

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

JULIO N. GONZALEZ,)	
)	
Petitioner,)	
)	
vs.)	Case No. CIV-13-0997-F
)	
HECTOR RIOS, Warden,)	
)	
Respondent.)	

ORDER

Petitioner, a state prisoner appearing *pro se* whose pleadings are liberally construed, brings this action seeking habeas relief under 28 U.S.C. § 2254.

Magistrate Judge Shon T. Erwin entered his Report and Recommendation in this matter on December 30, 2013, (the Report), recommending upon preliminary review, that this action be dismissed on filing because it is a second and successive petition over which this court has no jurisdiction because petitioner has not obtained authorization from the circuit. Alternatively, the Report recommends that if this court does have jurisdiction, then the petition should be dismissed as untimely.

Petitioner has filed an objection to the Report, asking the court to dismiss this action without prejudice based on the jurisdictional issues identified by the magistrate judge. Petitioner does not take issue with any recommendations included within the Report. The Report recommends dismissal for lack of jurisdiction, which constitutes a dismissal without prejudice, the same type of dismissal requested by petitioner. Accordingly, after *de novo* review of any arguably objected to matters, and after review of the entire contents of the Report, the court concurs with the magistrate

judge's determinations and concludes that it would not be useful to cite any additional arguments or authorities here.¹


The Report and Recommendation of the magistrate judge is **ACCEPTED**, **ADOPTED** and **AFFIRMED** in its entirety. This action is **DISMISSED** for lack of jurisdiction for the reasons stated in the Report; alternatively, if this court has jurisdiction, the petition is denied as untimely.

Petitioner is entitled to a certificate of appealability only upon making a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This standard is satisfied by demonstrating that the issues movant seeks to raise are deserving of further proceedings, debatable among jurists of reasons, or subject to different resolution on appeal. *See, Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (“[W]e give the language found in §2253(c) the meaning ascribed it in [*Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)], with due note for the substitution of the word ‘constitutional.’”). “Where a district court has rejected the constitutional claims on the merits,...[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* When a prisoner’s habeas petition is dismissed on procedural grounds without reaching the merits of the prisoner’s claims, “a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

¹Petitioner has also sent a letter to the clerk of this court, doc. no. 14, requesting a form to file with the Tenth Circuit Court of Appeals for the purpose of seeking authorization to file a successive petition. The clerk of this court is **DIRECTED** to mail the appropriate form to petitioner, with his copy of this order.

Petitioner has not made the requisite showing; a certificate of appealability is **DENIED.**

Dated this 17th day of January, 2014.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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