

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

KENNETH WAYNE LEIST,

1:11-cv-00194-SMS (HC)

Petitioner,

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

v.

R. GROUNDS,

Respondent.

/ [Doc. 11]

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

Petitioner pled nolo contendere to voluntary manslaughter with a firearm enhancement. On December 21, 2005, he was sentenced to a determinate state prison term of fifteen years. Petitioner did not appeal his sentence.

Petitioner subsequently filed three pro se state post-conviction collateral challenges. The first petition was filed on October 13, 2009, in the Kern County Superior Court. The petition was denied on December 23, 2009.

The second petition for writ of habeas corpus was filed on January 20, 2010, in the California Court of Appeal, Fifth Appellate District. The petition was denied on March 16, 2010.

1 ///

2 The third petition for writ of habeas corpus was filed on March 30, 2010, in the California  
3 Supreme Court. The petition was denied on November 10, 2010.

4 The instant petition for writ of habeas corpus was filed on December 15, 2010.

5 On April 12, 2011, Respondent filed the instant motion to dismiss. Petitioner filed an  
6 opposition on May 2, 2011, and Respondent filed a reply on May 6, 2011.

7 DISCUSSION

8 I. Procedural Grounds for Motion to Dismiss

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

12 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer  
13 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of  
14 the state’s procedural rules. See e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990)  
15 (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White  
16 v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review  
17 motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12  
18 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a  
19 response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F.  
20 Supp. at 1194 & n. 12.

21 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.  
22 2244(d)(1)'s one-year limitations period. Therefore, the Court will review Respondent’s motion  
23 to dismiss pursuant to its authority under Rule 4.

24 II. Limitation Period for Filing a Petition for Writ of Habeas Corpus

25 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
26 of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
27 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
28 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118

1 ///

2 S.Ct. 586 (1997). The instant petition was filed on December 15, 2010, and thus, it is subject to  
3 the provisions of the AEDPA.

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

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

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

11 (B) the date on which the impediment to filing an application created by  
12 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;

13 (C) the date on which the constitutional right asserted was initially recognized  
14 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

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

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

19 In most cases, the limitation period begins running on the date that the petitioner's direct  
20 review became final. Here, on December 21, 2005, Petitioner was sentenced to state prison.  
21 Petitioner did not file a direct appeal. Consequently, Petitioner's conviction became final sixty  
22 days after he was sentenced when the time for filing a direct appeal expired, i.e. February 19,  
23 2006. Cal. Rules of Court, rule 8.302(a) (notice of appeal must be filed within 60 days after the  
24 rendition of judgment); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D. Cal. 2001) (where  
25 petitioner did not appeal her conviction to California Court of Appeal, conviction became final  
26 60 days after she was sentenced). The one-year limitations period commenced running the  
27 following day—February 20, 2006. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)  
28 (citing Fed. R. Civ. P. 6(a)). Thus, the last day to file a federal petition was on February 19,

1 2007, absent any time for tolling.

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

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

16 As just stated, the statute of limitations commenced running on February 20, 2006, and  
17 expired on February 19, 2007. Petitioner did not file any state collateral actions within the  
18 limitations period. Therefore, because the federal petition was not filed until December 15,  
19 2010, well over three years after the limitations period expired on February 19, 2007, it is  
20 untimely under § 2244(d).

21 Petitioner’s first state petition was not filed until October 13, 2009, over two years after  
22 the limitations period expired. Thus, the filing of Petitioner’s first through third petitions filed  
23 after the expiration of the limitations period did not restart the clock at zero or otherwise save his  
24 claims from being time-barred. This is so because once the limitations period expires, any  
25 subsequent state petitions do not revive it. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.  
26 2003); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

27 Petitioner contends that he is entitled to a later start of the limitations period because the  
28 merits of his petition warrant review of the petition despite any untimeliness and his conviction

1 did

2 ///

3 not become final until 2007 three years after the decision in Blakely v. Washington, 542 U.S. 296  
4 (2004).

5 The merits of the federal petition are not relevant to whether extraordinary circumstances  
6 exist justifying the late filing of the habeas petition; a showing of extraordinary circumstances  
7 related to filing of the petition itself is required. Helton v. Secretary for Dept. of Corrections,  
8 259 F.3d 1310, 1314-15 (11th Cir. 2001); Escamilla v. Jungwirth, 426 F.3d 868 (7th Cir.2005)  
9 (Even "[p]risoners claiming to be innocent . . . must meet the statutory requirement of timely  
10 action.").

11 Contrary to Petitioner's claim, the Blakely decision has no affect on the finality of  
12 Petitioner's conviction. The finality of direct review is not dependent on when the United States  
13 Supreme Court decides a different case. See 28 U.S.C. § 2244(d)(1)(A). As explained above,  
14 Petitioner's direct review became final sixty days after he was sentenced when the time for filing  
15 a direct appeal expired, i.e. February 19, 2006. Cal. Rules of Court, rule 8.308(a) (notice of  
16 appeal must be filed within 60 days after the rendition of judgment); Lewis v. Mitchell, 173  
17 F.Supp.2d 1057, 1060 (C.D. Cal. 2001). Therefore, Petitioner had until February 19, 2007, to  
18 file his federal petition.

19 Petitioner contends that he is entitled to a later trigger date based on the Supreme Court's  
20 decision in Cunningham v. California, 549 U.S. 270 (2007). 28 U.S.C. § 2244(d)(1)(C) allows  
21 for commencement of the limitations period based on the date on which a constitutional right is  
22 recognized and made retroactively applicable to cases on collateral review. Cunningham did not  
23 announce a new rule of constitutional law. Butler v. Curry, 528 F.3d 624, 639 (9th Cir. 2008).  
24 In Butler, the Ninth Circuit found that the Cunningham decision merely applied the rule  
25 announced in Blakely:

26 *Apprendi [v. New Jersey, 530 U.S. 466 (2000)], Blakely [v. Washington,*  
27 *542 U.S. 296 (2004)], and [United States v.] Booker [ , 543 U.S. 220 (2005)] made*  
28 *"courts through the land" aware that sentencing schemes that raise the maximum*  
*possible term based on facts not found by a jury violate the constitutional rights of*  
*defendants. [Citation omitted.] No principles of comity or federalism would be*

1 served by refusing to apply this rule to functionally indistinguishable state  
2 sentencing schemes on collateral review. *Cunningham* thus did not announce a  
3 new rule of constitutional law and may be applied retroactively on collateral  
4 review.

5 ///

6 Butler, 528 F.3d at 639. Therefore, because Cunningham did not announce a new rule, Petitioner  
7 is not entitled to a later trigger date under 28 U.S.C. § 2244(d)(1)(C).

8 Furthermore, Petitioner’s reliance on In re Gomez, 45 Cal. 4th 650, in support of his  
9 argument is misplaced. In Gomez, the California Supreme Court also found that Cunningham  
10 did not announce a new constitutional right. In re Gomez, 45 Cal.4th 650, 656-657 (2009).

11 IV. Equitable Tolling

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

18 Petitioner has not presented nor has this Court found any basis to equitably toll the  
19 limitations period.

20 ORDER

21 Based on the foregoing, it is HEREBY ORDERED that:

- 22 1. Respondent’s motion to dismiss the instant petition is GRANTED;
- 23 2. The instant petition for writ of habeas corpus is DISMISSED with prejudice;
- 24 3. The Clerk of Court is directed to terminate this action; and
- 25 4. The Court declines to issue a certificate of appealability. 28 U.S.C. § 2253(c); Slack  
26 v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a COA, petitioner must  
27 show: (1) that jurists of reason would find it debatable whether the petition stated a  
28 valid claim of a denial of a constitutional right; and (2) that jurists of reason would  
find it debatable whether the district court was correct in its procedural ruling. Slack

1 v. McDaniel, 529 U.S. 473, 484 (2000). In the present case, the Court does not find  
2 that jurists of reason would not find it debatable whether the petition was properly  
3 dismissed, with prejudice, as time-barred under 28 U.S.C. § 2244(d)(1). Petitioner  
4 has not made the required substantial showing of the denial of a constitutional right.  
5

6 IT IS SO ORDERED.

7 **Dated:** May 12, 2011

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE