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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES ANTHONY DAVIS,
Petitioner,
v.
DWIGHT W. NEVEN, et al.,
Respondents.

Case No. 2:15-cv-01574-RFB-NJK

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion to dismiss (ECF No. 50), petitioner's motion to file an exhibit under seal (ECF No. 60), his motion for an evidentiary hearing (ECF No. 62), and an outstanding extension motion (ECF No. 71). In the motion to dismiss, respondents contend that the petition is untimely. Following review, the Court directs an evidentiary hearing.

Background

Petitioner James Davis challenges his Nevada state conviction, pursuant to a guilty plea, of first-degree murder. He is sentenced to life with the possibility of parole after twenty years.

Discussion

Provisional Base Calculation of the Federal Limitation Period

The original judgment of conviction was entered on April 27, 2004. Davis filed, inter alia, a timely appeal in proper person. On October 18, 2004, the attorney appointed for the appeal filed a verified notice asserting that Davis consented to a voluntary

1 dismissal of the appeal and moved for dismissal. The state supreme court dismissed the
2 appeal on December 16, 2004. (ECF Nos. 30-25, 30-33, 31-12, 31-13 & 31-19.)¹

3 The time to file a certiorari petition expired on Wednesday, March 16, 2005. Under
4 28 U.S.C. § 2244(d)(1)(A), the one-year federal limitation period, unless tolled or subject
5 to delayed accrual, would begin running after this date.²

6 However, petitioner filed, inter alia, a timely state postconviction petition prior to
7 March 16, 2005, on January 21, 2005, before any time had elapsed in the limitation
8 period. Pursuant to 28 U.S.C. § 2244(d)(2), the federal limitation period was statutorily
9 tolled while this petition was pending. Proceedings on the petition were pending before
10 the state district court and thereafter the state supreme court through the issuance of the
11 remittitur concluding the appeal on August 21, 2007. (ECF Nos. 31-20, 32-10, 32-16, &
12 32-17.)

13 Accordingly, the one-year limitation period would not begin running instead until
14 after August 21, 2007. Absent any other tolling or delayed accrual, or as discussed infra,
15 amended judgments, the federal limitation period would expire one year later on August
16 21, 2008.

17 Meanwhile, an amended judgment of conviction was filed on May 11, 2005,
18 following Davis' motion seeking more sentence credit for time served. The amended
19 judgment increased the credit for time served from 123 days in the original judgment to

20
21 ¹ The potential significance of petitioner's other proper person filings from in and around the time
of the filing of the notice of appeal is discussed, infra, at note 5.

22 ² Respondents posit that – absent tolling – the limitation period would expire on March 17, 2006,
23 because “Davis's conviction would have become final after [the March 16, 2005, expiration of] this period
24 [to seek certiorari review,] on March 17, 2005.” (ECF No. 51, at 6-7.) This is incorrect. The limitation period
25 instead would begin running after March 16, 2005. In that count, March 17, 2005, would be “day one” in
26 the count, not “day zero.” One year after March 16, 2005, is March 16, 2006, i.e., the one-year anniversary
27 of the March 16, 2005, expiration of the time to seek certiorari review. This “anniversary method” is the
28 controlling calculation rule under Federal Rule of Civil Procedure 6(a). See, e.g., *Patterson v. Stewart*, 251
F.3d 1243, (9th Cir. 2001); see also *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (applying the
rule specifically to a certiorari expiration date). Phrased another way, March 16, 2005, not March 17, 2005,
is “the date on which the judgment became final by . . . the expiration of the time for seeking such review”
under § 2244(d)(1)(A). The judgment became final by the expiration of the time for seeking certiorari review
on March 16, 2005. A similar error perhaps might be avoided in the future simply by following the
anniversary method rather than attempting to identify a “date of finality of the judgment” in the abstract.
The anniversary method further is the calculation method required by controlling Ninth Circuit law.

1 137 days in the amended judgment. However, the preamble in the May 11, 2005,
2 amended judgment did not refer to Davis' sentence of life imprisonment with the
3 possibility of parole after twenty years. The preamble instead stated, in error, that the
4 court at sentencing "did adjudge the Defendant guilty . . . , suspended the execution of the
5 sentence(s) imposed and granted probation to the Defendant." (ECF Nos. 30-25, 31-25
6 & 31-31.)

7 Under *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017), the federal limitation period
8 would start anew after the June 10, 2005, expiration of time to appeal the amended
9 judgment of conviction -- at least viewing the amended judgment in isolation.
10 Respondents analyze the impact of the May 11, 2005, amended judgment on the
11 calculation of the limitation period without accounting for the then-still-pending
12 proceedings on the timely January 21, 2005, state post-conviction petition. (See ECF No.
13 51, at 7-8.) However, respondents cite no authority holding that the filing of an amended
14 judgment of conviction overrides the directive in § 2244(d)(2) that "[t]he time during which
15 a properly filed application for State post-conviction or other collateral review with respect
16 to the pertinent judgment or claim is pending shall not be counted toward any period of
17 limitation under this subsection." There would appear to be every reason to construe the
18 phrase "with respect to the pertinent judgment" in § 2244(d)(2) as applying successively
19 to an amended judgment of conviction filed during the pendency of timely state post-
20 conviction proceedings. A successful post-conviction proceeding would also impact the
21 amended judgment. Failing to continue to statutorily toll the federal limitation period in
22 this situation would perversely disadvantage a petitioner who was diligently seeking to
23 challenge his conviction, as amended. There is no good reason either legally or equitably
24 to discontinue statutorily tolling of the federal limitation period in this circumstance.

25 The May 11, 2005, amended judgment of conviction therefore had no practical
26 impact on the calculation of the federal limitation period in this case. Because of the
27 already pending timely state post-conviction proceeding, the one-year limitation period
28 would not begin running until after the issuance of the remittitur on August 21, 2007.

1 Moreover, given that federal limitation period would not even begin running under
2 the foregoing analysis until after August 21, 2007, there is no need for the Court to
3 consider the potential statutory tolling effect of other state court proceedings that were
4 both begun and concluded prior to that date. The Court thus, for example, has no
5 occasion to consider the potential statutory tolling impact of Davis' two original petitions
6 for relief in the state supreme court that were denied prior to this date. (See ECF Nos.
7 31-5, 31-10, 31-11, 31-33, 31-34 & 31-35.)

8 A second amended judgment of conviction was filed after August 21, 2007,
9 however, on May 9, 2008. The new judgment corrected the error in the earlier amended
10 judgment, while maintaining the 137 days credit for time served. The new judgment
11 deleted the reference to suspension of the sentence with probation and again stated
12 instead that Davis was sentenced to life with the possibility of parole after twenty years.
13 (ECF No. 32-18.) Smith and subsequent Ninth Circuit caselaw suggests that the federal
14 limitation period also would start anew after the expiration of the time to seek direct review
15 of the second amended judgment. See *Scott v. Asuncion*, No. 16-55688, 737 Fed.Appx.
16 348 (9th Cir., Sept. 12, 2018); *Marquez v. McDaniel*, No. 17-15154, 729 Fed.Appx. 583
17 (9th Cir., June 29, 2018); *Gonzalez v. Sherman*, 873 F.3d 763, 773 n.5 (9th Cir. 2017).³ It
18 thus would appear that the federal limitation period began to run anew after the expiration
19 of the time to seek direct review on Monday, June 9, 2008. Absent tolling or delayed
20 accrual, the limitation period would expire one year later on June 9, 2009.

21 With one possible exception, petitioner's state court filings between June 9, 2008,
22 and the constructive filing of the present federal petition on August 10, 2015, either: (a)
23 were untimely state petitions that therefore were not "properly filed" for purposes of
24 statutory tolling under § 2244(d)(2); (b) sought collateral procedural relief rather than

25 ³ Caselaw addressing whether an amended judgment constitutes a new intervening judgment for
26 purposes of successive-petition rules appears to be fully applicable to the question of whether an amended
27 judgment restarts the federal limitation period. See, e.g., *Smith*, 871 F.3d at 687. Respondents suggest
28 that the second amended judgment made no substantive changes. (ECF No. 51, at 8.) However, even if
that arguendo were true, the absence of any substantive changes in the amended judgment, in and of itself,
would not necessarily prevent the amended judgment from restarting the federal limitation period. Cf.
Gonzalez, 873 F.3d at 773 n.5.

1 challenging petitioner's conviction; (c) otherwise did not challenge his criminal conviction
2 as opposed to challenging a prison disciplinary conviction; or (d) led to proceedings of
3 such short duration that they would not materially impact the calculation of the federal
4 limitation period even if they otherwise potentially might provide a basis for statutory
5 tolling. Moreover, any proceedings filed after a putative expiration of the federal limitation
6 period on June 9, 2009, in all events could not impact the calculation of the federal
7 limitation period, once expired, absent other tolling or delayed accrual that would prevent
8 the limitation period from expiring prior to those proceedings.⁴

9 Accordingly, at least within the contours of the parties' arguments, it would appear
10 as a provisional matter that the federal limitation period putatively expired on June 9,
11 2009, absent tolling, delayed accrual, or some other basis to overcome the time bar.⁵

12 ⁴ The one possible exception referenced at the beginning of the paragraph in the text is a June 26,
13 2014, petition. (ECF No. 161.) The Court was unable to find where any definitive action was taken on this
14 petition. A later filing by the State suggested that the petition was denied by an order filed on August 15,
15 2014. (See ECF No. 33-46, at 6.) However, the only order of that date in the federal record dismissed a
16 different petition that challenged a prison disciplinary conviction. (ECF 33-24.) While the June 26, 2014,
17 petition would appear to likely be untimely, the current federal record does not clearly reflect the disposition
18 of that petition. (See also ECF No. 30-1, at 122 & 124.)

19 ⁵ The Court refers to this calculation as a "provisional" calculation because the disposition of several
20 state petitions and other papers filed before the putative expiration of the federal limitation period is unclear.

21 The federal record contains (a) three state postconviction petitions, (b) an additional filing appearing
22 to challenge the conviction, and (c) a motion challenging the calculation of the credit for time served that all
23 were filed prior to or during the pendency of petitioner's direct appeal. (See ECF Nos. 30-26, 30-27, 30-
24 28, 31 & 31-1.) The federal record reflects that the state district court initially ordered a response to one
25 petition that was filed on May 6, 2004. (ECF No. 30-32.) The federal record does not reflect, however, the
26 disposition of that petition or of any of the other above-referenced petitions or other papers. The state
27 district court minutes reflect that: (a) the State initially indicated on June 30, 2004, that it had not responded
28 to petitioner's proper person filings because he still was represented by counsel; (b) the state district court
set a briefing schedule on multiple filings on July 19, 2004; (c) the state district court suspended the briefing
schedule on August 25, 2004, per direct appeal counsel's request due to the pendency of the appeal; and
(d) the state district court took "the matter" off calendar on October 27, 2004, after direct appeal counsel
"stated the deft. requests to withdraw the appeal and petition," with the latter reference in the minutes being
in the singular. (ECF No. 30-1, at 19, 33 & 36-37.) After the direct appeal was dismissed, petitioner filed
the January 21, 2005, petition that was litigated thereafter as described previously in the text. In that regard,
the state district court and state supreme court orders referenced only the January 2005 petition in their
decisions. (See ECF No. 32-4, at 3; ECF No. 32-16, at 2.)

26 The record and arguments presented thus are not clear as to: (a) the status of all of the proceedings
27 initiated by petitioner prior to or during the pendency of his direct appeal; and (b) the potential impact of
28 that status, including the impact of a petition being "off calendar," on statutory tolling under § 2244(d)(2).
Cf. *Brown v. Poole*, 337 F.3d 1155, 1157-58 (9th Cir. 2003) (state habeas petition was pending for purposes
of statutory tolling under § 2244(d)(2) during the time that the petition was off calendar at petitioner's
request); *Gibson v. Gibson*, 2016 WL 2956348, No. 68467 (Nev., May 18, 2016) (unpublished) (stipulation

1 **Equitable Tolling**

2 Davis has presented a neuropsychological evaluation report by Dr. Sharon Jones-
3 Forrester, Ph.D. She opines, inter alia, that his alleged borderline intellectual functioning,
4 relatively low literacy and significant neurocognitive and psychiatric deficits following upon
5 a traumatic and dysfunctional childhood, during which he was institutionalized, inter alia,
6 “may negatively impact his ability to understand legal information and the legal
7 consequences of his actions, carefully and consistently follow legally required case filing
8 deadlines and make decisions with regard to his case with a reasonable degree of rational
9 understanding.” (ECF No. 61-1, at 2, sealed exhibit.)

10 The Court finds that the handling of Davis’ four prior timely federal petitions, which
11 it outlines below, coupled with Dr. Jones-Forrester’s neuropsychological opinion,
12 warrants an evidentiary hearing in this matter.

13 The pleadings in the four actions have remained unfiled on the left side of the
14 archived physical records because the actions were dismissed during initial review. They
15 will be attached as an appendix to this order so that they may be accessed on CM/ECF
16 in this action.

17 On or about June 29, 2004, Davis dispatched his first federal postconviction
18 proceeding to the Clerk, which was docketed under No. 3:04-cv-00374-HDM-RAM. Davis

19 _____
20 and order taking an appeal-time tolling motion off-calendar does not constitute a disposition of the motion);
21 *Gayler v. State*, 2014 WL 2703073, No. 65513, at *1 n.1 (Nev., June 12, 2014) (unpublished) (state habeas
22 petitioner could move to place an off-calendar petition back on calendar); *Dennis v. State*, 2013 WL
23 5719235, No. 63846, at *1 n.1 (Nev., Oct. 16, 2013) (unpublished) (taking a state habeas petition off
24 calendar would preserve the timeliness of the petition under state law); *Sanchez v. State*, 2013 WL
25 4859517, No. 63527 (Nev., Sept. 9, 2013) (unpublished) (an order taking a state habeas petition off
calendar was not a final, appealable decision on the petition); *Warren v. State*, 2013 WL 3305551, No.
62115, at *1 n.1 (Nev., May 13, 2013) (unpublished) (taking a state habeas petition off calendar pending a
resolution of the direct appeal would preserve both the timeliness of the petition and the custodial status of
the petitioner at the time the petition was filed with respect to the relatively short duration sentence); *Diaz*
v. State, 124 Nev. 1031, 281 P.3d 1167 (Nev., April 14, 2009) (unpublished) (a motion to vacate an illegal
sentence cannot be resolved by taking the motion off calendar).

26 Similarly, the federal record does not reflect the disposition of an August 14, 2006, state petition
27 and September 27, 2006, supplemental petition. (ECF Nos. 32-3 & 32-8.) The State responded to each
28 pleading as ordered by the district court. (ECF Nos. 32-5, 32-7, 32-9 & 32-12.) Thereafter, however, no
disposition appears in the federal record. The state district court minutes reflect that: (a) the court took,
inter alia, a petition off calendar on October 23, 2006; and (b) petitioner through counsel thereafter withdrew
an unspecified “motion” on December 11, 2006. (ECF No. 30-1, at 75 & 78.)

1 submitted, inter alia, a notice of appeal and a motion pursuant to 28 U.S.C. § 2255.⁶ All
2 of Davis' papers other than the § 2255 petition were presented on apparently state court
3 forms, on which Davis provided his No. C197660 state court case number.⁷

4 The initial order in No. 3:04-cv-00374 noted that the Court did not have appellate
5 jurisdiction over the state courts and further that a § 2255 motion was "misguided" as an
6 attack on a state court conviction. The Court directed the Clerk to send petitioner § 2254
7 forms and instructions and gave him thirty days to file a habeas petition on the correct
8 form. (No. 3:04-cv-00374, ECF No. 3 at 2.)

9 Davis' pauper application also was on the wrong form and lacked the required
10 financial attachments, given that it also was submitted on state forms. The initial order
11 did not inform Davis of these deficiencies or provide the proper form and instructions,
12 however. The order stated instead that the pauper application was "premature until
13 petitioner files a cognizable pleading herein." (Id.)

14 The initial order in No. 3:04-cv-00374 was entered and served by the Clerk on
15 August 4, 2004. (Id., at 1.) The thirty-day deadline under the order therefore would have
16 expired on Tuesday, September 7, 2004, following the Labor Day holiday.

17 One day later, on or about September 8, 2004, Davis dispatched a motion for an
18 extension in No. 3:04-cv-00374, writing that docket number on the motion. He sought an
19 extension to November 1, 2004 to file a "civil rights complaint form: 42 U.S.C. 1983."
20 (No. 3:04-cv-00374, ECF No. 4.)⁸

21 ⁶ Criminal defendants often refer to everything that follows their judgment of conviction as their
22 "appeal," without regard to whether what they are referring to specifically is the direct appeal, state
23 postconviction proceedings, federal postconviction proceedings, or some other postjudgment proceeding.
24 Consequently, they on occasion will request a form to "appeal their conviction" from the prison law library
25 when what they perhaps instead need is the form for a federal petition for a writ of habeas corpus. The
26 circumstances where a state prisoner would have a need for a form for a § 2255 motion would appear to
27 be few and far between, but that apparently was what Davis also requested or was supplied.

28 ⁷ Once they have "caught a case," criminal defendants also often fail to distinguish their original
criminal proceeding from other distinct cases or actions related to that proceeding. They thus often continue
to use, as Davis did here, the case number from their original state court criminal proceeding.

⁸ Davis had recently filed several civil rights actions at approximately the same time; and he
dispatched similar extension motions in two of the civil rights cases the same date, in Nos. 3:04-cv-00368
and 3:04-cv-00369. It is possible that he confused the habeas action with a civil rights action.

1 Perhaps inconsistently, also on or about September 8, 2004, Davis dispatched to
2 the Clerk: (1) a habeas petition, albeit on a state form; (2) five accompanying handwritten
3 memoranda and/or motions, including papers presenting legal argument on the merits
4 and a motion for a writ of mandamus; and (3) a pauper application, again on state forms.
5 (No. 3:04-cv-00499-LRH-VPC, ECF No. 1 and left side of record.)

6 The Clerk filed these papers in a new civil action under a new docket number, No.
7 3:04-cv-00499-LRH-VPC. Davis again had placed the state court docket number – No.
8 C197660 – on his papers. Notably, above the title on the habeas petition form, Davis
9 wrote “Leave to Amend” and, somewhat ambiguously, “Amended Judgment of
10 Conviction.” Below the title, he wrote “Demand to Attact [sic] State Court Conviction.”

11 It is not uncommon for inmates to submit a new pauper application along with an
12 amended pleading even when they perhaps do not intend to commence a new civil action.
13 It also is not uncommon for the Clerk to file such papers – in the absence of a docket
14 number from a prior action -- as a new civil action. In the intervening years, the Court has
15 more frequently included language in the operative order expressly instructing petitioners
16 who are submitting an amended pleading in response to the order to place the docket
17 number from the then-pending federal action on the responsive papers. The Court has
18 done so to reduce the incidence of, inter alia, amended pleadings submitted in response
19 to a court order being filed instead as a new action.⁹

20 Perhaps even less consistently, on or about September 21, 2004, Davis
21 dispatched another § 2255 motion and notice of appeal along with a properly-completed

22 ⁹ Language that the Court has used in subsequent years would have read in the context here:

23
24 IT FURTHER IS ORDERED that petitioner shall clearly title the amended petition
25 as an amended petition by placing the word "AMENDED" immediately above "Petition for
a Writ of Habeas Corpus" on page 1 in the caption and shall place the docket number, CV-
N-04-0374-HDM-RAM, above the word "AMENDED."

26 The Court notes that the initial docketing letter sent by the Clerk does inform the inmate of the
27 docket number for the case and tells the inmate: “It is necessary for you to include this case number on all
28 future papers sent to the court for this case.” (No. 3:04-cv -00374-HDM-RAM, ECF No. 2.) However, the
inclusion of language such as the example in the first paragraph above in the Court’s initial compliance
orders nonetheless has sharply reduced the incidence of responsive papers being docketed instead as a
new action.

1 pauper application and, inter alia, a motion for appointment of counsel. While the pauper
2 application was properly completed on the required form with all required financial
3 attachments, Davis had checked "civil rights action" for the type of action on the financial
4 certificate. To the extent that Davis placed a docket number on any of these papers, he
5 used the No. C197660 case number from the state court proceedings. The Clerk
6 docketed these papers as a new civil action under No. 3:04-cv-00528-LRH-RAM.

7 On October 4, 2004, in No. 3:04-cv-00499, the Court informed Davis that: (1) the
8 pauper form in that action was not filed on the proper form and was incomplete; (2) the
9 habeas petition also was not filed on the proper form; and (3) the Court did not have
10 jurisdiction to issue a writ of mandamus to a state court. The Court directed the Clerk to
11 send petitioner the proper forms and gave Davis thirty days to: (1) either submit a properly
12 completed pauper application on the required form or pay the \$5.00 filing fee; and (2) file
13 an amended habeas petition on the required form. This order did expressly direct Davis
14 to include the docket number from that action on any document filed in response to the
15 order. (No. 3:04-cv-00499, ECF No. 2.)

16 Then, on October 6, 2004, in No. 3:04-cv-00528, the Court issued an order that,
17 inter alia: (1) dismissed the § 2255 motion with leave to amend under § 2254 within thirty
18 days; (2) noted petitioner's other pending habeas actions in Nos. 3:04-cv-00374 and 3:04-
19 cv-00499; (3) informed Davis that his only means to challenge his state court conviction
20 was pursuant to § 2254 and by only one petition in one action; (4) stated that the Court
21 was dismissing with leave to amend given the slight possibility that the § 2255 motion
22 arose out of a different nucleus of operative facts than in No. 3:04-cv-00374; (5) otherwise
23 indicated that Davis should seek to amend in No. 3:04-cv-00374; (6) suggested that Davis
24 potentially was filing the § 2255 and mandamus papers solely to harass his custodians
25 or their counsel, although the Court would not serve any such papers until Davis filed a
26 proper action; and (7) informed Davis that, if his motive in filing the multiple actions was
27 to harass the Court, it potentially could issue a "strike" against him under the Prison
28 Litigation Reform Act (PLRA), pursuant to 28 U.S.C. § 1915(g), for frivolous litigation, with

1 the proviso that if he accumulated three such “strikes” his ability to proceed in forma
2 pauperis in future actions would be virtually eliminated. (No. 3:04-cv-00528, ECF No.
3 3.)¹⁰

4 Significantly, on or about October 10, 2004, Davis dispatched to the Clerk: (1) a
5 § 2254 petition filed on the correct form; (2) proper financial attachments for a pauper
6 application that the Court thereafter treated as a pauper application that otherwise would
7 have qualified him for pauper status; and (3) on state court forms, inter alia, a habeas
8 petition, pauper application, and motion for appointment of counsel. Davis again checked
9 “civil rights action” on the financial certificate, and he did not supply a federal court docket
10 number on any of the papers. (No. 3:04-cv-00606-ECF-VPC, ECF No 1; ECF No. 3, at
11 2; and left side of the record.)

12 These compliant papers – which did not carry a federal docket number -- were not
13 filed in No. 3:04-cv-00374, which still was pending and in which Davis had been ordered
14 to file an amended petition on the required § 2254 petition form.

15 These substantially compliant papers were not filed in No. 3:04-cv-00499, which
16 also still was pending and in which Davis had been ordered to file both a § 2254 petition
17 and a pauper application on the required forms.

18 These compliant papers were not filed in No. 3:04-cv-00528, which also still was
19 pending and in which Davis had been ordered to file a § 2254 petition on the required
20 form.

21 Davis’ papers – which carried no federal docket number but which would have
22 complied or substantially complied with the pending orders in each one of the above three
23 cases – instead was filed as yet another separate and new civil action, under No. 3:04-
24 cv-00606-ECR-VPC.

25
26
27 ¹⁰ The Court discusses the application of the PLRA’s “three strikes” provisions to Davis’ habeas
28 cases further infra. A “strike” already had been assessed in Davis’ civil rights action in No. 3:04-cv-00368.
The order described in the text did not direct the Clerk to send any forms and did not itself expressly direct
that Davis use the docket number for that action on any amended pleading submitted.

1 Thereafter, in Davis' first habeas action, No. 3:04-cv-00374, by an order filed on
2 October 20, 2004, but not entered until October 28, 2004, the Court dismissed the action
3 without prejudice for failure to file an amended complaint within the time allowed by the
4 initial order. The dismissal order did not expressly reflect consideration of the possibility
5 that the intervening pleadings dispatched on September 8, 2004, and filed instead in No.
6 3:04-cv-00499 might have constituted an at least attempt by Davis to comply with the
7 initial order in No. 3:04-cv-00374. Nor did the dismissal order expressly reflect
8 consideration of the fact that Davis' petition dispatched on October 10, 2004, and filed on
9 October 14, 2004 instead under No. 3:04-cv-00606 would have complied with the Court's
10 initial order. The order further denied the pending extension motion as moot, although
11 Davis had requested an extension through November 1, 2004. (No. 3:04-cv-00374, ECF
12 No. 5.)

13 On November 2, 2004, the Court issued an initial order in No. 3:04-cv-00606, the
14 action in which Davis had filed compliant papers. The order found that Davis had "struck
15 out" under the "three-strikes" provisions of 28 U.S.C. § 1915(g), based on four prior civil
16 rights actions that had been dismissed for failure to state a claim. His pauper application,
17 which showed that he had only \$0.09 on hand, was denied on this basis. The Court gave
18 Davis until December 1, 2004, to: "(1) pay the \$5 filing fee for this action; (2) submit an
19 amended petition with this case number showing that he is in imminent danger of serious
20 physical injury and attacking a sentence or conviction that is not addressed in his other
21 petitions; or (3) move to voluntarily dismiss this action and incorporate the claims raised
22 in this petition in one of the actions for habeas corpus [one of which had just been
23 dismissed] already opened and on-file in this United States District Court." (No. 3:04-cv-
24 00606, ECF No. 3.)

25 This three-strikes order applying § 1915(g) to a habeas case contradicted
26 established Ninth Circuit precedent. In *Naddi v. Hill*, 106 F.3d 275 (9th Cir. 1997), the
27 Ninth Circuit addressed a question of whether provision requiring prisoners to pay the full
28 filing fee even if they were granted pauper status applied to habeas cases. The provision

1 in question had been added in § 1915(b) by the PLRA. The Ninth Circuit’s analysis clearly
2 rejected the application of the PLRA amendments to § 1915 – including the “three-strikes”
3 rule in § 1915(g) – to habeas actions:

4 The term “civil action or appeal” used in section 1915,
5 for example, does not include habeas proceedings in other
6 sections of the PLRA, and thus indicates that it was not
7 intended to include such proceedings in that section. Section
8 1915(g) prevents prisoners from filing civil actions or appeals
9 where at least three prior such actions have been dismissed
10 as frivolous or for failure to state a claim, unless the plaintiff
11 can demonstrate that he or she is under imminent danger of
12 serious bodily injury. Such a demonstration is clearly not
13 required in habeas proceedings. See also 42 U.S.C. §
14 1997e(e) (imposing on civil actions a requirement of a prior
15 showing of physical injury to maintain claim for mental or
16 emotional injury).

17 In addition, as the parties point out, Congress was
18 concerned with civil rights and prison conditions cases when
19 it debated and adopted the PLRA. See e.g., 141 Cong.Rec.
20 S7523-27 (daily ed. May 25, 1995) (statement of Senator
21 Dole). Congress was clearly not concerned with habeas
22 corpus proceedings when they enacted the PLRA, as is
23 further evidenced by the absence of any reference to the
24 PLRA or the forma pauperis revisions in the AEDPA enacted
25 only two days earlier. We therefore hold that the forma
26 pauperis provisions of the PLRA relating to prisoner civil
27 actions and appeals do not apply to habeas corpus
28 proceedings.

106 F.3d at 277 (emphasis added).

Any attempt to discount Naddi because it involved only the full-payment provision
of § 1915(b) necessarily would fail. First, the Ninth Circuit clearly held that “the forma
pauperis provisions of the PLRA relating to prisoner civil actions and appeals do not apply
to habeas corpus proceedings.” The three-strikes provision of § 1915(g) is such a
provision.¹¹ Moreover, the Ninth Circuit removed any possible room for doubt by stating

¹¹ 28 U.S.C. § 1915(g) provides, with emphasis added:

(g) In no event shall a prisoner bring a civil action or appeal a judgment in
a civil action or proceeding under this section [providing for proceedings
in forma pauperis] if the prisoner has, on 3 or more prior occasions, while
incarcerated or detained in any facility, brought an action or appeal in a
court of the United States that was dismissed on the grounds that it is

1 that a demonstration of imminent danger of serious bodily injury “clearly is not required in
2 habeas proceedings.”

3 The application of the three-strikes provision in § 1915(g) to the habeas action in
4 No. 3:04-cv-00606 – in which Davis finally had filed compliant pleadings – therefore was
5 erroneous under established Ninth Circuit precedent. As a result, the Court erroneously
6 required Davis to pay the \$5.00 filing fee, which he clearly could not do. The Court further
7 erroneously required Davis to show in the alternative that he was imminent danger of
8 serious bodily injury, a demonstration that has no relevance to a noncapital habeas case
9 and which he also clearly could not do.¹²

10 Thereafter, on November 17, 2004, prior to the December 1, 2004, deadline set in
11 No. 3:04-cv-00606, the Court dismissed No. 04-cv-00528 without prejudice because
12 Davis had not filed an amended pleading in that action. This dismissal order did not
13 expressly reflect consideration of whether, in context, Davis’ petition dispatched on
14 October 10, 2004, and filed on October 14, 2004 instead under No. 3:04-cv-00606 would
15 have substantially complied with its initial order. (No. 3:04-cv-00528, ECF No. 4.)

16 A short time later, by an order entered on December 6, 2014, the Court dismissed
17 No. 3:04-cv-00499 without prejudice for failure to file any papers in response to the initial
18 order. This dismissal order also did not expressly reflect consideration of the fact that
19 Davis’ petition dispatched on October 10, 2004, and filed on October 14, 2004 instead
20 under No. 3:04-cv-00606 would have complied with the Court’s initial order. (No. 3:04-
21 cv-00499, ECF No. 3.)

22 Then, by an order entered on December 8, 2014, the Court dismissed No. 3:04-
23 cv-00606 – the action in which Davis had filed papers that would have complied with the
24 orders in the three dismissed cases and done so prior to their dismissal – because Davis

25 frivolous, malicious, or fails to state a claim upon which relief may be
26 granted, unless the prisoner is under imminent danger of serious physical
27 injury.

28 ¹² It further is subject to question whether the Heck-based dismissals in two of Davis’ prior civil
rights cases relied upon by the Court, in Nos. 3:04-cv-00368 and 3:04-cv-00369, qualified as “strikes” in
any event. See *Washington v. Los Angeles County Sheriff’s Dept.*, 833 F.3d 1048, 1054-57 (9th Cir. 2016).

1 had not complied with the in large part impossible requirements imposed by the erroneous
2 three-strikes order. (No. 3:04-cv-00606, ECF No. 4.)

3 Even if papers submitted by Davis without a prior federal docket number arguendo
4 were properly docketed as a new action initially, the Court nonetheless arguably was
5 required to construe the filings in No. 3:04-cv-00606 as submitted for a prior pending
6 action in order to avoid prejudice to the petitioner. Cf. *Woods v. Carey*, 525 F.3d 886 (9th
7 Cir. 2008) (the rule requiring liberal construction of pro se pleadings required the district
8 court to construe a new petition filed in new action as a motion to amend the pleadings in
9 a prior still-pending action rather than construing the new petition as a successive
10 petition). Here, however, the Court instead dismissed three actions for a failure to file
11 compliant papers notwithstanding Davis' submission of compliant papers that were
12 docketed by the Clerk as a new action in No. 3:04-cv-00606. Then after dismissing the
13 prior three actions for Davis' failure to file compliant papers, the Court dismissed the
14 action in which he did file compliant papers by erroneously applying the three-strikes
15 provision in § 1915(g) to the habeas case.¹³

16 Due to these dismissals of what clearly were timely petitions, the Court never had
17 occasion to consider: (1) possible appointment of counsel, which the Court later found
18 was required by the interests of justice in this action; (2) the prospect that Davis at least
19 to an extent had exhausted claims at the time of the dismissals by virtue of his earlier
20 original petition in the state supreme court;¹⁴ and/or (3) whether a stay for further
21 exhaustion might be warranted if requested by appointed counsel.¹⁵

22 _____
23 ¹³ Only a short time after the dismissal of No. 3:04-cv-00606, on February 22, 2005, the Ninth
24 Circuit reaffirmed that the PLRA's three-strikes rule does not apply to habeas cases. See *Andrews v. King*,
398 F.3d 1113, 1122-23 (9th Cir. 2005).

25 ¹⁴ See ECF Nos. 31-5 & 31-6. The Ninth Circuit held in *Chambers v. McDaniel*, 549 F.3d 1191,
1195-99 (9th Cir. 2008), that language comparable to that used by the Supreme Court of Nevada in its
26 August 23, 2004, order denying Davis' petition constituted an adjudication on the merits.

27 ¹⁵ The Ninth Circuit held in *Mena v. Long*, 813 F.3d 907 (9th Cir. 2016), that a stay may be available
28 even when all claims in a petition are unexhausted. While *Woods*, *Chambers*, and *Mena* all were decided
after the four dismissals, the decisions did not overrule any prior decisions that the panels regarded as
representing binding circuit precedent. The decisions thus reflect the Ninth Circuit's appraisal of what the
law was at the time relevant here.

1 On or about June 17, 2005, Davis dispatched, inter alia, a § 2254 petition and a
2 pauper application on the proper forms, with the new action being docketed under 3:05-
3 cv-00369-LRH-VPC. By an order entered on August 2, 2005, The Court, inter alia: (1)
4 granted the pauper application, finding it sufficient; (2) noted that Davis had not signed
5 the petition; (3) stated that it appeared from the face of the petition that none of the claims
6 had been exhausted and noted that Davis had not completed all of the exhaustion queries
7 on the petition form; and (4) gave Davis until September 23, 2005, to file an amended
8 petition, inter alia, that was signed and that provided detailed information regarding
9 exhaustion as to each of his claims. Davis did not respond; and approximately one year
10 later, by an order entered on September 22, 2006, the Court therefore dismissed the
11 action. (No. 3:05-cv-00369, ECF Nos. 1, 4, 6 & 8.)

12 On or about August 9, 2007, Davis dispatched an application to file a second or
13 successive petition to the Ninth Circuit. The court of appeals treated the application as
14 an original habeas petition and transferred the matter to this Court, where the action was
15 docketed as No. 2:07-cv-01693-PMP-RJJ. By an order entered on January 9, 2008, the
16 Court directed the Clerk to send Davis pauper and habeas petition forms and instructions;
17 and the Court gave Davis thirty days within which to file an amended petition on the
18 required form and either pay the filing fee or submit a properly completed pauper
19 application. Davis obtained an extension of time through March 24, 2008. Thereafter,
20 however, he filed instead: (1) a motion for immediate release based upon the error in the
21 May 11, 2005, amended judgment of conviction described previously herein; and (2) a
22 financial certificate and inmate account statement without a pauper application. Davis
23 thus filed neither the amended petition nor the pauper application required by the Court.
24 The action therefore was dismissed by an order entered on April 14, 2008. (No. 2:07-cv-
25 01693-PMP-RJJ, ECF Nos. 1-8.)

26 Thereafter, subsequent to the provisional putative expiration of the federal
27 limitation period on June 9, 2009, Davis dispatched, inter alia, a § 2254 petition and a
28 pauper application, with the new action being docketed as 2:10-cv-01365-RLH-LRL. The

1 Court granted the pauper application. The Court further directed Davis to file an amended
2 petition fully on the required form and stating his claims with specificity. After Davis filed
3 an amended petition, the Court dismissed the action for failure to state a claim, finding
4 that he had not alleged sufficiently specific claims to withstand dismissal. Both this Court
5 and the court of appeals denied a certificate of appealability, with the matter concluding
6 in the appellate court in March 2012. (No. 2:10-cv-01365, ECF Nos. 1, 3-7, & 13.)

7 Davis dispatched the initial pleadings in the present action on or about August 10,
8 2015. (ECF No. 4, at 1.)

9 To be sure, Davis failed to follow through – for whatever reason – in several
10 instances after filing multiple timely actions prior to the provisional putative expiration of
11 the federal limitation period on June 9, 2009. However, this Court also inadvertently put
12 Davis through a procedural gauntlet where potentially responsive and even compliant
13 papers were docketed separately as new actions and then disregarded when the Court
14 dismissed his first three timely actions. The Court then dismissed the action in which
15 Davis’ compliant papers were docketed on an erroneous basis, incorrectly subjecting his
16 timely and procedurally compliant habeas action to the three-strikes provisions of §
17 1915(g). In short, the one time that Davis finally successfully navigated through all the
18 applicable procedural rules and duplicative docketing and presented a timely and
19 compliant federal petition, his action then was dismissed in error.

20 The Court pretermits for the moment consideration as to whether it should
21 exercise its equitable discretion with respect to the timely filed but dismissed prior actions
22 under *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000), and as to the extent of any
23 relief that then should be afforded.

24 In the meantime, on the separate and distinct issue of equitable tolling, the Court
25 would like to hear testimony, inter alia, by the clinical neuropsychologist regarding the
26 interaction between the Court’s handling of petitioner’s initial timely habeas petitions as
27 specifically described herein and the alleged borderline intellectual functioning, low
28 literacy and neurocognitive and psychiatric deficits referenced in her expert report.

1 The Court accordingly will grant petitioner's motion for an evidentiary hearing, at
2 which it will consider all factual evidence and legal argument presented directed to the
3 timeliness of the federal petition in this matter.

4 IT IS THEREFORE ORDERED that petitioner's motion for an evidentiary hearing
5 (ECF No. 62) is GRANTED and that the matter is set for an evidentiary hearing for **10:00**
6 **a.m. on June 25, 2019** in Courtroom 7C, Lloyd D. George United States Courthouse,
7 333 Las Vegas Blvd., Las Vegas, Nevada, with respect to all legal and factual issues
8 pertaining to respondents' motion to dismiss (ECF No. 50), which remains pending at this
9 time.

10 IT IS FURTHER ORDERED that, during the docketing of this order, the Clerk shall
11 retrieve from the Court's pro se law clerk, Mr. King, the physical records in Nos. 3:04-cv-
12 00374, 3:04-cv-00499, 3:04-cv-00528, and 3:04-cv-00606 obtained previously from
13 archives and shall file as an Appendix to this order copies of the papers on the left side
14 of the physical records in those prior actions. While the Court leaves the specific manner
15 and formatting of the Appendix to the Clerk's discretion, the Court and the parties will
16 need to be able to readily identify which left-side papers from which case are filed in which
17 specific CM/ECF attachment or attachments, such as perhaps via a cover sheet along
18 with identified CM/ECF attachments, somewhat similar to how petitioner filed his exhibits.

19 IT IS FURTHER ORDERED that in the prehearing memoranda directed below, the
20 parties additionally shall address: (a) the statutory-tolling issue referenced in footnote 5
21 of this order with regard to off-calendar and other possibly still-pending state court filings;
22 and (b) whether relief should be afforded and the extent thereof with regard to the prior
23 erroneous dismissals of petitioner's timely federal habeas petitions discussed herein.
24 Counsel should not assume that posthearing briefing automatically will be directed.

25 IT IS FURTHER ORDERED that petitioner's unopposed motion to file exhibit under
26 seal (ECF No. 60) is GRANTED, and that petitioner is granted leave to file the sealed
27 exhibit filed with ECF No. 63 under seal, with the Court finding in accordance with the
28 requirements of *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006),

1 that a compelling need to protect the medical confidentiality, privacy and/or personal
2 identifying information of petitioner and/or others with regard to the sealed exhibit
3 outweighs the public interest in open access to court records.

4 IT IS FURTHER ORDERED that respondents' unopposed motion for an extension
5 of time (ECF No. 71) is GRANTED nunc pro tunc in connection with the filing of
6 respondents' reply in support of their motion to dismiss and their opposition to petitioner's
7 motion for an evidentiary hearing (ECF Nos. 72 & 73).

8 IT IS FURTHER ORDERED that counsel shall complete the following prehearing
9 procedures:

- 10 1. **Exchange of Preliminary Witness and Exhibit Lists and Stipulations.** No later
11 than **twenty-eight (28) days** prior to the hearing, counsel shall confer together
12 either in person or by telephone and shall exchange preliminary exhibit and
13 witness lists, exchange (either in person or indirectly such as via mail, email or fax)
14 any exhibits not already possessed by opposing counsel, as well as discuss
15 stipulations as to authenticity and any evidentiary objections.
- 16 2. **Final Witness and Exhibit Lists and Evidentiary Objections.** No later than
17 **twenty-one (21) days** prior to the hearing, counsel shall jointly file a consolidated
18 final list of the witnesses and exhibits to be offered jointly and/or by each party and
19 which shall further identify any evidentiary objections that may be anticipated in
20 advance of the hearing. No party will be allowed to introduce over objection any
21 witness or exhibit not listed in the final witness and exhibit list, except that a party
22 may file a supplement no later than **fourteen (14) days** prior to the hearing listing
23 evidence in response to any witness or exhibit identified for the first time in the final
24 list. No objection that may be anticipated in advance of the hearing will be
25 preserved unless raised in the final list.
- 26 3. **Length of Hearing; Interpreters; Other Housekeeping Matters.** The Court
27 anticipates that the hearing possibly may take up to a full day. If counsel (a)
28 anticipate that the hearing will run longer than one full day, (b) anticipate that an

1 interpreter will be needed for a party or a witness, and/or (c) have other
2 housekeeping matters to address regarding the hearing, they shall contact the
3 Courtroom Administrator regarding same no later than **twenty-one (21) days** prior
4 to the hearing.

5 **4. Prisoner Transport Order and Subpoenas of Non-Prisoner Witnesses.** No
6 later than **fourteen (14) days** before the hearing, petitioner's counsel shall submit
7 an order to transport prisoner to secure petitioner's presence at the hearing; and
8 any party wishing to call any other prisoner to testify similarly shall submit an order
9 to transport prisoner by that date. No continuance will be granted for failure to
10 secure the attendance of the petitioner or any other prisoner unless an order to
11 transport prisoner was timely sought. Similarly, no continuance will be granted for
12 failure to secure the attendance of a non-prisoner witness who was not seasonably
13 subpoenaed. **Each prisoner-transport order shall include the following**
14 **sentence as the final paragraph: "The Clerk of Court additionally shall**
15 **provide a copy of this order to the Marshal's Las Vegas office."**

16 **5. Prehearing Memoranda.** No later than **seven (7) calendar days** prior to the
17 hearing, counsel for petitioner and for respondents each shall file a prehearing
18 memorandum setting forth the evidence that they expect to present at the hearing
19 together with their legal argument regarding the issues to be raised by the
20 anticipated evidence presented by the parties at the hearing.

21 **6. Exhibit Binders.** On the morning of the hearing, counsel for petitioner and for
22 respondents each shall provide to the Courtroom Administrator four binders or sets
23 of exhibit binders, with one such binder or set of binders containing the exhibits
24 offered for introduction at the hearing, and the other three binders or sets being for
25 the bench, the witness stand, and the staff attorney. Each counsel additionally
26 shall provide one additional binder or set of binders to opposing counsel. If joint
27 exhibits are submitted, counsel shall arrange between themselves similarly to
28 provide to the Courtroom Administrator four binders or sets of exhibit binders

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containing the joint exhibits. The “original” exhibits within the binder(s) for the Clerk each shall be marked by an exhibit sticker, prior to being copied for the other sets of binders. Any lengthy exhibits that are not otherwise internally numbered and that likely will be referenced in detail during live testimony shall be Bates-number stamped for ease of reference during the testimony.

IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 50) is dismissed without prejudice. It may be refiled upon completion of the hearing in this case.

DATED: March 31, 2019.



RICHARD F. BOULWARE, II
United States District Judge