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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

MARVIN WILLIAMS,  
Petitioner,  
v.  
J. KATAVICH, Warden,  
Respondent.

No. CV 15-2600-GW (PLA)  
**ORDER DISMISSING HABEAS PETITION  
AS SUCCESSIVE**

**I.  
BACKGROUND**

Marvin Williams (“petitioner”) initiated this action on April 8, 2015, by filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (“Petition” or “Pet.”). The Petition challenges his August 1, 1990,<sup>1</sup> conviction in the Los Angeles County Superior Court, case number A760191, for murder (Cal. Penal Code § 187), and robbery (Cal. Penal Code § 211). (Pet. at 2).

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<sup>1</sup> The Petition indicates that petitioner was convicted on August 1, 1991. (Pet. at 2). In the two prior habeas actions brought in this Court, the conviction date has been noted as August 1, 1990. As the Petition is successive under either of these conviction dates, the Court uses August 1, 1990, as the date of conviction.

1 On June 21, 1999, petitioner filed an earlier habeas petition in this Court, in case number  
2 CV 99-6273-WDK (SH) (“CV 99-6273”), also challenging his 1990 conviction (“1999 Petition”).  
3 The 1999 Petition was dismissed with prejudice as time barred, pursuant to the Judgment entered  
4 on October 1, 1999. (Case No. CV 99-6273, Dkt. No. 15). Petitioner’s request for a certificate  
5 of appealability was denied by a previous District Judge. (Case No. CV 99-6273, Dkt. No. 18).  
6 His request for a certificate of appealability was denied by the Ninth Circuit on August 25, 2000.  
7 (Case No. CV 99-6273, Dkt. No. 22).

8 On March 10, 2007, petitioner filed a second habeas petition in this Court, in case number  
9 CV 07-1582-AHM (PLA) (“CV 07-1582”), also challenging his August 1, 1990, conviction (“2007  
10 Petition”). The 2007 Petition was also dismissed with prejudice as time barred, pursuant to the  
11 Judgment entered on February 15, 2008. (Case No. CV 07-1582, Dkt. No. 22). Petitioner did not  
12 appeal from that Judgment.

13 On April 10, 2015, the Magistrate Judge issued an order requiring petitioner to show cause,  
14 no later than May 1, 2015, why the instant Petition should not be dismissed as successive, or as  
15 barred by the statute of limitations. (Dkt. No. 4). Petitioner was advised that he “must submit” the  
16 following: “(1) documentation showing that, pursuant to 28 U.S.C. § 2244(b)(3)(A), he properly  
17 filed a motion in the Ninth Circuit for an order authorizing the district court to consider a  
18 successive petition, and that the Ninth Circuit issued such an order; and (2) a response making  
19 clear his arguments, if any, as to why the Petition should not be dismissed as time barred.” (Dkt.  
20 No. 4 at 5). On April 27, 2015, petitioner filed a response to the order to show cause  
21 (“Response”). (Dkt. No. 5).

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23 **II.**

24 **DISCUSSION**

25 A federal habeas petition is successive if it raises claims that were or could have been  
26 adjudicated on the merits in a previous petition. Cooper v. Calderon, 274 F.3d 1270, 1273 (9th  
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1 Cir. 2001) (per curiam). The AEDPA provides that a claim presented in a second or successive  
2 federal habeas petition that was not presented in a prior petition shall be dismissed unless:

3 (A) the applicant shows that the claim relies on a new rule of constitutional law,  
4 made retroactive to cases on collateral review by the Supreme Court, that was  
previously unavailable; or

5 (B)(i) the factual predicate for the claim could not have been discovered previously  
6 through the exercise of due diligence; and

7 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as  
8 a whole, would be sufficient to establish by clear and convincing evidence that, but  
for constitutional error, no reasonable factfinder would have found the applicant  
guilty of the underlying offense.

9 28 U.S.C. § 2244(b)(2)(A), (B). Furthermore, “[b]efore a second or successive application  
10 permitted by this section is filed in the district court, the applicant shall move in the appropriate  
11 court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C.  
12 § 2244(b)(3)(A).

13 In the instant Petition, petitioner alleges that his 1999 Petition raised the following grounds  
14 for relief: (1) to be allowed to exhaust all state remedies; (2) request for mandamus relief; (3)  
15 correct a clerical mistake; and (4) newly discovered evidence.<sup>2</sup> (Pet. at 7). In his 2007 Petition,  
16 petitioner raised the following grounds for relief: (1) appellate counsel was ineffective for failing  
17 to research the applicable law, failing to present evidence, and failing to disclose conflicts of  
18 interest; and (2) trial counsel was ineffective for failing to keep confidences and to disclose  
19 conflicts of interest. (See Case No. CV 07-1582, Dkt. No 20 at 3). As mentioned above, both of  
20 these previous actions were dismissed with prejudice as time barred. In the instant Petition,  
21 petitioner appears to raise the same four claims as described above in the 1999 Petition, as well  
22 as the following additional claims: (1) trial counsel rendered ineffective assistance by failing to  
23 object to witness testimony or move to suppress certain testimony; (2) trial counsel rendered  
24 ineffective assistance by failing to make a motion to sever petitioner’s case from his co-  
25 defendant’s case; (3) the jury instructions lowered the burden of proof; and (4) the trial court “mis-

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27 <sup>2</sup> The Court is unable to discern from the docket in Case No. CV 99-6273 whether these  
28 actually were the grounds for relief raised in the 1999 Petition. Regardless, the claims raised in  
the 1999 Petition have no impact on the decision herein.

1 sentence[d] petitioner to life without the possibility of parole.” (Pet. Attach. titled “Mandamus  
2 Relief”).

3 A habeas petition that has been dismissed for failure to comply with the statute of  
4 limitations “renders subsequent petitions second or successive for purposes of the AEDPA.”  
5 McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (contrasting Slack v. McDaniel, 529 U.S.  
6 473, 485-86, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), which held that a prior petition dismissed  
7 without prejudice for failure to exhaust state remedies leaves open the possibility for future  
8 litigation); see also Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005) (a dismissal of  
9 a first petition with prejudice because of a procedural default constitutes a disposition on the  
10 merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. §  
11 2244(b)).

12 Accordingly, because the 1999 and 2007 Petitions were dismissed with prejudice as time  
13 barred, and the instant Petition raises claims that could have been adjudicated on the merits in  
14 a previous petition, the instant Petition is considered to be a successive application. Even if  
15 petitioner’s claims in the instant Petition satisfied the AEDPA standards for filing a successive  
16 petition, **he nevertheless is required to seek authorization from the Ninth Circuit before**  
17 **filing a successive petition.** 28 U.S.C. § 2244(b)(3)(A).

18 Petitioner’s Response gives no indication that petitioner has obtained such permission from  
19 the Ninth Circuit. See Burton v. Stewart, 549 U.S. 147, 153, 127 S. Ct. 793, 166 L. Ed. 2d 628  
20 (2007) (AEDPA requires petitioner to receive authorization from the Court of Appeals before filing  
21 a second habeas petition). Instead, petitioner contends that he tried to get authorization “from  
22 the district courts” to consider his successive petition by “submitting . . . his last writ” and giving  
23 consent to proceed before the Magistrate Judge “so that he would receive his or her Report [and]  
24 Recommendation for a[n] evidentiary hearing.” (Response at 2). He also requests appointment  
25 of counsel. (Response at 1-2). As the Magistrate Judge thoroughly informed petitioner in the  
26 April 10, 2015, order to show cause, if petitioner wishes to make a successive habeas application,  
27 “he must file a ‘Motion for Order Authorizing District Court to Consider Second or Successive  
28 Petition Pursuant to 28 U.S.C. § 2244(b)(3)(A)’ directly with the Ninth Circuit Court of Appeals.

1 Until the Ninth Circuit issues such an order, any direct or implied request for a second or  
2 successive petition for writ of habeas corpus is barred by § 2244(b) and must be dismissed  
3 **without prejudice** to petitioner’s right to seek authorization from the Ninth Circuit to file the  
4 petition.” (Dkt. No. 4 at 6 n.4).

5 Based on the foregoing, the Court is without jurisdiction to entertain the current Petition  
6 under 28 U.S.C. § 2244(b). See id.; Cooper, 274 F.3d at 1274 (“When the AEDPA is in play, the  
7 district court may not, in the absence of proper authorization from the court of appeals, consider  
8 a second or successive habeas application.”). Thus, the Court finds that it is appropriate to  
9 **dismiss the Petition without prejudice** as successive.<sup>3</sup>

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17 <sup>3</sup> The Court notes that petitioner’s two prior habeas petitions in this Court were **dismissed**  
18 **with prejudice** as time barred. Petitioner concedes that this action also is untimely but asserts  
19 that equitable tolling is available because he attempted to obtain documents and transcripts from  
20 trial and appellate counsel, but never received them. (Response at 3). This argument does not  
21 come close to demonstrating that petitioner acted with reasonable diligence during the twenty-  
22 year time frame for which he would require equitable tolling for the instant Petition to be timely.  
23 Indeed, the previous District Judge rejected this same argument in dismissing the 1999 Petition,  
24 noting that petitioner waited nearly two years from the day the California Supreme Court denied  
25 his petition for review to inquire about the status of his transcripts, and failed to demonstrate that  
26 the transcripts were necessary for the preparation of the 1999 Petition. (Case No. CV 99-6273,  
27 Dkt. No. 13 at 4-5 (citation omitted)). Petitioner’s similar arguments now are even less persuasive  
28 in light of the fact that another fifteen years have passed. To the extent petitioner may be  
contending herein that his ignorance of the law justifies his late filing (see Response at 2 (citing  
conflicts between the state habeas rules and the federal statute of limitations), this argument also  
has been previously raised and rejected. (Case No. CV 07-1582, Dkt. No. 20 at 7-12 (rejecting  
petitioner’s arguments that equitable tolling should apply because of his ignorance of the law and  
lack of legal skills, because counsel failed to provide him his files and records, because trial and  
appellate counsel were ineffective, and because he was actually innocent)). Accordingly, even  
if petitioner were to receive authorization from the Ninth Circuit to file a successive petition, it too  
would likely be untimely.

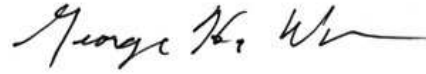
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III.

ORDER

IT IS THEREFORE ORDERED that the Petition is **dismissed without prejudice** as successive. In light of this dismissal, petitioner's request for appointment of counsel is **denied**.

DATED: May 6, 2015



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HONORABLE GEORGE H. WU  
UNITED STATES DISTRICT JUDGE