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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

GARY R. ELERICK,

Petitioner,

No. C 13-0744 PJH (PR)

vs.

KNIPP,

Respondent.

**ORDER GRANTING  
RESPONDENT'S MOTION TO  
DISMISS AND DENYING  
CERTIFICATE OF  
APPEALABILITY**

This is a habeas case brought pro se by a state prisoner under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss on the grounds that the petition is successive. Petitioner has not filed an opposition, but has filed a motion to stay. For the reasons set forth below, the motion to dismiss is granted.

**DISCUSSION**

**Successive Petitions**

“A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed....” 28 U.S.C. § 2244(b)(2). This is the case unless,

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

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

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as 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.

28 U.S.C. § 2244(b)(2).




1 P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural  
2 question antecedent to the merits, for instance a dismissal on statute of limitations grounds,  
3 as here. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

4 “Determining whether a COA should issue where the petition was dismissed on  
5 procedural grounds has two components, one directed at the underlying constitutional  
6 claims and one directed at the district court’s procedural holding.” *Id.* at 484-85. “When the  
7 district court denies a habeas petition on procedural grounds without reaching the  
8 prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at  
9 least, that jurists of reason would find it debatable whether the petition states a valid claim  
10 of the denial of a constitutional right and that jurists of reason would find it debatable  
11 whether the district court was correct in its procedural ruling.” *Id.* at 484. As each of these  
12 components is a “threshold inquiry,” the federal court “may find that it can dispose of the  
13 application in a fair and prompt manner if it proceeds first to resolve the issue whose  
14 answer is more apparent from the record and arguments.” *Id.* at 485. Supreme Court  
15 jurisprudence “allows and encourages” federal courts to first resolve the procedural issue,  
16 as was done here. See *id.*

17 Here, the court declines to issue a COA regarding the procedural holding or the  
18 underlying claim as reasonable jurists would not find the court’s findings debatable. The  
19 court therefore DENIES a COA.

20 **IT IS SO ORDERED.**

21 Dated: January 3, 2014.

  
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PHYLLIS J. HAMILTON  
United States District Judge

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