

DEC 14 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>APPLETON PICKETT, Jr.,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>GAY HALL,</p> <p>Respondent - Appellee.</p>

No. 07-35686

D.C. No. CV-05-00298-MRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Submitted November 17, 2009**

Before: ALARCÓN, TROTT, and TASHIMA, Circuit Judges.

Oregon state prisoner Appleton Pickett, Jr., appeals from the district court’s judgment dismissing his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The district court dismissed the petition, in part, on the grounds that it was untimely. Pickett contends that his petition was timely under 28 U.S.C. § 2244(d)(1)(C) because he filed it within one year of the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). This argument lacks merit because Pickett has not shown that he filed his petition within a year of the date on which the right he asserts was “newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” *See* 28 U.S.C. § 2244(d)(1)(C); *see also Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005) (concluding that the new rule announced in *Blakely* does not apply retroactively to a conviction that was final before that decision was announced).

In light of this disposition, we decline to reach Pickett's contention that he has a constitutional right to a unanimous jury verdict.

We construe Pickett's briefing of an uncertified ineffective assistance of counsel claim as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.