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

PHILLIP L. BROWN,

Petitioner,

No. 2:10-cv-01720-LKK-DAD P

vs.

MIKE McDONALD,

Respondent.

ORDER

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Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's July 9, 2012 dismissal of his petition for a writ of habeas corpus on the grounds that the petition was filed beyond the governing one-year statute of limitations. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).<sup>1</sup>

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.

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<sup>1</sup> On August 21, 2012, the undersigned issued an order in error addressing petitioner’s application for a certificate of appealability. Therein the undersigned erroneously characterized the underlying action as a civil rights action and advised petitioner that a certificate of appealability was not necessary in order to pursue an appeal in such an action. That order was obviously issued in error in this federal habeas action and is hereby vacated.

1 § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues  
2 satisfy the required showing or must state the reasons why such a certificate should not issue.  
3 Fed. R. App. P. 22(b).

4 Where, as here, the petition was dismissed on procedural grounds, a certificate of  
5 appealability “should issue if the prisoner can show: (1) ‘that jurists of reason would find it  
6 debatable whether the district court was correct in its procedural ruling’; and (2) ‘that jurists of  
7 reason would find it debatable whether the petition states a valid claim of the denial of a  
8 constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.  
9 McDaniel, 529 U.S. 473, 484 (2000)).

10 After careful review of the entire record herein, this court finds that petitioner has  
11 not satisfied the first requirement for issuance of a certificate of appealability in this case.  
12 Specifically, there is no showing that jurists of reason would find it debatable as to whether the  
13 petition was filed beyond the one-year statute of limitations. Instead of addressing what issues  
14 are debatable as to the statute of limitations, petitioner presents arguments on the merits of his  
15 claims for habeas relief. Accordingly, a certificate of appealability should not issue in this  
16 action.

17 Accordingly, IT IS ORDERED that:

- 18 1. Petitioner’s July 30, 2012 application for a certificate of appealability (Doc.  
19 No. 39) is denied; and  
20 2. The court’s order filed on August 21, 2012 (Doc. No. 40) is vacated.

21 DATED: August 24, 2012.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE