

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

MAR 10 2009

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

MARIO CAESAR ZAPATA,

Petitioner - Appellant,

v.

JAMES HARTLEY,

Respondent-Appellee.

No. 07-55127

D.C. No. CV-05-07640-JFW

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
John F. Walter, District Judge, Presiding

Submitted March 5, 2009\*\*  
Pasadena, California

Before: O'SCANNLAIN, RYMER, and WARDLAW, Circuit Judges.

Mario Zapata, a California state prisoner, appeals the order of the district court dismissing his petition for writ of habeas corpus as untimely. We have jurisdiction, 28 U.S.C. § 2253, and we affirm.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

## I

Zapata's petition is untimely even after applying the statutory tolling provision in 28 U.S.C. § 2244(d)(1)(D), which tolls the running of the one-year statute of limitations until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The factual predicate for Zapata's claims – his co-defendant's parole – could have been discovered as early as May 1, 2003, the date of parole, through the exercise of due diligence. Zapata undertook no investigation at all between May 2003 and September 2004, despite long suspecting his claim of prosecutorial misconduct would come to pass in the form of his co-defendant's early release from prison and despite having procured the help of private investigators and others in the past to confirm his co-defendant's status. His failure to investigate does not meet the due diligence standard and thus his October 25, 2005 federal habeas petition was filed long after the statute of limitations had elapsed.

## II

Although evidentiary hearings are generally favored in habeas proceedings, one need not be held when the state court record alone suffices to show no

entitlement to relief. *See Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998); *see also Schriro v. Landrigan*, 550 U.S. 465, 127 S. Ct. 1933, 1940 (2007). The parties do not dispute any of the facts recounted in the Magistrate Judge's Report and Recommendation and do not assert that additional evidence would be brought to light by an evidentiary hearing. The state court record suffices to show Zapata failed to exercise due diligence when, from May 2003 to September 2004, he undertook no investigation at all into his co-defendant's incarceration status. An evidentiary hearing would be but a "futile exercise." *Totten*, 137 F.3d at 1176.

**AFFIRMED.**