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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGELA MARIE JOHNSON,)	Case No. CV 13-5748-JEM
)	
Petitioner,)	
)	MEMORANDUM OPINION AND ORDER
v.)	GRANTING MOTION TO DISMISS AND
)	DENYING CERTIFICATE OF
TAMARA KABAN-MILLER, Warden,)	APPEALABILITY
)	
Respondent.)	

INTRODUCTION

On August 2, 2013,¹ Angela Marie Johnson (“Petitioner”), a California state prisoner, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. §

¹ Under the prison “mailbox rule,” “a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail.” Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002); accord Houston v. Lack, 487 U.S. 266, 276 (1988). The “[mailbox] rule applies to prisoners filing habeas petitions in both federal and state courts.” Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001) (citation omitted); accord Anthony v. Cambra, 236 F.3d 568, 574-75 (9th Cir. 2000), cert. denied, 533 U.S. 941 (2001). In the absence of evidence to the contrary, courts have treated a petition as delivered to prison authorities on the day the petition was signed. See Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010), cert. denied, 132 S.Ct. 286 (2011) (“When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, the court deems the petition constructively ‘filed’ on the date it is signed.”). Here, although the instant Petition was not filed within the limitations period, see Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (to benefit from the “mailbox rule” a petitioner must deliver the petition to prison officials within the limitations period), the Court will, nonetheless, afford Petitioner the benefit of the mailbox rule.

1 2254 ("Petition"). Respondent filed a Motion to Dismiss the Petition on September 11, 2013,
2 on the ground that Ground Two in the Petition is unexhausted, and that the Petition is time-
3 barred by the one-year statute of limitation set forth in 28 U.S.C. § 2244(d). On October 17,
4 2013, Petitioner filed an Opposition. Respondent filed a Reply on October 30, 2013. The
5 Motion to Dismiss is now ready for decision.

6 For the reasons set forth below, the Petition is dismissed with prejudice as untimely.

7 **STATE COURT PROCEEDINGS**

8 Following a jury trial in Los Angeles County Superior Court case number KA088534,
9 Petitioner was convicted of two counts of second degree robbery (Cal. Penal Code § 211) and
10 one count of petty theft with a prior (Cal. Penal Code § 666). It was also found true that, as to
11 one count of robbery, Petitioner personally used a firearm (Cal. Penal Code § 12022.53(b)),
12 and that Petitioner served three prior prison terms (Cal. Penal Code § 667.5(b)). Petitioner was
13 sentenced to a total of 17 years and eight months in state prison. (Respondent's Lodged
14 Document ("LD") 8.)

15 On August 25, 2011, the California Court of Appeal issued a reasoned opinion rejecting
16 Petitioner's claims of error on direct review in case number B226242. (LD 7.) Petitioner filed
17 a petition for review in the California Supreme Court ("CSC") in case number S196617. (LD 5-
18 6.) That petition was denied on November 30, 2011. (LD 5.)

19 On December 27, 2011, the Los Angeles County Superior Court received a habeas
20 corpus petition from Petitioner.² The petition was denied on January 5, 2012. (LD 4 at Attach.)

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24 ² The Court uses the date the habeas corpus petition was received in the superior
25 court, as reflected in the superior court's minute order, as the filing date. (See Motion to
26 Dismiss, at 1 n. 2 (explaining that counsel for Respondent was unable to obtain a copy of
27 the habeas corpus petition filed in the Los Angeles County Superior Court.)) However, as
28 discussed below, Petitioner's state habeas petition in the California Superior Court was filed
and determined prior to the date Petitioner's conviction became final and cannot contribute
to statutory tolling. See Boyd v. Knipp, 2013 WL 2151581, at *3 (E.D. Cal. 2013); Spencer
v. Tremble, 2012 WL 1932646, at *2 (C.D. Cal. 2012).

1 On February 7, 2012, Petitioner constructively filed a habeas corpus petition in the
2 California Court of Appeal in case number B239076. (LD 3-4.) The petition was denied on
3 February 24, 2012. (LD 3.)

4 On May 13, 2012, Petitioner constructively filed a habeas corpus petition in the CSC in
5 case number S202545. (LD 1-2.) The petition was denied on August 8, 2012. (LD 1.)

6 The instant Petition was filed on August 2, 2013. (Petition at 8.)

7 **DISCUSSION**

8 **I. The Applicable Statute of Limitations.**

9 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) “establishes a
10 1-year period of limitation for a state prisoner to file a federal application for a writ of habeas
11 corpus.” Wall v. Kholi, 131 S.Ct. 1278, 1283 (2011); Lawrence v. Florida, 549 U.S. 327, 329
12 (2007); 28 U.S.C. § 2244(d)(1). After the one-year limitations period expires, the prisoner’s
13 “ability to challenge the lawfulness of [his] incarceration is permanently foreclosed.” Lott v.
14 Mueller, 304 F.3d 918, 922 (9th Cir. 2002).

15 To determine whether the pending action is timely, it is necessary to determine when
16 AEDPA’s limitations period began and ended. Pursuant to 28 U.S.C. § 2244(d)(1)(A)-(D),
17 AEDPA’s limitations period begins to run from the latest of: (1) “the date on which the judgment
18 became final by the conclusion of direct review or the expiration of the time for seeking such
19 review;” (2) “the date on which the impediment to filing an application created by State action
20 in violation of the Constitution or laws of the United States is removed, if the applicant was
21 prevented from filing by such State action;” (3) “the date on which the constitutional right
22 asserted was initially recognized by the Supreme Court, if the right has been newly recognized
23 by the Supreme Court and made retroactively applicable to cases on collateral review;” or (4)
24 “the date on which the factual predicate of the claim or claims presented could have been
25 discovered through the exercise of due diligence.”

26 A habeas corpus claim can “be timely, even if filed after the one-year time period has
27 expired, when statutory or equitable tolling applies.” Jorss v. Gomez, 311 F.3d 1189, 1192 (9th
28 Cir. 2002). However, “a court must first determine whether a [claim] was untimely under the

1 statute itself before it considers whether equitable [or statutory] tolling should be applied. As
2 a matter of logic, where a [claim] is timely filed within the one-year statute of limitation imposed
3 by AEDPA, 28 U.S.C. § 2244(d)(1), then equitable [or statutory] tolling need not be applied.
4 Similarly, equitable tolling need not be applied where a [claim] is timely due to statutory tolling
5 under § 2244(d)(2).” Id. Following this framework, the court begins its analysis with the
6 relevant timeliness inquiry.

7 **II. The Petition Is Facially Untimely.**

8 Under § 2244(d)(1)(A) of the AEDPA, “a federal petition for writ of habeas corpus . . .
9 must be filed within one year after the state court judgment becomes final by the conclusion of
10 direct review or the expiration of the time to seek direct review.”³ Porter v. Ollison, 620 F.3d
11 952, 958 (9th Cir. 2010); 28 U.S.C. § 2244(d)(1)(A).

12 Here, Petitioner filed a petition for review with the CSC (LD 6), which was denied on
13 November 30, 2011. (LD 5.) Because direct review includes the 90 days during which
14 Petitioner could have filed a petition for writ of certiorari from the United States Supreme Court,
15 Petitioner’s judgment became final on February 28, 2012. See 28 U.S.C. § 2244(d)(1)(A)
16 (judgment becomes final either “by the conclusion of direct review or the expiration of the time
17 for seeking such review”); Spitsyn v. Moore, 345 F.3d 796, 798 (9th Cir. 2003, as amended
18 Nov. 3, 2003) (“The period of ‘direct review’ after which [a] state conviction becomes final under
19 28 U.S.C. § 2244(d)(1)(A) includes the 90-day period within which a petitioner can file a petition
20 for a writ of certiorari from the United States Supreme Court, even if the petitioner does not
21 actually file such a petition.”); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999) (“the process
22 of direct review includes the right to petition [the United States Supreme] Court for a writ of
23 certiorari[;]” therefore, AEDPA’s statute of limitations begins to run after the 90-day period within
24 which a petitioner can file a petition for writ of certiorari from the United States Supreme Court

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27 ³ Although § 2244(d)(1) sets forth three alternate possible starting dates other than §
28 2244(d)(1)(A) for the commencement of the running of the statute of limitations,” Miranda v.
Castro, 292 F.3d 1063, 1065 n. 1 (9th Cir.), cert. denied, 537 U.S. 1003 (2002), Petitioner’s
allegations and the record do not show that any of these apply in this case.

1 expires) (internal quotation marks, ellipses and citation omitted). The statute of limitations
2 began to run the next day, on February 29, 2012. See Patterson v. Stewart, 251 F.3d 1243,
3 1247 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)). Thus, Petitioner had until **February 28, 2013**,
4 to file her federal habeas petition. See Smith v. Duncan, 297 F.3d 809, 813 (9th Cir. 2002),
5 abrogation on other grounds recognized by Moreno v. Harrison, 245 Fed. Appx. 606 (9th Cir.
6 2007).

7 The Petition was not filed until August 2, 2013, approximately five months after the
8 statute of limitations had run; therefore, the Petition is facially untimely.

9 **III. Petitioner is Not Entitled To Statutory Tolling.**

10 Under 28 U.S.C. § 2244(d)(2), AEDPA's limitations period is tolled for the time during
11 which a "properly filed" state post conviction application is "pending," which in California can
12 include the intervals between the denial of relief in one court and the filing of a new petition in
13 a higher court. See Carey v. Saffold (Saffold), 536 U.S. 214, 223 (2002). However, the statute
14 of limitations is not tolled between the conviction's finality and the filing of Petitioner's first state
15 habeas petition. See Porter, 620 F.3d at 958 (AEDPA statute of limitations is not tolled between
16 the conviction's finality and the filing of the first state collateral challenge); Nino v. Galaza, 183
17 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000) (same).

18 As an initial matter, Petitioner's state habeas petitions in the California Superior Court
19 and in the California Court of Appeal were filed and determined prior to the date Petitioner's
20 conviction became final. (LD 3-4.) Absent gap tolling, therefore, these petitions cannot
21 contribute to statutory tolling. See Boyd v. Knipp, 2013 WL 2151581, at *3 (E.D. Cal. 2013);
22 Spencer v. Tremble, 2012 WL 1932646, at *2 (C.D. Cal. 2012).

23 Moreover, for the following reasons, Petitioner's CSC petition was not "properly filed"
24 under state law, and Petitioner is not entitled to tolling during its pendency, including during the
25 gap between the California Court of Appeal's denial of Petitioner's habeas petition on February
26 24, 2012, and the constructive filing of Petitioner's habeas petition in the CSC on May 13, 2012.
27 Saffold, 536 U.S. at 223. An untimely state habeas petition is not a "properly filed" petition for
28 purposes of statutory tolling under section 2244(d)(2). Pace v. DiGuglielmo, 544 U.S. 408, 412-

1 14 (2005); Saffold, 536 U.S. at 225 (California state habeas petition filed after unreasonable
2 delay not “pending” for purposes of section 2244(d)(2)); see also Evans v. Chavis, 546 U.S.
3 189, 191 (2006) (“The time that an application for state postconviction review is ‘pending’
4 includes the period between (1) a lower court's adverse determination, and (2) the prisoner's
5 filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state
6 law”) (italics in original). Where, as here, a state court denies a collateral application without
7 a “clear indication” that the application was timely or untimely, a federal habeas court “must
8 itself examine the delay in each case and determine what the state courts would have held in
9 respect to timeliness.” Evans, 546 U.S. at 198; see also Banjo v. Ayers, 614 F.3d 964, 968 (9th
10 Cir. 2010), cert. denied, — U.S. —, 131 S.Ct. 3023 (2011) (“We cannot infer from a
11 decision on the merits, or a decision without explanation, that the California court concluded
12 that the petition was timely.”) In California, a collateral application is timely if filed within a
13 “reasonable time” after the petitioner learns of the grounds for relief. Saffold, 536 U.S. at 235.

14 Here, Petitioner constructively filed her CSC petition on May 13, 2012, 79 days after the
15 California Court of Appeal denied her habeas corpus petition on February 24, 2012. This delay
16 is “far longer than the Supreme Court's thirty-to-sixty-day benchmark for California's
17 ‘reasonable time’ requirement” for filing a petition in a higher court. Velasquez v. Kirkland, 639
18 F.3d 964, 968 (9th Cir. 2011) (finding 81-day delay in filing petition in a higher court “far longer
19 than the Supreme Court's thirty-to-sixty-day benchmark for California's ‘reasonable time’
20 requirement”); see, e.g., Livermore v. Watson, 556 F.Supp.2d 1112, 1118-20 (E.D. Cal. 2008)
21 (petitioner not entitled to statutory tolling for unjustified 78-day delay between Superior Court's
22 denial of habeas petition and subsequent filing of habeas petition in California Court of Appeal);
23 Culver v. Dir. of Corrs., 450 F.Supp.2d 1135, 1140-41 (C.D. Cal. 2006) (unexplained, unjustified
24 delay of 71 days was unreasonable); Bayaird v. Cate, 2010 WL 1339617, at *3-*4 (E.D. Cal.
25 2010) (petitioner not entitled to tolling for unjustified 67-day delay between filings). Thus,
26 without an adequate explanation for the lengthy delay in filing her CSC petition, Petitioner’s
27 CSC petition was untimely under California law. Velasquez, 639 F.3d at 968.

1 In her Opposition, Petitioner argues that she has “justifiable reasons” for the 79-day
2 delay in filing her CSC petition. (Opposition at 4.) Specifically, Petitioner claims that this delay
3 was due to the following: (1) the March 2012 transfer of an inmate who had aided Petitioner
4 in filing her two previous habeas corpus petitions; (2) lack of legal knowledge; (3) difficulty in
5 accessing and keeping her property in order while being moved “from yard to yard and room
6 to room” within the prison facility; and (4) difficulty in accessing the library. (Opposition at 4-5;
7 see id. at 6 (explaining that the prison facility where Petitioner was housed during the relevant
8 period became a men’s facility while women were still housed there, and that women were kept
9 on “constant lockdown”, library access was “minimal”, and prisoners were transferred multiple
10 times throughout the institution).) Notably, Petitioner’s CSC petition did not assert any of the
11 aforementioned reasons to explain her filing delay. (See LD 2 at 6 (when answering a standard
12 question in the CSC petition form requesting an explanation for “any delay in the discovery of
13 the claimed grounds for relief and in raising the claims in this petition”, Petitioner stated only
14 that her “[a]ppellate attorney failed to raise [the] grounds claim[ed] [i]n [the] habeas corpus
15 petition”).)

16 Regardless, even considering Petitioner’s proffered explanations for the delay in filing
17 her CSC petition, Petitioner’s 79-day delay was not reasonable. Indeed, Petitioner’s CSC
18 petition is a nearly verbatim copy of the habeas corpus petition she filed in the California Court
19 of Appeal. (Compare LD 2 with LD 4.) Thus, there is no reason that completing the petition
20 required the assistance of another inmate, any specific legal knowledge, extensive use of her
21 legal property, or access to the law library. It was unreasonable for Petitioner to delay 79 days
22 in filing a nearly exact copy of her previous petition in the CSC. See Velasquez, 639 F.3d at
23 968 (gaps of 91 days between a superior court denial and a court of appeal filing and 81 days
24 between the court of appeal denial and a supreme court filing were unreasonable because each
25 habeas petition was nearly identical to the petition that came before it and thus is was “not
26 reasonable that [petitioner’s] counsel would need excess time essentially to re-file an already-
27 written brief.”), Bennett v. Felker, 635 F. Supp. 2d 1122, 1126-27 (C.D. Cal. 2009) (denying gap
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1 tolling for unexplained delay of ninety-three days because the two state court petitions at issue
2 were nearly identical to each other).

3 Therefore, Petitioner is not entitled to statutory tolling and, absent equitable tolling, the
4 Petition is untimely.

5 **IV. Petitioner Is Not Entitled To Equitable Tolling.**

6 AEDPA's statute of limitations is subject to equitable tolling "in appropriate cases."
7 Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 2560 (2010). "[A] petitioner is entitled to
8 equitable tolling only if he shows (1) that he has been pursuing his claims diligently, and (2) that
9 some extraordinary circumstance stood in his way and prevented timely filing." Id. at 2562
10 (internal quotation marks and citation omitted); see also Lawrence, 549 U.S. at 336. "The
11 petitioner must show that the extraordinary circumstances were the cause of his untimeliness,
12 and that the extraordinary circumstances made it impossible to file a petition on time." Porter,
13 620 F.3d at 959 (internal quotation marks and citations omitted).

14 "To apply the doctrine in extraordinary circumstances necessarily suggests the doctrine's
15 rarity, and the requirement that extraordinary circumstances stood in [petitioner's] way suggests
16 that an external force must cause the untimeliness, rather than . . . merely oversight,
17 miscalculation or negligence on the petitioner's part, all of which would preclude the application
18 of equitable tolling." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.), cert.
19 denied, 558 U.S. 897 (2009) (internal quotation marks, brackets and citation omitted); accord
20 Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) ("equitable tolling is unavailable in most
21 cases"). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
22 the exceptions swallow the rule." Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006)
23 (internal quotation marks and citation omitted); accord Bills v. Clark, 628 F.3d 1092, 1097 (9th
24 Cir. 2010).

25 Here, petitioner has not provided any rationale under which this Court might equitably
26 toll the limitations period. As an initial matter, Petitioner is not entitled to equitable tolling
27 because of her limited knowledge of the law. (See Opposition at 4-5); Waldron-Ramsey, 556
28 F.3d at 1013 n. 4 ("we have held that a pro se petitioner's confusion or ignorance of the law is

1 not, itself, a circumstance warranting equitable tolling”) (citation omitted); Rasberry v. Garcia,
2 448 F.3d 1150, 1154 (9th Cir. 2006) (“We now join our sister circuits and hold that a pro se
3 petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting
4 equitable tolling.”); Jimenez v. Hartley, 2010 WL 5598521, at *5 (C.D. Cal. 2010) (allegations
5 that petitioner was uneducated, illiterate and indigent insufficient); Oetting v. Henry, 2005 WL
6 1555941, at *3 (E.D. Cal. 2005) (“Neither an inmate's ignorance of the law nor pro se status are
7 the sort of extraordinary events upon which a finding of equitable tolling may be based”). Nor
8 is Petitioner entitled to equitable tolling because an inmate who was helping her draft her
9 habeas corpus petitions was transferred. (See Opposition at 4); Chaffer v. Prosper, 592 F.3d
10 1046, 1049 (9th Cir. 2010).

11 Finally, Petitioner conclusorily claims she is entitled to equitable tolling because she
12 experienced frequent moves throughout the prison facility, “constant lock down[s]”, a period of
13 confinement in administrative segregation, and restricted access to her legal materials and the
14 law library. (Opposition at 5-6.) However, these conclusory statements have no evidentiary
15 support and are manifestly insufficient to warrant equitable tolling. See, e.g., Trenkler v. United
16 States, 268 F.3d 16, 25 (1st Cir. 2001) (conclusory assertions rarely suffice to meet the burden
17 of demonstrating entitlement to equitable tolling); Miller v. Marr, 141 F.3d 976, 978 (10th Cir.),
18 cert. denied, 525 U.S. 891 (1998) (denying equitable tolling when petitioner “provided no
19 specificity regarding the alleged lack of access and the steps he took to diligently pursue his
20 federal claims”); Williams v. Dexter, 649 F.Supp.2d 1055, 1061-62 (C.D. Cal. 2009) (inmate not
21 entitled to equitable tolling when such “claim is . . . unsupported by competent evidence and
22 is grossly conclusory”); Evans v. Adams, 423 F.Supp.2d 1087, 1091 (C.D. Cal. 2006) (inmate
23 not entitled to equitable tolling when he “provided absolutely no evidentiary support for his
24 equitable tolling claim, and [did] not even bother[] to assert sufficient facts to suggest equitable
25 tolling might be warranted”); Ruiz v. Poole, 566 F.Supp.2d 336, 341 (S.D.N.Y. 2008) (petitioner
26 not entitled to equitable tolling for alleged lack of access to law library when he proffered no
27 evidence supporting claim and failed to indicate what steps he took to address his lack of
28 access to the law library). Significantly, Petitioner has not shown any connection between

1 these events and her failure to timely file her habeas corpus petition. Spitsyn, 345 F.3d at 799;
2 see also Baker v. Norris, 321 F.3d 769, 771 (8th Cir.), cert. denied, 539 U.S. 918 (2003) (prison
3 policy limiting inmates to two hours at a time in prison library and requiring them to sign up in
4 advance did not warrant equitable tolling); Corrigan v. Barbery, 371 F.Supp.2d 325, 330
5 (W.D.N.Y. 2005) (“In general, the difficulties attendant on prison life, such as transfers between
6 facilities, solitary confinement, lockdowns, restricted access to the law library, and an inability
7 to secure court documents, do not by themselves qualify as extraordinary circumstances.”);
8 United States ex rel. Ford v. Page, 132 F.Supp.2d 1112, 1116 (N.D. Ill. 2001) (“[T]hat a prison
9 was sometimes on lock-down, preventing access to the prison law library, does not establish
10 ‘extraordinary circumstances’ justifying equitable tolling.”).

11 In short, the pending Petition must be dismissed as untimely.⁴

12 **CERTIFICATE OF APPEALABILITY**

13 Under the AEDPA, a state prisoner seeking to appeal a district court’s final order in a
14 habeas corpus proceeding must obtain a Certificate of Appealability (“COA”) from the district
15 judge or a circuit judge. 28 U.S.C. § 2253(c)(1)(A). A COA may issue “only if the applicant has
16 made a substantial showing of the denial of a constitutional right.” Id. at § 2253(c)(2); accord
17 Williams v. Calderon, 83 F.3d 281, 286 (9th Cir.), cert. denied, 517 U.S. 1183 (1996). “A
18 petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the
19 district court’s resolution of his constitutional claims or that jurists could conclude the issues
20 presented are adequate to deserve encouragement to proceed further.” Miller-El v. Cockrell,
21 537 U.S. 322, 327 (2003); see also Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

22
23 When a district court dismisses a petition on procedural grounds, the reviewing court
24 should apply a two-step analysis, and a COA should issue if the petitioner can show both: (1)
25 “that jurists of reason would find it debatable whether the district court was correct in its
26

27
28 ⁴ Having reached this conclusion, the Court need not address Respondent’s
contention that Ground Two in the Petition is unexhausted.

1 procedural ruling[;]" and (2) "that jurists of reason would find it debatable whether the petition
2 states a valid claim of the denial of a constitutional right[.]" Slack, 529 U.S. at 478.

3 The court has determined that the Petition should be dismissed with prejudice because
4 it is time-barred under 28 U.S.C. § 2244(d). Given the fact that the Petition is clearly untimely,
5 and even considering Petitioner's allegations regarding statutory and equitable tolling, Petitioner
6 cannot make the requisite showing "that jurists of reason would find it debatable whether the
7 district court was correct in its procedural ruling." Slack, 529 U.S. at 478. Accordingly, the
8 Court finds that a COA must be denied with respect to the instant Petition.

9 **CONCLUSION**

10 Based on the foregoing, IT IS ORDERED THAT:

- 11
- 12 1. Respondent's Motion to Dismiss Petition (**Document No. 7**) is hereby **granted**
13 **in part.**
 - 14 2. Judgment shall be entered dismissing the action with prejudice.
 - 15 3. A Certificate of Appealability is **denied.**
- 16

17 DATED: December 3, 2013

18 /s/ John E. McDermott
19 JOHN E. MCDERMOTT
20 UNITED STATES MAGISTRATE JUDGE