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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Dewey Lee McBride,

Petitioner,

v.

Charles L Ryan,

Respondent.

No. CV-16-00485-TUC-CKJ

**ORDER**

On December 2, 2016, Magistrate Judge Leslie A. Bowman issued a Report and Recommendation (Doc. 19) in which she recommended the Petition Under 28 U.S.C. §2254 for a Writ of Habeas Corpus by a Person in State Custody (Doc. 1) filed by Dewey McBride be denied. McBride objected to the Report and Recommendation. (Doc. 20). Respondents have not filed a response.

This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). Further, under 28 U.S.C. § 636(b)(1), if a party makes a timely objection to a magistrate judge’s recommendation, then this Court is required to “make a de novo determination of those portions of the [report and recommendation] to which objection is made.” The statute

1 does not “require [] some lesser review by [this Court] when no objections are filed.”  
2  
3 *Thomas v. Arn*, 474 U.S. 140, 149-50, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Rather, this  
4 Court is not required to conduct “any review at all . . . of any issue that is not the subject  
5 of an objection.” *Id.* at 149.

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7 No objections having been made to the magistrate judge’s rendering of the  
8 procedural and factual history, the Court adopts those recitations. The Court now  
9 evaluates McBride’s objections to statutory time computation, and finds McBride’s  
10 petition is time-barred.

11  
12 *Procedural History*

13 The Court will briefly reiterate facts mentioned in the Report and  
14 Recommendation and supplement them with additional facts in the record that  
15 specifically address the objections by McBride.

16  
17 McBride was sentenced August 17, 2009, and filed his first petition for post-  
18 conviction relief on February 22, 2011. (Doc. 19, p. 2). The first petition requested an  
19 evidentiary hearing and resentencing on the issues of ineffective assistance of counsel  
20 and mental incompetency. (Doc. 12, p. 10; Doc. 19, p. 2). Specifically, McBride argued  
21 his mental health issues were not properly addressed by the court, and counsel failed to  
22 represent him in the presentence interview as well as failed to present mitigating evidence  
23 at sentencing. *Id.* The trial court denied the petition on November 30, 2011. (Doc. 13, pp.  
24 36-38).

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27 After the denial, McBride filed a petition for review in the Arizona Court of  
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1 Appeals on January 4, 2012. (Doc. 19, p. 2). The appeals court granted a limited remand  
2 to determine which exhibits the judge considered for sentencing. *Id.* The inquiry revealed  
3 a disparaging letter the trial judge had reviewed. *Id.* The letter was sealed and had not  
4 been disclosed to the parties. *Id.* Without directly addressing the letter, the Arizona Court  
5 of Appeals granted review but denied relief on May 25, 2012. (Doc. 14, p. 29). In its  
6 memorandum decision, the appeals court explained “McBride has failed to demonstrate  
7 the trial court abused its discretion, either in finding insufficient evidence that he was  
8 incompetent, or in concluding that counsel was not ineffective by failing to challenge  
9 McBride’s incompetency at the change-of-plea and sentencing hearings.” (Doc. 19, p. 2).  
10 McBride moved for a rehearing based on the letter but it was summarily denied. *Id.*

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15 On October 13, 2012, McBride filed a petition for review in the Arizona Supreme  
16 Court. (Doc. 19, p. 2). This petition again argued incompetency and ineffective  
17 assistance, but also included a request to remand for resentencing before a different judge  
18 due to the sealed letter. (Doc. 14, p. 52; Doc. 19, p. 2). The Arizona Supreme Court  
19 denied the petition February 15, 2013. (Doc. 19, p. 2).

20  
21 On April 12, 2013, McBride filed a second Notice of Post-Conviction Relief in the  
22 trial court. (Doc. 19, p. 3). The trial court dismissed the notice because the Arizona Court  
23 of Appeals had not yet issued its mandate, and the court did not have jurisdiction. *Id.*

24  
25 McBride then filed another Notice of Post-Conviction Relief (“Notice”) in the trial  
26 court on June 10, 2013, as well as a sealed motion for change of judge for cause. *Id.*  
27 When this petition was filed on August 12, 2013, McBride argued that the merits of the  
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1 issues raised in the First Petition (McBride’s incompetency and counsel’s ineffective  
2 assistance) needed to be re-reviewed because the disclosed letter constituted newly  
3 discovered evidence which could have had an impact not only on the sentencing, but in  
4 the trial court’s initial Rule 32 proceedings. (Doc. 15, p. 47; Doc. 19, p. 3). The court  
5 reassigned the case to a different judge, finding “[the judge] has not, in any way, acted  
6 improperly, that she acted in good faith in these matters, and that she reasonably believed  
7 that no party would gain an advantage as a result of the *ex-parte* communication and that  
8 the communication did not have an effect at the time of sentencing. However, this Court  
9 does not wish there to be any issue of any nature surrounding these procedures.” (Doc.  
10 15, p. 36).

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15 At first, the trial court held that the letter was not “newly discovered evidence”  
16 and denied both resentencing and re-evaluation of his first petition in front of a new  
17 judge. (Doc. 19, p. 3). But, after McBride filed a motion for rehearing, the trial court  
18 found the letter *was* “newly discovered evidence” and granted McBride a resentencing.  
19 (Doc. 17, pp. 6-7). It did not, however, re-examine its order denying a re-evaluation of  
20 the Rule 32 of-right petition in front of a different judge. (Doc. 19, p. 3).

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McBride then filed a petition for review in the Arizona Court of Appeals on March  
31, 2014. (Doc. 17, p. 11). The appeals court granted review but denied relief on  
September 22, 2014. (Doc. 18, pp. 3-6).

McBride filed for review in the Arizona Supreme Court but was this was denied  
on April 21, 2015. (Doc. 18, p. 20). The Arizona Court of Appeals’ mandate issued on

1  
2 May 7, 2015. (Doc. 8-4, p. 2).

3 Finally, McBride filed a petition for writ of certiorari with the U.S. Supreme Court  
4 on July 20, 2015 (Doc. 18, p. 36) which was denied on December 7, 2015. (Doc. 18-6, p.  
5 2).

6  
7 The pending petition for a writ of habeas corpus in this Court was filed July 21,  
8 2016. (Doc. 1).

9 *Statutory Limitations for Filing a Writ of Habeas Corpus*

10 Under the Antiterrorism and Effective Death Penalty Act of 1996, a petitioner may  
11 file a writ of habeas corpus in federal court requesting relief from a state judgment,  
12 however, the time for the appeal is not unlimited. Petitioners have one year to file from  
13 “the date on which the judgment became final by the conclusion of direct review or the  
14 expiration of the time for seeking such review.” 8 U.S.C. § 2244(d)(1). “The time during  
15 which a properly filed application for State post-conviction . . . is pending shall not be  
16 counted toward any period of limitation.” 8 U.S.C. § 2244(d)(2).

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19  
20 McBride’s objections raise three issues: (1) whether the time between the  
21 conclusion of review of the first Rule 32 of-right proceedings and the Notice was tolled  
22 when calculating the one-year statute of limitations, (2) whether the sealed letter viewed  
23 by the judge but not counsel constituted structural error, negating the first round of  
24 appeals, and (3) whether the review was “pending” until the U.S. Supreme Court issued  
25 its denial of certiorari. The Court addresses these issues separately.

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27  
28 *1. Tolling of Time Between Petitions*

1           The magistrate judge found the end of direct review occurred on May 16, 2013;  
2  
3 ninety (90) days after the Arizona Supreme Court denied McBride’s first petition. The  
4 Report and Recommendation subtracts the twenty-four (24) day period between that date  
5 and the date of the properly filed Notice of Post-Conviction Relief from the one year  
6 filing deadline. *See Hemmerle v. Schriro*, 495 F.3d 1069, 1074 (9th Cir. 2007) (When  
7 notice is filed properly “it is sufficient to toll the AEDPA statute of limitations.”).  
8

9           McBride argues that the time between conclusion of the first round of Rule 32  
10 proceedings and the filing of the Notice in the second petition on June 10, 2013 was  
11 tolled because his second petition met the two-pronged test laid out in *King v. Roe*, 340  
12 F.3d 821, 823 (9th Cir. 2003) (per curiam) (abrogated on other grounds); *accord. Stanclie*  
13 *v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012).  
14  
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16           The *King* test determines whether a petitioner is entitled to tolling of “the period  
17 between petitions filed in the same court.” *Stanclie v. Clay*, 692 F.3d at 953 (quoting  
18 *Banjo v. Ayers*, 614 F.3d 964, 968 (9th Cir. 2010)). First, the Court must decide “whether  
19 the petitions are limited to an elaboration of the facts relating to the claims in the first  
20 petition.” *King*, 340 F.3d at 823. If the Court considers the second petition an elaboration,  
21 “[the court] construe[s] the new petitions as part of the first ‘full round’ of collateral  
22 review” and allows tolling. *Id.* If the petitioner simply tried to correct deficiencies in the  
23 first petition the time would toll, but if the petitioner raises new claims, he brings a new  
24 round of collateral attack and the statute of limitations would run. *Stanclie*, 692 F.3d at  
25 954. Second, the Court must decide whether the state court denied the second claim based  
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1 on the merits or deemed the second petition untimely. *Id.*

2  
3 Here, the magistrate judge's determination of the date that terminated direct  
4 review was made prior to McBride's objections. Assumedly, the decision was predicated  
5 on the assumption that each petition was separate; the first petition raised issues of  
6 ineffective assistance of counsel and mental competency, the second raised the claim of  
7 newly-discovered evidence.  
8

9 Under this logic, McBride's first petition was first denied by the trial court, then  
10 the Arizona Court of Appeals, and finally the Arizona Supreme Court on February 15,  
11 2013. The Report and Recommendation states the final judgment would commence  
12 ninety (90) days after the denial, giving McBride a three month period to petition the U.S.  
13 Supreme Court for certiorari. Since McBride did not petition to the U.S. Supreme Court,  
14 the time expired to seek such review.  
15

16  
17 Based on McBride's arguments before the magistrate judge, her conclusions were  
18 reasonable. The "newly discovered evidence" argument was not raised until after the  
19 magistrate judge made her Report and Recommendation. However, when analyzed under  
20 *King*, the newly discovered evidence issue was inextricably tied to the first proceeding  
21 and functioned as an expansion of the record in the first petition.  
22

23  
24 The District Court of Arizona's decision in *Corrales v. Ryan* is instructive. 2015  
25 WL 4882632 (D. Ariz., Jun. 24, 2015). In that case, the defendant filed his first notice of  
26 post-conviction relief alleging his attorney was ineffective because he did not ask that  
27 counts be severed, and did not object to impeachment testimony or to the admission of  
28

1 evidence. *Id.* at \*2. The trial court denied the petition. *Id.* He then filed a petition for  
2 review to the Arizona Court of Appeals using the same arguments and was summarily  
3 denied. *Id.* Defendant did not file a petition to the Arizona Supreme Court, instead filing  
4 a second Rule 32 Notice in the trial court. *Id.* This time, defendant alleged ineffective  
5 assistance of counsel and newly-discovered evidence, but failed to include any argument  
6 or facts in support of either claim. *Id.* at 3. The court found that the second petition was  
7 not an elaboration of the first, instead it asserted new claims of ineffective assistance and  
8 newly discovered evidence and denied tolling of the time between petitions. *Id.* at 5.  
9 Addressing the second prong, the court also found the filings were untimely. *Id.* at 4.

13 McBride's situation is distinguishable from *Corrales*. In that case, the defendant  
14 had neither discovered new evidence during the pendency of the first proceedings, nor  
15 attempted to have the newly discovered evidence addressed during the pendency of the  
16 first round of review. When the defendant raised ineffective assistance and newly  
17 discovered evidence claims in the second round of proceedings, he failed to amend his  
18 second petition with any additional facts that were unknown to the trial court in the first.  
19 McBride, on the other hand, attempted at the earliest possible opportunity to obtain a  
20 rehearing at the Arizona Court of Appeals on the issue of the sealed letter during the first  
21 round of proceedings. He then petitioned for review of the issue to the Arizona Supreme  
22 Court. When McBride filed his second petition at the trial court, it included the letter, a  
23 newly discovered fact which was presented in the first round of review, but had not been  
24 properly addressed by the trial court in the first petition because the fact was unknown at  
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1 the time of filing. In McBride’s case, the trial court granted him resentencing and found  
2 there was newly discovered evidence which could have altered the sentence. (Doc. 17, p.  
3 6). McBride was attempting to fix the discrepancies and errors in the first petition based  
4 on facts that were only revealed in the process of his first Rule 32 post-conviction  
5 proceedings. Unlike *Corrales*, McBride reasserted his original claims, but then asked that  
6 these claims be re-examined based on the newly-discovered letter. The “newly  
7 discovered evidence” should not be considered another claim, but the avenue in which  
8 McBride was able to elaborate on the facts included in the first Rule 32 petition.  
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12 The second prong of the two-part analysis is satisfied as well. The trial court did  
13 not find McBride’s second petition untimely, and denied the petition on the merits.  
14

15 The Court finds the later petition, filed June 10, 2013, was not a subsequent round  
16 of collateral review, but elaborated on the facts of the first petition. Therefore, the time  
17 between the conclusion of direct review in the Arizona Supreme Court and the Notice in  
18 the second round of post-conviction proceedings was tolled.  
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## 20 2. *Structural Error*

21 In the alternative, McBride argues that if the Court rejects the argument that the  
22 time between proceedings is tolled, then the second Notice should be treated as the Rule  
23 32 of-right petition for the purposes of beginning the one-year statute of limitations. He  
24 reasons the first petition and all of its appeals proceedings were void because the sealed  
25 letter constituted structural error by the trial court, and cannot be used to calculate the  
26 time.  
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1 Structural errors “infect the entire trial process and necessarily render a trial  
2 fundamentally unfair.” *Neder v. United States*, 527 U.S. 1, 7–9, 119 S.Ct. 1827, 144  
3 L.Ed.2d 35 (1999); see *State v. Ring (Ring III)*, 65 P.3d 915, 993 ¶ 45 (2003). Structural  
4 error “is limited to such circumstances as denial of counsel or a biased [trier or fact],”  
5  
6 *State v. Valverde*, 208 P.3d 233, 235–36 (Ariz. 2009) (en banc) (citing *State v. Garza*,  
7 163 P.3d 1006, 1013 n. 6 (2007)). In such cases, prejudice is presumed, because errors  
8 were “so intrinsically harmful as to require automatic reversal.” *Id.* at ¶ 10.  
9

10 A biased trial judge may constitute structural error, but bias means more than  
11 simply considering evidence that should not have been considered. McBride’s examples  
12 differ from the present situation. In those cases, the judges had a high degree of improper  
13 personal involvement. In *Williams v. Pennsylvania*, a judge on a panel did not recuse  
14 himself from post-conviction review, but should have because he had approved the death  
15 penalty against the defendant when he served as a district attorney. \_\_\_ U.S. \_\_\_, 136 S.Ct.  
16 1899, 1910, 195 L.Ed.2d 132 (2016). In another case, the judge had a pecuniary interest  
17 in the outcome of the case. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749  
18 (1927). In the last case, a judge denied a defendant the right to a jury verdict, and instead  
19 substituted his own. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124  
20 L.Ed.2d 182 (1993).  
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25 The error committed here was not structural error. The sentencing judge sealed  
26 one letter and reviewed it for sentencing, however, she had no interest in the outcome and  
27 viewing the letter did not undermine the entire sentencing process. This situation is much  
28

1 closer to that of a jury permitted to review evidence which had not been admitted. *See*  
2 *e.g., Eslaminia v. White*, 136 F.3d 1234, fn. 1 (9th Cir. 1998) (not structural error when  
3 jurors considered taped interview of individual who did not testify, tape was not in  
4 evidence, and counsel did not find out until after deliberations.); *People v. Gamache*, 227  
5 P.3d 342, 385-86 (Cal. 2010) (not structural error when jurors viewed tape of two  
6 witnesses not admitted into evidence); *but see United States v. Noushfar*, 78 F.3d 1442  
7 (9th Cir. 1996) (structural error found when judge allowed jury to view 14 incriminating  
8 tapes of defendants' statements). Because there was no structural error, prejudice is not  
9 presumed. *Valverde*, 208 P.3d at 236. McBride has failed to show prejudice during his  
10 first round of post-conviction proceedings, and the Court finds the denials of review in  
11 McBride's first round of post-conviction review proceedings are valid.

12 Therefore, the conclusion of direct review occurred after the Arizona Supreme  
13 Court denied review in the first round of proceedings on February 15, 2013. *See section*  
14 *4, infra* (discussing conclusion of review occurs on the date the state's highest court  
15 denied review).

16 Nonetheless, even if this Court found the first round of post-conviction review  
17 void due to structural error, the Court would not agree with McBride's conclusion.  
18 Because the Court finds tolling of all the time from the first petition to the conclusion of  
19 the second petition, McBride's argument would not increase the tolled time.

### 20 21 3. *Final Judgment to U.S. Supreme Court*

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28 McBride then argues the case remained "pending" until his petition for certiorari

1 to the United States Supreme Court was denied on December 7, 2015. He cites no case  
2 law supporting this theory. If true, it would mean the entire time between final judgment  
3 of the Arizona Supreme Court on May 16, 2013, to the denial of his petition for certiorari  
4 by the U.S. Supreme Court on December 7, 2013 was excluded from statute of  
5 limitations calculations. Accordingly, the pending petition (Doc. 1) would have been filed  
6 within the statutory time, 227 days later on July 21, 2016.  
7

8  
9 McBride's calculations for the end of tolling are incorrect. A petition to the U.S.  
10 Supreme Court for certiorari does not stop the statute of limitations clock from running.  
11 The U.S. Supreme Court explained:  
12

13 "[T]he statute of limitations is tolled only while state courts review the  
14 application. . . . [A] state post-conviction application 'remains pending' 'until the  
15 application has achieved final resolution though the State's post-conviction  
16 procedures.' [The U.S. Supreme Court] is not a part of a 'State's post-conviction  
17 procedures.' And an application for state post-conviction review no longer exists.  
18 All that remains is a separate certiorari petition pending before a *federal* court. The  
19 application for state post-conviction review is therefore not 'pending' after the  
20 state court's post-conviction review is complete, and § 2244(d)(2) does not toll the  
21 1-year limitations period during the pendency of a petition for certiorari."  
22

23 *Lawrence v. Florida*, 549 U.S. 327, 332 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007)  
24 (emphasis in original). Applying this to the pending writ, the time between the Arizona  
25 Supreme Court denial on the second round of post-conviction review and the final denial  
26 of certiorari from the U.S. Supreme Court was not tolled.  
27

#### 28 4. Denial from Arizona Supreme Court

Since the Court finds that McBride's petition was not pending while seeking a  
petition for certiorari to the U.S. Supreme Court, the Court must now determine the

1 actual date the tolling of time concluded and the clock began to run.

2  
3 Tolling concludes at the time in which “the State’s highest court has issued its  
4 mandate *or denied review*.” *Lawrence*, 549 U.S. at 332 (emphasis added). In Arizona, the  
5 denial of review by the State Supreme Court ends the pendency of appeals proceedings  
6 and allows the clock to begin again. *Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th Cir.  
7 2007), *cert. denied*, 555 U.S. 829 (2008); *Flores v. Trujillo*, 2013 WL 424725 (D. Ariz.,  
8 Apr. 10, 2014) (“When the Arizona Supreme Court denied his petition for post-  
9 conviction review, the limitation period began running again from where it left off.”).

10  
11  
12 The Court concludes the date the proceedings were no longer ‘pending’ was on  
13 April 21, 2015, when the Arizona Supreme Court denied relief. Therefore, the clock  
14 began on April 24, 2015, the day after the Arizona Supreme Court decision and expired  
15 366 days later on April 23, 2016.<sup>1</sup> McBride filed his federal habeas petition on July 21,  
16 2016, 457 days after the clock started. So, even granting tolling for the twenty-four (24)  
17 days between his first and second petition, the pending habeas is still eighty-nine (89)  
18 days overdue and is deemed untimely. The Court therefore finds:  
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- 21 1. The entire time period between McBride’s filing of his first Rule 32 petition of-  
22 right on February 22, 2011, and his denial by the Arizona Supreme Court on April  
23 21, 2015 is tolled.  
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<sup>1</sup> Like the magistrate judge, the Court uses the “anniversary method” and includes  
28 an additional day because 2016 was a leap year. (Doc. 19, p. 6) (citing *United State v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). Since the filing deadline was a Sunday, the court extends the deadline to Monday, April 24, 2016. Fed.R.Civ.P 6(a)(1)(C).

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2. The clock for the one-year time limit to file a writ for habeas corpus in federal court began the day after the Arizona Supreme Court issued its denial of review, April 22, 2015.
3. Petitioner’s deadline for filing within the one-year time limit expired April 24, 2016.
4. Petitioner filed his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody on July 21, 2016, eighty-nine (88) days after the one-year statute of limitations had expired.
5. Petitioner’s writ is therefore time-barred.

*Certificate of Appealability (“COA”)*

Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the “district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Such certificates are required in cases concerning detention arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. This Court must determine, therefore, if a COA shall issue.

The standard for issuing a COA is whether the applicant has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). “When the district court denies a habeas petition on procedural grounds without reaching

1 the prisoner's underlying constitutional claim, a COA should issue when the prisoner  
2 shows, at least, that jurists of reason would find it debatable whether the petition states a  
3 valid claim of the denial of a constitutional right and that jurists of reason would find it  
4 debatable whether the district court was correct in its procedural ruling.” *Id.*; *see also*  
5 *Robbins v. Carey*, 481 F.3d 1143,1146-47 (9th Cir. 2007) (failure to object to magistrate  
6 judge’s conclusions does not automatically waive appellate challenge) In the certificate,  
7 the Court must indicate which specific issues satisfy the showing. *See* 28 U.S.C. §  
8 2253(c)(3).

9 The Court finds that jurists of reason would not find it debatable whether the  
10 Petition was filed within the statutory time limitations and the Court finds that jurists of  
11 reason would not find it debatable whether the district court was correct in its procedural  
12 ruling. A COA shall not issue as to McBride’s claims.

13 Any further request for a COA must be addressed to the Court of Appeals. *See*  
14 *Fed. R.App. P. 22(b)*; *Ninth Circuit R. 22-1*

15  
16 Accordingly, IT IS ORDERED:

- 17 1. The Report and Recommendation (Doc. 19) is ADOPTED IN PART;
- 18 2. The Petition Under 28 U.S.C. §2254 for a Writ of Habeas Corpus by a Person in  
19 State Custody (Doc. 1) is DENIED;

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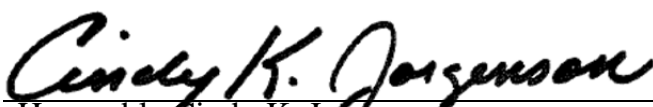
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- 3. The Clerk of the Court shall enter judgment and shall then close its file in this matter, and;
- 4. A Certificate of Appealability shall not issue in this case.

Dated this 26th day of January, 2017.

  
Honorable Cindy K. Jorgenson  
United States District Judge