

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

8 JOSE GAXIOLA,)
9 Petitioner,) 3:16-cv-00500-RCJ-VPC
10 vs.)
11 WARDEN, LCC, *et. al.*,)
12 Respondents.)
/

14 Petitioner has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 and paid the
15 required fee. ECF Nos. 1/2.

16 The court notes that petitioner has a previous case under 28 U.S.C. § 2254 with respect to the
17 conviction challenged in this newly-submitted petition: *Gaxiola v. Palmer, et. al.*,
18 3:06-cv-00516-RCJ-RAM. In that proceeding, the court denied the petition on merits. ECF No. 33,
19 3:06-cv-00516-RCJ-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 application ((b)(1)) or a claim that was not presented in a prior application ((b)(2)) unless:

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

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

3 (ii) the facts underlying the claim, if proven and viewed in light of the
4 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.

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

7 The claims in the current petition are claims that either were or could have been raised in the
8 earlier petition. Petitioner has not made a sufficient showing that the exceptions outlined in 28
9 U.S.C. § 2244(b)(2) apply. More importantly, he has failed to secure an order from the court of
10 appeals authorizing this action as required by 28 U.S.C. § 2244(b)(3). Therefore, this court is
11 without jurisdiction to consider the habeas petition filed herein.

12 *Certificate of Appealability*

13 If petitioner seeks to appeal this decision, he must first obtain a certificate of appealability.
14 See 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the court of appeals from a
15 final order in a habeas corpus proceeding unless a circuit justice or judge issues a certificate of
16 appealability); *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir. 2005) (per curiam) (holding that a
17 certificate of appealability is required when the district court dismisses a motion on the ground that it
18 is an unauthorized, successive collateral attack). A certificate of appealability may issue only if the
19 petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §
20 2253(c)(2). In addition, when a § 2254 petition is denied on procedural grounds, a certificate of
21 appealability should issue only when the petitioner shows that reasonable jurists "would find it
22 debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529
23 U.S. 473, 484 (2000).

24 Petitioner has not made the necessary showing. Therefore, the court denies a certificate of
25 appealability.

1 **IT IS THEREFORE ORDERED** that the petition for writ of habeas corpus (ECF No. 2) is
2 dismissed for lack of jurisdiction. The Clerk shall enter judgment accordingly.

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

DATED: This 18th day of October, 2016.

UNITED STATES DISTRICT JUDGE