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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CORTE DEON BANKS,  
Petitioner,  
v.  
STEWARD SHERMAN, Warden,  
Respondent.

Case No. CV 18-9468-SP  
MEMORANDUM OPINION AND  
ORDER GRANTING MOTION TO  
DISMISS

I.

INTRODUCTION

On November 7, 2018, petitioner Corte Deon Banks filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”). Petitioner seeks to challenge his 2013 conviction and sentence for second degree robbery in the Los Angeles County Superior Court on the basis that his Sixth Amendment rights were violated when the trial court determined the facts of petitioner’s prior convictions instead of a jury. Petitioner cites two cases in support of his claim, *People v. Gallardo*, 4 Cal. 5th 120, 226 Cal. Rptr. 3d 379, 407 P.3d 55 (2017), and *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438

1 (2013).

2 On January 18, 2019, respondent filed a Motion to Dismiss the Petition  
3 (“MTD”), arguing the Petition is barred by the one-year statute of limitations set  
4 forth in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28  
5 U.S.C. § 2244(d)(1). Petitioner filed a Motion to Not Dismiss on February 11,  
6 2019, which the court understands to be petitioner’s Opposition (“Opp.”).

7 For the reasons discussed below, this action is untimely. The Motion to  
8 Dismiss will therefore be granted and this action dismissed with prejudice.

9 **II.**

10 **PROCEEDINGS**

11 On September 10, 2013, petitioner pled nolo contendere to one count of  
12 second degree robbery (Cal. Penal Code § 211) in Los Angeles County Superior  
13 Court and was sentenced to eleven years in state prison. Lodg. Doc. 1.  
14 Petitioner’s sentence included a five-year enhancement under California Penal  
15 Code § 667(a)(1) for having a prior serious felony conviction. Lodg. Doc. 6 at 28.<sup>1</sup>  
16 In addition to pleading no contest to the robbery in this case, petitioner admitted to  
17 a prior strike conviction (which doubled his sentence) and another prior serious  
18 felony conviction (which gave him the five-year enhancement). *Id.* at 22-24.

19 There is no record of petitioner filing an appeal. *See* Lodg. Doc. 1; MTD at  
20 1. Although petitioner states he did not file any state habeas petitions and pursued  
21 his direct appeal with the California Court of Appeal and the California Supreme  
22 Court, the opposite appears to be true – that petitioner did not appeal the trial  
23 court’s judgment, but did pursue habeas relief in state court. Indeed, the case  
24 numbers petitioner cites for his purported appeal to the California Court of Appeal  
25 and California Supreme Court are those of his habeas petitions to those courts. *See*

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27 <sup>1</sup> Citations to page numbers in the lodged documents and in the Petition refer  
28 to those designated by CM/ECF.

1 Pet. at 2-3; Lodg. Docs. 4, 6.

2 Petitioner filed his first state habeas petition in the Los Angeles County  
3 Superior Court on February 22, 2018, claiming the trial court violated his rights by  
4 not having a jury determine his prior strike convictions. Lodg. Doc. 2. The court  
5 denied the petition on April 6, 2018 on the ground that petitioner’s claim lacked  
6 merit because petitioner had admitted the strike prior allegations during the course  
7 of a negotiated disposition. Lodg. Doc. 3.

8 Petitioner then filed a habeas petition in the California Court of Appeal on  
9 August 31, 2018, presenting the same argument raised below. Lodg. Doc. 4. The  
10 Court of Appeal summarily denied the petition on September 7, 2018. Lodg. Doc.  
11 5.

12 On September 19, 2018, petitioner presented the same argument in a petition  
13 for review of his habeas denials filed in the California Supreme Court. Lodg. Doc.  
14 6. The California Supreme Court summarily denied the petition for review on  
15 October 24, 2018. Lodg. Doc. 7.

### 16 III.

#### 17 DISCUSSION

##### 18 A. The Petition Is Untimely Under AEDPA’s One-Year Statute of 19 Limitations

20 AEDPA mandates that a “1-year period of limitation shall apply to an  
21 application for a writ of habeas corpus by a person in custody pursuant to the  
22 judgment of a State court.” 28 U.S.C. § 2244(d)(1); *see also Lawrence v. Florida*,  
23 549 U.S. 327, 329, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); *Mardesich v. Cate*,  
24 668 F.3d 1164, 1171 (9th Cir. 2012). After the one-year limitation period expires,  
25 the prisoner’s “ability to challenge the lawfulness of [his] incarceration is  
26 permanently foreclosed.” *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002).

27 To assess whether a petition is timely filed under AEDPA, it is essential to  
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1 determine when AEDPA’s limitation period starts and ends. By statute, AEDPA’s  
2 limitation period begins to run from the latest of four possible events:

3 (A) the date on which the judgment became final by the conclusion  
4 of direct review or the expiration of the time for seeking such review;

5 (B) the date on which the impediment to filing an application  
6 created by State action in violation of the Constitution or laws of the  
7 United States is removed, if the applicant was prevented from filing  
8 by such State action;

9 (C) the date on which the constitutional right asserted was initially  
10 recognized by the Supreme Court, if the right has been newly  
11 recognized by the Supreme Court and made retroactively applicable to  
12 cases on collateral review; or

13 (D) the date on which the factual predicate of the claim or claims  
14 presented could have been discovered through the exercise of due  
15 diligence.

16 28 U.S.C. § 2244(d)(1). Ordinarily, the starting date of the limitation period is the  
17 date on which the judgment becomes final after the conclusion of direct review or  
18 the expiration of the time allotted for seeking direct review. *See Wixom v.*  
19 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

20 AEDPA may also allow for statutory tolling or equitable tolling. *Jorss v.*  
21 *Gomez*, 311 F.3d 1189, 1192 (9th Cir. 2002). But “a court must first determine  
22 whether a petition was untimely under the statute itself before it considers whether  
23 equitable [or statutory] tolling should be applied.” *Id.*

24 **1. The Petition Is Untimely Under § 2244(d)(1)(A)**

25 Here, petitioner did not seek direct review of the trial court’s judgment in the  
26 California Court of Appeal. The judgment thus became final sixty days later, on  
27 November 9, 2013, when petitioner’s time to file an appeal expired. *See Cal. R.*  
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1 Ct. 8.308(a); *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d  
2 236 (1994) (“A state conviction and sentence become final for purposes of  
3 retroactivity analysis when the availability of direct appeal to the state courts has  
4 been exhausted and the time for filing a petition for writ of certiorari has elapsed or  
5 a timely filed petition has been finally denied.”). As such, using the date the  
6 judgment became final as the start date, the AEDPA limitation period expired one  
7 year after that, on November 9, 2014.

## 8 **2. Petitioner Is Not Entitled to a Later Start Date**

9 Petitioner argues he is entitled to a later limitation period start date due to  
10 the California Supreme Court’s 2017 decision in *Gallardo*, 4 Cal. 5th 120, and  
11 possibly also due to the United States Supreme Court’s 2013 decision in  
12 *Descamps*, 570 U.S. 254. Opp. at 1. Under 28 U.S.C. § 2244(d)(1)(C), the one-  
13 year limitation period may run from “the date on which the constitutional right  
14 asserted was initially recognized by the Supreme Court, if the right has been newly  
15 recognized by the Supreme Court and made retroactively applicable to cases on  
16 collateral review.” 28 U.S.C. § 2244(d)(1)(C). Neither *Gallardo* nor *Descamps*  
17 qualifies petitioner for a later start date under § 2244(d)(1)(C).

18 Petitioner primarily relies on *Gallardo*, but it was decided by the California  
19 Supreme Court rather than the United States Supreme Court. The California  
20 Supreme Court cannot recognize a new federal constitutional right that alters the  
21 AEDPA limitation period; United States Supreme Court recognition is required for  
22 § 2244(d)(1)(C) to apply by its very terms. *See Preston v. Gibson*, 234 F.3d 1118,  
23 1120 (10th Cir. 2000); *Shavers v. Fox*, 2017 WL 467841, at \*4 (N.D. Cal. Feb. 3,  
24 2017) (“only the United States Supreme Court can announce a ‘new rule’ under 28  
25 U.S.C. § 2244(d)(1)(C)”).

26 *Descamps* is a United States Supreme Court decision, but it also does not  
27 help petitioner. *Descamps* addressed the question of when and how a prior state  
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1 conviction can trigger a harsher sentence under the Armed Career Criminal Act  
2 (“ACCA”), 18 U.S.C. § 922(e), and holds that “sentencing courts may not apply  
3 the modified categorical approach” to determine whether the prior conviction  
4 qualifies as a predicate offense under the ACCA when the prior crime “has a  
5 single, indivisible set of elements.” 570 U.S. at 258. Thus, *Descamps* involves  
6 statutory interpretation; it did not establish a new rule of *constitutional* law. *See*  
7 *Ezell v. U.S.*, 778 F.3d 762, 766 (9th Cir. 2015) (“The Supreme Court did not  
8 announce a new rule in *Descamps*. . . . Rather, as both the Supreme Court and we  
9 have recognized, *Descamps* clarified application of the modified categorical  
10 approach in light of existing precedent. . . . But even if the Supreme Court did  
11 announce a new rule in *Descamps*, that rule is not constitutional.”). Moreover,  
12 even if *Descamps* could trigger a new start date under § 2244(d)(1)(C), it would  
13 not help petitioner here since *Descamps* was decided on June 20, 2013, before the  
14 date petitioner pled no contest and was sentenced, and certainly before his  
15 judgment became final.

16 Accordingly, under AEDPA, the limitation period started running when  
17 judgment became final and expired one year later, on November 9, 2014.  
18 Petitioner did not initiate this action until November 7, 2018, nearly four years  
19 after the limitation period expired. Consequently, the Petition is untimely absent  
20 sufficient statutory or equitable tolling.

21 **B. Petitioner Is Not Entitled to Statutory Tolling**

22 Statutory tolling is available under AEDPA during the time “a properly filed  
23 application for State post-conviction or other collateral review with respect to the  
24 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *accord Evans v.*  
25 *Chavis*, 546 U.S. 189, 191-92, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); *Patterson*  
26 *v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001). But “in order to qualify for  
27 statutory tolling during the time the petitioner is pursuing collateral review in the  
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1 state courts, the prisoner’s state habeas petition must be constructively filed *before*,  
2 not after, the expiration of AEDPA’s one-year limitations period.” *Johnson v.*  
3 *Lewis*, 310 F. Supp. 2d 1121, 1125 (C.D. Cal. 2004); *see also Laws v. Lamarque*,  
4 351 F.3d 919, 922 (9th Cir. 2003) (where petitioner does not file his first state  
5 petition until after the eligibility for filing a federal habeas petition has lapsed,  
6 “statutory tolling cannot save his claim”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th  
7 Cir. 2001) (petitioner not entitled to statutory tolling for state habeas petition filed  
8 “well after the AEDPA statute of limitations ended”).

9 Here, petitioner filed his first state habeas petition on February 22, 2018,  
10 more than three years after the AEDPA limitation period expired. Because  
11 petitioner’s state habeas petitions were filed well after the limitation period  
12 expired, petitioner is not entitled to any statutory tolling.

13 **C. Petitioner Is Not Entitled to Equitable Tolling**

14 The United States Supreme Court has decided that “§ 2244(d) is subject to  
15 equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645, 130  
16 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Tolling is appropriate when “extraordinary  
17 circumstances” beyond a petitioner’s control make it impossible to file a petition  
18 on time. *Id.* at 649; *see Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)  
19 (“[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very  
20 high, lest the exceptions swallow the rule”) (citation and quotations omitted and  
21 brackets in original). “When external forces, rather than a petitioner’s lack of  
22 diligence, account for the failure to file a timely claim, equitable tolling of the  
23 statute of limitations may be appropriate.” *Miles v. Prunty*, 187 F.3d 1104, 1107  
24 (9th Cir. 1999).

25 A petitioner seeking equitable tolling must establish two elements: “(1) that  
26 he has been pursuing his rights diligently, and (2) that some extraordinary  
27 circumstance stood in his way.” *Pace v. DiGuliamo*, 544 U.S. 408, 418, 125 S. Ct.  
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1 1807, 161 L. Ed. 2d. 669 (2005). Petitioner must also establish a “causal  
2 connection” between the extraordinary circumstance and his failure to file a timely  
3 petition. *See Bryant v. Arizona Att’y Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007).

4 Petitioner here argues he is entitled to equitable tolling “in the interest of  
5 justice” due to the *Gallardo* decision. Opp. at 2. He states he has been pursuing  
6 his case diligently, at least since *Gallardo*. Even assuming that is true, petitioner  
7 still must show an extraordinary circumstance caused his failure to file earlier. He  
8 shows no such thing here.

9 Petitioner is operating from the premise that *Gallardo* applies to him and  
10 entitles him to relief where none previously was available, but that simply is not  
11 correct. In *Gallardo*, the California Supreme Court held that a trial court may not  
12 engage in independent fact-finding as to disputed facts about a defendant’s prior  
13 conviction, and that such an inquiry violates a defendant’s Sixth Amendment right  
14 to a jury trial. 4 Cal. 5th at 138. The trial court in that case reviewed the  
15 preliminary hearing transcript from the defendant’s prior assault case to determine  
16 the defendant used a deadly weapon while committing the assault. *Id.* at 126. That  
17 determination qualified the assault as a serious felony under the Three Strikes law,  
18 which then was used to enhance the defendant’s sentence. *Id.* The California  
19 Supreme Court held that the trial court’s factfinding violated the defendant’s Sixth  
20 Amendment right to a jury trial because the relevant facts about defendant’s prior  
21 assault “were neither found by a jury nor admitted by defendant when entering her  
22 guilty plea . . . .” *Id.* at 137.

23 *Gallardo* is inapposite here. At his sentencing hearing, petitioner here pled  
24 no contest to the charge of second-degree robbery, and admitted two prior strike  
25 convictions for attempted robbery (Cal. Penal Code §§ 664, 211) and robbery (Cal.  
26 Penal Code § 211). Lodg. Doc. 6 at 14-15, 22-23. Based on petitioner’s  
27 admissions, he was sentenced to six years for second degree robbery (his three-



1 year term was doubled based on his first strike conviction) plus five years for his  
2 second strike conviction, for a total sentence of eleven years in prison. *Id.* at 24.  
3 Thus, unlike in *Gallardo*, the trial court here did not engage in any fact-finding,  
4 and simply enhanced petitioner’s sentence based on his own admissions. The  
5 California Supreme Court did not question a sentencing court’s ability to rely on  
6 facts admitted by the defendant as part of a guilty plea. *Gallardo*, 4 Cal. 5th at 124  
7 (“While a sentencing court is permitted to identify those facts that were already  
8 necessarily found by a prior jury in rendering a guilty verdict or admitted by the  
9 defendant in entering a guilty plea, the court may not rely on its own independent  
10 review of record evidence to determine what conduct “realistically” led to the  
11 defendant’s conviction.”). In short, even assuming a decision by the California  
12 Supreme Court could in some case be considered an extraordinary circumstance  
13 warranting equitable tolling, it is not here since *Gallardo* is inapplicable to  
14 petitioner.

15 Nor does petitioner identify any other extraordinary circumstance. To the  
16 extent petitioner contends his status as a layman unfamiliar with “how habeas  
17 corpus works” entitles him to equitable tolling, petitioner still fails to meet his  
18 burden. *See* Pet. at 15, 48. Ignorance of the law does not justify equitable tolling.  
19 *See Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se petitioner’s  
20 lack of legal sophistication is not, by itself, an extraordinary circumstance  
21 warranting equitable tolling”).

22 Because petitioner has failed to show there was an extraordinary  
23 circumstance that caused his failure to timely file, petitioner is not entitled to  
24 equitable tolling. Accordingly, the AEDPA limitation period expired on  
25 November 9, 2014, making the instant Petition filed on November 7, 2018  
26 untimely.

27 **IV.**

1 **CONCLUSION**

2 IT IS THEREFORE ORDERED that respondent's Motion to Dismiss  
3 (docket no. 11) is GRANTED, petitioner's Motion to Not Dismiss (docket no. 14)  
4 is consequently DENIED, and Judgment shall be entered denying the Petition and  
5 dismissing this action with prejudice.

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8 DATED: September 30, 2019



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10 SHERI PYM  
11 United States Magistrate Judge  
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