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6   UNITED STATES DISTRICT COURT

7   DISTRICT OF NEVADA

8   * * *

9   GARY JOSEPH WINKLER,   Case No. 3:18-cv-00115-MMD-WGC

10   Petitioner,   ORDER

11   v.

12   ISIDRO BACA, et al.,

13   Respondents.

14   This pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 comes

15   before the Court on Petitioner's motion for production of transcripts. (ECF No. 22.)

16   Specifically, Petitioner seeks a transcript of his September 11, 2015 state postconviction

17   evidentiary hearing. (Id.) While Respondents filed the minutes of the proceeding as part

18   of the relevant state court record, they did not file any transcript of the proceeding. (See

19   Ex. 1 (ECF No. 15-1) at 26-27.) Respondents argue that this is because no transcript has

20   ever been made or requested by Petitioner in state court. (ECF No. 23.) Respondents

21   also appear to suggest that the transcript is not necessary to resolve their motion to

22   dismiss. (See id.) In response, Petitioner filed a "motion to oppose respondents'

23   opposition," which the Court construes as a reply. (ECF No. 24.)

24   In his motion, Petitioner argues in conclusory fashion that the transcript of the

25   evidentiary hearing is necessary to resolve his claims and to rebut Respondents'

26   assertion that some of his claims are not cognizable. In his reply, Petitioner argues more

27   specifically that the transcript will show that his attorneys at sentencing and on direct

28   appeal committed perjury during the evidentiary hearing.

1 The Court may order the production of transcripts necessary to resolve the

2 petitioner's claims. See Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir. 2001). However,

3 the Court is not persuaded, at this juncture at least, that the evidentiary hearing transcript

4 is necessary. In the motion to dismiss, Respondents assert that several of Petitioner's

5 claims—all asserting ineffective assistance of postconviction counsel—are not

6 cognizable. (ECF No. 14 at 11.) Respondents are correct: Errors in state postconviction

7 proceedings, including ineffective assistance of postconviction counsel, are not

8 cognizable on federal habeas review. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.

9 1989); see also Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987). This would include

10 claims that trial and appellate counsel committed perjury during a postconviction

11 evidentiary hearing. There cannot be anything in the hearing transcript that could change

12 this conclusion, and the transcripts are therefore not necessary to respond to

13 Respondents' argument that some of Petitioner's claims are not cognizable.

14 While conceivable that the transcript might be relevant to deciding Petitioner's

15 otherwise cognizable claims, the request to produce the transcript is premature. In their

16 motion to dismiss, Respondents have raised the threshold issue of timeliness. If the

17 Petition is dismissed as untimely, the Court will not be resolving Petitioner's claims on the

18 merits. Thus, the transcript of the evidentiary hearing may never be necessary in this

19 action. Petitioner has not otherwise shown, or even argued, that the transcript contains

20 information necessary to address the timeliness issue. Accordingly, the request for the

21 production of a transcript of the evidentiary hearing is premature and will be denied

22 without prejudice. Petitioner may renew his motion following the Court's ruling on

23 Respondents' motion to dismiss or if he has additional grounds for asserting the transcript

24 is necessary to respond to the motion to dismiss.

25 It is therefore ordered that Petitioner's motion for production of transcripts (ECF

26 No. 22) is denied without prejudice.

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1   It is further ordered that Petitioner's "motion to oppose respondents' opposition"

2 (ECF No. 24), construed as a reply, is denied as moot.

3   DATED THIS 26th day of September 2018.

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      MIRANDA M. DU
6   UNITED STATES DISTRICT JUDGE

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