

United States District Court  
For the Northern District of California

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*\*E-FILED - 1/15/14\**

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

WILLIE BRANNER, aka JAMES WILLIS  
JOHNSON,

No. C 90-3219 DLJ

Petitioner,

**ORDER DENYING RESPONDENT'S  
UPDATED MOTION TO DISMISS  
CLAIMS BASED ON STATUTE OF  
LIMITATIONS**

v.

KEVIN CHAPPELL, Acting Warden of  
California State Prison at San Quentin

**DEATH PENALTY CASE**

Respondent.

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**I. Introduction**

Petitioner's habeas petition challenging his state conviction and sentence is pending before the court. Respondent has filed a motion seeking dismissal of numerous claims based on the statute of limitations established by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Petitioner contends that he is entitled to tolling of the limitations period. Pursuant to Civil Local Rules 7-1(b) and 7-6, the court finds that petitioner's motion is appropriate for submission on the papers without oral argument. For the reasons stated below, the court denies respondent's motion.

1 **II. Background**

2 In 1982, petitioner was convicted in Santa Clara County Superior Court of murdering  
3 Edward Dukor in Dukor's jewelry store in a shopping center in Milpitas, California. The jury found  
4 the special circumstance that he committed the murder in the course of robbery to be true and fixed  
5 the penalty at death. People v. Johnson, 47 Cal. 3d 1194, 1212 (1989). The California Supreme  
6 Court affirmed the conviction and sentence on February 23, 1989. The United States Supreme Court  
7 denied petitioner's petition for writ of certiorari on March 19, 1990.  
8

9 Acting in pro per, petitioner filed in this court on November 9, 1990, a request for a stay of  
10 execution and appointment of counsel. The court stayed the execution and referred the matter for  
11 appointment of counsel. On January 31, 1991, the court appointed the California Appellate Project  
12 ("CAP") to represent petitioner. On October 6, 1992, CAP filed a motion to withdraw from  
13 petitioner's case. The court granted this motion on January 12, 1993, and appointed attorneys  
14 Alexander Brainerd, Kenneth Keller and David Eiseman from the law firm of Bronson, Bronson &  
15 McKinnon to represent petitioner. On March 14, 1997, Alexander Brainerd and David Eiseman  
16 resigned from the Bronson firm and joined the law firm of Quinn Emanuel Urquhart Oliver &  
17 Hedges, LLP. David Eiseman remained as appointed counsel, while Alexander Brainerd and  
18 Kenneth Keller withdrew from representation and were replaced by Carlyn Clause of the Bronson  
19 firm. Carlyn Clause subsequently withdrew from the case.  
20

21 Pursuant to the court's instructions, on April 23, 1997, petitioner filed a federal habeas  
22 petition containing only exhausted claims, a notice regarding the existence of non-exhausted claims  
23 and a motion to hold proceedings in abeyance pending the exhaustion of non-exhausted claims. On  
24 October 6, 1997, the court granted petitioner's abeyance motion and directed him to exhaust all  
25 unexhausted claims once they were identified by the court. On November 6, 2002, petitioner filed  
26 an exhaustion petition in state court. The California Supreme Court denied this petition on the  
27 merits and on procedural grounds, in a two-page order on October 29, 2003. In re Willie Branner,  
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1 Cal. Supr. Ct. No. SO92757 (Oct. 29, 2003).

2 Pursuant to the court's instructions, petitioner filed an amended federal habeas petition  
3 containing his newly-exhausted claims in this court on December 19, 2003. After litigating issues of  
4 procedural default and other procedural bars, respondent subsequently filed the instant motion to  
5 dismiss. Briefing on the matter was completed on December 28, 2010.  
6

7 Respondent argues that although petitioner's original federal habeas petition, filed on April  
8 23, 1997, was timely, claims contained in his amended petition, filed on December 19, 2003, are  
9 time-barred. He contends that these claims do not relate back to any claim asserted in the original  
10 petition. Respondent further requests that the court vacate, nunc pro tunc, its 1997 order granting  
11 petitioner a stay on the grounds that petitioner has engaged in dilatory practices that render the stay  
12 inappropriate. Petitioner counters that he is entitled to equitable and statutory tolling of the  
13 limitations period. He also contends that claims in his amended petition relate back to claims in his  
14 original petition, but reserves briefing on the matter, should it be necessary, for a later date.  
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### 17 **III. Discussion**

18 The AEDPA imposes a one-year limitations period for the filing of a federal habeas petition.  
19 28 U.S.C. § 2244(d)(1). The statute provides, in pertinent part, that the limitations period runs from  
20 the latest of the date on which the judgment became final by the conclusion of direct review or the  
21 expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). "Direct review"  
22 includes the period within which a petitioner can file a petition for a writ of certiorari from the  
23 United States Supreme Court, whether or not the petitioner actually files such a petition. Bowen v.  
24 Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). The time during which a properly filed application for  
25 state post-conviction or other collateral review is pending shall not be counted toward the limitation  
26 period. 28 U.S.C. § 2244(d)(1)(2).  
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1           The Supreme Court of the United States recently held that the timeliness provision in the  
2 federal habeas corpus statute is subject to equitable tolling. Holland v. Florida, 130 S. Ct. 2549,  
3 2560 (2010). A federal habeas petitioner “is ‘entitled to equitable tolling’ only if he shows ‘(1) that  
4 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
5 way’ and prevented timely filing.” Id., at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418  
6 (2005)). “When external forces, rather than a petitioner’s lack of diligence, account for the failure to  
7 file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.  
8 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). The extraordinary circumstances must be the cause of  
9 the untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003).

11           Here, petitioner’s direct appeal was denied on February 23, 1989. The United States  
12 Supreme Court denied petitioner’s petition for writ of certiorari on March 19, 1990, rendering his  
13 conviction final. Because petitioner’s conviction was final on direct appeal prior to the enactment of  
14 the AEDPA, his limitations period began to run on April 23, 1996, and expired on April 24, 1997.  
15 See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent tolling or a finding of  
16 relation-back, petitioner’s amended petition, filed on December 19, 2003, is therefore untimely.

18           Petitioner’s request for tolling is largely occasioned by the interplay between three legal  
19 principles: the “total exhaustion requirement” of Rose v. Lundy, 455 U.S. 509, 522 (1982), the  
20 AEDPA’s statute of limitations and the “relation back” standard articulated in Mayle v. Felix, 545  
21 U.S. 644, 656 (2005). Under Rose, petitioners were required to fully exhaust their claims in state  
22 court before seeking federal habeas relief. “Rose required district courts to dismiss a “mixed”  
23 petition, ‘leaving the prisoner with the choice of returning to state court to exhaust his claims or of  
24 amending or resubmitting the habeas petition to present only exhausted claims to the district court.”  
25 King v. Ryan, 564 F.3d 1133, 1138 (9th Cir. 2009), quoting Rose, 455 U.S. at 510.

27           The AEDPA’s one-year statute of limitations changed the practical impact of Rose’s total  
28 exhaustion requirement. It meant that “petitioners whose mixed petitions were dismissed under

1 Rose ran the risk of being time-barred from bringing their claims, once exhausted, in federal court."  
2 King, 564 F.3d at 1138. In view of this problem, the Ninth Circuit developed a three-step procedure  
3 for mixed petitions, allowing:

- 4 (1) a petitioner to amend his petition to delete any unexhausted claims; (2) the court  
5 in its discretion to stay and hold in abeyance the amended, fully exhausted petition;  
6 (3) once the claims have been exhausted in state court, the petitioner to return to  
federal court and amend his federal petition to include the newly exhausted claims.

7 Id. at 1139, citing Calderon v. United States District Court (Taylor), 134 F.3d 981, 986 (9th Cir.  
8 1998). This procedure curtailed the risk that petitioners might forfeit federal review of their  
9 unexhausted claims.

10 In 2005, the United States Supreme Court's decision in Mayle rendered the amendment of  
11 federal petitions to include newly exhausted claims problematic. Prior to Mayle, under Ninth  
12 Circuit law, an amendment to a habeas petition related back to the date of the original petition "so  
13 long as the new claim stems from the habeas petitioner's trial, conviction, or sentence." 545 U.S. at  
14 656. Finding this interpretation of the relation-back standard too broad, the Supreme Court held that  
15 an amended claim in a habeas petition relates back for statute of limitation purposes only if it shares  
16 a common core of operative facts with the original claim. Id. at 664. This new standard rendered  
17 the demonstration of timeliness of claims amended into federal habeas petitions more difficult.  
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19  
20 Petitioner faces the conundrum created by Rose, the AEDPA and Mayle. Having followed  
21 the court's instructions to file a petition containing only exhausted claims prior to the expiration of  
22 the statute of limitations, and to request a stay pending the completion of state exhaustion  
23 proceedings, petitioner's exhausted claims are now barred by the statute of limitations unless they  
24 relate back to claims in his original petition under Mayle, or the statute of limitations is tolled.

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26 As discussed below, equitable principles dictate that the period from April 23, 1997, the date  
27 petitioner filed his original petition, until December 19, 2003, the date of filing of the amended  
28 petition, be tolled. Petitioner has diligently pursued his rights and extraordinary circumstances

1 prevented timely filing. Holland, 130 S. Ct. at 2562.

2 **A. Diligent Pursuit of Rights**

3 Petitioner has diligently pursued habeas relief. After his conviction and sentence became  
4 final on direct appeal on March 19, 1990, he initiated his federal habeas proceedings by requesting  
5 appointment of counsel on November 9, 1990. The court granted the request and the California  
6 Appellate Project ("CAP") was appointed to represent him on January 31, 1991. CAP began  
7 reviewing the 12,000-page record and briefing related to petitioner's trial. From 1991-1992, CAP  
8 investigated potential state and federal habeas claims. Its efforts were hampered by the fact that no  
9 extra-record investigation had been conducted while petitioner's case was in state court. Dkt. No.  
10 238.  
11

12 In October 1992, CAP moved to withdraw as petitioner's counsel. Then-Chief Judge  
13 Henderson requested that current counsel's former firm, which specialized in intellectual property  
14 and commercial litigation, accept appointment as counsel. None of the attorneys in that firm had  
15 any experience representing a capital defendant. Nonetheless, in January 1993, the court allowed  
16 current counsel to substitute CAP with the understanding that CAP would assist the firm on an  
17 ongoing basis. Id.  
18

19 Newly-substituted counsel immediately began reviewing the extensive documents provided  
20 by CAP and met with petitioner several times. By the end of 1993, counsel had completed initial  
21 review of the documents, retained an investigator and sought a consultant for further aid. Their  
22 investigation was hindered by the fact that they were unable to interview petitioner's trial counsel,  
23 who had passed away in June 1992.  
24

25 In August 1994, petitioner's counsel filed a request for funds to retain investigators and  
26 consultants. As part of their investigation, counsel requested that respondent stipulate to the  
27 issuance of subpoenas to obtain various records. Because respondent refused to stipulate, petitioner  
28 sought authorization to serve subpoenas from the court. Following briefing and a hearing, the court

1 issued an order in January 1995 permitting petitioner to serve subpoenas seeking a limited range of  
2 records from two law enforcement agencies. Id.

3 In the interim, CAP was defunded as a federal resource center. As a result, petitioner's  
4 counsel lost CAP's assistance.

5 At the time of the enactment of the AEDPA in April 1996, petitioner was continuing to  
6 investigate and prepare his federal claims. The AEDPA introduced, for the first time, a statute of  
7 limitations for federal habeas petitions. Petitioner promptly sought the court's guidance as to its  
8 effect on his case. Dkt. Nos. 85, 238. On March 24, 1997, the court ruled that the AEDPA's statute  
9 of limitations did not apply to petitioner's case. Dkt. No. 91.

10 Out of an abundance of caution, petitioner nonetheless filed on April 23, 1997, within the  
11 statutory period, a federal petition containing only exhausted claims, a notice of unexhausted claims  
12 and a motion to hold the petition in abeyance pending the completion of exhaustion proceedings in  
13 state court. This filing was in compliance with the court's scheduling order. Dkt. No. 93.

14 On October 6, 1997, in light of Calderon v. United States District Court (Kelly), 127 F.3d  
15 782 (9th Cir. 1997), the court reversed itself and found that the AEDPA statute of limitations did  
16 apply to petitioner's case. Dkt. No. 127. The court directed petitioner to delete any claims it  
17 determined to be unexhausted and stayed the petition pending the completion of exhaustion  
18 proceedings. The court instructed petitioner to present unexhausted claims to the state court within  
19 60 days of the date of the court's order identifying unexhausted claims.

20 Petitioner followed the court's instructions. The court identified unexhausted claims in June  
21 1999. Dkt. No. 142. Petitioner withdrew them from his petition in July 1999. Dkt. 145. Following  
22 the court's grant of four extensions of time, petitioner filed a 500-page state exhaustion petition  
23 containing 69 claims on November 6, 2002. The Supreme Court of California denied it on October  
24 29, 2003.

1 The court held a status conference on November 14, 2003, during which it ordered petitioner  
2 to file an amended petition containing his newly exhausted claims by December 19, 2003. He did  
3 so. Throughout his habeas proceedings, petitioner has complied with court orders, observed  
4 deadlines and moved forward with his case.

5 Respondent argues that petitioner was dilatory in the years prior to the commencement of the  
6 limitations period, in effect ever since his conviction became final on direct review. Seven years  
7 elapsed between the time that his conviction became final and the date his original petition was filed  
8 on April 23, 1997. During a portion of that time however, petitioner either lacked counsel because  
9 the state court did not provide him with counsel to pursue state habeas proceedings, or his federal  
10 representation was in flux as a result of numerous substitutions of counsel. Furthermore, the state's  
11 failure to provide petitioner with habeas counsel made the preparation of an exhaustion petition  
12 more time-consuming for federal counsel. As described above, federal counsel diligently pursued  
13 petitioner's claims despite numerous obstacles, and notwithstanding the fact that no statute of  
14 limitations existed prior to the passage of the AEDPA.

15 Respondent's contention that petitioner was dilatory in filing his state exhaustion petition  
16 once federal counsel were appointed is refuted by the court's finding of good cause for granting  
17 petitioner four extensions of time to prepare and file the petition. With each extension request, the  
18 court found that the need for additional time was warranted. See Dkt. Nos. 146, 147, 149 and 152.

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21 **B. Extraordinary Circumstances**

22 Extraordinary circumstances warrant an equitable tolling of the statute of limitation. As  
23 discussed below, the extraordinary circumstances that render the petition time-barred are changes in  
24 the law largely occasioned by the passage of the AEDPA. See Harris v. Carter, 515 F.3d 1051 (9th  
25 Cir. 2008) (petitioner entitled to equitable tolling where the Supreme Court's overruling of precedent  
26 he had relied upon made it impossible to file a timely petition), Townsend v. Knowles, 562 F.3d  
27 1200 (9th Cir. 2009), abrogated on other grounds, Walker v. Martin, 131 S.Ct. 1120 (2011) (change  
28

1 in law warrants equitable tolling); Ashmus v. Ayers, C93-594 TEH (N.D. Cal. Oct. 5, 2006); Jesus  
2 v. Miller, 215 F. Supp. 2d 410 (S.D.N.Y. 2002).

3 First, the Ninth Circuit's decisions in Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997),  
4 and Calderon v. United States District Court (Gordon), 107 F.3d 756 (9th Cir. 1997), precluded  
5 petitioner from originally filing a mixed petition which ultimately would have preserved the  
6 timeliness of all of his claims. Greenawalt and Gordon interpreted Rose to require the total  
7 exhaustion of habeas claims filed in district court and the dismissal of "mixed petitions." Pursuant  
8 to these cases as well as the court's instructions, (Dkt. No. 93), petitioner's original petition, filed on  
9 September 23, 1997, contained only exhausted claims. In Rhines v. Weber, 544 U.S. 269, 275  
10 (2005), however, the Supreme Court recognized that as a result of the interplay between the  
11 AEDPA's statute of limitations and Rose's dismissal requirement, "petitioners who came to federal  
12 court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of  
13 their unexhausted claims." The Court therefore afforded district courts discretion to grant stays of  
14 mixed petitions. Id. at 277. But for Greenawalt and Gordon, petitioner would have filed a mixed  
15 petition, as was indeed the practice in the Ninth Circuit prior to these decisions, see former Local  
16 Rule 296-8(e), and his claims would have been timely.

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19 Second, after petitioner filed his petition in 1997, the Supreme Court's decision in Duncan v.  
20 Walker, 533 U.S. 167 (2001), changed the law relating to statutory tolling. The AEDPA's statute of  
21 limitations is tolled while "a properly filed application for State post-conviction or other collateral  
22 review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In  
23 Duncan, the Court held that the phrase "State post-conviction or other collateral review" does not  
24 include federal habeas petitions, and therefore the AEDPA's statute of limitations is not tolled by the  
25 filing of a federal habeas petition. 533 U.S. at 181-82. Until Duncan, petitioner had every reason to  
26 believe that the filing of his federal petition statutorily tolled the limitations period and obviated the  
27 need to file a state habeas petition in order to benefit from statutory tolling.  
28

1 Third, as discussed above, the Supreme Court's decision in Mayle made relation-back much  
2 more difficult. Mayle provides that a petitioner may amend a new claim into a pending federal  
3 habeas petition after the expiration of the statute of limitations only if the new claim shares a  
4 "common core of operative facts" with the claims in the pending petition. 545 U.S. at 659. The  
5 scope of claims eligible for relation-back was further narrowed in King, 564 F.3d at 1142, in which  
6 the Ninth Circuit held that new claims may only relate back to claims that were "properly contained  
7 in the original petition - that is, those claims that were exhausted at the time of filing." To the extent  
8 that any of petitioner's claims do not relate back to claims in his original petition, their resulting  
9 untimeliness is a consequence of the new standard announced in Mayle.

11 Finally, tolling is warranted because in light of the gravity of capital punishment, a rigid  
12 application of the limitations period would be unfair. In considering a request for equitable tolling  
13 from a capital prisoner, the Third Circuit observed:

15 If the limitations period is not tolled in this case, [petitioner] will be denied all federal  
16 review of his claims. Here the penalty is death, and courts must consider the ever-  
17 changing complexities of the relevant provisions [petitioner] attempted to navigate.  
18 Because the consequences are so grave and the applicable law is so confounding and  
19 unsettled, we must allow less than 'extraordinary circumstances' to trigger equitable  
20 tolling of the AEDPA's statute of limitations when a petitioner has been diligent in  
21 asserting his or her claims and rigid application of the statute would be unfair.

19 Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001). As the Supreme Court has repeatedly observed,  
20 "death is different." See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985).

21 In sum, equitable tolling is necessary to soften the harsh impact of rules that might otherwise  
22 prevent petitioner from obtaining federal review of his claims. Petitioner has diligently pursued his  
23 claims and has sought guidance from the court when unsure as to how he should proceed. He has  
24 always complied with court orders. He filed a habeas petition within the limitations period even  
25 though the court had ruled that the AEDPA's statute of limitations did not apply to his case. He also  
26 provided respondent, within the limitations period, notice of his unexhausted claims which under  
27 then-existing precedent, he was precluded from including in his petition. After the court determined  
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1 that the limitations period did apply, he relied on then-existing precedent and court rulings to delete  
2 unexhausted claims from his petition. His current predicament is the result of unforeseen changes in  
3 the law.

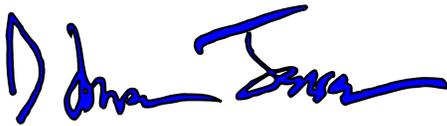
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5 **IV. Conclusion**

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7 Equitable principles weigh in favor of tolling the statute of limitations. Because the court  
8 finds equitable tolling warranted, it need not address the parties arguments regarding statutory  
9 tolling, or determine whether petitioner's claims relate back to claims in the original petition.  
10 Additionally, respondent's request to vacate, nunc pro tunc, the court's 1997 order granting petitioner  
11 a stay is denied.

12 Respondent's motion is DENIED.

13 **IT IS SO ORDERED.**

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16 DATED: 1/14/14

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19 D. Lowell Jensen  
20 United States District Judge

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Suite 600  
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