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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUAN CARLOS SANTIAGO VELASCO,)	1:11-cv-01952-BAM-HC
)	
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS THE PETITION
)	(DOC. 13)
v.)	
)	ORDER DISMISSING THE PETITION
M. D. BITER,)	WITH PREJUDICE (DOC. 1) AND
)	DIRECTING THE CLERK TO ENTER
Respondent.)	JUDGMENT
)	
_____)	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, by manifesting their consent in writings signed by the parties or their representatives and filed by Petitioner on December 7, 2011, and on behalf of Respondent on January 13, 2012.

Pending before the Court is Respondent's motion to dismiss the petition as untimely, which was filed on January 27, 2012.

1 Respondent lodged supporting documents in connection with the
2 motion. Petitioner filed opposition to the motion on March 15,
3 2012. No reply was filed.

4 I. Motion to Dismiss for Untimeliness

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

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

12 In the Ninth Circuit, respondents have been allowed to file
13 a motion to dismiss pursuant to Rule 4 instead of an answer if
14 the motion to dismiss attacks the pleadings by claiming that the
15 petitioner has failed to exhaust state remedies or has violated
16 the state's procedural rules. See, e.g., O'Bremski v. Maass, 915
17 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion
18 to dismiss a petition for failure to exhaust state remedies);
19 White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule
20 4 to review a motion to dismiss for state procedural default);
21 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D.Cal. 1982)
22 (same). Thus, a respondent may file a motion to dismiss after
23 the Court orders the respondent to respond, and the Court should
24 use Rule 4 standards to review a motion to dismiss filed before a
25 formal answer. See, Hillery, 533 F. Supp. at 1194 & n.12.

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

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

9 II. The Limitations Period

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

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

22 (d) (1) A 1-year period of limitation shall apply to
23 an application for a writ of habeas corpus by a person
24 in custody pursuant to the judgment of a State court.
The limitation period shall run from the latest of --

25 (A) the date on which the judgment became final by
26 the conclusion of direct review or the expiration
of the time for seeking such review;

27 (B) the date on which the impediment to filing an
28 application created by State action in violation of
the Constitution or laws of the United States
is removed, if the applicant was prevented from

1 filing by such State action;

2 (C) the date on which the constitutional right
3 asserted was initially recognized by the
4 Supreme Court, if the right has been newly
5 recognized by the Supreme Court and made
6 retroactively applicable to cases on collateral
7 review; or

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

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

16 28 U.S.C. § 2244(d).

17 III. Factual Summary

18 In the petition filed here, Petitioner challenges his
19 conviction of assault with a deadly weapon and with force likely
20 to produce great bodily injury, and his sentence of seventeen
21 years that was enhanced for Petitioner's personal infliction of
22 great bodily injury and his commission of the offense for the
23 benefit of a criminal street gang in violation of Cal. Pen. Code
24 §§ 245(a)(1), 186.22(b)(1)(c), and 12022.7(a). (Pet., doc. 1, 1-
25 2, 6-15.)

26 Petitioner was sentenced in the Merced County Superior Court
27 (MCSC) on June 17, 2005. (LD 1.)

28 On December 12, 2006, the Court of Appeal of the State of
California, Fifth Appellate District (CCA) affirmed the judgment
on direct appeal. (LD 2, 10.)

Petitioner filed a petition for review in the California
Supreme Court (CSC) on January 23, 2007, which was dismissed on
September 12, 2007, in light of People v. Black, 41 Cal.4th 799

1 (2007). (LD 3-4.) There is no evidence before the Court
2 suggesting that Petitioner sought certiorari; Petitioner states
3 in his opposition that his direct appeal concluded on December
4 12, 2007, in light of the ninety-day period for filing a petition
5 for writ of certiorari. (Opp., doc. 17, 1:24-26.)

6 On August 10, 2009, Petitioner filed¹ a petition for writ of
7 habeas corpus in the MCSC. (LD 5, 1.) The petition was denied
8 on January 4, 2010, because 1) in the absence of an exception to
9 the general rule, reconsideration of all grounds for relief that
10 could have been raised on appeal but were not so raised was
11 barred; and 2) all twenty-two grounds alleged in the petition
12 were untimely, and Petitioner had failed to explain meritoriously
13 the reasons for his considerable delay in seeking habeas relief.
14 (LD 6, 1-2.)

15 On December 24, 2009, Petitioner filed a petition for writ
16 of habeas corpus in the CCA. (LD 7, 1.) On January 21, 2010,
17 the CCA denied the petition without any statement of reasoning or
18 citation of authority. (LD 8.)

19 On January 25, 2010, Petitioner filed another petition for
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22 ¹Under the mailbox rule, a prisoner's pro se habeas petition is "deemed
23 filed when he hands it over to prison authorities for mailing to the relevant
24 court." Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001); Houston v.
25 Lack, 487 U.S. 266, 276 (1988); see, Rule 3(d) of the Rules Governing Section
26 2254 Cases in the United States District Courts (Habeas Rules). The mailbox
27 rule applies to federal and state petitions alike. Campbell v. Henry, 614
28 F.3d 1056, 1058-59 (9th Cir. 2010) (citing Stillman v. LaMarque, 319 F.3d
1199, 1201 (9th Cir. 2003), and Smith v. Ratelle, 323 F.3d 813, 816 n.2 (9th
Cir. 2003)). It has been held that the date the petition is signed may be
inferred to be the earliest possible date an inmate could submit his petition
to prison authorities for filing under the mailbox rule. Jenkins v. Johnson,
330 F.3d 1146, 1149 n.2 (9th Cir. 2003), overruled on other grounds, Pace v.
DiGuglielmo, 544 U.S. 408 (2005). The Petitioner's filings have been given
the benefit of the mailbox rule to the extent possible based on the
documentation before the Court.

1 writ of habeas corpus in the CCA, which denied the petition
2 without any statement of reasoning or citation of authority. (LD
3 9-10.)

4 On March 16, 2010, Petitioner filed a petition for writ of
5 habeas corpus in the CSC, which denied the petition with
6 citations to In re Robbins, 18 Cal.4th 770, 780 (1998) and People
7 v. Duvall, 9 Cal.4th 464, 474 (1995). (L.D. 11, 35; LD 12.)

8 On September 28, 2011, Petitioner filed the petition that is
9 presently pending before the Court. The proceeding was
10 transferred to this Court on November 23, 2011.

11 IV. The Running of the Limitations Period

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

14 Under § 2244(d)(1)(A), the "judgment" refers to the sentence
15 imposed on the petitioner. Burton v. Stewart, 549 U.S.147, 156-
16 57 (2007). The last sentence was imposed on Petitioner on June
17 17, 2005.

18 Under § 2244(d)(1)(A), a judgment becomes final either upon
19 the conclusion of direct review or the expiration of the time for
20 seeking such review in the highest court from which review could
21 be sought. Wixom v. Washington, 264 F.3d 894, 897 (9th Cir.
22 2001). The statute commences to run pursuant to § 2244(d)(1)(A)
23 upon either 1) the conclusion of all direct criminal appeals in
24 the state court system, followed by either the completion or
25 denial of certiorari proceedings before the United States Supreme
26 Court; or 2) if certiorari was not sought, then by the conclusion
27 of all direct criminal appeals in the state court system followed
28 by the expiration of the time permitted for filing a petition for

1 writ of certiorari. Wixom, 264 F.3d at 897 (quoting Smith v.
2 Bowersox, 159 F.3d 345, 348 (8th Cir. 1998), cert. denied 525
3 U.S. 1187 (1999)).

4 Here, Petitioner's direct review concluded when his petition
5 for review was dismissed by the California Supreme Court on
6 September 12, 2007. The time for direct review expired ninety
7 days thereafter on December 11, 2007, when the period for seeking
8 a writ of certiorari concluded. See, Bowen v. Roe, 188 F.3d
9 1157, 1158-59 (9th Cir. 1999). Thus, the limitations period
10 began to run on December 12, 2007, to expire one year later on
11 December 11, 2008. Patterson v. Stewart, 251 F.3d 1243, 1245-46
12 (9th Cir. 2001) (holding analogously that the correct method for
13 computing the running of the one-year grace period is pursuant to
14 Fed. R. Civ. P. 6(a), in which the day upon which the triggering
15 event occurs is not counted).

16 The petition was filed here on September 28, 2011. Thus,
17 absent any tolling, the petition shows on its face that it was
18 filed outside the one-year limitations period provided for by the
19 statute.

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

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

26 Once a petitioner is on notice that his habeas petition may
27 be subject to dismissal based on the statute of limitations, he
28 has the burden of demonstrating that the limitations period was

1 sufficiently tolled by providing pertinent dates of filing and
2 denial, although the state must affirmatively argue that the
3 petitioner failed to meet his burden of alleging the tolling
4 facts; simply noting the absence of such facts is not sufficient.
5 Smith v. Duncan, 297 F.3d 809, 814-15 (9th Cir. 2002).

6 Here, Petitioner did not file his first state petition for
7 collateral relief until August 10, 2009, eight months after the
8 statutory period had expired on December 11, 2008. Thus, the
9 statutory period had run by the time any application for
10 collateral relief was filed in the state courts.

11 Under such circumstances, the pendency of state applications
12 has no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823
13 (9th Cir. 2003) (filing a state collateral petition after the
14 running of the one-year limitations period of the AEDPA but even
15 before the expiration of the pertinent state period of finality
16 did not toll the running of the period under § 2244(d)(2)).

17 Respondent further notes that in any event, the state courts
18 expressly found that some of the petitions filed by Petitioner
19 were untimely, and thus they could not have tolled the running of
20 the statutory period because they were not properly filed.

21 An application for state post-conviction or other collateral
22 review is "properly filed" within the meaning of 28 U.S.C.
23 § 2244(d)(2) when its delivery and acceptance are in compliance
24 with the applicable laws and rules governing filings, such as
25 provisions concerning the form of the document, the time limits
26 upon its delivery, the court and office in which it must be
27 lodged, and the requisite filing fee. Artuz v. Bennett, 531 U.S.
28 4, 8 (2000). State time limits are conditions to filing, which

1 render a petition not "properly filed" within the meaning of 28
2 U.S.C. § 2244(d) (2). Pace v. DiGuglielmo, 544 U.S. at 417. When
3 a state court rejects a petition for post-conviction relief as
4 untimely, the petition is not a "properly filed" application for
5 post-conviction or collateral review within the meaning of §
6 2244(d) (2), and thus it does not toll the running of the
7 limitation period. Id. Where a petition is untimely under
8 California's standards, none of the time before or during the
9 court's consideration of the petition is statutorily tolled.
10 White v. Martel, 601 F.3d 882, 883-84 (9th Cir. 2010), cert.
11 denied, 131 S.Ct. 332 (2010).

12 Here, the MCSC denied Petitioner's first habeas petition
13 with an express determination that the claims were all untimely
14 and were presented without any meritorious reason for
15 Petitioner's considerable delay. (LD 6, 1-2.) In connection
16 with its finding of untimeliness, the MCSC cited In re Robbins,
17 18 Cal.4th 770, 780-781 (1998). (Id. at 2.) The CCA summarily
18 denied the second petition, which contained the same claims as
19 the first. (LD 5, 7, 8.) The CCA likewise summarily denied the
20 third petition, which contained all the claims contained in the
21 second petition. (LD 7, 9, 10.) It is presumed that the state
22 appellate court did not silently disregard the last reasoned
23 opinion of the MCSC (LD 3), in which the court found the petition
24 was procedurally deficient. Cf. Ylst v. Nunnemaker, 501 U.S.
25 797, 803-06 (1991). Thus, the CCA's silent denials constituted
26 determinations that the petitions were untimely.

27 The CSC then denied the fourth habeas petition with a
28 citation to Robbins, 18 Cal.4th at 780. (LD 12.) Robbins stands

1 for the proposition that delayed and repetitious claims will not
2 be condoned; a citation to Robbins at 780 means that the petition
3 was untimely. Thorson v. Palmer, 479 F.3d 643, 645 (9th Cir.
4 2007).

5 Therefore, in addition to having been filed too late to toll
6 the statute, Petitioner's state petitions were not properly
7 filed, and thus they did not toll the limitations period for
8 purposes of 28 U.S.C. § 2244(d) (2). Pace v. DiGulielmo, 544 U.S.
9 at 414-15.

10 It is concluded that the running of the limitations period
11 was not tolled by Petitioner's state court filings pursuant to
12 § 2244(d) (2).

13 VI. Equitable Tolling

14 The one-year limitation period of § 2244 is subject to
15 equitable tolling where the petitioner has been diligent, and
16 extraordinary circumstances, such as the egregious misconduct of
17 counsel, have prevented the petitioner from filing a timely
18 petition. Holland v. Florida, - U.S. -, 130 S.Ct. 2549, 2560
19 (2010). The petitioner must show that the extraordinary
20 circumstances were the cause of his untimeliness and that the
21 extraordinary circumstances made it impossible to file a petition
22 on time. Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009).
23 The diligence required for equitable tolling is reasonable
24 diligence, not "maximum feasible diligence." Holland v. Florida,
25 130 S.Ct. at 2565.

26 "[T]he threshold necessary to trigger equitable tolling
27 [under AEDPA] is very high, lest the exceptions swallow the
28 rule." Spitsyn v. Moore, 345 F.3d 796, 799 (quoting Miranda v.

1 Castro, 292 F.3d 1063, 1066 (9th Cir. 2002)).

2 In his opposition, Petitioner asserts in an unsworn
3 statement that he had tried to file a petition for writ of habeas
4 corpus in the MCSC in May 2007, but the petition was returned
5 with a notation that it was on the wrong form, and with a
6 direction to submit it on the current form. Petitioner states
7 that he complied with the direction; the court enclosed a
8 "current 2009 Judicial form," which Petitioner resubmitted "in
9 all diligence." (Opp., doc. 17, 1-2.) Although Petitioner
10 asserts generally that he was diligent, Petitioner does not
11 provide any facts that would explain why he delayed over two
12 years before filing another petition in the MCSC in August 2009.

13 Petitioner argues that his appellate counsel refused to
14 submit on appeal the additional claims that Petitioner seeks to
15 raise here. Petitioner may be attempting to assert that the
16 ineffective assistance of counsel constituted an extraordinary
17 circumstance.

18 Reference to the opinion of the CCA in the direct appeal
19 shows that the assault of which Petitioner was convicted involved
20 Petitioner's knocking the victim's red hat off his head and
21 ordering the victim to take off his red jacket because Petitioner
22 did not like the victim's wearing red on Petitioner's street. A
23 short time later, Petitioner again encountered the victim, who
24 had put his jacket back on after having removed it for
25 Petitioner. Petitioner and a companion exited their vehicle and
26 ran to the victim, who again removed his jacket. Petitioner
27 swung at the victim and missed; the victim hit Petitioner, who
28 fell. Petitioner's companion threw a beer at the victim and

1 attacked him, but Petitioner's companion was punched and knocked
2 to the ground by the victim. Petitioner then ran up behind the
3 victim and stabbed him on the side, and Petitioner's companion
4 stabbed the victim on his other side; one of the assailants was
5 observed by the victim carrying a five-inch-long boot knife.
6 Petitioner and his companion ran off and drove away. (LD 2, 2-
7 3.)

8 The victim's identification of Petitioner in a photographic
9 line-up was certain because the victim had been in the same
10 grade, and in some of the same classes, as Petitioner in high
11 school. Further, persons who had accompanied the victim at the
12 time of the attack identified Petitioner and Petitioner's
13 companion. One of the victim's companions knew both Petitioner
14 and his co-participant because he had grown up with Petitioner
15 and had attended the same school; he had also seen Petitioner
16 around town a lot. (LD 2, 4.)

17 The claims which Petitioner seeks to raise here that were
18 not raised on appeal primarily concern alleged judicial bias and
19 erroneous rulings as well as the prosecution's failure to
20 disclose, or untimely disclosure of, information that related to
21 impeachment of Petitioner's alibi witness, and a stipulation to
22 be revealed to the jury regarding this information. The
23 information related to the defense witness's having allegedly
24 attacked a child a year and one-half before the trial. (LD 5.)

25 The record before the Court does not reveal counsel's
26 reasons for failing to raise the omitted issues. Generally, mere
27 negligence or excusable neglect on the part of counsel does not
28 warrant equitable tolling. Holland v. Florida, 130 S.Ct. 2549,

1 2564. However, more egregious misconduct in the nature of
2 abandonment of the client or a failure to perform essential
3 functions might provide a basis for equitable tolling. Id.

4 Here, it is unknown why appellate counsel did not raise
5 these issues on appeal. Petitioner has not set forth any facts
6 concerning the substance of the alibi witness's knowledge or
7 testimony, or the circumstances relevant to the stipulation, that
8 would support an inference that counsel was engaging in sub-
9 standard conduct in failing to raise these issues on appeal, or
10 that a failure to raise such issues was prejudicial to
11 Petitioner. See, Strickland v. Washington, 466 U.S. 668, 687-94
12 (1984); Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). It is
13 concluded that Petitioner has not demonstrated that his counsel
14 rendered ineffective assistance, let alone egregious misconduct
15 that might warrant equitable tolling.

16 Petitioner asserts that he had difficulty obtaining his
17 trial transcripts, which, despite his requests, were not mailed
18 to him until March 2008, which was about six months after the
19 conclusion of his direct appeal. Petitioner also asserts that he
20 lacked knowledge and suffered unspecified limitations with
21 respect to access to legal materials; further, in the last six
22 weeks before Petitioner submitted his opposition to the instant
23 motion, his custodial institution was on lock-down, and he had no
24 opportunity to visit the law library. (Id. at 1-4.)

25 Here, Petitioner proceeded pro se. Petitioner's pro se
26 status is not an extraordinary circumstance. Chaffer v. Prosper,
27 592 F.3d 1046, 1049 (9th Cir. 2010). A pro se petitioner's
28 confusion or ignorance of the law is not alone a circumstance

1 warranting equitable tolling. Rasberry v. Garcia, 448 F.3d 1150,
2 1154 (9th Cir. 2006). Limited access to a law library and copy
3 machine is a routine restriction of prison life and thus is not
4 an extraordinary circumstance. Ramirez v. Yates, 571 F.3d at
5 993. Petitioner's allegations are general, and Petitioner has
6 not shown how any limitation of access to the law library or to
7 any other materials actually made it impossible for him to file a
8 petition. Thus, Petitioner's showing differs materially from one
9 that establishes that lack of access to specific materials
10 precluded timely filing.

11 Further, Petitioner's filing of numerous petitions in the
12 state courts during his incarceration is inconsistent with his
13 allegations of impossibility. Cf., Ramirez v. Yates, 571 F.3d at
14 998. Petitioner has failed to show that the circumstances in
15 question actually caused Petitioner's inability to file timely a
16 federal habeas application. Such a failure warrants denial of an
17 equitable tolling claim. Gaston v. Palmer, 417 F.3d 1030,
18 1034-35 (9th Cir. 2005).

19 Likewise, Petitioner has not established his diligence more
20 generally throughout the state court proceedings in attempting to
21 file a timely federal petition. Petitioner has failed to set
22 forth affirmative allegations showing his diligent efforts to
23 file the necessary documents. Cf., Chaffer v. Prosper, 592 F.3d
24 at 1049. It is established that the failure of the person
25 seeking equitable tolling to exercise reasonable diligence in
26 attempting to file timely after the extraordinary circumstances
27 begin disrupts the link of causation between the circumstances
28 and the failure to file. Spitsyn v. Moore, 345 F.3d at 802.

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

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

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

11 VII. Certificate of Appealability

12 Unless a circuit justice or judge issues a certificate of
13 appealability, an appeal may not be taken to the court of appeals
14 from the final order in a habeas proceeding in which the
15 detention complained of arises out of process issued by a state
16 court. 28 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537
17 U.S. 322, 336 (2003). A certificate of appealability may issue
18 only if the applicant makes a substantial showing of the denial
19 of a constitutional right. § 2253(c) (2). Under this standard, a
20 petitioner must show that reasonable jurists could debate whether
21 the petition should have been resolved in a different manner or
22 that the issues presented were adequate to deserve encouragement
23 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
24 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
25 certificate should issue if the Petitioner shows that jurists of
26 reason would find it debatable whether the petition states a
27 valid claim of the denial of a constitutional right and, with
28 respect to procedural issues, that jurists of reason would find

1 it debatable whether the district court was correct in any
2 procedural ruling. Slack v. McDaniel, 529 U.S. 473, 483-84
3 (2000).

4 In determining this issue, a court conducts an overview of
5 the claims in the habeas petition, generally assesses their
6 merits, and determines whether the resolution was debatable among
7 jurists of reason or wrong. Id. It is necessary for an
8 applicant to show more than an absence of frivolity or the
9 existence of mere good faith; however, it is not necessary for an
10 applicant to show that the appeal will succeed. Id. at 338.

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

14 Here, because the facts concerning the various state
15 proceedings are undisputed, and because Petitioner failed to
16 demonstrate by specific facts his entitlement to relief from the
17 bar of the statute of limitations, jurists of reason would not
18 find it debatable whether the Court was correct in its ruling.

19 Accordingly, the Court concludes that Petitioner has not
20 made a substantial showing of the denial of a constitutional
21 right, and the Court will decline to issue a certificate of
22 appealability.

23 VIII. Disposition

24 Accordingly, it is ORDERED that:

- 25 1) Respondent's motion to dismiss the petition is GRANTED;
26 and
27 2) The petition for writ of habeas corpus is DISMISSED WITH
28 PREJUDICE as untimely filed; and

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

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

5 IT IS SO ORDERED.

6 **Dated: June 5, 2012**

/s/ **Barbara A. McAuliffe**
UNITED STATES MAGISTRATE JUDGE

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