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

BENNIE LEE MATHIS,

Plaintiff,

vs.

DOMINGO URIBE, JR., Warden,

Defendant.

CASE NO. 09cv230-MMA(AJB)

**ORDER RE: CERTIFICATE OF
APPEALABILITY**

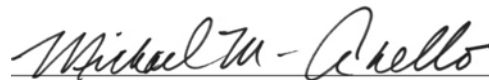
Petitioner, Bennie Lee Mathis, a state Petitioner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his May 21, 1993, sentencing in San Diego Superior Court, Case No. 14943, for second degree murder and voluntary manslaughter, to which Petitioner entered a plea of no contest. Respondents moved to dismiss the Petition as procedurally time-barred pursuant to 28 U.S.C. § 2244(d). Magistrate Judge Anthony J. Battaglia issued a Report and Recommendation on September 9, 2009, recommending that this Court dismiss the petition as untimely [Doc. No. 13]. After Petitioner filed Objections to the Report and Recommendation [Doc. Nos. 14 & 16], the Court adopted the Report and Recommendation and dismissed the petition for failure to comply with 28 U.S.C. § 2244(d) [Doc. No. 17]. Petitioner has timely filed a notice of appeal of the Court's denial of his application for a writ of habeas corpus [Doc. No. 20]. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

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1 A petitioner may not seek an appeal of a claim arising out of state court detention unless
2 the petitioner first obtains a certificate of appealability from a district judge or a circuit judge
3 under 28 U.S.C. § 2253. Fed. R. App. P. 22(b). Under 28 U.S.C. § 2253(c)(1), a certificate of
4 appealability will issue only if the petitioner makes a substantial showing of the denial of a
5 constitutional right. For the reasons set forth in Judge Battaglia's Report and Recommendation,
6 Petitioner has not made a substantial showing of the denial of a constitutional right. Moreover,
7 when a district court has denied a petition on procedural grounds, a certificate of appealability
8 should issue if the petitioner shows both that jurists of reason would find it debatable whether the
9 petition states a valid claim of the denial of a constitutional right and that jurists of reason would
10 find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*,
11 529 U.S. 473, 484-85 (2000). A court need not address both showings if one showing is defective.
12 *Slack*, 529 U.S. at 485. The Court finds that reasonable jurists would not debate whether
13 Petitioner's petition is barred by the applicable statute of limitations. Accordingly, a certificate of
14 appealability should not issue in this action.

15 **IT IS SO ORDERED.**

16 DATED: November 9, 2009

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18 Hon. Michael M. Anello
19 United States District Judge
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