

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER WILLIAMS,

1:10-cv-00410-DLB (HC)

Petitioner,

ORDER GRANTING RESPONDENT’S  
MOTION TO DISMISS, DISMISSING  
PETITION FOR WRIT OF HABEAS CORPUS  
WITH PREJUDICE, DIRECTING CLERK OF  
COURT TO ENTER JUDGMENT, AND  
DECLINING TO ISSUE CERTIFICATE OF  
APPEALABILITY

v.

RICK HILL, Warden

Respondent.

/ [Doc. 16]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge. Local Rule 305(b).

BACKGROUND<sup>1</sup>

Petitioner pled no contest to transportation of cocaine, possession of cocaine base for sale, leaving the scene of an injury accident, and felony evasion of a peace officer, with great bodily injury enhancements. A jury found Petitioner guilty of second degree murder and vehicular manslaughter. On August 10, 2005, Petitioner was sentenced to an indeterminate term of fifteen years to life plus a consecutive determinate term of sixteen months.

On January 4, 2007, the California Court of Appeal, Fifth Appellate District, affirmed the judgment. The California Supreme Court denied review on April 11, 2007.

---

<sup>1</sup> This information is derived from the state court documents lodged by Respondent which are not subject to dispute.

1 Petitioner filed six pro se state post-conviction collateral petitions.<sup>2</sup> The first petition was  
2 filed on August 31, 2006, in the Fresno County Superior Court. The petition was denied on  
3 September 22, 2006.

4 The second petition was filed on January 15, 2007 in the California Court of Appeal,  
5 Fifth Appellate District. The petition was denied on April 9, 2007.

6 The third petition was filed in the California Supreme Court on April 18, 2007. The  
7 petition was denied on June 13, 2007.

8 The fourth petition for writ of habeas corpus was filed on September 12, 2008, in the  
9 Fresno County Superior Court. The petition was denied as untimely on October 27, 2008.

10 The fifth petition for writ of habeas corpus was filed on February 15, 2009, in the  
11 California Court of Appeal, Fifth Appellate District. The petition was denied on March 5, 2009.

12 The sixth petition for writ of habeas corpus was filed in the California Supreme Court on  
13 April 9, 2009. On September 9, 2009, the petition was denied with a citation to In re Clark, 5  
14 Cal.4th 750 (1993).

15 Petitioner filed the instant petition for writ of habeas corpus on March 4, 2010.  
16 Respondent filed a motion to dismiss on August 17, 2010. Petitioner did not file an opposition.

### 17 DISCUSSION

#### 18 A. Procedural Grounds for Motion to Dismiss

19 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
20 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not  
21 entitled to relief in the district court . . .” Rule 4 of the Rules Governing Section 2254 Cases.

22 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer  
23 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of  
24 the state’s procedural rules. See e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990)  
25 (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White  
26 v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review  
27

---

28 <sup>2</sup> All filing dates set forth here reflect the benefit of the mailbox rule. See Rule 3(d) of the Federal Rules  
Governing Section 2254 Cases.

1 motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12  
2 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a  
3 response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F.  
4 Supp. at 1194 & n. 12.

5 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.  
6 2244(d)(1)'s one-year limitations period. Therefore, the Court will review Respondent's motion  
7 to dismiss pursuant to its authority under Rule 4.

8 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
10 of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
11 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
12 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118  
13 S.Ct. 586 (1997). The instant petition was filed on March 4, 2010, and thus, it is subject to the  
14 provisions of the AEDPA.

15 The AEDPA imposes a one year period of limitation on petitioners seeking to file a  
16 federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, Section 2244,  
17 subdivision (d) reads:

18 (1) A 1-year period of limitation shall apply to an application for a writ of  
19 habeas corpus by a person in custody pursuant to the judgment of a State court.  
The limitation period shall run from the latest of –

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

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

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

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

27 (2) The time during which a properly filed application for State post-  
28 conviction or other collateral review with respect to the pertinent judgment or  
claim is pending shall not be counted toward any period of limitation under this

1 subsection.

2 In most cases, the limitation period begins running on the date that the petitioner's direct  
3 review became final. Here, on January 4, 2007, the California Court of Appeal, affirmed the  
4 judgment. Petitioner filed a petition for review in the California Supreme Court which was  
5 denied on April 11, 2007. Thus, direct review became final on July 10, 2007, when the ninety-  
6 day period to file a petition for writ of certiorari in the United States Supreme Court expired.  
7 Therefore, the one year limitations period began on the following day, July 11, 2007, and absent  
8 tolling, was set to expire on July 10, 2008. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th  
9 Cir. 2001) (holding that Rule 6(a) of the Federal Rules of Civil Procedure governs the calculation  
10 of statutory tolling applicable to the one year limitations period.)

11 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

12 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed  
13 application for State post-conviction or other collateral review with respect to the pertinent  
14 judgment or claim is pending shall not be counted toward" the one year limitation period. 28  
15 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is  
16 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled  
17 during the intervals between one state court's disposition of a habeas petition and the filing of a  
18 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also  
19 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).  
20 Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2) if  
21 the state court explicitly states that the post-conviction petition was timely or was filed within a  
22 reasonable time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis,  
23 546 U.S. 189 (2006). Claims denied as untimely or determined by the federal courts to have been  
24 untimely in state court will not satisfy the requirements for statutory tolling. Id.

25 1. No Tolling While The First Through Third Petitions Were Pending in State Court

26 The first through third state petitions were filed and concluded prior to the  
27 commencement of the limitations period and therefore no tolling is available. More specifically,  
28 the first petition concluded on September 22, 2006, almost ten months prior to the

1 commencement of the limitations period. The second action concluded on April 9, 2007-three  
2 months before the statute of limitations commenced. The third action concluded on June 13,  
3 2007, nearly one month before the limitations period commenced. A collateral action filed prior  
4 to the effective date of the statute of limitations has no tolling consequence. Waldrip v. Hall, 548  
5 F.3d 729, 735 (9th Cir. 2008) (noting that although the filing of a state habeas petition “would  
6 otherwise have tolled the running of the federal limitations period, since it was denied before that  
7 period had started to run, it had no effect on the timeliness of the ultimate federal filing.”). Thus,  
8 there is no tolling of the limitations for the filing of the first through third petitions.

9 D. End of Limitations Period

10 As previously stated, the limitations period commenced on July 11, 2007. Because the  
11 first through third petitions were filed prior to the effective date of the limitations period, no  
12 tolling is available and the limitations period expired on July 10, 2008. Thus, the instant petition  
13 filed on March 4, 2010, is untimely.

14 E. No Tolling For Subsequent Petitions Filed After Expirations of Limitations Period

15 Petitioner filed his fourth state petition on September 12, 2008-over two months after the  
16 limitations period expired. Therefore, the filing of the fourth through sixth petitions after the  
17 expiration of the limitations period did not restart the clock at zero or revive it. Accordingly, the  
18 fourth through sixth state petitions do not extend the statute of limitations because they were both  
19 filed after it expired. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jiminez v. Rice,  
20 276 F.3d 478, 482 (9th Cir. 2001).

21 Moreover, the fourth and sixth state petitions were explicitly found untimely by the  
22 Fresno County Superior Court and the California Supreme Court, as they were denied with a  
23 citation to In re Clark, 5 Cal.4th 750, 765 (1993), and cannot toll the limitations period. See  
24 Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005) (finding that a petition denied as untimely  
25 is not properly filed and does not toll the limitations period). The fifth petition was denied  
26 without comment which is presumably denied for the same reason as the prior petition. Ylst v.  
27 Nunnemaker, 501 U.S. 797, 803 (1991) (“Where there has been one reasoned state judgment  
28 rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same

1 claim rest upon the same ground.”). Therefore, the fourth through sixth petitions were not  
2 “properly filed” within the meaning of section 2244(d)(2) and tolling is not available.

3 F. Equitable Tolling

4 The AEDPA’s limitations period is subject to equitable tolling if the petitioner  
5 demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
6 circumstance stood in his way.” Holland v. Florida, 130 S.Ct.2549, 2562 (2010); Pace v.  
7 DiGuglielmo, 544 U.S. 408, 418 (2005). Petitioner bears the burden of alleging facts that would  
8 give rise to tolling. Pace, 544 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton  
9 v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

10 Petitioner has not presented any basis to equitably toll the limitations period nor does the  
11 Court find a basis to do so. Accordingly, the instant petition is untimely and Respondent’s  
12 motion to dismiss must be granted.

13 F. Certificate of Appealability

14 When a district court denies a habeas petition on procedural grounds without reaching the  
15 underlying constitutional claims, the petitioner must show, in order to obtain a certificate of  
16 appealability: (1) that jurists of reason would find it debatable whether the petition stated a valid  
17 claim of a denial of a constitutional right; and (2) that jurists of reason would find it debatable  
18 whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473,  
19 484 (2000). While both showings must be made to obtain a certificate of appealability, “a court  
20 may find that it can dispose of the application in a fair and prompt manner if it proceeds first to  
21 resolve the issue whose answer is more apparent from the record and arguments.” Slack, 529  
22 U.S. at 485.

23 The Court finds that Petitioner has failed to make an adequate showing. The Court does  
24 not find that jurists of reason would not find it debatable whether the petition was properly  
25 dismissed with prejudice as untimely. Petitioner has not made the required substantial showing  
26 of the denial of a constitutional right.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ORDER

Based on the foregoing, it is HEREBY ORDERED that:

- 1. Respondent’s motion to dismiss the instant petition is GRANTED;
- 2. The instant petition for writ of habeas corpus is DISMISSED with prejudice; and
- 3. The Court declines to issue a Certificate of Appealability.

IT IS SO ORDERED.

**Dated: October 1, 2010**

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE