

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

Mar-Nique Simon v. Jason Schultz

No. C 09-05859 WHA (N.D. Cal. Dec. 30, 2025) · No. C 09-05859 WHA · Decided December 30, 2025

OPINION

1 2 3 4 5 6 7 8 9 10 UNITED STATES DISTRICT COURT 11 NORTHERN DISTRICT OF
CALIFORNIA 12 13 14 MAR-NIQUE SIMON, 15 Petitioner, No. C 09-05859 WHA 16 v. 17
JASON SCHULTZ, ORDER ON MOTION TO DISMISS FOR LACK OF PROSECUTION 18
Respondent. 19 20 INTRODUCTION 21 In this petition for a writ of habeas corpus filed more
than a decade ago, respondent seeks 22 to dismiss for lack of prosecution by petitioner, who has
since completed his sentence for the 23 conviction that gave rise to the petition in the first place.

24 STATEMENT 25 1. INITIAL PROCEDURE IN FEDERAL COURT (2004 TO 2019). 26 In
2004, Mar-Nique Simon pleaded nolo contendere in state court to attempted murder 27 and
second-degree robbery with use of a deadly weapon and was sentenced to 20 years in 1 In 2009,
Simon filed this petition for writ of habeas corpus in federal district court, 2 initially pro se.

The petition asserted (1) incompetence to enter a plea, (2) ineffective 3 assistance of counsel
under the Fourth and Fifth Amendments, and (3) ineffective assistance of 4 counsel under the
Sixth Amendment (ibid.; see Dkt. No. 129 at 6). 5 A. ORDERS RE TIMELINESS. 6 In 2011,
Judge Thelton Henderson determined that the petition was untimely, dismissed 7 it with prejudice,
and entered judgment (Dkt.

Nos. 10, 11). But, in 2012, our appellate court 8 reversed and remanded for factual development to
determine “whether Simon [wa]s entitled to 9 equitable tolling based on a mental impairment”
(Dkt. No. 18). On remand, Attorney Richard 10 Tamor was appointed to represent petitioner, and
he has done so ever since (see Dkt. Nos. 22, 11 222). (For her part, Attorney Michele Swanson of
the California State Attorney General’s 12 Office has represented respondent since the petition’s
filing.)

13 In 2017, after five years of discovery into equitable tolling, Judge Henderson held two 14 days
of evidentiary hearings (Dkt. Nos. 94–95). Judge Henderson found petitioner eligible for 15
equitable tolling and denied respondent’s motion to dismiss (Dkt. No. 105). 16 The case was
reassigned to the undersigned. And, in December 2017, respondent 17 Warden Domingo Uribe
filed his response (Dkt.

No. 109). (The caption reflects that Warden 18 Jason Shultz oversees California State Prison,
Sacramento, where petitioner is now.) 19 B. ORDERS RE PROCEDURAL DEFAULT AND

EXHAUSTION. 20 In July 2019, the undersigned determined there was cause and prejudice to excuse what 21 otherwise would have been a procedural default in state court barring federal habeas review 22 (Dkt.

No. 129 at 7). Specifically, “petitioner[had suffered from a] mental condition, near 23 illiteracy, and lack of post-conviction counsel.” These together had “rendered him completely 24 unable to file his petition on his own or seek the help he needed” (id. at 10). 25 However, the judge found that petitioner might have failed to exhaust every ground of 26 the petition in state court, so ordered a fresh round of briefing (id. at 11).

Upon review, the 27 judge found that the ineffective assistance of counsel ground had not been exhausted (Dkt. 1 2. STAY AND STATE COURT PROCEEDINGS (2019 TO 2023). 2 So, on September 24, 2019, the Court stayed federal action and ordered petitioner to 3 complete a state action to exhaust all three grounds in ten months (id. at 4), by July 2020. 4 A. PRIOR TO FILING IN STATE COURT.

5 It took sixteen months to file in state court. 6 About three months after stay, on December 22, 2019, petitioner was released on parole. 7 For Attorney Tamor, this raised the question whether petitioner still wished to press for relief. 8 Six months after stay, in January 2020, petitioner’s “counsel spoke with [petitioner] and 9 there was an indication [petitioner] no longer wished to pursue this matter” (Dkt.

No. 140 at 2). 10 Eight months after stay, the COVID-19 pandemic struck. While in-person visitation 11 between client and counsel would not have been possible if the client had been incarcerated 12 (Opp. 4 nn.1–3), the client was now on parole. Business continued apace in our courtroom, but 13 ours was not where the action was to take place. (Respondent did not seek to dismiss.)

14 Twelve months after stay, in September 2020, petitioner’s counsel for the first time 15 requested from this Court an extension (Dkt. No. 151). The Court granted a continuance, with 16 a status update due October 2020. 17 Thirteen months after stay, in October 2020, petitioner’s counsel reported that petitioner 18 had been rearrested on fresh federal charges for possessing ammunition (Dkt.

No. 143). 19 Petitioner’s counsel considered with his client whether to keep pursuing his petition. He 20 suggested that based on the sentencing guidelines any plea or conviction could, in his view, 21 “moot [the] habeas petition because [petitioner] w[ould] no longer be on parole” (Dkt. No. 145 22 at 2–3 & n.1). 23 Fifteen months after stay, in December 2020, the Court requested a fresh update (Dkt.

24 No. 147). Counsel reported that he “ha[d] had several Zoom conferences with [petitioner] 25 regarding his desire to pursue his habeas corpus petition and the impact of a federal conviction 26

on [its] viability” but that petitioner was not yet willing to dismiss (Dkt. No. 148 at 2–3). 27 However, at this time, counsel newly opined that petitioner’s “mental condition ha[d] 1 undersigned counsel [wa]s relaying to him” (id. at 3 (emphasis added)).

Counsel indicated an intent to appoint a guardian ad litem (ibid.). The Court was not told of any appointment. 3 Sixteen months after stay, in January 2021, counsel reported that “in light of Mr. Simon’s 4 inclination not to dismiss his habeas petition, undersigned counsel w[ould] concurrently 5 undertake the task of exhausting the state claims” (ibid.). This account was not satisfactory.

6 So, in February 2021, the Court asked why — despite a ten-month deadline to exhaust — 7 petitioner had not filed any state court action even within sixteen months (Dkt. No. 149). 8 Counsel stated an intent to file that month (Dkt. No. 150). This, too, was not satisfactory.

The 9 Court threatened dismissal if state charges were not filed that month, this in February 2021: 10 The problem here is that the petition has three claims, one of which 11 is unquestionably unexhausted. In September 2019, a prior order remitted all claims to state court, since the case for exhaustion of 12 the other two was a “close call” (Dkt. No. 137).

For over a year, petitioner’s counsel has been promising to meet with his client 13 because he thought his client did not want to pursue the habeas claim at all. The Court was careful not to bless any delay. Now, 14 after more than 16 months, petitioner’s counsel still has not filed any claims in state court and says he “targets” the end of February 15 to do so (Dkt.

No. 150). With great reluctance, the Court will keep the case in abeyance until the end of this month, and if the state 16 claims are not filed, the Court will dismiss. 17 (Dkt. No. 151 at 1–2 (emphasis added)). A petition was filed on February 26, 2021 in the 18 Superior Court of the State of California for the County of Alameda, Case No. HC145604-1 19 (see Dkt.

No. 153; cf. Dkt. No. 178-1). 20 Notably, during this sixteen month period, respondent did not move to lift stay and 21 dismiss the petition for failure to prosecute. The Court itself threatened this sanction, imposed 22 a drop-dead deadline, and petitioner met the deadline. 23 B. PROSECUTING IN STATE TRIAL COURT. 24 About two years were spent prosecuting in state court.

25 Ten months after filing the state-court petition, the Court directed petitioner’s counsel to 26 provide monthly status reports (Dkt. No. 164, 167). From July 2022 to June 2025, a total of 41 27 monthly reports were filed (e.g., Dkt. Nos. 169–205). 1 Thirteen months after filing, on December 21, 2022, petitioner’s parole in the criminal 2 conviction at issue in this petition was terminated (Dkt.

No. 218 at 2). Both sides now agree 3 that under state law the state court thereafter lacked jurisdiction to decide the merits, but 4 apparently neither side raised this issue at the time and the

state court proceeded. 5 And, twenty-six months after filing the state petition, on April 20, 2023, the state court 6 denied it on the merits (Dkt. No. 178 Exh. A).

7 C. DECISION NOT TO APPEAL IN STATE COURT. 8 Three months after the denial, in July 2023, counsel was finally paid for prosecuting the 9 petition in state court (Dkt. No. 179–181). He began “further investigation in light of the 10 Superior Court’s order” and started to draft an appeal (Dkt. No. 182; see Dkt. Nos. 182–83). 11 About six months after the denial (and ten months after parole terminated), in October 12 2023, Attorney Tamor discovered that the parole termination had deprived the state court of 13 jurisdiction (see Dkt.

Nos. 184, 201). This seemed to have been very similar to the issue that at 14 one time Attorney Tamor had anticipated might result when the new federal charge had been 15 brought (Dkt. No. 145 at 2–3 & n.1). 16 Attorney Tamor put aside any hope for state-court appeal (all agree this was proper). It 17 was not yet clear to Attorney Tamor, however, what implication this would have for the scope 18 of relief his client would still wish to seek, nor for the scope of relief possible in federal court.

19 3. STAY AND RETURN TO FEDERAL COURT (2023 TO 2025). 20 Thus began another two-year process — now of Attorney Tamor trying to communicate 21 the state court developments to petitioner to inform next steps (see Dkt. No. 201). 22 A. NOT IN CUSTODY. 23 (i) Seeking to Discuss Results and Goals. 24 For seven months, from October 2023 through April 2024, Attorney Tamor tried to reach 25 Simon.

He tried an average of three times a month for seven months (Dkt. Nos. 184–90). In 26 May 2024, Attorney Tamor finally reached Simon (Dkt. No. 191 at 3). A conflict emerged. 27 Simon “indicated his desire to continue to pursue his habeas corpus petition” (ibid.). Attorney 1 as to the federal one — and told his client he wished to show him written materials supporting 2 this result (presumably to be read by someone else to petitioner).

3 (ii) Seeking to Send Files re Mootness. 4 For four or five months, Attorney Tamor could not find a way to send these files to 5 Simon. He attempted to reach Simon in June 2024, but was rebuffed by a bad address (Dkt. 6 No. 192 at 3), then tried again in July 2024 but “was apparently unsuccessful” (we are not told 7 why) (Dkt. No. 193 at 3). He finally conferred with his client in August 2024 while planning 8 to re-send the materials in September 2024 (Dkt.

No. 194 at 3), before getting sick in 9 September 2024 while planning to send the materials in October 2024 (Dkt. No. 195). 10 Notably, respondent still did not move to dismiss for failure to prosecute. 11 B. IN CUSTODY. 12 On September 13, 2024, Simon was arrested on fresh state charges for domestic violence 13 and put into custody in Sacramento County Jail (Dkt.

No. 196 at 3). Attorney Tamor 14 discovered this shortly thereafter. 15 (i) Criminal Proceedings. 16 For about five months, from October 2024 through February 2025, Attorney Tamor did 17 not

seek to contact Simon while the criminal matter was adjudicated (Dkt. Nos. 197–200).

On 18 February 7, 2025, Simon was convicted. And, on March 13, 2025, Simon was transferred to 19 North Kern State Prison (Dkt. No. 203). 20 (ii) Transfers Prior to Motion to Withdraw. 21 For about four months, from March 2025 through June 2025, Attorney Tamor did try to 22 contact his client but could not pin him down. He tried state correctional records and friends 23 and family (Dkt.

Nos. 201–02). Then he hired a private investigator who located petitioner in 24 North Kern State Prison (Dkt. No. 203). At some point, Simon was transferred to California 25 State Prison Sacramento. And, in June 2025, Attorney Tamor requested time to meet him there 26 (Dkt. No. 205).

In July 2025, they met (Dkt. No. 207). Attorney Tamor confirmed Simon 27 wanted to proceed, meaning he believed there was now a robust conflict between attorney and 1 For three months, Attorney Tamor prepared to withdraw based on the belief the federal 2 court lacked jurisdiction and he could not pursue frivolous relief (Dkt. Nos. 208, 210). 3 (iii) Motion to Withdraw.

4 In September 2025, Attorney Tamor served his motion to withdraw upon his client (Dkt. 5 Nos. 211, 214). 6 For three months, from September 2025 through November 2025, Simon did not contact 7 his counsel nor the Court respecting the motion to withdraw (see *ibid.*).

However, in July and 8 again in September, petitioner submitted pro se a letter and then a notice and demand for jury 9 trial in another matter in our district court (Opp. 8). See *United States v. Simon*, No. 21-cr- 10 0352-JSW, Dkt. Nos. 112 & 113 (N.D. Cal. filed July 22 & Sept. 29, 2021). Our record tells 11 us little about these submissions, such as whether they were made by petitioner himself or with 12 assistance from someone else, or why.

13 Notably, respondent did not move to terminate the action for lack of jurisdiction. 14 The undersigned called a status conference to sort things out. 15 * * * 16 On November 13, 2025, we held the conference. At the hearing, counsel for respondent, 17 Attorney Swanson, stepped forward to say that there was a basis for jurisdiction — though 18 respondent believed the petition should be dismissed for lack of prosecution anyway (see Dkt.

19 No. 217). After the hearing, Attorney Tamor agreed there was a jurisdictional basis for 20 proceeding and withdrew his motion to withdraw (see Dkt. Nos. 218, 219). 21 Now, respondent moves to dismiss for failure to prosecute. This order follows full 22 briefing and argument. 23 ANALYSIS 24 Under Rule 41(b), a district court may dismiss an action if its proponent fails to comply 25 with court orders or fails to prosecute without unreasonable delay.

Nealey v. Transportacion 26 Maritima Mexicana, S.A., 662 F.2d 1275, 1280 (9th Cir. 1980). When considering dismissal, 27 the Court must weigh the following factors: (1) the public's 1

defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. 3 *Pagtalunan v. Galaza*, 291 F.3d 639, 641 (9th Cir. 2002). 4 1. THE PUBLIC’S INTEREST IN EXPEDITIOUS RESOLUTION? 5 “The public’s interest in expeditious resolution of litigation always favors dismissal.” *Id.* 6 at 642 (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)).

Here, both 7 sides agree it does here (Reply 3 (citing Opp. 15)). 8 2. THE COURT’S NEED TO MANAGE ITS DOCKET? 9 “The trial judge is in the best position to determine whether the delay in a particular case 10 interferes with docket management and the public interest.” *Id.* at 642. 11 Rarely has the docket in this action suffered from non-compliance — a more significant 12 and time-consuming problem than delay alone.

Yes, when the Court imposed the stay and 13 ordered that petitioner complete a petition in state court in ten months, petitioner did not abide. 14 But respondent did not bring this to the Court’s immediate attention nor seek dismissal. And, 15 as soon as the Court threatened such a result through a fresh order, petitioner complied. 16 This petition has, however, suffered from successive delays. “In our judicial system, 17 many delays are of an acceptable duration; others, though lengthy, may be unavoidable.

18 Where these exist, there is no basis for a dismissal.” *Nealey*, 662 F.2d at 1280. Here, not all 19 the delay was unavoidable, but much of it was understandable given the exceptional 20 confluence of unusual circumstances, limited petitioner competence, and conflict between 21 petitioner and counselor. 22 Much of the delay coincided with a global pandemic.

Some coincided with active 23 proceedings in two fresh criminal matters, too, though this was less unusual. More 24 importantly, all this delay coincided with petitioner confronting these challenges with below- 25 average capacity. Recall that earlier in this action, evidentiary findings established that 26 petitioner had been entitled to equitable tolling at the time of filing his petition because of such 27 limitations.

In the present motion, respondent presents no reason to discount that such 1 causal chain leading to the recent delays (keeping in mind that in this posture it is respondent 2 who seeks extraordinary relief — to foreclose adjudication on the merits). Yes, petitioner has 3 been represented by counsel for all periods at issue. Yes, that ordinarily would have 4 disconnected the problem of mental competence from the problem of further delay in 5 prosecution — the purpose of the appointment.

But one more unusual circumstance coincided: 6 For much of the period at issue, petitioner’s counsel appeared in good faith to believe that the 7 benefits of pursuing relief and even the ability to pursue relief at all had changed so 8 dramatically that this required robust communication with the client and eventually required 9 even his withdrawal. This client-counselor conflict plausibly

thrust to the fore the problem of 10 mental competence given that the client became required to participate but apparently could 11 not.

Attorney Tamor now acknowledges that he was mistaken in his views, and that this 12 mistake compounded the delay. A court must be mindful if “the fault lies with the attorney 13 rather than the litigant.” *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). 14 The confluence of these three factors will rarely recur, if ever. Unsurprisingly, 15 respondent points to no situation where dismissal has been ever before considered in a situation 16 like ours.

This factor points against dismissal. 17 3. THE RISK OF PREJUDICE TO RESPONDENT? 18 “To prove prejudice, a [respondent] must establish that plaintiff’s actions impaired 19 [respondent]’s ability to proceed to [a merits disposition] or threatened to interfere with the 20 rightful decision of the case.” *Pagtalunan*, 291 F.3d at 642. Whether litigation pends for some 21 lengthy period is not the point; instead, what matters is whether the delay is both unreasonable 22 and results in some prejudice for respondent.

Ibid. 23 As above, much of the delay was reasonable under the unusual circumstances outlined. 24 So, much of the delay does not weigh much for this factor. That said, some delay was 25 unnecessary. And, while petitioner is right that respondent has not pointed to specific 26 evidentiary loss from any such delay (*Opp.* 15–16), petitioner is wrong that pointing to specific 27 loss is required: “Unnecessary delay inherently increases the risk that witnesses’ memories 1 however, can be further limited by ordering prompt adjudication on the merits — and the 2 district judge can weigh the risk that critical evidence was lost to any extent appropriate.

3 This factor points nowhere — it’s neutral. 4 4. THE AVAILABILITY OF LESS DRASTIC ALTERNATIVES? 5 This factor favors dismissal only if after unreasonable delay and failure to follow court 6 orders the Court raises alternatives to dismissal, considers those alternatives, but concludes 7 they cannot solve the problem of non-prosecution by any lesser sanction than dismissal 8 (whether because compliance is futile or because compliance has been ordered but then failed).

9 *Cf. Id.* at 643 & n.1 (discussing caselaw before and after *Yourish*, 191 F.3d at 990). 10 Here, the Court earlier warned petitioner to redouble efforts to prosecute by filing his 11 petition in state court within the month or face dismissal (*Dkt. No.* 151). Petitioner filed in 12 state court (*Dkt. No.* 153). When the Court imposed other orders, counsel complied.

At 13 present, there is no non-compliance. Compliance will not be futile. Now that counsel is back 14 on board, prompt prosecution is expected. 15 Indeed, as an alternative to dismissal, petitioner proposes that the Court order dispositive 16 briefing on a tight timeline with the evidentiary record as it stands today. This is a sensible 17 alternative. Indeed, at our hearing,

respondent lapsed into explaining the various reasons why 18 petitioner's merits positions were so poor.

If so, then explaining these merits fully should be a 19 sensible alternative pathway for respondent to reach the closure it seeks. 20 This factor points against dismissal. 21 5. THE PUBLIC POLICY FAVORING DISPOSITION OF CASES ON THEIR MERITS. 22 Because the alternative to dismissal is a merits decision, and because deciding actions on 23 their merits is always preferred, this factor points against dismissal.

24 * * * 25 "[D]ismissal is a harsh penalty and, therefore, it should only be imposed in extreme 26 circumstances." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). In *Pagtalunan*, 27 "[t]hree factors favor[ed] dismissal and two factors weigh[ed] against dismissal," making the] out on the second factor, this petition might go the way of *Pagtalunan*. But the rare confluence 2 of circumstances did occur, and respondent failed to address mental competence especially — 3 the motive force of this petition and its procedure, which under the circumstances especially of 4 attorney-client conflict may explain delay.

The Court declines to exercise its discretion to 5 dismiss the petition under Rule 41(b). 6 Note well that this order makes no renewed evidentiary finding as to petitioner's mental 7 capacity. To the extent petitioner's mental capacity becomes an issue on the merits of the 8 petition — for instance, as to whether there was good cause to excuse any procedural default in 9 the state court — this order should not be cited as a basis for finding that there was good 10 cause (or not).

This order has not found either way. Rather, this order sits in its own posture: 11 In this motion, respondent seeks extraordinary relief from having to face the petition at all. 12 The burden is different on the merits. This order takes no position on the merits. E 13 CONCLUSION 14 For the reasons above, the motion (Dkt. No. 220) is DENIED.

To limit prejudice to 3 15 respondent from any further delay, respondent SHALL bring a motion seeking to dispose of this 16 petition on the merits By NOON ON FEBRUARY 27, 2026. And, pursuant to petitioner's i 17 proposed alternative to dismissal in the opposition filed on this motion, that being to proceed to Z 18 the merits on the record as it stands (Opp.

17:23—18:4 ("This is an appropriate sanction...")), 19 this order finds that petitioner has WAIVED any further evidentiary development that would 20 delay respondent's ability to meet respondent's deadline or petitioner's ability to meet 21 petitioner's resulting briefing deadline. 22 IT IS SO ORDERED. 23 24 Dated: December 30, 2025. ls Pome 26 ~ ILLIAM ALSUP 27 UNITED STATES DISTRICT JUDGE 28