim. The claim is DISMISSED.

19 **C. Equitable Tolling**

20 Finally, Marcus asserts that if the Court finds that his federal Petition is a mixed petition of  
21 exhausted and unexhausted claims, it allow him equitable tolling to amend and exhaust the  
22 unexhausted claims in the California Supreme Court. Opp'n at 5.

23 In his Opposition, Marcus does not provide a sufficient basis for tolling, but the Court need  
24 not address this issue because, although a mixed petition exists, the unexhausted claims are further  
25 dismissed for failing to state a federal claim in Marcus's federal Petition.

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1 **D. CONCLUSION**

2 For the foregoing reasons, the Government's Motion to Dismiss is GRANTED IN PART  
3 and DENIED IN PART. The claim that Count Three violated the statute of limitations and the  
4 claim that the probation condition preventing Marcus from practicing dentistry violated state law  
5 are dismissed both for failure to exhaust and for failure to raise a federal claim. The remaining  
6 claims are not dismissed. The Government shall file with the Court and serve on Marcus, within  
7 **thirty (30) days** of the issuance of this Order, an answer conforming in all respects to Rule 5 of the  
8 Rules Governing § 2254 Cases, showing cause why a writ of habeas corpus should not be granted.  
9 If Marcus wishes to respond to the answer, he shall do so by filing a traverse with the Court and  
10 serving it on the Government within thirty (30) days of service of the Government's answer.

11 **IT IS SO ORDERED.**

12  
13 Dated: August 11, 2015



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14 CHARLES R. BREYER  
15 UNITED STATES DISTRICT JUDGE  
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