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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 VILATH XAYASOMLOTH,

Petitioner,

vs.

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13 MATTHEW CATE, Secretary,

Respondent.

Case No. 08cv0260 BEN (AJB)

**ORDER DENYING APPLICATION FOR
A CERTIFICATE OF APPEALABILITY**

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16 Vilath Xayasomloth, a state prisoner proceeding *pro se*, petitioned for a writ of *habeas corpus*
17 pursuant to 28 U.S.C. § 2254. Respondent moved to dismiss, arguing that Xayasomloth failed to
18 comply with the one-year limitations period under the Antiterrorism and Effective Death Penalty Act.
19 Xayasomloth opposed. After carefully considering the motion papers, the Honorable Anthony J.
20 Battaglia issued a Report and Recommendation, recommending that the motion be granted.
21 Xayasomloth objected. Overruling the objections, the Court adopted the well-reasoned Report and
22 Recommendation and dismissed the Petition. Dkt. No. 30. Xayasomloth now applies for a certificate
23 of appealability. Dkt. No. 33.


24 The Court may issue a certificate of appealability only if Xayasomloth makes a “substantial
25 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this standard,
26 Xayasomloth “need not show that he should prevail on the merits.” *Silva v. Woodford*, 279 F.3d 825,
27 833 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). But he must show
28 “that jurists of reason could disagree with the district court’s resolution of his constitutional claims

1 or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
2 further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473,
3 484 (2000)).

4 Here, Xayasomloth cannot meet this standard for two reasons. First, as the Court had
5 previously found, he delayed the filing of his Petition for nearly six months, during which no statutory
6 tolling was available. Dkt. No. 26 at 11. Second, he failed to present any fact to justify equitable
7 tolling. *Id.* at 11-13. As a result, his claims are not debatable among jurists of reason and do not
8 deserve further encouragement. Accordingly, the Court denies his application for a certificate of
9 appealability.

10 IT IS SO ORDERED.

11 Dated: April 6, 2009


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13 Hon. Roger T. Benitez
United States District Judge
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