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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
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8 CLIFFORD DILBERT,

No. C 10-3396 SI (pr)

9 Petitioner,

**ORDER DENYING RULE 60(b)
MOTION**

10 v.

11 M. MARTEL, warden,

12 Respondent.
13 _____/

14 This action for writ of habeas corpus was dismissed because the petition was barred by
15 the statute of limitations. Petitioner has filed a motion for relief from the judgment under Rule
16 60(b)(1) and (6) of the Federal Rules of Civil Procedure. In his motion for relief from the
17 judgment, petitioner argues that the procedural default of untimeliness imposed by the Napa
18 County Superior Court in denying his first habeas petition should not have been honored and
19 therefore this court erred in determining that his first state habeas petition did not toll the one-
20 year limitations period for the filing of a federal petition. Petitioner's procedural default
21 argument is irrelevant to the statute of limitations question. The motion to dismiss required
22 consideration of the timeliness of the federal petition under the federal habeas statute of
23 limitations, 28 U.S.C. § 2244(d), and not whether the petition was procedurally defaulted. *Cf.*
24 *See Artuz v. Bennett*, 531 U.S. 4, 9 (2000) ("the question whether an application has been
25 'properly filed' is quite separate from the question whether the claims *contained in the*
26 *application* are meritorious and free of procedural bar"). The motion for relief from the
27 judgment is DENIED. (Docket # 10.)
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A certificate of appealability will not issue. See 28 U.S.C. § 2253(c). This is not a case in which "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural [rulings]" in the Order Of Dismissal or in this order. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The denial of the certificate of appealability is without prejudice to petitioner seeking a certificate from the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

DATED: July 6, 2011



SUSAN ILLSTON
United States District Judge