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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAMES C. BOTTOMLEY,

Petitioner,

v.

JAMES E. TILTON,

Respondent.

CASE NO. 07-CV-1973W(NLS)

**ORDER DENYING REQUEST  
FOR CERTIFICATE  
OF APPEALABILITY**

Petitioner James C. Bottomley ("Petitioner"), a state prisoner proceeding through counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). On December 12, 2007, Respondent James E. Tilton ("Respondent") filed a Motion to Dismiss. On April 21, 2008, United States Magistrate Judge Nita L. Stormes issued a Report and Recommendation ("Report"), recommending that the Court grant the motion. On May 13, 2008, Petitioner filed objections to the Report. By order dated July 3, 2008 this court denied habeas relief. Petitioner now requests a Certificate of Appealability ("COA"). For the reasons discussed below, the Court **DENIES** Petitioner's COA request.

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1 **I. BACKGROUND**

2 The facts of this case are not in dispute, and are taken from the Court's July 3,  
3 2008 order denying habeas relief.

4 On August 18, 2000, a jury convicted Petitioner, a practicing attorney, of second-  
5 degree murder. Petitioner was sentenced to a term of 40-years-to-life.

6 On June 27, 2001, Petitioner appealed his conviction. He raised, *inter alia*, an  
7 ineffective assistance of counsel claim based on trial counsel's failure to show jurors  
8 Petitioner's journal entries. The appellate court affirmed the conviction and sentence,  
9 and Petitioner's subsequent petition for review with the California Supreme Court was  
10 denied. On February 23, 2004, the U.S. Supreme Court denied Petitioner's petition for  
11 writ of certiorari.

12 Meanwhile, Petitioner's counsel, Laura Gordon, assured Petitioner that she would  
13 prepare and file his state habeas petition raising a new ineffective assistance of counsel  
14 claim. The new claim was based on trial counsel's alleged failure to adequately  
15 investigate and introduce evidence that Petitioner was prescribed the wrong medication  
16 (i.e., Wellbutrin) for treatment of his bi-polar disorder. According to Petitioner, these  
17 facts would have assisted his heat-of-passion defense because the Wellbutrin aggravated  
18 Petitioner's mental state at the time of the murder (the "Wellbutrin Theory").

19 During a fifteen month period, Gordon continued to assure Petitioner that she  
20 was investigating and researching the basis for his new claim, and consulting with a  
21 medical expert and other attorneys about the habeas petition. Then on January 3, 2005,  
22 Gordon terminated their attorney-client relationship.

23 On February 23, 2005, Petitioner, proceeding *pro se*, filed a state habeas petition  
24 raising the new ineffective assistance of counsel claim based on the Wellbutrin Theory.  
25 On June 10, 2005, the superior court denied the petition.

26 On September 28, 2005, Petitioner filed a petition with the California Court of  
27 Appeal, which was denied on December 6, 2005. On January 30, 2006, Petitioner filed  
28

1 a petition with the California Supreme Court, which was summarily denied on October  
2 11, 2006.

3 On October 11, 2007, Petitioner filed the federal Petition based on two claims.  
4 First, Petitioner raised the new ineffective assistance of counsel claim based on the  
5 Wellbutrin Theory. Second, Petitioner claimed a denial of due process arising from the  
6 California courts' summary denial, without hearings, of his new claim. On December  
7 12, 2007, Respondent filed a motion to dismiss arguing that the Petition was barred by  
8 the statute of limitations. See 28 U.S.C. §2244(d). Petitioner's opposition argued that  
9 the limitations period should be equitably tolled, and that the claims raised therein were  
10 distinct from those raised on direct appeal.

11 On July 3, 2008, this Court issued an order adopting in its entirety Magistrate  
12 Judge Stormes' Report, granting the motion to dismiss, and denying the Petition. (See  
13 Doc. No. 15 [the "Order"].) In the Order, the Court held that equitable tolling was  
14 appropriate for the period during which Petitioner relied on Gordon (from February 23,  
15 2004 until January 3, 2005). The Court, however, declined to allow equitable tolling  
16 after January 3rd, when Petitioner prepared the state petition himself. Furthermore, the  
17 Court found that Petitioner was aware of the underlying facts supporting the ineffective  
18 assistance of counsel claim based on the Wellbutrin theory by no later than April 21,  
19 2004, not October 11, 2006 as Petitioner contended.

20 On August 6, 2008, Petitioner filed his request for COA. For the following  
21 reasons, the Court denies the request.

## 22 23 **II. LEGAL STANDARD**

24 Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No.  
25 104-132, 110 Stat. 1214 (1996) ("AEDPA"), a state prisoner may not appeal the denial  
26 of a section 2254 habeas petition unless he obtains a COA from a district or circuit  
27 judge. 28 U.S.C. § 2253 (c)(1)(A); see also United States v. Asrar, 116 F.3d 1268,  
28 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue certificates

1 of appealability under the AEDPA).

2 In deciding whether to grant a COA, a court must either indicate the specific  
3 issues supporting a certificate or state reasons why a certificate is not warranted. *Id.* at  
4 1270. A court may issue a COA only if the applicant has made a “substantial showing”  
5 of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This requirement means  
6 that:

7 Where a district court has rejected the constitutional claims on the merits,  
8 the showing required to satisfy section 2253 (c) is straightforward: The  
9 petitioner must demonstrate that reasonable jurists would find the district  
10 court’s assessment of the constitutional claims debatable or wrong ...  
11 When the district court denies a habeas petition on procedural grounds  
12 without reaching the petitioner’s underlying constitutional claim, *a COA*  
13 *should issue when the prisoner shows, at least, that 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 ruling.*

14 Slack v. McDaniel, 529 U.S. 473, 484 (2000) (emphasis added).

15  
16 **III. DISCUSSION**

17 In seeking a COA, Petitioner challenges the Court’s denial of equitable tolling for  
18 the period following the termination of Petitioner’s attorney-client relationship, when  
19 Petitioner prepared and filed his first state habeas petition. Petitioner also challenges  
20 this Court’s ruling regarding the commencement of the statute of limitations.

21 Because Petitioner was denied habeas relief on procedural grounds, the two-part test  
22 established in Slack applies. A COA is warranted if the petitioner shows that “jurists  
23 of reason would find it debatable whether the petition states a valid claim of the denial  
24 of a constitutional right *and* that jurists of reason would find it debatable whether the  
25 district court was correct in its procedural ruling.” Slack, 529 U.S. at 484 (emphasis  
26 added). The test has two components which *must* be satisfied: “one directed at the  
27 underlying constitutional claims and one directed at the district court’s procedural  
28 holding.” *Id.* at 484-85. Thus, a court may dispose of a COA application if the

1 petitioner fails to make either showing. Id. at 485. Indeed, “[w]here a plain procedural  
2 bar is present and the district court is correct to invoke it to dispose of the case, a  
3 reasonable jurist could not conclude either that the district court erred in dismissing the  
4 petition or that the petitioner should be allowed to proceed further.” Id. at 484.

5 Here, the Court properly held, and no reasonable jurist would find it debatable,  
6 that Petitioner’s habeas claim was procedurally defective because it was not timely filed.  
7 Therefore, the COA must be denied.

8  
9 **A. Equitable Tolling**

10 Petitioner first claims that the amount of equitable tolling awarded by the Court  
11 was incorrect. Specifically, Petitioner claims that the Court erred in finding that the  
12 statute of limitations should not be tolled for the time following the termination of the  
13 attorney-client relationship, when Petitioner was preparing his state habeas petition.  
14 The Court finds Petitioner’s contention unpersuasive.

15 The AEDPA provides:

- 16 A 1-year period of limitation shall apply to an application for a writ of  
17 habeas corpus by a person in custody pursuant to the judgment of a  
18 State court. The limitation period shall run from the latest of--  
19 (A) the date on which the judgment became final by the conclusion  
20 of direct review or the expiration of the time for seeking such review;  
21 (B) the date on which the impediment to filing an application created  
22 by State action in violation of the Constitution or laws of the United  
23 States is removed, if the applicant was prevented from filing by such  
24 State action;  
25 (C) the date on which the constitutional right asserted was initially  
26 recognized by the Supreme Court, if the right has been newly  
27 recognized by the Supreme Court and made retroactively applicable to  
28 cases on collateral review; or  
(D) the date on which the factual predicate of the claim or claims  
presented could have been discovered through the exercise of due  
diligence.

27 28 U.S.C. § 2244(d)(1). Equitable tolling of the statute of limitations is permitted  
28 when “extraordinary circumstances” beyond the petitioner’s control make it

1 impossible for him to file his petition on time. Calderon v. U.S. Dist. Ct., 128 F.3d  
2 1283, 1288 (9th Cir. 1997) (overruled in part on other grounds by Calderon v. U.S.  
3 Dist. Ct., 163 F.3d 530 (9th Cir. 1997)). “When external forces, rather than a  
4 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable  
5 tolling of the statute of limitations may be appropriate.” Lott v. Mueller, 304 F. 3d  
6 918, 922 (9th Cir. 2002).

7 Under AEDPA, the statute of limitations in this case began to run on February  
8 23, 2004, when the U.S. Supreme Court denied Petitioner’s request for certiorari. 28  
9 U.S.C. § 2244(d)(1)(A). Petitioner established that from February 23, 2004 until  
10 January 3, 2005, when Gordon terminated their attorney-client relationship, he  
11 justifiably relied on Gordon to prepare the state habeas petition. Accordingly, the Court  
12 held that the statute of limitations should be tolled for this period.

13 The Court, however, refused to allow tolling for the period after January 3, 2005,  
14 when Petitioner was preparing the petition. Petitioner is not entitled to tolling for this  
15 period because he failed to demonstrate how the termination of the attorney-client  
16 relationship hindered his ability to prepare and file the state petition. Many habeas  
17 petitioners proceed on a pro se basis. Thus, the fact that Petitioner was forced to  
18 proceed pro se, especially considering that he is an attorney, does not amount to the  
19 extraordinary hardship necessary to justify equitable tolling. Because Petitioner failed  
20 to support his request for tolling during this period, the Court finds that the ruling is not  
21 debatable by jurists of reason. Petitioner’s COA request on this issue is, therefore,  
22 denied.

23  
24 **B. Statute of Limitations**

25 In objecting to the Report, Petitioner claimed that the statute of limitations did  
26 not begin to run until October 12, 2006, because until then, Petitioner did not know  
27 about the facts supporting his ineffective assistance of counsel claim based on the  
28 Wellbutrin Theory. (Objection, 6:16–19.) The Court found, however, and reasonable

1 jurists could not debate, that Petitioner and his counsel were “clearly” aware of all of the  
2 underlying facts regarding his new claim by no later than April 21, 2004. (Order,  
3 8:11–12.)

4 Relying on that finding, Petitioner now raises a new argument: that the Court’s  
5 ruling on the statute of limitations start date should be combined with the equitable  
6 tolling ruling. In other words, Petitioner seeks to add 315 days of tolling to April 21,  
7 2004. Petitioner’s argument is unpersuasive for two reasons.

8 First, contrary to Petitioner’s contention, the Court did not establish April 21,  
9 2004 as the definitive statute of limitations start date for the claim based on the  
10 Wellbutrin Theory. Rather, in the context of evaluating Petitioner’s contention that  
11 until October 12, 2006, he was unaware of sufficient facts to start the limitations period,  
12 the Court found that Petitioner, in fact, had the requisite knowledge by no later than  
13 April 21, 2004, when attorney Gordon sent Petitioner a letter discussing the status of the  
14 investigation into the Wellbutrin Theory. Based on that letter, Gordon and Petitioner  
15 must have known about the facts giving rise to the Wellbutrin Theory long before April  
16 21, 2004, otherwise Gordon could not have written the letter. Thus, the Court did not  
17 establish April 21, 2004 as the statute of limitations start date.<sup>1</sup>

18 Second, and perhaps more importantly, Petitioner’s argument misconstrues the  
19 Court’s decision on equitable tolling. As discussed above, the Court allowed equitable  
20 tolling for the period during which Petitioner justifiably relied on Gordon to prepare the  
21 state habeas petition. Thus, regardless of when the statute of limitations started, tolling  
22 ended on January 3, 2005, when Gordon terminated the attorney-client relationship,  
23 because at that point Petitioner could not longer justifiably rely on Gordon to prepare  
24 the petition. Accordingly, if the statute started on April 21, 2004, rather than February  
25 23, 2004, Petitioner would have simply been entitled to fewer days of tolling.

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27 <sup>1</sup>Indeed, by adopting “the findings contained in the Report” (*see* Order, 9:6–7),  
28 the Court necessarily agreed with Magistrate Judge Stormes’ conclusion that the  
limitations period began as early as August 2003. (Report, 10:17–20.)

1 For these reasons, the Court properly determined that Petitioner's habeas claim  
2 was untimely. No reasonable jurist could conclude otherwise. Slack, 529 U.S. at 484.

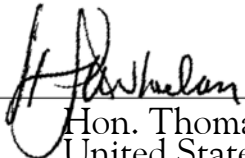
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**IV. CONCLUSION AND ORDER**

In light of the foregoing, the Court **DENIES** Petitioner's COA request. The case shall remain closed.

**IT IS SO ORDERED.**

DATED: September 5, 2008

  
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Hon. Thomas J. Whelan  
United States District Judge