

HEATHER E. WILLIAMS, State Bar No. 122664
Federal Defender

JENNIFER MANN, State Bar No. 215737

Assistant Federal Defender

ALYSSA MACK, NY State Bar No. 4982294

Assistant Federal Defender

801 I Street, 3rd Floor

Sacramento, CA 95814

Telephone: (916) 498-6666

Facsimile: (916) 498-6656

E-mail: jennifer_mann@fd.org

Attorneys for Petitioner

ROBERT WESLEY COWAN

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ROBERT WESLEY COWAN, Petitioner, vs. RONALD DAVIS, Warden of San Quentin State Prison, Respondent.	Case No. 1:19-cv-00745-DAD <u>DEATH PENALTY CASE</u> PETITIONER'S MOTION FOR EQUITABLE TOLLING; DECLARATION OF COUNSEL Hearing: April 7, 2020¹
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Petitioner, ROBERT WESLEY COWAN, through undersigned counsel, hereby requests equitable tolling of the statute of limitations governing his petition for writ of habeas corpus. U.S.C. § 2244(d)(1). Pursuant to § 2244(d)(1), the limitations period for Mr. Cowan to file his petition for writ of habeas corpus expires on May 15, 2020. Mr. Cowan requests equitable tolling for ninety (90) days, to and including August 13, 2020. In support thereof, Mr. Cowan states:

¹ In accordance with this Court's Standing Order in Light of Ongoing Judicial Emergency in the Eastern District of California (Doc. 17), we are setting this matter for hearing with the understanding that the Court will decide the motion on the pleadings without argument.

I. Extraordinary Circumstances

A. COVID-19

On March 11, 2020, the World Health Organization declared a global pandemic. The outbreak relates to the novel coronavirus, or COVID-19. COVID-19 is a highly contagious respiratory illness that causes fever, cough and shortness of breath. See Centers for Disease Control and Prevention (CDC), Coronavirus Disease 2019 (COVID-19), https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Ftransmission.html

The illness is transmitted from person to person through respiratory droplets when an infected person coughs or sneezes. *Ibid.* According to Johns Hopkins University, as of March 16, 2020, there were 179,029 confirmed cases in the world, with 7,057 deaths. <https://coronavirus.jhu.edu/> As of March 16, 2020, there are 3,813 cases in the United States, with 69 deaths. <https://myemail.constantcontact.com/COVID-19-Updates---March-16.html?soid=1107826135286&aid=UK6Pep7xzYA> According to the California Department of Public Health, there are 335 cases in California with six deaths. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx> According to Peter Beilenson, Sacramento County health services director, 81% of all cases are mild or asymptomatic. This means that someone who has no symptoms may have the virus and may infect others. <https://www.sacbee.com/news/local/article241167901.html>

In response to the pandemic, the Governor of California declared a state of emergency on March 4, 2020. <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> The President of the United States declared a state of emergency on March 13, 2020.

1 <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency->
2 [concerning-novel-coronavirus-disease-covid-19-outbreak/](https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/)

3 The CDC has declared that the United States is experiencing ongoing community
4 transmission of the disease. The CDC recommends that older adults and people of any age with
5 serious chronic medical conditions should consider postponing nonessential travel.

6 <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

7
8 On March 13, 2020, most the school districts in the Sacramento area suspended classes.

9 <https://www.sacbee.com/news/local/education/article241179826.html>

10 B. Circumstances Particular to Mr. Cowan's Case

11 As set forth in the attached declaration, there are circumstances relevant to Mr. Cowan's
12 case that, in light of the pandemic, that are extraordinary and prevent him from timely filing his
13 petition. The Federal Defender has assigned a team of attorneys, investigators and paralegals to
14 represent Mr. Cowan. On the team, we have one person who is over age 70. That team member
15 is an investigator. We have four members whose children are home from school because their
16 school districts have cancelled classes. We have one team member who has a child with a
17 compromised immune system.

18
19 We have been diligently working on Mr. Cowan's case. We have identified potentially
20 meritorious claims that require additional investigation. At least one of those claims requires the
21 assistance of an expert.

22
23 There is additional work left to do. Our investigators must interview witnesses, both in
24 California and out-of-state. Because of the age of this case (the charged offenses took place in
25 1984), most of the witnesses are elderly. Our client is 71 years old. Because of the extremely
26 contagious nature of the illness, we are not visiting our client. Further, we are heeding the advice
27 of the CDC and suspending all travel related to the case.

1 The Federal Defender's Office today implemented mandatory telework for all employees.
2 While the attorneys will be able to continue working remotely, the investigators and paralegals
3 will not be able to accomplish necessary tasks, such as interviewing witnesses and collecting
4 records. The Federal Defender does not have enough laptops to assign to each employee; as of
5 now, only attorneys are assigned laptops.
6

7 Finally, we have retained an expert to assist us in developing a claim. We retained that
8 expert in February. Subsequently, the expert had to travel to Europe to settle the estate of a
9 family member. That expert is still in Europe and is unsure when he will return to the United
10 States. In order to form his opinion, the expert has requested that we arrange an in-person visit
11 with Mr. Cowan.

12 II. Equitable Tolling Is Justified in These Circumstances

13 The statute of limitations in § 2244(d)(1) may be equitably tolled for extraordinary
14 circumstances that prevent a diligent petitioner from timely filing. *Holland v. Florida*, 560 U.S.
15 631, 649 (2010). As described above and in the attached declaration, the global COVID-19
16 pandemic presents such extraordinary circumstances.
17

18 In order to protect Mr. Cowan's statutory right to assistance of counsel to prepare his
19 federal petition for writ of habeas corpus, we seek ninety (90) days of equitable tolling. We have
20 no idea what the state of the pandemic will be in August, but we are certain that we are unable to
21 carry out our responsibilities to Mr. Cowan and file a federal petition by May 15, 2020.
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23 Undersigned counsel contacted Deputy Attorney General Lewis Martinez, counsel for
24 Respondent, by telephone on this day to ask whether Respondent would oppose this motion. Mr.
25 Martinez was consulting with his supervisor and was unable to take a position before Petitioner
26 filed this motion.
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1 WHEREFORE, for the grounds and reasons stated herein and in the attached declaration
2 of counsel, we request that the Court enter the attached proposed order granting ninety (90) days
3 of equitable tolling, to and including August 13, 2020.
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5 DATED: March 16, 2020

Respectfully submitted,

6 HEATHER E. WILLIAMS
7 Federal Defender

8 /s/ Jennifer Mann
9 JENNIFER MANN
Assistant Federal Defender

10 /s/ Alyssa Mack
11 ALYSSA MACK
Assistant Federal Defender

12 Attorneys for Petitioner
13 ROBERT WESLEY COWAN
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DECLARATION OF JENNIFER MANN

I, Jennifer Mann, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am employed by the Federal Defender for the Eastern District of California Capital Habeas Unit. Along with Assistant Federal Defender Alyssa Mack, I represent Robert Wesley Cowan in these habeas corpus proceedings. This declaration sets forth the circumstances justifying equitable tolling of Mr. Cowan's 28 U.S.C. § 2244(d)(1) statute of limitations, which expires of May 15, 2020.
2. As discussed in the Motion, we are experiencing a global pandemic. According to the World Health Organization, novel coronavirus, or COVID-19, began in China in December 2019. Since then, it has spread to 148 countries and led to 6,610 deaths. The United States to date has 3,813 cases.
3. COVID-19 is highly contagious.
4. In response to the pandemic, the Centers for Disease Control (CDC) recommends that persons at high risk of contracting the disease (the elderly and those with serious medical conditions), postpone travel until the pandemic has passed.
5. The Federal Defender has assigned a team of attorneys, investigators and paralegals to investigate and prepare Mr. Cowan's federal habeas corpus petition. Such investigation involves multiple in-person visits with our client, in-person witness interviews and extensive travel. On our team, we have one person who is over age 70. That team member is an investigator who is required to travel. We have four team members whose children are home from school because their school districts have cancelled classes. We have one team member who has a child with a compromised immune system.
6. On March 16, 2020, the Federal Defender instituted mandatory telework for all

employees. All staff must work from home. We have been directed to avoid unnecessary in-person meetings, including client visits.

7. We have been working diligently on Mr. Cowan's case. We have interviewed multiple witnesses in California and in other states, met with Mr. Cowan many times, reviewed the existing files and obtained documents that have not previously been obtained. We are investigating those claims and preparing to present them in this Court and to exhaust any new claims in state court.
8. Our investigation has revealed potentially meritorious claims that have not been raised on Mr. Cowan's behalf. Our investigation into those claims is ongoing. At least one such claim requires the assistance of an expert witness. That expert told us that he needs an in-person meeting with Mr. Cowan to formulate his opinion.
9. The expert we retained in February had to go to Europe to settle an estate for a family member. We contacted him today. He is still there and is unsure when he may return.
10. We have identified a large number of witnesses whom we need to interview, both in California and in other states. Because of the pandemic, we have suspended travel and in-person witness interviews. Because of the age of this case (the offenses occurred in 1984), most of the witnesses we must interview are elderly. Our client is 71 years old. We do not want to put him or witnesses at risk by conducting in-person interviews. Our client will be unable to speak with us by telephone because of the order directing us to vacate the office and work from home. We will continue to work on Mr. Cowan's case from home as best we can.
11. In the exercise of my reasonable professional judgment, the extraordinary circumstance of the COVID-19 global pandemic will prevent us from providing Mr. Cowan with effective assistance of counsel unless his statute of limitations is equitably tolled to allow

1 us to complete our investigation.

2 Signed under penalty of perjury on this 16th day of March, 2020

3 /s/ Jennifer Mann
4 JENNIFER MANN

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