

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

ELIBERTO RIOS-LOPEZ,

Petitioner,

v.

TOM BEAUCLAIR,

Respondent.

CASE NO. C06-164RJB

ORDER

This matter comes before the Court on Petitioner's Petition for Permission to Appeal Denial of Habeas Corpus (Dkt. 26), and Petitioner's Motion to Stay and Abey Petition for Permission for Certificate of Appealability (Dkt. 28). The Court has considered the pleadings filed in support of and in opposition to the petition and the motion and the remainder of the file herein.

I. PROCEDURAL BACKGROUND

On August 20, 2006, Petitioner filed a Petition for Writ of Habeas Corpus. Dkt. 1. After filing his petition for writ of habeas corpus, the state learned that petitioner had a pending appeal from an order granting summary dismissal of a successive post-conviction petition.

On July 25, 2006, the state filed a motion for dismissal without prejudice or, alternatively, to stay the habeas proceedings (Dkt. 11), in order to allow completion of Petitioner's appeal of the dismissal of his successive state post-conviction petition. On October 27, 2006, the Court

1 denied the motion to dismiss, but granted a stay of the habeas corpus proceedings, and ordered
2 the parties to notify the Court within 30 days of the completion of the state court matter and
3 request that the stay be lifted. In July of 2007, both parties filed notices with the Court that
4 Petitioner's state court proceedings were completed (Dkts. 15, 16), and the Court lifted the stay
5 of proceedings and set a briefing schedule.

6 On November 29, 2007, Petitioner filed an Amended Petition for Writ of Habeas Corpus
7 (Dkt. 18), raising five claims; the first four claims consisting of the same four claims raised in his
8 initial habeas petition, and a new fifth claim alleging "due process violations when the state district
9 court denied Rios-Lopez's motion for new counsel (on his successive post-conviction petition)
10 without giving him any notice of the hearing or an opportunity to be heard, and when the state
11 district court summarily disposed of his successive post-conviction petition." Dkt. 18, at 4
12 (explanation in original).

13 On February 21, 2008, the state filed a motion for summary dismissal. Dkt. 20. On
14 March 17, 2008, Petitioner filed Petitioner's Response Opposing Motion for Summary Dismissal.
15 Dkt. 23.

16 On September 2, 2008, the Court issued an Order Denying Petition for Writ of Habeas
17 Corpus. Dkt. 24. The Court held that Petitioner's first four claims were procedurally defaulted,
18 that Petitioner failed to establish cause and prejudice sufficient to excuse the default, and that
19 Petitioner's fifth claim failed to constitute a cognizable federal habeas corpus claim.

20 On September 24, 2008, Petitioner filed a Petition for Permission to Appeal Denial of
21 Habeas Corpus. Dkt. 26. The state construed this petition as an application for a certificate of
22 appealability, and filed a Response to Petitioner's Application for Certificate of Appealability on
23 October 14, 2008. Dkt. 27. On October 24, 2008, Petitioner filed a Motion to Stay and Abey
24 Petition for Permission for Certificate of Appealability. Dkt. 28. The state filed its Response to
25 Petitioner's Motion to Stay on November 7, 2008. Dkt. 29. Neither party filed a reply.

1 **II. DISCUSSION**

2 Petitioner has filed two pleadings related to the denial of his petition for writ of
3 habeas corpus: (1) a Petition for Permission to Appeal Denial of Habeas Corpus (Dkt. 26); and
4 (2) a Motion to Stay and Abey Petition for Permission for Certificate of Appealability (Dkt. 28).
5 Each pleading is ripe for decision and is addressed below.

6 **A. PETITION TO APPEAL DENIAL OF HABEAS CORPUS**

7 Under 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b), a petitioner
8 may not appeal the final order in a habeas corpus proceeding in which the detention complained of
9 arises out of a state court proceeding or in a proceeding under 28 U.S.C. § 2255 unless the
10 district court or the Ninth Circuit issues a certificate of appealability identifying the particular
11 issues that may be pursued on appeal. *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir.
12 1997).

13 To obtain a certificate of appealability, a petitioner must make a substantial showing of the
14 denial of a constitutional right. A petitioner must also demonstrate that reasonable jurists could
15 debate whether, or agree that, the petition should have been resolved in a different manner or that
16 the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
17 *McDaniel*, 529 U.S. 473, 484 (2000). When the denial is based on procedural grounds, a
18 petitioner must show that jurists of reason would find it debatable whether the petition states a
19 valid claim of the denial of a constitutional right and that jurists of reason would find it debatable
20 whether the district court was correct in its procedural ruling. *Id.*

21 Here, Petitioner has failed to establish that reasonable jurists would find it debatable
22 whether any of his first four claims are procedurally defaulted or whether he established cause and
23 prejudice sufficient to excuse the default. Petitioner has also failed to establish that reasonable
24 jurists could debate whether his fifth claim should have been resolved in a different manner or
25 presented issues deserving further proceedings. Having reviewed the record in this case, the
26 Court finds that Petitioner’s first four claims fail as procedurally defaulted, and that Petitioner’s
27 fifth claim fails for not constituting a cognizable federal habeas corpus claim. These conclusions
28

1 are not debatable among reasonable jurists. Therefore, the Court should decline to issue
2 Petitioner a certificate of appealability.

3 **B. MOTION TO STAY AND ABEY PETITION FOR PERMISSION FOR**
4 **CERTIFICATE OF APPEALABILITY**

5 In his motion, Petitioner asks the Court to stay his application for a certificate of
6 appealability because he has “just recently became aware that there are other federal grounds that
7 need to be added to [his] habeas corpus petition,” and he intends “to file those other federal
8 grounds . . . with the district court as soon as possible.” Dkt. 28, at 1-2. Petitioner further
9 informs the Court that he intends to pursue “going through all the state processes” on his new
10 federal claims until the state processes have been exhausted, and that if these claims are not
11 corrected by the state, he then wants to “refile a habeas corpus with the U.S. District Court.”
12 Dkt. 28, at 2.

13 It is unclear from Petitioner’s motion whether he wants to further amend the Amended
14 Petition for Writ of Habeas Corpus (Dkt. 18) that he filed on November 29, 2007, or if he wants
15 to stay his pending Petition for Permission for Certificate of Appealability while he exhausts his
16 recently discovered grounds for habeas relief. To the extent that Petitioner’s motion is intended
17 to seek leave to further amend his Amended Petition for Writ of Habeas Corpus, the motion
18 should be denied as untimely.

19 To the extent that Petitioner is requesting that the Court stay his pending Petition for
20 Permission for Certificate of Appealability, he has failed to explain why his petition should be
21 stayed. In *Rhines v. Weber*, 544 U.S. 260, 277 (2005), the United States Supreme Court
22 concluded that, “stay and abeyance is only appropriate when the district court determines there
23 was good cause for the petitioner’s failure to exhaust his claims in state court.” Here, Petitioner
24 has failed to explain the nature of the recently discovered “other federal grounds,” and he has
25 failed to explain why he only recently became aware of his additional claims and did not exhaust
26 them in state court. Given Petitioner’s absence of explanation, the Court cannot conclude that
27 Petitioner has established good cause for his failure to exhaust the claims in state court. Because
28 Petitioner has failed to show good cause for his failure to exhaust his claims in state court, his


1 motion to stay and abey his petition for permission for certificate of appealability should be
2 denied.

3 **III. ORDER**

4 Therefore, it is hereby

5 **ORDERED** that Petitioner's Petition for Permission to Appeal Denial of Habeas Corpus
6 (Dkt. 26) and Motion to Stay and Abey Petition for Permission for Certificate of Appealability
7 (Dkt. 28) are **DENIED**. The issuance of a Certificate of Appealability is **DENIED**.

8 DATED this 2nd day of December, 2008.

9
10 
11 ROBERT J. BRYAN
United States District Judge