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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JOSEPH TORRES,

Case No. 3:15-cv-00198-MMD-WGC

Petitioner,

ORDER

v.

RENEE BAKER, et al.,

Respondents.

Petitioner has submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and has paid the filing fee. (Dkt. nos. 1-1 and 5.) The Court notes that petitioner has a previous case under 28 U.S.C. § 2254 with respect to the conviction challenged in this newly-submitted petition: *Torres v. Benedetti, et al.*, 3:07-cv-00563-ECR-RAM.<sup>1</sup> In that proceeding, the court dismissed the petition with prejudice based on a finding it was untimely-filed. (Dkt. nos. 19 and 20, 3:07-cv-00563-ECR-RAM.)

Under 28 U.S.C. § 2244(b), where the petitioner has previously filed an application for habeas relief under section 2254 which has been denied on the merits, the court cannot grant relief with respect to a claim that was presented in a prior

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<sup>1</sup>Both the current petition and the petition in 3:07-cv-00563-ECR-RAM challenge petitioner's Nevada conviction on April 1, 2004, for second degree murder with use of a deadly weapon.

1 application ((b)(1)), or a claim that was not presented in a prior application ((b)(2))  
2 unless:

3 (A) the applicant shows that the claim relies on a new rule of  
4 constitutional law, 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  
6 discovered previously through the exercise of due diligence; and

7 (ii) the facts underlying the claim, if proven and viewed in light of  
8 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.

9 In addition, 28 U.S.C. § 2244(b)(3) requires a petitioner to obtain leave from the  
10 appropriate court of appeals before filing a second or successive petition in the district  
11 court.

12 The dismissal of a federal petition on the ground of untimeliness is a  
13 determination “on the merits” for purposes of § 2244(b). *McNabb v. Yates*, 576 F.3d  
14 1028, 1030 (9<sup>th</sup> Cir. 2009). With the exception of Ground Three, the claims in the current  
15 petition are claims that either were or could have been raised in earlier petition.  
16 Because Ground Three seeks relief based on an allegation that the state court  
17 improperly dismissed his second post-conviction proceeding on state procedural  
18 grounds (dkt. no. 1-1 at 7), it is not cognizable in this federal proceeding. *See Ortiz v.*  
19 *Stewart*, 149 F.3d 923, 939 (9<sup>th</sup> Cir. 1998) (“[F]ederal habeas relief is not available to  
20 redress alleged procedural errors in state post-conviction proceedings.”).

21 Petitioner has not made a sufficient showing that the exceptions outlined in 28  
22 U.S.C. § 2244(b)(2) apply. Further, he has failed to secure an order from the court of  
23 appeals authorizing this action as required by 28 U.S.C. § 2244(b)(3). Therefore, this  
24 Court is without jurisdiction to consider the habeas petition submitted herein.

25 *Certificate of Appealability*

26 If Petitioner seeks to appeal this decision, he must first obtain a certificate of  
27 appealability. *See* 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to  
28 the court of appeals from a final order in a § 2255 proceeding unless a circuit justice or

1 judge issues a certificate of appealability); *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir.  
2 2005) (per curiam) (holding that a certificate of appealability is required when the district  
3 court dismisses a motion on the ground that it is an unauthorized, successive collateral  
4 attack). A certificate of appealability may issue only if the petitioner “has made a  
5 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In  
6 addition, when a § 2254 petition is denied on procedural grounds, a certificate of  
7 appealability should issue only when the petitioner shows that reasonable jurists “would  
8 find it debatable whether the district court was correct in its procedural ruling.” *Slack v.*  
9 *McDaniel*, 529 U.S. 473, 484 (2000).

10 Petitioner has not made a substantial showing of the denial of a constitutional  
11 right or that a reasonable jurist would find it debatable whether the district court was  
12 correct in its procedural ruling. Therefore, the Court denies a certificate of appealability.

13 It is therefore ordered that the Clerk shall file the petition for writ of habeas  
14 corpus (currently docketed as dkt. no. 1-1).

15 It is further order that the petition is dismissed without prejudice. The Clerk shall  
16 enter judgment accordingly. A certificate of appealability is denied.

17 It is further order that petitioner’s motions to proceed *in forma pauperis* and for  
18 appointment of counsel (dkt. nos. 4 and 7) are denied as moot.

19 DATED THIS 18<sup>th</sup> day of May 2015.

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23 MIRANDA M. DU  
24 UNITED STATES DISTRICT JUDGE  
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