UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSE MEDA, Petitioner, v. BEN CURRY, Warden, Respondent.	1:09-cv—00161-SMS-HC ORDER GRANTING RESPONDENT'S MOTION TO DISMISS (DOC. 16) AND DISMISSING THE ACTION WITH PREJUDICE ORDER DIRECTING THE CLERK TO ENTER JUDGMENT AND CLOSE THE CASE ORDER DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se and in forma pauperis 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 to conduct all further proceedings in the case, including the entry of final judgment.[1] Pending before the Court is Respondent's motion to dismiss the petition for untimeliness, which was filed on December 3, 2009, along with lodged documents. Petitioner filed opposition on March 15, 2010. Respondent filed

[1] The parties manifested their consent in written consent forms signed by them or by their representatives and filed by Petitioner on July 23, 2008, February 5, 2009, and October 19, 2009, and on behalf of Respondent on December 3, 2009.

a reply on May 3, 2010, and lodged an additional document. Pursuant to Local Rule 230(l), the motion is submitted for decision without oral argument.

I. Motion to Dismiss for Untimeliness

Respondent has filed a motion to dismiss the petition on the ground that the petition was untimely filed.

Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rules) allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court...."

In the Ninth Circuit, respondents have been allowed to file a motion to dismiss pursuant to Rule 4 instead of an answer if the motion to dismiss attacks the pleadings by claiming that the petitioner has failed to exhaust state remedies or has violated the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss a petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 to review a motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a respondent may file a motion to dismiss after the Court orders the respondent to respond, and the Court should use Rule 4 standards to review a motion to dismiss filed before a formal answer. See, Hillery, 533 F. Supp. at 1194 & n. 12.

In this case, Respondent's motion to dismiss addresses the timing of the filing of the petition. The material facts pertinent to the motion are mainly to be found in copies of the

official records of state judicial proceedings which have been provided by Respondent and Petitioner, and as to which there is no factual dispute. Because Respondent has not filed a formal answer and because Respondent's motion to dismiss is similar in procedural standing to a motion to dismiss for failure to exhaust state remedies or for state procedural default, the Court will review Respondent's motion to dismiss pursuant to its authority under Rule 4.

II. The Limitations Period

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997). Petitioner filed his petition for writ of habeas corpus on July 9, 2008. Thus, the AEDPA applies to the petition.

The AEDPA provides a one-year period of limitation in which a petitioner must file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). It further identifies the pendency of some proceedings for collateral review as a basis for tolling the running of the period. As amended, subdivision (d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by 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;

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

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

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

28 U.S.C. § 2244(d).

III. Analysis

Pursuant to § 2244(d)(1)(A), the limitation period runs from the date on which the judgment became final.

Here, the parties disagree on when direct review concluded. Further, Petitioner asserts equitable defenses to the running of the statute, argues that state rulings could not serve as adequate and independent procedural grounds, and contends that the decision in Cunningham v. California, 549 U.S. 270 (2007) constituted a new rule of law.

A. Factual Summary

An abstract of judgment of the Superior Court of the County of Tulare in case number Cr-F-01-75146-2, filed on January 18, 2002, reflects that upon his pleas of no contest entered on October 30, 2001, Petitioner was convicted of voluntary manslaughter in violation of Cal. Pen. Code § 192(a) and assault with a semi-automatic firearm in violation of Cal. Pen. Code § 245(b); he was also subject to a sentence enhancement pursuant to

Cal. Pen. Code § 12022.5(a). (LD 1.) On January 18, 2002, Petitioner was sentenced to an upper term of eleven years on the manslaughter, a lower term of two years on the assault, and four years on the enhancement; his total determinate term was seventeen years. (Id.)

Petitioner appealed to the Court of Appeal of the State of California, Fifth Appellate District (DCA), which, in an opinion filed on March 18, 2003, affirmed the judgment but determined that the record suggested that the sentencing court did not appreciate its discretionary power to grant probation to Petitioner. Thus, the DCA remanded the case for resentencing to permit the sentencing court to consider whether Petitioner should be granted probation. (LD 2.) There is no evidence suggesting that Petitioner sought review of the DCA's opinion in the California Supreme Court.

An amended abstract of judgment reflects that resentencing occurred in compliance with the opinion of the DCA, and the Tulare County Superior Court again sentenced Petitioner to a determinate state prison term of seventeen years on November 5, 2003. (LD 3.)

Petitioner filed an appeal, and the DCA affirmed the judgment in case number F44312 in an opinion filed on March 16, 2005. (LD 4.)

A petition for review was denied by the California Supreme Court by order filed June 8, 2005, in case number S133265. The denial was without prejudice to any relief to which Petitioner might be entitled after the Supreme Court determined "in *People v. Black* S126182, and *People v. Towne*, S125677, the effect of

Blakely v. Washington (2004) __ U.S. __ 124 S. Ct. 2531, on California law." (LD 5.)[2]

There is no evidence before the Court suggesting that Petitioner sought certiorari.

Petitioner filed in the state courts three collateral, post-conviction petitions with respect to the pertinent judgment.

On March 27, 2007, with the assistance of the public defender, Petitioner filed a petition for habeas corpus in the Tulare County Superior Court, case number VHC 181001, alleging error pursuant to Cunningham v. California, 549 U.S. 270 (2007) (Cunningham error), because factors used to impose the upper term were neither admitted by Petitioner nor found true beyond a reasonable doubt by the trier of fact. (LD 6.) On March 28, 2007, the Tulare Superior Court denied the petition because Cunningham had not precluded a waiver of a jury trial on the issues of aggravating factors or an agreement to enter a plea in exchange for a lesser term of imprisonment than the defendant could receive should he be convicted in a jury trial. Petitioner had initially been charged with murder and attempted murder in violation of Cal. Pen. Code § 187, which carried a maximum sentence of fifty years to life. (LD 7 at 1.) Petitioner had chosen not to be exposed to fifty years to life in prison and to take the court's indicated sentence of up to twenty-three years in prison; he had received the benefit of his bargain. (LD 7 at 2.)

On May 22, 2007, a petition for writ of habeas corpus was

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[2] No copy of the petition for review is in the record before this Court. (Mot. 2 n. 1.)

filed in the DCA alleging Cunningham error. (LD 8.) On May 24, 2007, the DCA denied the petition in a single sentence without a statement of reasons or citation to authority. (LD 9.)

On July 7, 2007, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, case number S154321, alleging Cunningham error. (LD 10.) On December 19, 2007, the Supreme Court denied the petition in a single sentence without a statement of reasons or citation to any authority. (LD 11.)

B. Commencement of the Running of the Statutory Period

The limitation period begins running on the latest of several dates. § 2244(d)(1).

1. Final Judgment

Respondent argues that the limitation period began running on the date on which the judgment became final pursuant to § 2244(d)(1)(A).

Under § 2244(d)(1)(A), the "judgment" refers to the sentence imposed on the petitioner. Burton v. Stewart, 549 U.S.147, 156-57 (2007). The last sentence was imposed on Petitioner on November 5, 2003.

Under § 2244(d)(1)(A), a judgment becomes final either upon the conclusion of direct review or the expiration of the time for seeking such review in the highest court from which review could be sought. Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). The statute commences to run pursuant to § 2244(d)(1)(A) upon either 1) the conclusion of all direct criminal appeals in the state court system, followed by either the completion or denial of certiorari proceedings before the United States Supreme

Court; or 2) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state court system followed by the expiration of the time permitted for filing a petition for writ of certiorari. Wixom, 264 F.3d at 897 (quoting Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998), cert. denied 525 U.S. 1187 (1999)).

Here, Petitioner's direct review concluded when his petition for review was denied by the California Supreme Court on June 8, 2005. The time for direct review expired ninety days thereafter on September 6, 2005, when the period for seeking a writ of certiorari concluded. See, Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Thus, the limitations period began to run on September 7, 2005, to expire one year later on September 6, 2006. Patterson v. Stewart, 251 F.3d 1243, 1245-46 (9th Cir. 2001) (holding analogously that the correct method for computing the running of the one-year grace period is pursuant to Fed. R. Civ. P. 6(a), in which the day upon which the triggering event occurs is not counted).

The petition was filed here on July 9, 2008. Thus, absent any tolling, the petition shows on its face, that it was filed outside the one-year limitations period provided for by the statute.

C. Statutory Tolling pursuant to 28 U.S.C. § 2244(d)(2)

Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one-year limitation period. 28 U.S.C. § 2244(d)(2).

Once a petitioner is on notice that his habeas petition may be subject to dismissal based on the statute of limitations, he has the burden of demonstrating that the limitations period was sufficiently tolled by providing pertinent dates of filing and denial, although the state must affirmatively argue that the petitioner failed to meet his burden of alleging the tolling facts; simply noting the absence of such facts is not sufficient. Smith v. Duncan, 297 F.3d 809, 814-15 (9th Cir. 2002).

Here, Petitioner did not file his first state petition for collateral relief until March 27, 2007. Thus, the statutory period had run by the time any application for collateral relief was filed in the state courts.

Under such circumstances, the pendency of state applications has no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (filing a state collateral petition after the running of the one-year limitations period of the AEDPA but even before the expiration of the pertinent state period of finality did not toll the running of the period under § 2244(d)(2)).

D. Equitable Tolling

In his opposition to the motion to dismiss, Petitioner argues that the running of the statute was equitably tolled by various circumstances.

1. Legal Standards

The governing standards are established:

> "[A] litigant seeking equitable tolling [of the one-year AEDPA limitations period] bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807, 1814, 161 L.Ed.2d 669 (2005). "[T]he threshold necessary to

> trigger equitable tolling under [the] AEDPA is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.2002) (internal quotation marks and citation omitted). This high bar is necessary to effectuate the "AEDPA's statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir.2003) (internal quotation marks and citation omitted). Equitable tolling determinations are "highly fact-dependent." Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir.2000) (en banc) (per curiam). Accord Lott v. Mueller, 304 F.3d 918, 923 (9th Cir.2002) (observing that equitable tolling determinations "turn[] on an examination of detailed facts").

Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006).

Petitioner bears the burden of alleging facts that would give rise to tolling. Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). The prisoner must show that the extraordinary circumstances were the cause of his untimeliness. Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003).

2. Ignorance and Ineffective Assistance of Counsel

Petitioner states under penalty of perjury that his "procedural default," which is understood as his delay in filing his petition here, was due to his counsel's failure to advise him of the procedures to be followed to proceed to federal court on his claim after the petition for review was denied by the California Supreme Court on June 8, 2005. (Opp. 5, 3.) The attorney to whom he refers was his counsel on his appeal to the DCA. Petitioner states that as an uninformed layperson, he did not know the proper procedures or time limits and believed and assumed that his counsel filed a further appeal. (Opp. 3.)

Petitioner's right under the Sixth and Fourteenth Amendments to counsel on appeal was limited to his first appeal as of right;

it did not extend to discretionary appeals or to collateral attacks on convictions. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Petitioner did not have a Sixth Amendment right to counsel on collateral attacks even if those proceedings were the first opportunity in which Petitioner could raise the previous ineffectiveness of counsel. Jeffers v. Lewis, 68 F.3d 299, 300 (9th Cir. 1994). Equitable tolling is not warranted where a petitioner seeks to attribute his delay in filing a federal petition to counsel's conduct at a time when the petitioner did not have a constitutional right to counsel to perfect his post-conviction petitions. Lawrence v. Florida, 549 U.S. 327, 336 (2007).

Petitioner's first appeal as of right terminated on March 16, 2005, when the DCA affirmed the judgment upon direct appeal from the resentencing of November 2003. Thereafter, including when petitioning for habeas relief, Petitioner had no right to counsel under the Constitution. Thus, at the time that the alleged ineffective assistance of counsel occurred, Petitioner did not have a right to counsel.

Generally, counsel's negligence will not be sufficient to constitute extraordinary circumstances that would warrant equitable tolling. Miranda v. Castro, 292 F.3d 1063, 1066-67 (9th Cir. 2002); Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001). However, sufficiently egregious and atypical misconduct of an attorney may constitute an extraordinary circumstance warranting equitable tolling of AEDPA's statute of limitations. Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir. 2003) (recognizing equitable tolling in a capital case where counsel failed to

perform work for an extended period of time and retained the client's papers throughout the limitations period despite the client's diligence in communication); Calderon v. U.S. Dist. Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly), 163 F.3d 530, 540-41 (9th Cir. 1998).

Petitioner states that he believed and assumed that counsel would file a further appeal. Petitioner does not state any specific facts in support of this general statement. He refers to counsel's failure to advise him of the procedures to be followed to proceed to federal court; he does not specify any affirmative misrepresentation about that process, or any expressed undertaking of counsel to continue beyond the scope of the appointed representation on the first appeal of right or otherwise to file for additional relief in other courts. Petitioner has not established that there was any extreme or even gross misfeasance or malfeasance of counsel within the scope of the appellate proceedings before the DCA that could be characterized as extraordinary. Petitioner thus has not met his burden to specify the facts that demonstrate that it was extraordinary circumstances, and not Petitioner's lack of diligence, from which the untimeliness resulted. Roy v. Lampert, 465 F.3d 964, 973 (9th Cir. 2006).

Further, there is no showing how counsel's failure of advice in early 2005 actually caused Petitioner's continued failure to seek relief in the federal courts. After direct review became final in September 2005, it was about eighteen months until Petitioner first sought collateral, post-conviction relief in the

Superior Court. Even if this delay were understandable with respect to the errors alleged on the basis of Cunningham v. California, 549 U.S. 270 (2007), which was decided in January 2007, Petitioner has not provided facts concerning this period that explain the delay with respect to his other claims concerning the sentencing in 2003 as to which direct appellate review in the state courts was final in September 2005.

Further, after the California Supreme Court denied his third state petition in December 2007, Petitioner delayed in filing his petition in federal court for almost seven months until July 2008. Petitioner provides no specific facts constituting extraordinary circumstances or demonstrating diligence.

The repeated delays are inconsistent with reasonable diligence. In Pace v. DiGuglielmo, 544 U.S. 408, 418-19 (2005), the Court addressed whether petitions that were untimely pursuant to state standards were "properly filed" under § 2244(d)(2), and it assumed that the doctrine of equitable tolling could be applied to toll the running of § 2244(d). In Pace, the Court held that a petitioner proceeding pursuant to § 2254 was nevertheless not entitled to equitable tolling because he had not demonstrated diligence. Facts pertinent to the validity of his plea had been known to the petitioner for ten years. Because the petitioner had repeatedly delayed, with the most recent delay enduring for five months after the date of finality in the state courts, he was not entitled to statutory tolling under § 2244(d), and likewise was not entitled to equitable tolling, even if he had relied on erroneous judicial decisions to his detriment, because he lacked diligence. Id. at 418-19.

Part and parcel of Petitioner's assertion here concerning counsel's inaction or failure of advice is the additional circumstance of Petitioner's ignorance. Petitioner states under penalty of perjury that he did not know the proper procedure or time limits for filing a petition in this Court. However, a pro se petitioner's confusion or ignorance of the law is not alone a circumstance warranting equitable tolling. Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). Petitioner has not shown anything more than individual ignorance or generalized confusion.

Further, Petitioner has not alleged specific facts showing that he was diligent or lacked the time or resources with which to exercise a diligent attempt to learn the relatively simple procedures for seeking review by the California Supreme Court and for filing for relief in the federal system. It is established that the failure of the person seeking equitable tolling to exercise reasonable diligence in attempting to file timely after the extraordinary circumstances begin disrupts the link of causation between the circumstances and the failure to file. Spitsyn v. Moore, 345 F.3d 796, 802 (9th Cir. 2003).

Here, Petitioner's delays in commencing proceedings to obtain post-conviction, collateral relief and in bringing his claims to federal court after state court review was completed and final are significantly longer than the unexplained periods of three (3) months to four (4) months held to have been unreasonable and inconsistent with the diligent pursuit of rights required for entitlement to equitable tolling in Chaffer v. Prosper, 592 F.3d 1046, 1048-49 (9th Cir. 2010).

In summary, the Court concludes that Petitioner has not

shown that the circumstances of his ignorance and his counsel's alleged omissions warranted equitable tolling.

3. Prison Transfers and Programs

Petitioner asserts that his untimely filing was because of circumstances warranting relief:

> [E]xternal forces beyond petitioner's control of counsel not advising petitioner of the procedures on proceeding to federal court on his claim and of being transferred to various institutions and being on modified prison programs resulted on (sic) petitioner's late filing of his petition to this Court.... (Opp. 5.)

In order to establish that timely filing was prevented by external circumstances, it is a petitioner's burden to establish the specific facts concerning the particular grounds asserted to have prevented timely filing; further, the petitioner must establish that timely filing was rendered impossible by the condition alleged to warrant tolling, including the petitioner's ignorance or lack of notice of pertinent decisions or developments in his case, the complete unavailability of legal papers or library materials, or placement or programming in prison precluding the timely filing of a petition. Ramirez v. Yates, 571 F.3d 993, 997-1001 (9th Cir. 2009); Espinoza-Matthews v. California, 432 F.3d 1021, 1027-28 (9th Cir. 2005). To warrant the extraordinary intervention of equity, a petitioner is required to set forth facts concerning the absence of specific resources and the precise effect thereof on the ability to file a timely petition. Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010). Generally, transfers of inmates within the prison system and a shortage of library access or volumes are not extraordinary circumstances; rather, they are ordinary

vicissitudes of prison life. Id.

Here, Petitioner makes only the most generalized assertions concerning transfers and programming. He has not demonstrated extraordinary circumstances or diligence. Therefore, the Court concludes that Petitioner has failed to establish that the running of the statute should be equitably tolled.

E. Newly Recognized Constitutional Right

Petitioner argues that the statutory period began to run on a date subsequent to the time of the finality of the judgment, namely, pursuant to § 2244(d)(1)(C):

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review....

Petitioner contends that Cunningham v. California is either a retroactive, new rule of law, or if not retroactive, a watershed exception that permits his claim of Cunningham error to be reached in this proceeding. (Opp. 3-4.)

Under Teague v. Lane, 489 U.S. 288 (1989), a new rule of law is generally not retroactive and thus applies only to cases that are still on direct review; "old" rules of criminal procedure generally apply both on direct and collateral review. Whorton v. Bockting, 549 U.S. 406, 416 (2007). It has been determined that the decision in Cunningham did not announce a new rule of law, but rather merely applied the rule announced by the Supreme Court in Blakely v. Washington, 542 U.S. 296 (2004). Butler v. Curry, 528 F.3d 624, 639-39 (9th Cir. 2008).

The rule of Blakely, which was new, is not retroactively applicable to cases on collateral review. Schardt v. Payne, 414

F.3d 1025, 1034-36 (9th Cir. 2005). Thus, Petitioner cannot take advantage of the particular new rule.

Further, as Respondent notes, Petitioner's contentions concerning Blakely were briefed by Petitioner during the direct review process in the Court of Appeal. (LD 12.) The state appellate court considered the arguments in its opinion and concluded that Blakely and related authority did not apply in the particular circumstances of Petitioner's case. (LD 4-5.) The California Supreme Court's order of denial expressly referred to a case pending before it concerning the effect of Blakely v. Washington on California law. (LD 5.)

The Court concludes that Petitioner has not established that his circumstances come within the terms of § 2244(d)(1)(C).

F. Untimeliness as a Procedural Default

Petitioner argues that his default of untimeliness was not sufficiently independent or adequate to prevent federal review. (Opp. 2.)

In White v Martel, 601 F.3d 882 (9th Cir. 2010), it was argued that California's timeliness rule was not an "adequate" procedural bar because it was vague, ambiguous, and inconsistently applied. The court determined, however, that the adequacy analysis used in considering procedural default issues is inapplicable to the issue of whether a state petition was "properly filed" for purposes of section 2244(d)(2). White v Martel, 601 F.3d 882, 884 (citing Zepeda v. Walker, 581 F.3d 1013, 1018 (9th Cir. 2009)). The court proceeded to analyze Petitioner's diligence and the circumstances, and to conclude that the petitioner was not entitled to statutory or equitable

tolling, all without reference to the adequacy of California's processes.

With respect to the applicability of the adequacy analysis, there does not appear to be any reason to adopt a different position with respect to equitable, as distinct from statutory, tolling. Any special circumstances sought to be considered in connection with the request for equitable relief are already before the Court.

Petitioner also argues that at no time did the state courts deny the petition as being untimely or procedurally defaulted, and further that his claims were exhausted; thus, Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) and Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003), authorities relied on by Respondent, do not apply. (Pet. 3.)

However, it is not asserted or contended by Respondent that the state courts either found that the petitions filed in the state courts were untimely or imposed a procedural bar to consideration of Petitioner's claims by this Court.

The Court concludes that Petitioner has not demonstrated extraordinary circumstances or diligence, and thus he is not entitled to equitable tolling of the statutory period.

In summary, the Court finds that the facts concerning the various state proceedings are undisputed. The petition was filed outside of the one-year statutory period, and Petitioner failed to demonstrate his entitlement to relief from the bar of the statute of limitations.

Accordingly, Respondent's motion to dismiss the petition as untimely will be granted.

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IV. Certificate of Appealability

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas proceeding in which the detention complained of arises out of process issued by a state court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). A certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. § 2253(c)(2). Under this standard, a petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A certificate should issue if the Petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and, with respect to procedural issues, that jurists of reason would find it debatable whether the district court was correct in any procedural ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). In determining this issue, a court conducts an overview of the claims in the habeas petition, generally assesses their merits, and determines whether the resolution was debatable among jurists of reason or wrong. Id. It is necessary for an applicant to show more than an absence of frivolity or the existence of mere good faith; however, it is not necessary for an applicant to show that the appeal will succeed. Id. at 338.

A district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Habeas Rule 11(a).

Here, because the facts concerning the various state proceedings are undisputed, and because Petitioner failed to demonstrate by specific facts his entitlement to relief from the bar of the statute of limitations, jurists of reason would not find it debatable whether the Court was correct in its ruling. Accordingly, the Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right, and the Court declines to issue a certificate of appealability.

V. Disposition

Accordingly, it is ORDERED that:

1) Respondent's motion to dismiss the petition is GRANTED; and

2) The petition for writ of habeas corpus is DISMISSED WITH PREJUDICE as untimely filed; and

3) The Clerk is DIRECTED to enter judgment and close the case; and

4) The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: May 27, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE