

1 **II. Background**

2 On February 2, 1978, a single gunman robbed Wolff's Jewelry Store in Contra Costa
3 County. The gunman shot two store employees, Raymond Murphy and John Benjamin. Murphy
4 died from his injuries. The gunman was later identified as petitioner.

5 On December 21, 1978, a jury convicted petitioner of first degree murder with special
6 circumstances, attempted murder and robbery, all arising out of the jewelry store robbery. The
7 jury imposed the death penalty. It also convicted petitioner of possession of a concealable
8 firearm by an ex-felon. The verdict was obtained in a second trial before a new jury, after a prior
9 jury had been unable to reach a verdict other than on the firearm charge.

10 On September 5, 1989, the Supreme Court of California affirmed petitioner's conviction
11 and death sentence. *People v. Bell*, 49 Cal. 3d 502 (1989). The United States Supreme Court
12 denied petitioner's petition for writ of certiorari on May 29, 1990. Petitioner filed his first state
13 habeas petition in the Supreme Court of California on May 29, 1990. The state court denied this
14 petition on October 18, 1990.

15 Petitioner filed a request for a stay of execution and appointment of counsel in federal
16 court on April 12, 1991. The stay was granted and counsel was appointed. A federal petition
17 containing unexhausted claims was filed on June 11, 1992. Petitioner's case was stayed for three
18 years while he exhausted claims in state court.

19 On June 21, 1995, the state court denied petitioner's second state habeas petition. On
20 January 18, 2000, this Court ordered petitioner to file an amended petition by March 17, 2000.
21 An amended petition alleging forty claims for relief was timely filed.

22 On April 17, 2000, respondent filed a motion to dismiss the federal petition on the
23 grounds that it contained unexhausted claims. The Court found that petitioner had failed to
24 exhaust several claims contained in his petition, but declined petitioner's request to stay
25 proceedings while he completed exhaustion proceedings in state court. Petitioner filed a first
26 amended petition containing only exhausted claims on June 26, 2000.

27 The case proceeded and petitioner filed a request for an evidentiary hearing in federal
28 court as to many of his claims. During the course of the evidentiary hearing, it became apparent
that petitioner's claim of actual innocence had not been properly exhausted. On February 7,

1 2002, petitioner filed a second amended petition deleting the unexhausted claim as well as a
2 request to stay federal proceedings pending the exhaustion of his actual innocence claim in state
3 court. The Court granted this request and directed petitioner to file quarterly status reports
4 beginning on June 1, 2002, until the conclusion of the state court proceedings. (Docket No.
5 289).

6 Petitioner proceeded to file quarterly status reports until July 16, 2004. (Docket No.
7 203). Thereafter, he did not advise the court of state court developments, including the
8 convening of a state evidentiary hearing in 2005, and the state court's denial of petitioner's third
9 state habeas petition in 2008. Petitioner also did not take any steps to further litigate his federal
10 petition.

11 Respondent argues that petitioner's failure to file quarterly status reports since 2004 and
12 to prosecute his petition after state proceedings terminated in 2008 warrant the dismissal of his
13 petition pursuant to Fed. R. Civ. P. 41(b). In the alternative, he argues that petitioner should at
14 the very least, be deemed to have forfeited all claims attacking his judgment of guilt. Petitioner
15 counters that while these failures may have been negligent and unprofessional, the dismissal of
16 his petition would be much too severe and drastic a remedy. He explains that unusual
17 circumstances, including the death of his counsel Roger Hurt, counsel Margaret Littlefield's
18 personal responsibilities, as well as her apparently mistaken assumption that a funding request
19 informing the court of the conclusion of state proceedings and of petitioner's mental
20 deterioration had been properly filed with the court in 2008, all contributed to the lapses cited by
21 respondent. Petitioner also requests that in light of petitioner's current severe dementia, the
22 Court direct respondent to file a report on petitioner's medical condition and schedule a status
23 conference within thirty days of the submission of the report.

24 **III. Discussion**

25 Fed. R. Civ. P. 41(b) provides:

26 If the plaintiff fails to prosecute or to comply with these rules or a court order, a
27 defendant may move to dismiss the action or any claim against it. Unless the
28 dismissal order states otherwise, a dismissal under this subdivision(b) and any
dismissal not under this rule – except one for lack of jurisdiction, improper venue,
or failure to join a party under Rule 19 – operates as an adjudication on the
merits.

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3 In determining whether to dismiss an action for failure to prosecute or failure to comply
4 with a court order, the Court must weigh the following factors:

5 (1) the public's interest in expeditious resolution of litigation; (2) the court's need
6 to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the
7 availability of less drastic alternatives; and (5) the public policy favoring
8 disposition of cases on the merits.

9 *Pagtalunan v. Galaza*, 291 F.3d 639 (9th Cir. 2002).

10 Petitioner's failure to file quarterly status reports from 2004 to 2008 did not cause delay
11 or otherwise significantly impact his federal proceedings because his case was stayed during the
12 duration of state exhaustion proceedings anyway. Moreover, as noted above, the failure was
13 inadvertent and due to his counsel's personal responsibilities as well as co-counsel's death. *See*
14 *Opposition* at 3.

15 Petitioner's failure to prosecute his case since the completion of state proceedings in
16 2008 also does not warrant the dismissal of his petition under the factors enumerated in
17 *Pagtalunan*. The first factor, the public's interest in expeditious resolution of litigation, always
18 favors dismissal. *See Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). The
19 second factor, however, a court's need to manage its docket, does not favor dismissal. "[A] trial
20 judge is in the best position to determine whether the delay in a particular case interferes with
21 docket management and the public interest. *Id.* Here, petitioner's failure to advance his case
22 since 2008 did not consume the court's resources or otherwise significantly affect the court's
23 docket. The third factor, prejudice suffered by respondent as a result of petitioner's delay,
24 namely the risk that witnesses' memories will fade and evidence will become unavailable, favors
25 dismissal. It is tempered, however, by petitioner's reasons for his delay, as described above. *See*
26 *Pagtalunan*, 291 F.3d at 642 (relating risk of prejudice to plaintiff's reason for defaulting.) The
27 pendency of a lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal. *Id.* The
28 fourth factor, the existence of alternatives to dismissal, weighs against dismissal: the case can
quickly be placed back on track to be disposed of as justice requires. Finally, the fifth factor, the
public policy favoring disposition of cases on the merits, *see Pagtalunan*, 291 F.3d at 643,

1 particularly in a capital case, strongly weighs against dismissal.

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3 **IV. Conclusion**

4 Respondent's motion presents a compelling argument that this case should be dismissed.
5 However, on balance the Court concludes that the factors discussed above weigh against the
6 dismissal of petitioner's capital habeas petition, or of any claims therein. Accordingly,
7 respondent's motion is denied. Respondent is directed to file a report on petitioner's medical
8 condition within 60 days of the date of this Order. The Court will schedule a case management
9 conference following receipt of this report.

10 IT IS SO ORDERED.

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12 DATED: _____

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14 RONALD M. WHYTE
15 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RONALD LEE BELL,
Plaintiff,

Case Number: CV99-20615 RMW

CERTIFICATE OF SERVICE

v.

KEVIN CHAPPELL, et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 28, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: September 28, 2012

Richard W. Wieking, Clerk
By: Jackie Lynn Garcia, Deputy Clerk