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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARQUIMEDES MENDOZA,

Petitioner,

No. CIV S-09-1710 MCE DAD P

vs.

MATTHEW CATE,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a federal prisoner proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254.<sup>1</sup> Therein, petitioner is challenging his 2004 judgment of conviction for rape of an intoxicated person in violation of California Penal Code § 261(a)(3) which was entered in the San Joaquin County Superior Court pursuant to a plea agreement.

On September 16, 2010, this court ordered respondent to file a response to the habeas petition. On November 3, 2010, respondent filed the pending motion to dismiss, arguing that the petition is time-barred under the Antiterrorism and Effective Death Penalty Act of 1996

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<sup>1</sup> On December 21, 2009, this court ordered petitioner to clarify the habeas relief he was seeking since it appeared that he was now in federal custody following his conviction for illegal reentry into the United States following his deportation. On February 1, 2010, petitioner responded to the court's order, explaining that he was challenging his 2004 San Joaquin County Superior Court conviction and was on parole at the time he filed this federal habeas action.

1 (“AEDPA”). When petitioner failed to file an opposition to the pending motion, the court  
2 ordered him to show cause why the motion to dismiss should not be granted. On January 3,  
3 2011, petitioner filed his response to the order to show cause in which he also argued that the  
4 motion to dismiss should be denied. On May 31, 2011, the court ordered respondent to file a  
5 reply addressing petitioner’s arguments and, specifically, the issue of when the factual predicate  
6 with respect to each of petitioner’s claims could have been discovered through the exercise of  
7 reasonable diligence under 28 U.S.C. § 2244(d)(1)(D). On July 28, 2011, respondent filed a  
8 three page reply without exhibits, very briefly and generally addressed the issue the court had  
9 identified.

#### 10 **BACKGROUND**

11 On May 3, 2004, in the San Joaquin County Superior Court, petitioner entered a  
12 guilty plea to a violation of California Penal Code § 261(a)(3) (intercourse with a person who is  
13 prevented from resisting by any intoxicating or anesthetic substance) pursuant to a plea  
14 agreement and was sentenced to a term of three years in state prison. (Lod. Doc. 1.) Petitioner  
15 did not appeal from his judgment of conviction. (Mot. to Dismiss (“MTD”) at 1.)

16 Thereafter, petitioner filed three state habeas petitions. First, on March 10, 2008,  
17 petitioner filed a habeas petition with the San Joaquin County Superior Court. (Lod. Doc. 2.)  
18 Therein, he raised two grounds for relief: (1) ineffective assistance of counsel in the negotiation  
19 and entry of his guilty plea based on counsel’s misrepresentation that the conviction would not be  
20 a serious felony or a “strike”; and (2) ineffective assistance of counsel in failing to investigate  
21 and challenge the validity of the prosecutor’s DNA evidence. On July 28, 2008, that habeas  
22 petition was denied.<sup>2</sup> (Lod. Doc. 3.)

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24 <sup>2</sup> The San Joaquin County Superior Court determined that petitioner had not met his  
25 burden of stating a prima facie case of prejudice with respect to his ineffective assistance of  
26 counsel claims. (Lod. Doc. No. 3 at 4.) In addition, that court was not persuaded that petitioner  
would not have pled guilty if he had known that his conviction in the underlying case would be  
counted as a strike under California’s Three Strikes law. (Id. at 3.)

1 On January 21, 2009, petitioner filed his next habeas petition with the California  
2 Court of Appeal for the Third Appellate District. (Lod. Doc. 4.) Therein, petitioner raised the  
3 same two grounds for relief that had been presented to the San Joaquin County Superior Court.  
4 On January 29, 2009, that petition was summarily denied. (Lod. Doc. 5.)

5 On March 26, 2009, petitioner filed a habeas petition with the California Supreme  
6 Court. (Lod. Doc. 6.) In that application petitioner raised the same two grounds as in his two  
7 earlier petitions as well as a third ground for relief, which was actually a combination of the other  
8 two grounds. Specifically, in his third ground for relief petitioner argued:

9 I was denied the effective assistance of counsel in plea  
10 negotiations, in that my attorney's failure to seek relevant  
11 discovery and to investigate possible challenges to the  
12 prosecution's DNA analysis, together with his failure to apprehend  
that the plea bargain he procured would leave me with a serious  
felony or "strike" conviction, prevented him from negotiating a  
more favorable plea bargain.

13 (Id., Cal. Supreme Ct. Petition, Ground 3.) On April 22, 2009, the California Supreme Court  
14 summarily denied relief. (Lod. Doc. No. 7.)

15 On June 16, 2009, petitioner signed his federal habeas petition which was  
16 subsequently filed with this court on June 22, 2009. (Doc. No. 1 at 17.)

### 17 PETITIONER'S HABEAS PETITION

18 In his pending federal habeas petition, petitioner presents the same three grounds  
19 for relief that were presented to the California Supreme Court. First, petitioner claims that he  
20 was denied the effective assistance of counsel in plea negotiations and in the entry of his guilty  
21 plea.<sup>3</sup> In this regard, petitioner contends that during the plea negotiations he repeatedly asked his  
22 attorney if the offense he was pleading guilty to would be considered as a strike under  
23 California's Three Strikes law, since petitioner already had suffered one strike conviction and  
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25 <sup>3</sup> As noted, petitioner pled guilty to rape under circumstances "[w]here a person is  
26 prevented from resisting by any intoxicating or anesthetic substance . . . and this condition was  
known, or reasonably should have been known by the accused." Cal. Penal Code § 261(a)(3).

1 wished to avoid a second. Petitioner alleges that his attorney assured him that the charge to  
2 which he would plead guilty was not a strike and that counsel even emphasized this point on the  
3 record at the change of plea hearing. The following exchange at the plea hearing provides  
4 compelling evidence in support of petitioner's allegation in this regard:

5 MR. HICKEY [Petitioner's Counsel]: He is prepared this morning  
6 to resolve his case. I have been in discussion with Mr. Brooks.  
7 We have come up with a section that is fine as to his conduct; sex  
8 with a woman who is passed out. So we'll enter a plea to 261(a)(3)  
9 for a period of three years.

10 \* \* \*

11 MR. HICKEY: We want to make sure the subsection is correct,  
12 because it does make a difference.

13 THE COURT: 261(a)(3).

14 MR. BROOKS [Deputy District Attorney]: Correct.

15 \* \* \*

16 THE COURT: Having each of your rights in mind then, how do  
17 you plead to Count 1, a violation of Section 261(a)(3) of the Penal  
18 Code, a rape by use of drugs, a felony, occurring July 17, 1999?

19 THE DEFENDANT: Guilty.

20 \* \* \*

21 THE COURT: Because it is a serious felony or violent felony  
22 conviction, you will be required to complete 85 percent of the  
23 term.

24 MR. HICKEY [Petitioner's Counsel]: No, that was not agreed  
25 upon. That is why we found this section.

26 THE COURT: This is not a strike, then?

MR. BROOKS [Deputy District Attorney]: I don't believe so,  
Judge.

THE COURT: All right. You will be eligible for 50 percent good  
time/work time credits. Do you understand that?

THE DEFENDANT: Yes.

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1 (Petition (Doc. No. 1) at 82, 85-86.)<sup>4</sup>

2           Petitioner asserts that he would not have accepted the plea bargain but for his  
3 counsel’s misrepresentation that the offense would not be considered as a strike conviction and,  
4 instead, he would have gone forward with the trial if his counsel was unable to negotiate a plea to  
5 a non-strike offense. In support of this contention, petitioner argues that the eyewitness and  
6 DNA evidence against him was subject to challenge and/or to an “alternative exculpatory  
7 interpretation.” (Id. at 6.)

8           Petitioner also argues that he was denied the effective assistance of counsel when  
9 his attorney failed to investigate or challenge the prosecution’s DNA evidence and analysis  
10 thereof. (Id. at 7.) In this regard, petitioner contends that the DNA match was a “cold hit” from  
11 California’s DNA database and that his DNA was identified by the authorities from a sample  
12 containing two or more genotypes. (Id. at 8.) Petitioner argues that his counsel did not challenge  
13 the reliability of the DNA evidence or determine whether the levels of DNA in the sample were  
14 “consistent with . . . an inadvertent non-criminal transfer of genetic material or indirect contact,  
15 as opposed to direct sexual contact between . . . [petitioner] and the victim.” (Id.) Petitioner  
16 contends that he was prejudiced both by his attorney’s failure to adequately evaluate the DNA  
17 evidence and his attorney’s mistaken opinion that “the DNA evidence was unassailable.” (Id.)

18           Finally, petitioner claims that he was denied the effective assistance of counsel  
19 when his attorney failed to seek relevant discovery, failed to investigate challenges to the  
20 prosecutor’s DNA evidence and analysis thereof, and mis-characterized the offense to which  
21 petitioner pled as not constituting a strike. (Id. at 11.) Petitioner concludes that had his attorney  
22 “merely examined the relevant provisions of the California Penal Code, he would have  
23 recognized his error and could have bargained instead for a lesser charge.” (Id.)

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25           <sup>4</sup> At that hearing, the sentencing judge later stated: “You have credit for 239 actual days  
26 served, plus 118 days good time/work time, for a total credit of 357 days.” (Doc. No. 1 at 87.)

1 **RESPONDENT’S MOTION TO DISMISS**

2 I. Respondent’s Arguments

3 Respondent asserts that petitioner’s judgment of conviction became final on July  
4 2, 2004, sixty-days after sentencing. (MTD at 3) (citing Rule 8.308 of the California Rules of  
5 Court ). Thus, according to respondent, the statute of limitations for the filing of a federal habeas  
6 petition began to run on July 3, 2004, and expired on July 2, 2005, absent any tolling of the  
7 limitations period. (Id.) Respondent contends that because petitioner did not file any state post-  
8 conviction collateral challenges the one-year limitations period, the statute of limitations for the  
9 filing of a federal habeas action expired on July 2, 2005. (Id.) Respondent asserts that the three  
10 state habeas applications filed by petitioner were submitted over two years after the expiration of  
11 the statute of limitations for the filing of a federal petition and therefore did not extend the  
12 federal statute of limitations. (Id.) Respondent concludes, the pending federal habeas petition  
13 was untimely filed and should be dismissed. (Id.)

14 II. Petitioner’s Opposition

15 On January 3, 2011, petitioner filed his response to the court’s order that he show  
16 cause as to why respondent’s motion to dismiss should not be granted in light of his failure to file  
17 an opposition to the motion. (Doc. No. 16.) The court has construed the filing as petitioner’s  
18 opposition to the motion to dismiss.

19 Therein, petitioner argues that he did not learn of the factual basis for his habeas  
20 claims until January 25, 2008, when he was first informed by an Assistant Federal Public  
21 Defender<sup>5</sup> that his rape conviction was a strike or serious felony conviction under California law  
22 and that he had potentially meritorious habeas challenges to the reliability of the DNA evidence  
23 and analysis upon which his prosecution was based. (Id. at 2; Doc. No. 1 at 34.) Petitioner’s  
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25 <sup>5</sup> According to a declaration from Assistant Federal Public Defender Cynthia Lie, she  
26 was assigned to represent petitioner on appeal following his federal conviction. (Doc. No 1 at 33.)

1 argument in this regard is supported by the detailed declaration of Assistant Federal Public  
2 Defender Cynthia Lie. (Doc. No 1 at 33-36.) Attorney Lie states that in late 2007 or early 2008  
3 while representing petitioner in connection with federal charges, petitioner told her that his San  
4 Joaquin County Superior Court conviction for violation of California Penal Code § 261(a)(3) did  
5 not constitute a “strike” under California’s Three Strikes law. (Id. at 34.) Because petitioner’s  
6 belief struck her as “anomalous” Attorney Lie researched the issue further and discovered that a  
7 conviction under Penal Code § 261(a)(3) was in fact a serious felony under Penal Code § 1192.7  
8 and constituted a strike conviction under California law. (Id.) Attorney Lie declares that on  
9 January 25, 2008, she met with petitioner and for the first time told him that the representations  
10 previously made to him<sup>6</sup> were incorrect, that his conviction for violating Penal Code § 261(a)(3)  
11 was a strike and discussed with him the possibility of seeking habeas relief to present his  
12 potentially meritorious challenges to that conviction. (Id.) Attorney Lie also details her efforts to  
13 further investigate petitioner’s allegations, including obtaining a copy of the charging  
14 Information which did not contain the allegation that the § 261(a)(3) charge was a serious felony  
15 under § 1192.7, even though that was the practice of the San Joaquin County District Attorney  
16 when charging a serious felony/strike offense at the time. (Id.) Finally, Attorney Lie declared  
17 that after she obtained the change of plea transcript in February of 2008 and read the relevant  
18 portions to petitioner’s trial counsel, he replied only that the “transcript spoke for itself” with  
19 respect to how petitioner had been advised. (Id.)

20           Supported by Attorney Lie’s declaration, petitioner argues that the statute of  
21 limitations for his filing of a federal habeas petition did not begin to run until January 25, 2008  
22 when he first learned of this factual basis, and that he is entitled to statutory tolling of the period  
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24           <sup>6</sup> As the plea hearing transcript quoted above reflects, petitioner’s attorney, the deputy  
25 district attorney and the sentencing judge all represented to petitioner on the record that the  
26 offense to which he was entering his plea would not be considered a strike under California law  
and that the specific offense had been selected as part of the plea negotiations specifically  
because it was not a strike offense.

1 during which his state habeas petitions were pending. (Doc. No. 16 at 2.) Petitioner contends  
2 that the statute of limitations for the filing of his federal petition was tolled for the following  
3 periods: March 10, 2008 to July 28, 2008 (San Joaquin County Superior Court petition); January  
4 21, 2009 to January 29, 2009 (California Court of Appeal petition); and March 27, 2009 to April  
5 22, 2009 (California Supreme Court petition). (Id.) Based on these periods of tolling, petitioner  
6 contends that his federal habeas petition was timely filed pursuant to 28 U.S.C. §§ 2244(d)(1)(d)  
7 and 2244(d)(2).

### 8 III. Respondent's Reply

9 As noted above, on May 31, 2011, the undersigned issued an order bringing to  
10 respondent's attention the quoted language at petitioner's change of plea hearing and directing  
11 him to address the commencement date of the statute of limitations under these circumstances as  
12 well as the possible application of 28 U.S.C. § 2244(d)(1)(D). Respondent's three page reply is  
13 conclusory and unhelpful. Essentially, respondent rejects out of hand any suggestion that the  
14 statute of limitations in this case did not begin to run until January 25, 2008. (Doc. No. 20 at 1-  
15 2.) Respondent advances two arguments in this regard.

16 First, respondent relies on the decision in Hasan v. Galaza, 254 F.3d 1150, 1154  
17 n.3 (9th Cir. 2001), in arguing that petitioner is not entitled to a delayed commencement of the  
18 statute of limitations because he was aware of all the relevant facts underlying his claims at the  
19 time he pled guilty in state court. (Id. at 2.) According to respondent, the only operative facts  
20 were that petitioner was pleading guilty to a certain offense and that his counsel informed him  
21 that the offense was not a strike. (Id.) That the offense was actually a strike under California law  
22 is merely an issue regarding the legal significance of the known facts, according to respondent.  
23 (Id.) Respondent makes the puzzling claim that by the time of his change of plea, petitioner  
24 should have "realized the alleged problem." (Id.) Respondent concludes that "no additional  
25 'facts' were discovered after the change of plea and 28 U.S.C. § 2244(d)(1)(D) is not applicable."  
26 (Id.)





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

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

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

12 The one-year AEDPA statute of limitations applies to all federal habeas corpus petitions filed  
13 after the statute was enacted and therefore applies to the pending petition. See Lindh v. Murphy,  
14 521 U.S. 320, 322-23 (1997).

## 15 II. Application of § 2244(d)(1)(D)

16 The parties dispute when the statute of limitations for the filing of a federal  
17 petition for writ of habeas corpus began to run in this case. Respondent asserts that petitioner's  
18 judgment of conviction became final on July 2, 2004, when the time for seeking direct review  
19 expired, and that the statute of limitations for seeking federal habeas relief began to run the next  
20 day, on July 3, 2004. Petitioner argues that the federal statute of limitations did not begin to run  
21 until January 25, 2008, the date he first discovered that the offense to which he had agreed to  
22 plead guilty pursuant to a negotiated plea agreement was, contrary to what was represented to  
23 him at the time, considered to be a strike under California's Three-Strikes law.

24 Under 28 U.S.C. § 2244(d)(1)(D), the limitations period for the filing of a federal  
25 habeas petition begins to run "when the prisoner knows (or through diligence could discover) the  
26 important facts, not when the prisoner recognizes their legal significance." Hasan, 254 F.3d at  
1154 (reversing dismissal of petition on statute of limitations grounds where petitioner did not  
know at the time of his trial, or have reason to know, added facts that he later learned which  
materially changed the circumstances and provided a good-faith basis upon which to seek habeas

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1 relief).<sup>7</sup> See also Rhoades v. Henry, 598 F.3d 511, 519 (9th Cir. 2010).

2 Instructive in considering the issue posed by the pending motion is the decision in  
3 Turner v. Marshall, No. CV 08-3778-GAF (JTL), 2008 WL 5501268 (C.D. Cal. Nov. 19, 2008).

4 There, the petitioner filed a federal habeas petition claiming that he was unaware that the  
5 offenses he had plead guilty to in state court had resulted in him becoming a “second striker”  
6 under California’s Three Strikes law. 2008 WL 5501268, at \*2. The petitioner had entered his  
7 plea in 1999. Id. at \*1. Over eight years after being sentenced, petitioner filed his federal habeas  
8 petition claiming that he was not advised by his counsel, the court, or the prosecutor that his  
9 guilty plea had resulted in him becoming a “second striker.” Id. at \*2. The petitioner sought the  
10 delayed commencement of the federal statute of limitations under § 2244(d)(1)(D), arguing that  
11 the limitations period did not begin to run until April 2007, when he ““discovered via his  
12 institutional time computation that he was a 2nd striker under the California Three Strikes Law,”  
13 pursuant to his 1999 plea agreement.” Id. at \*3. In moving to dismiss his federal petition as  
14 untimely respondent argued, as respondent does here, that the petitioner was aware of the charges  
15 to which he entered his no contest plea, that they were serious felonies, and thus, petitioner  
16 ““could easily have discovered his status as a second striker . . . through reasonable diligence.””

17 Id. at \*4. The District Court rejected respondent’s argument and concluded that although the  
18 charging Information identified the offenses in question as serious felonies, the record revealed

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24 <sup>7</sup> As one district court has explained, the factual predicate for the habeas claim in Hasan,  
25 “was carefully and actively hidden away by the persons involved, and it was only through a  
26 stroke of fortune that the proof did not remain forever buried.” Flores v. Hedgpeth, No. CV 08-  
03329 SJO (RZ), 2008 WL 4196629, at \*5 (C.D. Cal. Sept. 10, 2008).

1 no link between serious felonies and strike offenses of which petitioner was advised. Id. at \*5.<sup>8</sup>  
2 In addition, the court in Turner pointed out that during the entry of plea and sentencing hearings,  
3 there was no discussion of the fact that petitioner’s guilty plea would result in him becoming a  
4 “second-striker.” Id. Under these circumstances, the court applied § 2244(d)(1)(D), holding that  
5 the record did not establish that petitioner could have discovered the factual basis for his claim  
6 any earlier than the date he received his institutional time computation. Id.

7           Here, petitioner’s ineffective assistance claim is predicated on one critical fact that  
8 petitioner apparently became aware of only after the fact - that he had been affirmatively  
9 misadvised by his attorney, the prosecutor and the court regarding the nature of the charge to  
10 which he entered his plea. At sentencing, petitioner was aware that he was pleading guilty to  
11 rape under California Penal Code § 261(a)(3), and that his attorney had advised him that the  
12 offense to which he was pleading guilty was not a strike under California’s Three Strikes law.  
13 Petitioner was also aware that during the change of plea hearing, the deputy district attorney  
14 specifically voiced his agreement that the rape offense to which he was entering his plea was not  
15 a strike under California law. In fact, the deputy district attorney’s statement was made in  
16 response to the sentencing judge’s inquiry about the nature of the offense and whether it  
17 constituted a strike. What petitioner did not know at that time, and what he apparently did not  
18 learn until January 25, 2008, was that none of these statements on the record in state court were  
19 accurate. Based upon the evidence currently before this court, petitioner had absolutely no  
20 reason to doubt the non-strike nature of the offense to which he was entering his plea.

21           Certainly there are many decisions reflecting the principle that the AEDPA statute  
22 of limitations begins to run when a prisoner knows, or thought the exercise of reasonable  
23 diligence could discover, the important facts underlying his habeas claim and not when the

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25 <sup>8</sup> Here, as Attorney Lie’s declaration and the exhibits thereto establish, the Information in  
26 petitioner’s case did not even allege that the § 261(a)(3) charge was a serious felony under §  
1192.7 even though that was the practice of the San Joaquin County District Attorney at the time  
when charging serious felonies constituting strikes. (Doc. No 1 at 34.)

1 prisoner first recognizes the legal significance of those facts. See Storie v. Kramer, No. 1:10-cv-  
2 02236JLT HC, 2011 WL 924736, at \*3 (E.D. Cal. March 14, 2011) (“That Petitioner, due to his  
3 lack of legal training, may not have appreciated the legal significance of those facts vis-a-vis a  
4 federal habeas petition, does not alter the fact that he was aware of these *factual bases* for his  
5 claims no later than the end of his criminal trial.”); Pelaya v. Cate, No. CV 10-2270-VBF (VBK),  
6 2011 WL 976771, at \*4 (C.D. Cal. Jan. 18, 2011) (rejecting petitioner’s argument for a delayed  
7 start of the statute of limitations because the record showed that petitioner was aware that her  
8 crimes constituted a strike before being sentenced), report & recommendation adopted by 2011  
9 WL 976763 (C.D. Cal. March 14, 2011); Rodriguez v. Walker, No. 1:09-cv-01376-JLT HC,  
10 2010 WL 3943629 at \*7 (E.D. Cal. Oct. 4, 2010); Walker v. Yates, No. CV 09-2179 RGK (JC),  
11 2010 WL 358841, at \*3 (C.D. Cal. Jan. 28, 2010) (holding that petitioner who claims that he was  
12 unaware of his constitutional right to appeal his sentence until advised by a fellow inmate is  
13 asserting he was not aware of the legal significance of events); Bustamonte v. Adams, No. CIV  
14 S-08-2105 JAM DAD P, 2009 WL 2390610 (E.D. Cal. Aug. 3, 2009), aff’d, 2011 WL 2749872  
15 (9th Cir. July 15, 2011). However, none of those decisions involve a situation where the legal  
16 effect of the known facts was affirmatively misrepresented to a petitioner by not only his own  
17 attorney, but the prosecutor and the court as well. Here, it was not at all unreasonable for  
18 petitioner to rely on these assurances and for the true nature of the rape offense to remain hidden  
19 until petitioner was advised by another attorney of the error. As such, the decisions noted above  
20 are all distinguishable from this case based on the record currently before the court.

21 Under § 2254(d)(1)(D), the court also considers whether petitioner could have  
22 discovered earlier, with the exercise of due diligence, that the rape offense to which he pled was  
23 a strike offense. Of course, “the ‘due diligence requirement is an objective standard that  
24 considers the petitioner’s specific situation,’ and it ‘does not require that petitioners exercise the  
25 maximum diligence possible . . . but only “due” or “reasonable” diligence.’” Alcox v. Hartley,

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1 No. 09-55825, 407 Fed. Appx. 174, at \*1 (9th Cir. Dec. 27, 2010)<sup>9</sup> (quoting Souliotes v. Evans,  
2 622 F.3d 1173, 1178 (9th Cir. 2010), vacated on other grounds \_\_\_ F.3d \_\_\_, 2011 WL 3606632  
3 (9th Cir. Aug. 17, 2011)). See also Avagyan v. Holder, 646 F.3d 672, (9th Cir. 2011) (same  
4 description of “due diligence” in the context of assessing the timeliness of a motion to reopen  
5 immigration proceedings).

6 Here, petitioner contends that the earliest he could have discovered his claim was  
7 on January 25, 2008, when he was advised by Assistant Federal Public Defender Lie that his rape  
8 conviction was a strike offense under California law despite what he had been told. In reply  
9 respondent merely argues, without any evidentiary support, that petitioner was not diligent  
10 because he waited four years to be advised by an attorney that his conviction was a strike offense.  
11 (Reply at 3.) Based on this record, the court finds that there is no evidence suggesting that  
12 petitioner should have discovered the factual predicate for his habeas claim any earlier than  
13 January 25, 2008. See Hasan, 254 F.3d at 1155 (finding there was “no evidence in the record  
14 from which it can be determined when with the exercise of due diligence Hasan could have  
15 discovered . . . [the] factual predicate” to support his ineffective assistance of counsel claim);  
16 Ellis v. Harrison, No. EDCV 05-00520-SJO (MAN), 2010 WL 3385206 (C.D. Cal. July 12,  
17 2010) (concluding that until petitioner learned about trial counsel’s racism from a newspaper  
18 article, petitioner lacked a good faith basis for raising a conflict of interest claim), findings and  
19 recommendations adopted by 2010 WL 3385201 (C.D. Cal. Aug. 25, 2010); Turner, 2008 WL at  
20 \*5 (“The Court cannot conclude that Petitioner could have discovered that the charges to which  
21 he pleaded no contest constituted strikes prior to April 2007, when Petitioner asserts he received  
22 his ‘institutional time computation’ informed him of as much. Nothing in the record indicates  
23 that Petitioner could have discovered the factual basis for his claims at an earlier date.”); see also  
24 Hines v. Kane, No. CV 05-4113-DDP (OP), 2009 WL 1073168, at \*4 (C.D. Cal. April 16, 2009)

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25 <sup>9</sup> Citation to this unpublished decision is appropriate pursuant to Ninth Circuit Rule 36-  
26 3(b).

1 (“The requirement of due diligence generally implies an affirmative duty to investigate *after*  
2 some triggering event has raised or should have raised the suspicion that further investigation  
3 might prove fruitful.”). Based upon the present record, the court concludes that under 28 U.S.C.  
4 § 2244(d)(1)(D) the statute of limitations for the filing a federal habeas petition in this case did  
5 not begin to run until January 26, 2008.<sup>10</sup>

6 III. Application of § 2244(d)(2)

7 Under § 2244(d)(2), petitioner is entitled to tolling of the AEDPA statute of  
8 limitations while he was properly seeking collateral review in state court. Porter v. Ollison, 620  
9 F.3d 952, 958 (9th Cir. 2010). As petitioner has argued, and even without application of the  
10 mailbox rule, the AEDPA statute of limitations in this case was tolled for 408 days from March  
11 10, 2008 when he filed his habeas petition in the San Joaquin County Superior Court through  
12 April 22, 2009 when his final state petition was denied by the California Supreme Court.  
13 Accordingly, at most only 105 days (January 26, 2008 to March 10, 2008 and April 22, 2009 to  
14 June 22, 2009) of the one year statute of limitations had expired when petitioner filed his federal

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21 <sup>10</sup> As indicated above, on May 31, 2011, the court ordered respondent to file a reply brief  
22 addressing “whether petitioner is entitled to a delayed commencement of the AEDPA statute of  
23 limitations with respect to **each of his claims** for habeas relief.” (Order (Doc. No. 17) at 4  
24 (emphasis added). Nonetheless, respondent filed a brief three-page reply that addressed only  
25 petitioner’s first claim for federal habeas relief. Therefore, to the extent respondent’s motion to  
26 dismiss is intended to seek dismissal of petitioner’s second and third claims for habeas relief, it  
should also be denied due to respondent’s failure to address any argument to the timeliness of  
those claims. See Fielder v. Varner, 379 F.3d 31, 317-18 (3d Cir. 2004) (AEDPA statute of  
limitations should be applied on a claim-by-claim basis). But see Walker v. Crosby, 341 F.3d  
1240, 1245 (11th Cir. 2003) (“the statute of limitations in § 2244(d)(1)(D) applies to the  
application as a whole; individual claims within an application cannot be reviewed separately for  
timeliness.”)

1 habeas petition on June 22, 2009. His federal habeas petition was therefore timely filed and the  
2 pending motion to dismiss should be denied.<sup>11</sup>

3 **CONCLUSION**

4 In accordance with the above, IT IS HEREBY RECOMMENDED that:

5 1. Respondent's November 3, 2010 motion to dismiss the petition as untimely  
6 (Doc. No. 13) be denied; and

7 2. Respondent be ordered to file an answer to the petition for a writ of habeas  
8 corpus within thirty days of any order adopting these findings and recommendations.

9 These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
11 days after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
14 shall be served and filed within seven days after service of the objections. The parties are  
15 advised that failure to file objections within the specified time may waive the right to appeal the  
16 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: August 25, 2011.

18  
19   
20 \_\_\_\_\_  
21 DALE A. DROZD  
22 UNITED STATES MAGISTRATE JUDGE

20 DAD:4  
21 men1710.mtd

23 <sup>11</sup> Of course, the undersigned has no view at this time on the ultimate merits of  
24 petitioner's ineffective assistance of counsel claims. However, it may well be difficult for  
25 petitioner to prevail. See Turner v. Marshall, No. CV 08-3778-GAF (JTL), 2009 WL 2900344,  
26 at \*3 (C.D. Cal. Sept. 2, 2009) (after the denial of motion to dismiss on timeliness grounds noted  
above, ultimately denying federal habeas relief because "neither the trial court, trial counsel, nor  
the prosecutor erred in failing to advise petitioner" that the offenses to which he was pleading  
constituted strikes that could be used to enhance a future sentence).