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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GISTARVE RUFFIN, JR.,)	
)	
Petitioner,)	3:07-cv-00528-LRH-RAM
)	
vs.)	
)	<u>ORDER</u>
JIM BENEDETTI, <i>et al.</i> ,)	
)	
Respondents.)	
	/	

This action proceeds on a petition for a writ of habeas corpus by petitioner Gistarve Ruffin, a Nevada prisoner. Before the court is respondents’ motion to dismiss (docket #10).

I. Procedural History

Petitioner was charged, by amended information, with one count of burglary, one count of possession of tools commonly used for the commission of burglary, and with being a habitual criminal. Exhibit 10.¹ After a jury trial, petitioner was convicted on June 22, 1994 of burglary and possession of burglary tools. Exhibit 19. The district court found petitioner to be a habitual criminal, and sentenced the petitioner to ten years in prison on the burglary count, to one year in prison for the possession of tools count, and to life in prison with the possibility of parole as a habitual criminal, to run consecutively to the other counts. Exhibit 34. A judgment of conviction was entered on August 9, 1994. Exhibit 35. Petitioner appealed, and the Nevada Supreme Court

¹ The exhibits cited in this order in the form “Exhibit ___” are those filed by respondents in case 3:03-cv-0511-LRH-VPC, petitioner’s first federal habeas corpus case, and are located in the record at docket #20, #21, and #22.

1 affirmed the convictions, but vacated the sentences, finding the trial court erred in sentencing
2 petitioner to a sentence for burglary and a separate sentence as a habitual criminal. Exhibits 36 and
3 68. Remittitur issued on January 12, 1996. Exhibit 71.

4 The state district court resentenced the petitioner to life in prison with the possibility of
5 parole for the burglary count, as a habitual criminal, and to one year in prison for the possession of
6 tools commonly used for the commission of burglary, to run concurrently. Exhibit 74. An amended
7 judgment of conviction was entered on January 29, 1996. Exhibit 76. The court then entered a
8 corrected amended judgment on March 22, 1996. Exhibit 78.

9 Petitioner filed his first state habeas corpus petition on December 17, 1996. Exhibit 89. The
10 trial court dismissed the petition without prejudice as the trial transcripts were not attached. Exhibit
11 102. The petitioner appealed this dismissal, but then voluntarily withdrew his appeal. Petitioner
12 then filed a corrected petition with the state district court. Exhibit 107. This petition was denied as
13 untimely. Exhibit 108. Again, the petitioner appealed the denial of this petition but later voluntarily
14 dismissed his appeal. Exhibit 137. Petitioner then filed a motion to file a belated petition for writ of
15 habeas corpus. Exhibit 128. The trial court granted this motion, and allowed petitioner to file a third
16 habeas corpus petition. Exhibits 129 and 130. After holding on evidentiary hearing on the petition
17 and the supplement that was filed, the district court denied the habeas corpus petition. Exhibits 145,
18 161, and 165.

19 Petitioner appealed this denial to the Nevada Supreme Court, and the court affirmed the
20 denial of the third state habeas corpus petition. Exhibits 167 and 182. The court found that the third
21 petition was untimely filed and successive. Exhibit 182. Remittitur issued on October 1, 2002.
22 Exhibit 189. Petitioner moved for rehearing, and the court denied that motion. Exhibits 190 and
23 191.

24 Petitioner filed his first federal habeas corpus petition with this Court on September 15,
25 2003.² The respondents moved to dismiss the petition as untimely filed.³ This Court granted the
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27 ² Docket #6 of case 3:03-cv-0511-LRH-VPC.

28 ³ Docket #19.

1 motion and dismissed the petition as untimely on September 30, 2004.⁴ On appeal, the Ninth Circuit
2 Court of Appeals affirmed this court's order.⁵

3 On November 5, 2007, petitioner initiated the instant action (docket #1) by filing his second
4 habeas corpus petition (docket #6). Respondents have moved to dismiss the petition, arguing the
5 petition is successive, untimely, and that the issues presented are not cognizable in a federal habeas
6 corpus action (docket #10). Petitioner opposes the motion (docket #13).

7 **II. Discussion**

8 A federal habeas corpus petition "is 'second or successive' if it raises claims that were or
9 could have been adjudicated on their merits in an earlier petition." *Woods v. Carey*, 525 F.3d 886,
10 888 (9th Cir. 2008); *Cooper v. Calderon*, 274 F.3d 1270, 1273 (9th Cir. 2001). 28 U.S.C. §
11 2244(3)(A) requires that, "[b]efore a second or successive application permitted by this section is
12 filed in the district court, the applicant shall move in the appropriate court of appeals for an order
13 authorizing the district court to consider the application."

14 The petitioner argues, in his opposition to the motion to dismiss, that the instant petition is
15 not successive because his first petition was dismissed as untimely, therefore no determination was
16 made on the merits of the petition.

17 A second habeas corpus petition is not successive if the first habeas corpus petition was
18 "dismissed for a technical or procedural reason rather than on the merits." *Slack v. McDaniel*, 529
19 U.S. 473, 486 (2000) (holding that a habeas petition filed after a prior petition was dismissed for
20 failure to exhaust state remedies is not a second or successive petition); *In re Turner*, 101 F.3d 1323
21 (9th Cir. 1996). *See also Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998) (holding that a
22 claim raised for the second time after it was dismissed as premature is not a second or successive
23 petition under section 2244(b)(3)(A)). However, several courts have held that a prior dismissal of a
24 habeas corpus petition on the grounds that it was barred by the statute of limitations contained in the
25 AEDPA is the equivalent of an adjudication on the merits. *Reyes v. Vaughn*, 276 F.Supp.2d 1027,

26
27 ⁴ Docket #32.

28 ⁵ Docket #53 and #54.

1 1029 (C.D. Cal. 2001); *Cate v. Ayers*, 2001 WL 1729214, at *3-*4 (E.D. Cal. 2001) (stating “[t]he
2 law is clear that a dismissal based on the statute of limitations is an adjudication of the merits of the
3 claim) (citing *Ellingson v. Burlington Northern Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981) (“[a]
4 judgment based on the statute of limitations is on the merits”)); *Plaut v. Spendthrift Farm*, 514 U.S.
5 211, 228 (1995) (“The rules of finality, both statutory and judge made, treat a dismissal on statute-of-
6 limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to
7 prove substantive liability, or for failure to prosecute: as a judgment on the merits”).

8 Therefore, although this court did not adjudicate the merits of petitioner’s first federal
9 petition, the instant petition is considered second or successive as the first petition was dismissed as
10 untimely filed. The Court is required to dismiss the petition, as the petitioner has not secured an
11 order from the court of appeals authorizing this action.

12 Even if the petition was not second or successive, the petition is still untimely filed. This
13 Court found petitioner’s first petition to be untimely filed. Furthermore, on appeal, the Ninth Circuit
14 Court of Appeals affirmed this Court’s dismissal of the petition as untimely, noting that the federal
15 petition was filed five years late. If the first petition was untimely filed by five years when it was
16 filed on September 15, 2003, then the instant petition, received on November 5, 2007, was filed
17 more than seven years beyond the limitations period. Furthermore, the motion to correct illegal
18 sentence filed in the state district court on January 9, 2007, did not meet the requirements for tolling,
19 as the motion was filed after the petitioner’s one year time limitation had already expired. *See Green*
20 *v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000) (petitioner is not entitled to tolling where the time
21 limitation under the AEDPA has already run).

22 Petitioner’s federal habeas corpus petition was untimely filed, and must be dismissed unless
23 petitioner can show that he is entitled to equitable tolling of the limitations period. The AEDPA
24 one-year limitations period is subject to equitable tolling. *See Calderon v. United States District*
25 *Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds, Calderon*
26 *v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998). Equitable tolling is available
27 “if extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on
28 time.” *Beeler*, 128 F.3d at 1288. Generally, a litigant seeking equitable tolling bears the burden of

1 establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some
2 extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

3 Petitioner has not advanced any arguments relating to why his petition should not be
4 dismissed as untimely filed. The federal habeas corpus petition was filed over two years late without
5 valid justification for the delay, and therefore will be dismissed. The Court shall not address
6 respondents’ arguments relating to whether the claims contained in the federal petition are
7 cognizable.

8 **III. Certificate of Appealability**

9 In order to proceed with an appeal from this court, petitioner must receive a certificate of
10 appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial showing of
11 the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The Supreme Court
12 has held that a petitioner “must demonstrate that reasonable jurists would find the district court’s
13 assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484
14 (2000).

15 When a court has dismissed a petitioner’s habeas corpus petition on procedural grounds,
16 however, the determination of whether a certificate of appealability issues becomes a two-part test.
17 The Supreme Court has stated that under such circumstances:

18 A COA should issue when the prisoner shows...that jurists of reason
19 would find it debatable whether the petition states a valid claim of the
20 denial of a constitutional right and that jurists of reason would find it
21 debatable whether the district court was correct in its procedural ruling.

22 *Id.* See also *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). Therefore, in order to obtain a
23 COA in cases dismissed on procedural grounds, petitioner has the burden of demonstrating both that
24 he was denied a valid constitutional right *and* that jurists of reason would find it debatable whether
25 the court’s procedural ruling was correct. In cases where there is a plain procedural bar to a
26 petitioner’s claims and the district court is correct to invoke that procedural bar to dispose of the
27 case, “a reasonable jurist could not conclude either that the district court erred in dismissing the
28 petition or that the petitioner should be allowed to proceed further.” *Slack*, 529 U.S. at 484.

 In the present case, petitioner’s habeas petition is being dismissed because it is a successive

1 petition, and is untimely filed. The Court did not reach the merits of any of petitioner's
2 constitutional claims. No reasonable jurist could conclude that this Court's procedural ruling was in
3 error. Petitioner is not entitled to a certificate of appealability.

4 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #10) is
5 **GRANTED** and the petition is **DISMISSED** as successive.

6 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**
7 **ACCORDINGLY.**

8 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of appealability.

9 DATED this 29th day of January, 2009.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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