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

SALVADOR GONZALEZ,

Petitioner,

No. 2:11-cv-2275 GEB GGH P

vs.

DOMINGO URIBE, JR.,

Respondent.

FINDINGS and RECOMMENDATIONS

_____ /

This is a pro se petition for habeas corpus relief under 28 U.S.C. § 2254. Petitioner challenges a disciplinary decision issued in 2007, and the warden now moves to dismiss alleging that the petition is untimely, and that the claims are procedurally defaulted. Petitioner opposes the motion, essentially arguing that he is entitled to statutory and equitable tolling. For the reasons explained below, the undersigned recommends that the court grant the warden’s motion and dismiss the petition as untimely.

BACKGROUND

In January 2007, petitioner, who at the time was a prisoner at High Desert State Prison, received a Rules Violation Report charging him with “Participating in a Mass Disturbance/Cell Extraction” in violation of California Code of Regulations § 3005(c). See Doc. No. 1 at 65. According to the report, on January 16, 2007, petitioner and his cellmate covered

1 their cell windows, then refused to remove the covers and to be handcuffed voluntarily. Id. The
2 cell extraction was videotaped. See Doc. No. 1 at 72. After a hearing on February 27, 2007,
3 petitioner was found guilty of the charge and assessed, among other things, a 90 day loss of
4 credit. See id. at 72.

5 A review of the record reflects that petitioner was not afforded an opportunity to
6 watch the videotape at the time of his original hearing because allowing petition to view the
7 video “would expose staff cell extraction procedures and jeopardize the safety and security of the
8 institution.” See Doc. Nos. 1 at 72, 10-9 at 54. A review of the record reflects that the Senior
9 Hearing Officer viewed and considered the videotape before arriving at his verdict, and
10 specifically found that the video supported the contents of the disciplinary report. Id. at 72-73.
11 The Senior Hearing Officer additionally found that the written evidence presented at the hearing
12 was sufficient to support the charge against petitioner. Id. at 74.

13 Petitioner filed administrative appeals of his disciplinary conviction, the last of
14 which was denied on April 28, 2008. See Doc. No. 1 at 58. Petitioner alleges that he received
15 notice of the decision on May 2, 2008. Id. at 50.

16 Additionally, on January 24, 2008, petitioner filed a civil action pursuant to 42
17 U.S.C. § 1983, alleging violations of his Eighth and Fourteenth Amendment rights in connection
18 with the January 16, 2007 incident. See Gonzalez v. Felker et al., 2:08-cv-0173-MCE-CMK P,
19 Doc. No. 1. Judgment was entered for the defendant prison officials on March 29, 2011. See id.
20 at Doc. 77. Between the time of filing, and entry of judgment, petitioner communicated with the
21 court, either by letter or by motion/response, on the following dates: February 4, 2008 (amended
22 complaint); February 6, 2008; February 21, 2008; April 28, 2008; May 1, 2008 (amended
23 complaint); October 17, 2008; November 26, 2008 (third amended complaint); March 4, 2009
24 (notice of submission of documents); March 18, 2009; July 22, 2009; September 10, 2009;
25 November 2, 2009; December 28, 2009; March 15, 2010; April 15, 2010; June 4, 2010; June 14,
26 2010; July 9, 2010; July 26, 2010; September 22, 2010; October 27, 2010; February 28, 2011;

1 and March 21, 2011.

2 On July 9, 2009, 436 days after the California Department of Corrections and
3 Rehabilitation (“CDCR”) denied petitioner’s final administrative appeal, he filed his first state
4 habeas petition with the Superior Court. Doc. No. 10-1 at 5. Petitioner explained the delay in
5 filing the petition:

6 I received a response from the Director’s Level Review which exhaust all
7 remedies on May 02, 2008. I was not able to get all information and forms
8 needed until June 04, 2008. It’s real difficult to go to the law library here
9 at Centinela, especially during lockdowns. On June 04, 2008, I was placed
10 in Ad-Seg (administrative segregation) and all my personal property was
11 stored away. I requested all the paperwork regarding this petition and
12 forms needed that were in my property. I was told that I’m only allowed to
13 get legal mail that is approved by staff as a judge order court deadline. I
14 explained that it’s not a court order deadline, but there is a time limit to
15 file a petition for writ of habeas corpus and I need all the requested papers
16 and documents to file in court...For 10 months, I tried and tried, but would
17 not get them, including 2 months I was in the prison infirmary [sic] due to
18 surgery on my ankle....On April 9, 2009 I was released from administrative
19 segregation and I finally was able to receive my property, including the
20 papers and documents needed and after 2 weeks of waiting I was able to
21 go back to the law library and get the information and forms needed since
22 staff lost most of my property.

23 Id. at 50.

24 On September 3, 2009, the Superior Court denied the petition, finding that
25 petitioner “provides no explanation for the delay between the final administrative decision and
26 the filing of the instant writ petition.” See Doc. No. 1 at 19. The Superior Court further wrote:

 Claims stated in a petition for writ of habeas corpus must be raised as
promptly as circumstances allow; a court will not consider issues not
raised in a timely manner. In re Clark (1993) 5 Cal.4th 750. Petitioner has
failed to explain the significant delay in this matter.

Id. at 20.

 On December 30, 2009, plaintiff filed a petition with the Appellate Division,
which denied his petition in a summary order on March 11, 2010. See Doc. No. 1 at 32, Doc.
No. 10-7 at 3, 5. On June 4, 2010, petitioner then filed a petition with the Supreme Court, and,
on July 14, 2010, the Supreme Court denied his petition in a summary order. See Doc. No. 1 at

1 39, 40. The current federal petition was filed 13 months later, on August 22, 2011.¹

2 The claims raised by petitioner in his habeas petitions are: (1) the hearing officer
3 denied petitioner's right to call witnesses during his hearing; (2) prison officials failed to appoint
4 an investigative employee; (3) prison officials would not allow petitioner to view the videotape
5 of his cell extraction, claiming that it was confidential; and (4) prison officials failed to provide
6 petitioner with all documentary evidence, including incident reports. See Doc. No. 11 at 5-8.

7 **THE MOTION TO DISMISS**

8 The warden moves to dismiss, arguing that (1) the petition is untimely, being filed
9 more than a year after the Supreme Court's decision; and (2) the claims are procedurally barred,
10 because the Superior Court denied petitioner's first state petition as untimely. See Doc. No. 10.

11 Petitioner does not deny that his petitions were late (see Doc. No. 12 at 4), but
12 objects to the dismissal motion, alleging that the Superior Court incorrectly denied his petition as
13 late. See Doc. No. 12 at 4. Petitioner argues that the Superior Court erred when it determined
14 that he had failed to explain the reason for his delay in filing his Superior Court petition, because,
15 in his petition, petitioner had alleged that (1) his property was held until April 9, 2009 because he
16 was in administrative segregation; (2) he was in surgery for two months; and (3) his access to the
17 law library was limited. Id.

18 Petitioner further argues that his federal petition was filed more than a year after
19 the Supreme Court's decision because his access to the law library is limited, and that this
20 limited access is a state-created impediment. Id. at 5. He adds that he filed his petition as soon
21 as the impediment was removed. Id. at 6. See also Doc. No. 1 at 14 (petitioner acknowledges
22 that petition is filed outside one-year deadline, and describes difficulty in getting to law library,
23 and getting envelopes and postage stamps).

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25 ¹ The court uses as the filing date the date on which petitioner mailed his petition,
26 according to his proof of service, when such proof of service is attached to his pleadings. See
Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988).

1 Petitioner finally appears to argue that he has new evidence which establishes that
2 he is innocent of the disciplinary conviction. See Doc. No. 1 at 8, 87-88. Specifically, petitioner
3 argues that, as part of discovery in his § 1983 proceeding, he was allowed to view the videotape
4 of the cell extraction. See Doc. No. 1 at 87.

5 According to petitioner, “[t]his videotape shows that petitioner never refused to
6 come out of his cell and never covered his cell window, and is not guilty of the charge.” Id. at
7 88. He additionally argues that, by allowing petitioner to view the videotape as part of his civil
8 suit’s discovery, “defendants (prison officials) admitted that the videotape is not and never was
9 confidential.” Id. at 87. Plaintiff explains that he has not presented this claim to the state courts,
10 because his Supreme Court petition was denied in July 2010, but he was not able to view the
11 videotape until December 2010. Id. at 88.

12 **RELEVANT AUTHORITY**

13 Jurisdiction

14 This court has jurisdiction to consider habeas petitions where the petitioner is “in
15 custody pursuant to the judgment of a State court” and alleges that “he is in custody in violation
16 of the Constitution or laws or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A writ
17 of habeas corpus is not limited to immediate release from unlawful confinement, but rather is
18 available to attack future confinement and obtain future releases. See Preiser v. Rodriquez, 411
19 U.S. 475, 487, 93 S.Ct. 1827 (1973); see also Toussaint v. McCarthy, 801 F.2d 1080, 1096 n.14
20 (9th Cir. 1986)² (“To the extent that defendants may from time to time deny the credits due under
21 sections 2931 and 2933, without affording a prisoner due process of law, that prisoner may
22 obtain habeas corpus relief.”). A prisoner may challenge a prison disciplinary conviction by
23 petition for writ of habeas corpus if the conviction resulted in the loss of good time credits
24 because credits impact the duration of the prisoner’s confinement. Preiser at 487-88 (suit seeking

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26 ² Toussaint was abrogated in part on other grounds by Sandin v. Conner, 515 U.S. 472, 115
S.Ct. 2293 (1995).

1 restoration of good time credits was “within the core of habeas corpus in attacking the very
2 duration of their physical confinement itself”). In dicta, the court in Preiser noted that such a
3 challenge is permissible even if restoration of the credits would not result in the prisoner’s
4 immediate release from prison. Id.

5 Timeliness

6 28 U.S.C. § 2244(d)(1) sets forth the relevant statute of limitations:

7 A 1-year period of limitation shall apply to an application for a writ of habeas
8 corpus by a person in custody pursuant to the judgement of a State court. The
9 limitation period shall run from the latest of–

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

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

15 (C) the date on which the constitutional right asserted was initially
16 recognized by the Supreme Court, if the right has been recognized by the
17 Supreme Court and made retroactively applicable to cases on collateral
18 review; or

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

22 In most cases, the limitations period begins running on the date that the
23 petitioner’s direct review becomes final, pursuant to subsection (d)(1)(A). In a situation like this,
24 however, where the petitioner is challenging a prison disciplinary conviction, the Ninth Circuit
25 has held that direct review is concluded and the statute of limitations commences, pursuant to
26 subsection (d)(1)(D), when the final administrative appeal is denied. Shelby v. Bartlett, 391 F.3d
1061, 1066 (9th Cir. 2004) (holding that statute of limitation does not begin to run until
petitioner’s administrative appeal has been denied); Redd v. McGrath, 343 F.3d 1077, 1081-83
(9th Cir. 2003) (holding that denial of inmate’s administrative appeal was the “factual predicate”
of inmate’s claim that triggered commencement of limitations period).

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1 Statutory Tolling

2 The time during which a “properly filed” application for state post-conviction or
3 collateral review (including California habeas proceedings) is pending does not count toward this
4 one-year period. Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010), citing 28 U.S.C. §
5 2244(d)(2). However, a petition filed after the expiration of the statute of limitations does not
6 operate to effect the petitioner’s available time at all. See Ferguson v. Palmateer, 321 F.3d 820,
7 823 (9th Cir.), cert. denied, 540 U.S. 924, 124 S.Ct. 328 (2003) (state petition filed after
8 expiration of § 2244 period cannot resuscitate expired period); Jiminez v. Rice, 276 F.3d 478,
9 482 (9th Cir. 2001), cert. denied, 538 U.S. 949, 123 S. Ct. 1627 (2003).

10 An application is “properly filed” when its delivery and acceptance are in
11 compliance with the applicable laws and rules governing filings. Artuz v. Bennett, 531 U.S. 4, 8,
12 121 S. Ct. 361, 364 (2000). Untimely petitions are not properly filed. Pace v. DiGuglielmo, 544
13 U.S. 408, 417, 125 S. Ct. 1807, 1814 (2005) (where state court rejects petition as untimely, it was
14 not “properly filed” and petitioner is not entitled to statutory tolling); Carey v. Saffold, 536 U.S.
15 214, 225-26, 122 S. Ct. 2134, 2141 (2002) (if state court rules that petition is untimely, that is
16 “the end of the matter,” regardless of whether state court also addressed merits of the claims, or
17 whether timeliness ruling was “entangled” with the merits).

18 In applying AEDPA’s standards, the federal court must identify the state court
19 decision that is appropriate for our review. Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir.
20 2005). The relevant state court determination for purposes of AEDPA review is the last reasoned
21 state court decision. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where there
22 has been one reasoned state judgment rejecting a federal claim, later unexplained orders rest
23 upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590 (1991).

24 Equitable Tolling

25 A habeas petitioner is entitled to equitable tolling of AEDPA’s one-year statute of
26 limitations only if he shows: (1) that he has been pursuing his rights diligently; and (2) that some

1 extraordinary circumstances stood in his way and prevented timely filing. See Holland v.
2 Florida, – U.S. –, 130 S.Ct. 2549, 2562 (2010); Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir.
3 2009). The diligence required for equitable tolling purposes is “reasonable diligence,” not
4 “maximum feasible diligence.” See Holland v. Florida, 130 S.Ct. at 2565. See also Bills v.
5 Clark, 628 F.3d 1092, 1096 (9th Cir. 2010).

6 As to the extraordinary circumstances required, the Ninth Circuit has held that the
7 circumstances alleged must make it impossible to file a petition on time, and that the
8 extraordinary circumstances must be the cause of the petitioner’s untimeliness. See Bills v.
9 Clark, 628 F.3d at 1097, citing Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003). This is a
10 very high threshold, “lest the exceptions swallow the rule.” See Miranda v. Castro, 292 F.3d
11 1063, 1066 (9th Cir. 2002).

12 For example, the Ninth Circuit has found that a prisoner’s lack of access to his
13 legal file may warrant equitable tolling, but that “ordinary prison limitations on [petitioner’s]
14 lack of access to the law library and copier (quite unlike the denial altogether of access to his
15 personal legal papers) were neither ‘extraordinary’ nor made it ‘impossible’ for him to file his
16 petition in a timely manner.” Ramirez v. Yates, 571 F.3d at 998 (prisoner not entitled to
17 equitable tolling for time in administrative segregation when he had only limited access to law
18 library and copier).³

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21 ³ The Ramirez panel also noted that

22 during the same period of time [petitioner] claims that he was ‘unable to
23 prepare’ his federal habeas petition due to limited library and copier access,
24 he filed a lengthy and well-researched motion in federal court requesting the
25 limitations period be tolled, and a successful discovery motion in the
26 California Superior Court. [Petitioner] offers no explanation of how or why
his restricted library access made it impossible for him to file a timely § 2254
petition but not these other substantial legal filings.

Ramirez v. Yates, 571 F.3d at 998.

1 Actual Innocence

2 The Ninth Circuit has recently determined that the “actual innocence” exception
3 applies to AEDPA’s statute of limitations. See Lee v. Lampert, 653 F.3d 929, 934 (9th Cir.
4 2011) (en banc). “[A] credible claim of actual innocence constitutes an equitable exception to
5 AEDPA’s limitations period, and a petitioner who makes such a showing may pass through the
6 Schlup gateway and have his otherwise time-barred claims heard on the merits.” Id. at 932.

7 In order to present otherwise time-barred claims to a federal habeas court
8 under Schlup [v. Delo], 513 U.S. 298, 115 S.Ct. 851 (1995)], a petitioner
9 must produce sufficient proof of his actual innocence to bring him “within
10 the ‘narrow class of cases...implicating a fundamental miscarriage of
11 justice.’” 513 U.S. at 314-15, 115 S.Ct. 851 (quoting McCleskey [v. Zant],
499 U.S. 467 (1991)], at 494, 111 S.Ct. 1454). The evidence of innocence
12 must be “so strong that a court cannot have confidence in the outcome of
13 the trial unless the court is also satisfied that the trial was free of
14 nonharmless constitutional error.” Id. at 316, 115 S.Ct. 851.

15 To pass through the Schlup gateway, a “petitioner must show that it is
16 more likely than not that no reasonable juror would have convicted him in
17 light of the new evidence....Schlup requires a petitioner “to support his
18 allegations of constitutional error with new reliable evidence – whether it
19 be exculpatory scientific evidence, trustworthy eyewitness accounts, or
20 critical physical evidence – *that was not presented at trial.*

21 Lee v. Lambert, 653 F.3d at 937-38 (emphasis added).

22 **ANALYSIS**

23 The Petition is Untimely

24 Petitioner’s final administrative appeal was denied on April 28, 2008, and
25 petitioner received notice of the denial on May 2, 2008. Accordingly the federal petition was due
26 no later than May 3, 2009. See 28 U.S.C. § 2244(d). This petition was filed more than three
years later, on August 26, 2011, and so is untimely unless petitioner is entitled to tolling.

Petitioner is Not Entitled to Statutory Tolling

 Petitioner filed his first state court petition on July 9, 2009, more than one year
after the CDCR denied his final appeal. After denial of his first state petition in the Superior
Court, pursuant to In re Clark, supra, petitioner filed two additional habeas petitions, the last of

1 which was denied by the state Supreme Court in a summary order filed July 14, 2010.

2 Petitioner is not entitled to statutory tolling for the time when his state court
3 petitions were pending, because they were filed after the expiration of the statutory deadline in 28
4 U.S.C. § 2244. See Ferguson v. Palmateer, 321 F.3d at 823. Additionally, the petitions were not
5 properly filed, as the Superior Court, in the only reasoned decision made by the state courts,
6 denied petitioner’s first state court petition as untimely. See Pace v. DiGuglielmo, 544 U.S. at
7 417, 125 S. Ct. at 1814.

8 Petitioner Is Not Entitled to Equitable Tolling

9 Petitioner does not deny that his petition was untimely filed, but appears to seek
10 equitable tolling on the bases that he has had difficulty in obtaining the correct forms and in
11 accessing the prison law library. See Doc. Nos. 1 at 14, 12 at 5-6. The court additionally notes
12 that, in filing his original habeas petition with the state court, petitioner alleged that, while in
13 administrative segregation, he had been denied access to his legal papers, and had been
14 hospitalized. See Doc. No. 10-1 at 50.

15 However, the denial of his papers in 2008 and 2009 did not make it impossible for
16 him to file a timely petition, as his papers were returned to him on April 9, 2009, before the
17 deadline expired on April 29, 2009. Similarly, it appears from petitioner’s argument that he was
18 hospitalized well before the April 29, 2009 deadline, so that his hospitalization did not make
19 timely filing impossible.

20 In addition, petitioner’s difficulty in accessing the law library, getting proper
21 forms, and making copies are not “extraordinary circumstances” warranting equitable relief. See
22 Ramirez v. Yates, 571 F.3d at 998.⁴ Moreover, just as the petitioner in Ramirez, petitioner has

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24 ⁴ A review of the pleadings filed by petitioner in his civil rights case during the period
25 June 4, 2008 through April 9, 2009 suggest that petitioner did have some access to the law library,
26 even while in administrative segregation. See, e.g., Gonzalez v. Felker, 2:08-cv-0173, Doc. No. 16,
filed October 17, 2008: “I’ve had a lot of trouble getting to the law library, even when showing a
deadline. It took me over 2 weeks to get to the law library after receiving the order to write a third
amended complaint, despite showing the 30 day deadline. Finally, they’ve let me go, but so far only

1 not reconciled his alleged inability to file a § 2254 petition, in this court, during the same period
2 when he had initiated and prosecuted a civil rights action, in this court, arising out of the same
3 incident which is the subject of the current petition. See id.

4 Even if petitioner were entitled to toll all the time during which his state court
5 petitions were pending, his federal petition was still filed more than a year after the state
6 Supreme Court denied his final state court petition on July 14, 2010. And, petitioner is not
7 entitled to any equitable tolling for the period of July 14, 2010 through August 26, 2011, because
8 difficulty in accessing the law library, getting proper forms, and making copies are not
9 “extraordinary circumstances” warranting equitable relief.⁵ See Ramirez v. Yates, 571 F.3d at
10 998.

11 Petitioner is Not Entitled to Equitable Tolling based on New Evidence

12 Under the standard adopted by the Ninth Circuit, a petitioner seeking to toll the
13 AEDPA deadline under Schlup must present reliable evidence of his actual innocence that was
14 not presented at trial. See Lee v. Lambert, 653 F.3d at 937-38. In this case, petitioner appears to
15 seek tolling of the AEDPA deadline through December 14, 2010, when he was allowed to view
16 the videotape of his cell extraction.

17 However, petitioner presents no colorable *evidence*, or potential evidence, of
18 actual innocence. The sum total allegations in this regard is: “Also, petitioner now was able to
19 view the video of the incident which will clearly prove his innocence. No reasonable person
20 would find him guilty after viewing this tape.” Opposition at 9 (electronic pagination). This
21 mere, boilerplate conclusion is insufficient. Petitioner does not even bother to set forth a
22 description of what he assertedly viewed in the video which would make him innocent.

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24 3 times, for 2 hours a session.”

25 ⁵ Petitioner appears to have access to the library during this period as well. See, e.g.,
26 Gonzalez v. Felker, 2:08-cv-0173, Doc. No. 72, filed Feb. 28, 2011, at 2 (“Plaintiff has had access
to the law library twice a week, but is still not enough time to study and look up cases in 2 hours per
day....”)

1 CONCLUSION

2 This federal petition was filed: (1) more than three years after the denial of
3 petitioner’s final administrative appeal; (2) more than two years after his papers were returned to
4 him on April 9, 2009; and (3) more than a year after the state Supreme Court’s decision denying
5 his state habeas petition.⁶ Petitioner is not entitled to any statutory or equitable tolling. The
6 petition is accordingly untimely, and should be dismissed.⁷

7 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this
8 court must issue or deny a certificate of appealability when it enters a final order adverse to the
9 applicant. A certificate of appealability may issue only “if the applicant has made a substantial
10 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For the reasons set
11 forth in these findings and recommendations, a substantial showing of the denial of a
12 constitutional right has not been made in this case.

13 Accordingly, IT IS HEREBY RECOMMENDED that:

- 14 1. Respondent’s motion to dismiss be granted; and
15 2. The District Court decline to issue a certificate of appealability.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
21 shall be served and filed within fourteen days after service of the objections. The parties are

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23 ⁶ To the extent petitioner alleges as a grounds for federal habeas relief that the state Superior
24 Court incorrectly determined that his initial state court petition was untimely, this court may not
25 reach the argument, as federal courts may not grant habeas relief on account of state court errors in
determining state court law. See, e.g., Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480
(1991).

26 ⁷ The court need not rule on any other grounds for dismissal.

1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: August 8, 2012

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/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

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