

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

MAY 28 2024

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JOSE MORENO,

Petitioner-Appellant,

v.

JIM ROBINSON,

Respondent-Appellee.

No. 23-15453

D.C. No. 2:21-cv-01757-DAD-DMC  
Eastern District of California,  
Sacramento

ORDER

Before: CHRISTEN and FORREST, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

**DENIED.**

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

JOSE MORENO,

Petitioner-Appellant,

v.

JIM ROBINSON,

Respondent-Appellee.

No. 23-15453

D.C. No. 2:21-cv-01757-DAD-DMC  
Eastern District of California,  
Sacramento

ORDER

Before: FRIEDLAND and MENDOZA, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

## **APPENDIX B**

**U.S. Magistrate Judge's Findings and Recommendations**

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

JOSÉ MORENO,

No. 2:21-CV-1757-KMJ-DMC-P

Petitioner,

V.

## FINDINGS AND RECOMMENDATIONS

JIM ROBINSON,

**Respondent.**

Petitioner, a former state prisoner proceeding pro se, brings this petition for a writ of habeas corpus under 28 U.S.C. § 2254. Pending before the Court is Respondent's motion to dismiss, ECF No. 12. In his motion to dismiss, Respondent argues the petition must be dismissed with prejudice as untimely. Respondent's motion is supported by the state court record, which has been lodged at ECF No. 13. For the reasons discussed below, the Court agrees that the petition is untimely.

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## I. BACKGROUND<sup>1</sup>

#### **A. Conviction and Direct Review**

3 On December 3, 2012, in case number 10F06494, Petitioner was convicted after a  
4 jury trial of eleven counts of first-degree burglary, three counts of unauthorized computer access,  
5 three counts of wiretapping, two counts of stalking, and two counts of misdemeanor possession of  
6 stolen property. Petitioner was sentenced to nineteen years and four months in prison. Petitioner  
7 filed an appeal in the California Court of Appeal for the Third District which affirmed Petitioner's  
8 conviction and sentence on December 3, 2014. On January 9, 2015, Petitioner filed a petition for  
9 review with the California Supreme Court, which was denied on February 25, 2015. On October  
10 30, 2019, the judgment was amended by the Court of Appeal to award Petitioner additional  
11 credits.

12 Petitioner did not file a petition for writ of certiorari in the United States Supreme  
13 Court.

**B. State Court Post-Conviction Proceedings**

15 Petitioner filed several state court post-conviction actions. In total, Petitioner filed  
16 the following fourteen post-conviction actions relating to the December 3, 2012, conviction.

First Action      Sacramento County Superior Court.  
                            Filed January 9, 2014.  
                            Denied April 24, 2014.

Second Action California Court of Appeal.  
Filed August 27, 2014.  
Denied September 18, 2014.

Third Action California Supreme Court.  
Filed October 28, 2014.  
Denied February 25, 2015.

Fifth Action      Sacramento County Superior Court.  
                            Filed June 21, 2018.  
                            Denied July 2, 2018.

<sup>1</sup> The Court's summary of state court proceedings is derived from the state court record lodged at ECF No. 13.

1	<u>Sixth Action</u>	California Court of Appeal. Filed July 16, 2018. Denied October 30, 2019.
2		
3	<u>Seventh Action</u>	Sacramento County Superior Court. Filed October 24, 2018. Denied November 30, 2018.
4		
5	<u>Eighth Action</u>	California Court of Appeal. Filed February 14, 2019. Denied February 28, 2019.
6		
7	<u>Ninth Action</u>	Sacramento County Superior Court. Filed March 9, 2020. Denied June 23, 2020.
8		
9	<u>Tenth Action</u>	California Court of Appeal. Filed July 7, 2020. Denied July 31, 2020.
10		
11	<u>Eleventh Action</u>	California Court of Appeal. Filed July 27, 2020. Denied August 14, 2020.
12		
13	<u>Twelfth Action</u>	Sacramento County Superior Court. Filed November 3, 2020. Denied January 4, 2021.
14		
15	<u>Thirteenth Action</u>	California Court of Appeal. Filed January 19, 2021. Denied February 17, 2021.
16		
17	<u>Fourteenth Action</u>	California Supreme Court. Filed February 25, 2021. Denied May 26, 2021.
18		

19                   C. **Federal Habeas Review**

20                   Petitioner filed the instant federal petition on September 27, 2021. See ECF No. 1.

21

22                   **II. DISCUSSION**

23                   In his motion to dismiss, Respondent argues: (1) the limitations period started to  
 24 run on December 10, 2019; (2) Petitioner is not entitled to statutory tolling for the time the first  
 25 through eighth state court post-conviction actions were pending; (3) the limitations period expired  
 26 before the ninth state court post-conviction action was filed; (4) Petitioner is not entitled to any  
 27 tolling for the time the ninth state court post-conviction action was pending; (5) Petitioner is not  
 28 entitled to any tolling for the time between the denial of the ninth state court action and through

1 conclusion of all other state court post-conviction actions; and (6) the limitations period ended on  
2 March 26, 2021. See ECF No. 12.

3           **A.       The Limitations Period Begins**

4           Federal habeas corpus petitions must be filed within one year from the later of:  
5 (1) the date the state court judgment became final; (2) the date on which an impediment to filing  
6 created by state action is removed; (3) the date on which a constitutional right is newly-  
7 recognized and made retroactive on collateral review; or (4) the date on which the factual  
8 predicate of the claim could have been discovered through the exercise of due diligence. See 28  
9 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court  
10 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct  
11 review. See 28 U.S.C. § 2244(d)(1). Where, as here, no petition for review by the California  
12 Supreme Court is filed challenging the final decision of the appellate court, the conviction  
13 becomes final 40 days following the Court of Appeal's decision, and the limitations period begins  
14 running the following day. See Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002); see also  
15 California Rules of Court 8.366 and 8.500.

16           In his motion to dismiss, Respondent calculates commencement of the limitations  
17 period based on the latest possible date – the date the California Court of Appeal amended its  
18 final judgment on October 30, 2019. Petitioner did not seek any further direct review of this  
19 amended judgment. Based on this date, Respondent correctly argues that, pursuant to 28 U.S.C.  
20 § 2244(d)(1) and California Rules of Court, Rules 8.366 and 8.500, the state appellate court  
21 judgment became final 40 days later on December 9, 2019. Thus, the one-year limitations period  
22 for filing a federal habeas petition began to run the day after that – December 10, 2019. Cf.  
23 Wixom, 264 F.3d, 897.

24           **B.       Statutory Tolling**

25           The limitations period is tolled for the time a properly filed application for post-  
26 conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be “properly  
27 filed,” the application must be authorized by, and in compliance with, state law. See Artuz v.  
28 Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 128 S.Ct. 2 (2007); Pace v. DiGuglielmo,

1 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a state's  
2 timeliness bar, time limits for filing a state post-conviction petition are filing conditions and the  
3 failure to comply with those time limits precludes a finding that the state petition is properly  
4 filed). A state court application for post-conviction relief is "pending" during all the time the  
5 petitioner is attempting, through proper use of state court procedures, to present his claims. See  
6 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered "pending"  
7 after the state post-conviction process is concluded. See Lawrence v. Florida, 549 U.S. 327  
8 (2007) (holding that federal habeas petition not tolled for time during which certiorari petition to  
9 the Supreme Court was pending). Where the petitioner unreasonably delays between state court  
10 applications, however, there is no tolling for that period of time. See Carey v. Saffold,  
11 536 U.S. 214 (2002). If the state court does not explicitly deny a post-conviction application as  
12 untimely, the federal court must independently determine whether there was undue delay. See id.  
13 at 226-27.

14 There is no tolling for the interval of time between post-conviction applications  
15 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183  
16 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no  
17 tolling for the period between different sets of post-conviction applications. See Biggs v.  
18 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct  
19 review and the filing of a state post-conviction application does not toll the limitations period.  
20 See Nino, 1983 F.3d at 1006-07.

21 1. First Through Eighth State Court Actions

22 With respect to statutory tolling, Respondent argues that the first through  
23 eighth state court post-conviction actions had no tolling effect because they all concluded  
24 prior to commencement of the limitations period. The Court agrees. As outlined above, direct  
25 review concluded in December 2019. The first though eighth state court post-conviction  
26 actions, the last of which was resolved in February 2019, have no effect on the one-year  
27 limitations period.

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1                   2.     Ninth State Court Action

2                   Respondent next argues that the limitations period ran between the time the  
3 conviction became final and the time the ninth state court post-conviction action was filed.  
4 Again, the Court agrees. See Nino, 1983 F.3d at 1006-07, see also Lawrence v. Florida, 549  
5 U.S. 327, 330 (2007). Respondent concedes for the purposes of his motion that the ninth state  
6 court action was properly filed, and that Petitioner is entitled to statutory tolling for the time it  
7 was pending – March 9, 2020, through June 23, 2020 – a total of 107 days.

8                   3.     Remaining State Court Actions

9                   Respondent argues that Petitioner’s remaining state court actions for post-  
10 conviction relief have no tolling effect for a variety of reasons with which the Court agrees.  
11 Petitioner’s tenth and eleventh actions were both appeals from non-appealable orders and  
12 were, as Respondent notes, not “properly filed application[s] for State post-conviction or  
13 other collateral review” for purposes of statutory tolling. The remaining actions were  
14 denied by the state court as time-barred. See ECF No. 12, pg. 7 (Respondent’s brief noting  
15 state citations to timeliness rules of In re Robbins, 18 Cal.4th 770, 780 (1998), and In re  
16 Clark, 5 Cal.4th 750, 767-69 (1993)); see also ECF No. 13.

17                   C.     The Limitations Period Expires

18                   As discussed above, the one-year limitations period commenced on  
19 December 10, 2019. Time ran from this date until the filing of Petitioner’s ninth state court  
20 action on March 9, 2020. The limitations period was then tolled for 107 days to June 23,  
21 2020, which is when the ninth petition was denied and no longer pending. The remaining  
22 state court actions were untimely, as determined by the state court, and were never properly  
23 filed. Considering the portion of the limitations period that elapsed after the conviction  
24 became final and the ninth action was filed, as well as the 107 days the limitations period  
25 was tolled while the ninth action was pending, the one-year limitations period expired in  
26 March 2021. The current federal habeas petition, which was filed in September 2021, is  
27 untimely and must be dismissed.

28                   ///

### III. CONCLUSION

Based on the foregoing, the undersigned recommends that Respondent's motion to dismiss, ECF No. 12, be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 29, 2022

DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE

## **APPENDIX C**

**District Court's Order Adopting F&R  
and Granting Respondent's Motion to Dismiss  
Habeas Petition with Prejudice as Untimely**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 JOSE MORENO.

No. 2:21-cv-01757-DAD-DMC (HC)

Petitioner,

13

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND GRANTING  
RESPONDENT'S MOTION TO DISMISS  
HABEAS PETITION WITH PREJUDICE AS  
UNTIMELY

14 JIM ROBINSON,

Respondent.

(Doc. Nos. 12, 13)

18 Petitioner Jose Moreno proceeds *pro se* with a petition for a writ of habeas corpus  
19 pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge  
20 pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

21 On August 1, 2022, the assigned magistrate judge issued findings and recommendations  
22 recommending that respondent's motion to dismiss with prejudice (Doc. No. 12) be granted  
23 (Doc. No. 21.) Those findings and recommendations were served on all parties and contained  
24 notice that any objections thereto were to be filed within fourteen (14) days from the date of  
25 service. (*Id.* at 4.) On August 8, 2022, petitioner filed timely objections to the pending findings  
26 and recommendations.<sup>1</sup> (Doc. No. 22.) Respondent filed no response to those objections.

<sup>28</sup> <sup>1</sup> On August 25, 2022, this case was reassigned to the undersigned district judge. (Doc. No. 23.)

1        In his objections to the pending findings and recommendations petitioner focuses solely  
2 upon his argument that his untimely petition qualifies under the miscarriage of justice exception  
3 to untimeliness. (Doc. No. 22 at 1–18.)<sup>2</sup>

4        The Supreme Court has recognized that exception to be applicable where a petitioner is  
5 able to show that “a constitutional violation has probably resulted in the conviction of one who is  
6 actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). More specifically, the court has  
7 held that the “actual innocence” exception applies to the AEDPA’s statute of limitations.

8        *McQuiggin v. Perkins*, 569 U.S. 383, 393–98 (2013); *see also Lee v. Lampert*, 653 F.3d 929, 932  
9 (9th Cir. 2011) (“We hold that a credible claim of actual innocence constitutes an equitable  
10 exception to AEDPA’s limitations period, and a petitioner who makes such a showing may pass  
11 through the *Schlup* gateway and have his otherwise time-barred claims heard on the merits.”) (en  
12 banc). Thus, a federal habeas petitioner can rely upon a claim of actual innocence to avoid a  
13 procedural bar, such as the statute of limitations, if “he persuades the district court that, in light of  
14 the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a  
15 reasonable doubt.” *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329 and citing  
16 *House v. Bell*, 547 U.S. 518, 538 (2006)). To obtain habeas relief, evidence of innocence must be  
17 “so strong that a court cannot have confidence in the outcome of the trial unless the court is also  
18 satisfied that the trial was free of nonharmless constitutional error.” *Schlup*, 513 U.S. at 316. The  
19 holding in *Schlup* additionally requires a petitioner “to support his allegations of constitutional  
20 error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy  
21 eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Lee*, 653  
22 F.3d at 937–38. In light of the “extremely rare” and “narrow class of cases” in which an actual  
23 innocence claim will measure up under these exacting standards, the Ninth Circuit has recognized  
24 that an equitable exception to the AEDPA statute of limitations allows such claims to be

25        <sup>2</sup> Although the actual innocence exception to the AEDPA’s statute of limitations was not the  
26 primary basis upon which petitioner originally opposed respondent’s motion to dismiss, he did  
27 argue that the actual innocence exception applies here in his opposition to the motion. (Doc. Nos.  
28 15 at 5–8; 20 at 2–15.) It appears that the pending findings and recommendations do not address  
this argument advanced by petitioner. (See Doc. No. 21.) Accordingly, in this order the  
undersigned will address petitioner’s argument in this regard.

1 considered, observing:

2                   Given that the exception is confined to these extraordinary cases,  
3 there is little danger of it swallowing the rule. The exacting  
4 requirements we have imposed for the application of equitable tolling  
remain intact and are not in conflict with an actual innocence  
exception.

5 *Lee*, 653 F.3d at 937. Finally, as to whether a claim falls within the actual innocence exception  
6 the Ninth Circuit has stated as follows:

7                   “In this circuit, a claim of actual innocence for purposes of the escape  
8 hatch of § 2255 is tested by the standard articulated by the Supreme  
9 Court in *Bousley v. United States*, 523 U.S. 614[, 623], 118 S. Ct.  
10 1604, 140 L.Ed.2d 828 (1998): ‘To establish actual innocence,  
11 petitioner must demonstrate that, in light of all the evidence, it is  
more likely than not that no reasonable juror would have convicted  
him.’” *Stephens*, 464 F.3d at 898. “[A]ctual innocence’ means  
factual innocence, not mere legal insufficiency.” *Bousley*, 523 U.S.  
at 623, 118 S. Ct. 1604.

12 *Muth v. Foreman*, 676 F.3d 815, 819 (9th Cir. 2012); *see also Sawyer v. Whitley*, 505 U.S. 333,  
13 340 (1992) (“A prototypical example of ‘actual innocence’ in a colloquial sense is the case where  
14 the State has convicted the wrong person of the crime.”); *Beavers v. Saffle*, 216 F.3d 918, 923  
15 (10th Cir. 2000) (“Mr. Beavers does not claim that he is innocent of killing Raymond Matthews.  
16 Rather, he claims that he is not guilty of first degree murder because he was intoxicated and acted  
17 in self defense. However, these arguments go to legal innocence, as opposed to factual  
18 innocence.”); *Verhulst v. Braham*, No. 1:22-cv-563, 2022 WL 2589908, at \*4 (W.D. Mich. July  
19 8, 2022) (“But claiming ‘insanity’ is a ‘legal defense,’ [citations omitted] not a factual one.  
20 Because Petitioner has wholly failed to provide evidence of his actual innocence, he would not be  
21 excused from the statute of limitations under 28 U.S.C. § 2244(d)(1).”)

22                   Here, petitioner argues that the jury at his trial in state court was not properly instructed as  
23 to the elements of wiretapping in violation of California Penal Code § 631(a). (Doc. No. 22 at 5,  
24 8–10, 12.) According to petitioner, this resulted in his conviction on those counts which was a  
25 “miscarriage of justice” because his conduct was not prohibited by state law as correctly  
26 interpreted and no properly instructed jury would have found him guilty beyond a reasonable  
27 //

28 //

1 doubt. (*Id.* at 6, 10–11.) Petitioner contends that he has presented a meritorious claim that his  
2 wiretap convictions resulted from a denial of due process. (*Id.* at 11–14.)<sup>3</sup>

3 The court finds petitioner’s arguments in this regard to be unpersuasive. Here, petitioner  
4 concedes that “there is no dispute whatsoever over the facts relating to [his] wiretapping  
5 convictions” and that he “does not dispute the facts that were submitted as evidence to support  
6 such convictions.” (Doc. No. 1 at 30.) Petitioner presents no new evidence in support of his  
7 claim, which he characterizes as one of “actual innocence.” Instead, petitioner merely argues that  
8 the jury at his trial in state court was improperly instructed on the elements of wiretapping in  
9 violation of California Penal Code § 631(a) and that if properly instructed no reasonable jury  
10 could have convicted him of the wiretapping counts.<sup>4</sup> This is not a claim of factual innocence  
11 which qualifies to pass through the *Schlup* gateway so that petitioner’s otherwise time-barred  
12 claim may be heard on the merits because it invokes a purported legal defense, not factual  
13 innocence.<sup>5</sup>

14 The court observes that petitioner’s focus in arguing that he has stated a cognizable due  
15 process violation claim is misplaced. The question before this court in ruling upon the pending

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17 <sup>3</sup> Petitioner also argues that his wiretap convictions stemmed from the ineffective assistance of  
18 his trial counsel. (Doc. No. 22 at 14–17.) However, petitioner advances no argument that this  
19 untimely ineffective assistance claim somehow falls within the “actual innocence” exception to  
the AEDPA’s statute of limitations, nor does he provide any legal authority that would support  
any such argument.

20 <sup>4</sup> The court notes that the California Court of Appeal for the Third Appellate District concluded  
21 on direct appeal that the evidence introduced against petitioner at his trial was sufficient to  
support his convictions for wiretapping in violation of California Penal Code § 631(a). *People v.*  
*22 Moreno*, No. C072902, 2014 WL 6809702, at \*3–4 (Cal. Ct. App. Dec. 3, 2014), *review denied*  
(Feb. 25, 2015).

23 <sup>5</sup> The undersigned also notes that petitioner advanced this same argument challenging his state  
24 wiretapping conviction in his prior habeas petition filed in this court, 2:15-cv-0704 TLN CKD P.,  
25 before his criminal judgment was amended in 2019. In that prior habeas action the assigned  
magistrate judge found that petitioner had failed to establish cause and prejudice that would  
26 excuse his procedural default as to that claim, and had not shown that the failure to consider such  
claim would result in a fundamental miscarriage of justice. *Moreno v. Valenzuela*, No. 2:15-cv-  
27 0704-TLN-CKD-P, 2017 WL 1534276, at \*7–8 (E.D. Cal. Apr. 28, 2017). The magistrate judge  
28 determined that petitioner’s claims were barred on collateral review and the assigned district  
judge adopted those findings and recommendation in full. (*Id.*)

1 motion to dismiss is not whether petitioner has stated a cognizable claim for habeas relief.  
2 Rather, the question is whether the claim or claims brought by petitioner in this case, which are  
3 otherwise barred by the applicable statute of limitations, should nonetheless be considered on  
4 their merits because his case qualifies as one of the “extremely rare” and “narrow class of cases”  
5 in which the *Schlup* gateway or escape hatch applies. The court has concluded that the answer to  
6 that question is “no.”<sup>6</sup>

7 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this  
8 court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the  
9 court finds the findings and recommendations to be supported by the record and proper analysis.  
10 In addition, the court concludes that petitioner’s argument that his petition qualifies under  
11 miscarriage of justice exception to the AEDPA statute of limitations must be rejected.  
12 Accordingly, respondent’s motion to dismiss the pending petition with prejudice as untimely will  
13 be granted.

14 Additionally, the court declines to issue a certificate of appealability. A petitioner seeking  
15 writ of habeas corpus has no absolute right to appeal; he may appeal only in limited  
16 circumstances. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Rule  
17 11 of the Rules Governing Section 2254 Cases requires that a district court issue or deny a  
18 certificate of appealability when entering a final order adverse to a petitioner. *See also* Ninth  
19 Circuit Rule 22-1(a): *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). The court will  
20 issue a certificate of appealability “if jurists of reason would find it debatable whether the petition  
21 states a valid claim of the denial of a constitutional right and that jurists of reason would find it  
22 debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529  
23 U.S. 473, 484 (2000). Here, reasonable jurists would not find the court’s decision to dismiss the  
24 petition to be debatable or conclude that the petition should proceed further. Thus, the court  
25 declines to issue a certificate of appealability.

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26 <sup>6</sup> Petitioner places considerable emphasis upon the decision in *Fiore v. White*, 531 U.S. 225  
27 (2001). However, in that case the Supreme Court did not have before it any question regarding  
28 the applicability of the miscarriage of justice exception to the AEDPA statute of limitations.  
Accordingly, that decision has no relevance to resolution of the pending motion to dismiss.

1                   Accordingly,

2                   1. The recommendation set forth in the findings and recommendations filed on  
3                   August 1, 2022 (Doc. No. 21) is adopted in full;  
4                   2. Respondent's motion to dismiss the petition with prejudice (Doc. No. 12) is  
5                   granted;  
6                   3. The court declines to issue a certificate of appealability; and  
7                   4. The Clerk of the Court is directed to close this case.

8                   IT IS SO ORDERED.

9                   Dated: March 1, 2023

  
10                   \_\_\_\_\_  
11                   UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

**JUDGMENT IN A CIVIL CASE**

JOSE MORENO,

CASE NO: 2:21-CV-01757-DAD-DMC

v.

JIM ROBINSON,

---

**Decision by the Court.** This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE  
COURT'S ORDER FILED ON 03/01/23**

**Keith Holland**  
Clerk of Court

ENTERED: March 1, 2023

by: /s/ A. Benson  
Deputy Clerk

MIME-Version:1.0 From:caed\_cmccf\_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain  
José Moreno  
210 Shasta Street  
Watsonville CA 95076  
US

--Case Participants: Justain Paul Riley (diane.boggess@doj.ca.gov, docketingsacawt@doj.ca.gov, ecfcoordinator@doj.ca.gov, justain.riley@doj.ca.gov, tracy.sabella@doj.ca.gov), Magistrate Judge Dennis M. Cota (caed\_cmccf\_dmc@caed.uscourts.gov), District Judge Dale A. Drozd (caed\_cmccf\_dad@caed.uscourts.gov, pbuzo@caed.uscourts.gov)

--Non Case Participants:

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*U.S. District Court*

*Eastern District of California - Live System*

**Notice of Electronic Filing**

The following transaction was entered on 3/1/2023 at 11:23 AM PST and filed on 3/1/2023

**Case Name:** (HC) Moreno v. Robinson

**Case Number:** 2:21-cv-01757-DAD-DMC

**Filer:**

**WARNING: CASE CLOSED on 03/01/2023**

**Document Number:** 25

**Docket Text:**

JUDGMENT dated \*03/01/23\* pursuant to order signed by District Judge Dale A. Drozd on 03/01/23. (Benson, A.)

**2:21-cv-01757-DAD-DMC Notice has been electronically mailed to:**

Justain Paul Riley justain.riley@doj.ca.gov, tracy.sabella@doj.ca.gov, ecfcoordinator@doj.ca.gov, docketingsacawt@doj.ca.gov, diane.boggess@doj.ca.gov

**2:21-cv-01757-DAD-DMC Electronically filed documents must be served conventionally by the filer to:**

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