

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
EASTERN DISTRICT OF CALIFORNIA

DEMOND MIMMS,	)	1:09-cv-01698-OWW-SKO-HC
)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS THE PETITION FOR WRIT OF
v.	)	HABEAS CORPUS AS A SUCCESSIVE
	)	PETITION (Doc. 1), TO DISREGARD
DARRYL ADAMS,	)	MOTIONS (Docs. 7, 8, 9), AND TO
	)	DECLINE TO ISSUE A CERTIFICATE OF
	)	APPEALABILITY
Respondent.)	
	)	DEADLINE FOR OBJECTIONS:
	)	THIRTY (30) DAYS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on September 28, 2009.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court...."

1 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
2 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
3 1990). Habeas Rule 2(c) requires that a petition 1) specify all
4 grounds of relief available to the Petitioner; 2) state the facts
5 supporting each ground; and 3) state the relief requested.
6 Notice pleading is not sufficient; rather, the petition must
7 state facts that point to a real possibility of constitutional
8 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
9 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
10 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
11 that are vague, conclusory, or palpably incredible are subject to
12 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
13 Cir. 1990).

14 Further, the Court may dismiss a petition for writ of habeas
15 corpus either on its own motion under Habeas Rule 4, pursuant to
16 the respondent's motion to dismiss, or after an answer to the
17 petition has been filed. Advisory Committee Notes to Habeas Rule
18 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
19 (9th Cir. 2001).

20 II. Background

21 In the petition, Petitioner, who was sentenced to ten (10)
22 years in prison for convictions of battery of a fellow prisoner
23 and gassing, challenges state prison officials' having unlawfully
24 extended his maximum term of imprisonment by altering the date of
25 his release or parole beginning on or about April 27, 2007.

26 (Pet. 2.)

27 The present petition is the second petition filed with
28 respect to this claim. The Court may take judicial notice of

1 court records. Fed. R. Evid. 201(b); United States v. Bernal-
2 Obeso, 989 F.2d 331, 333 (9th Cir. 1993); Valerio v. Boise
3 Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978), aff'd,
4 645 F.2d 699 (9th Cir. 1981). A review of the Court's own
5 dockets and files shows that Petitioner has previously sought
6 habeas relief with respect to the specific conduct of the prison
7 authorities that is the subject of the present petition. The
8 Court takes judicial notice of the docket in Mimms v. Galaza,
9 Warden, no. 1:08-cv-0532-AWI-WMW-HC and of documents and exhibits
10 filed in that action. In that proceeding, the Court ultimately
11 granted the respondent's motion to dismiss and also denied the
12 petition for writ of habeas corpus, directing a judgment for the
13 respondent. (Order filed March 12, 2009, doc. 17, 2: 22-23.)

14 III. Successive Petition

15 The Court must determine whether the petition in the present
16 case is barred by 28 U.S.C. § 2244 as a successive petition.

17 A. Legal Standards

18 Because the petition in the present case was filed after the
19 enactment of the Antiterrorism and Effective Death Penalty Act of
20 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.
21 Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
22 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

23 A federal court must dismiss a second or successive petition
24 that raises the same grounds as a prior petition. 28 U.S.C.
25 § 2244(b) (1). The Court must also dismiss a second or successive
26 petition raising a new ground unless the petitioner can show that
27 1) the claim rests on a new, retroactive, constitutional right or
28 2) the factual basis of the claim was not previously discoverable

1 through due diligence, and these new facts establish by clear and
2 convincing evidence that but for the constitutional error, no
3 reasonable fact finder would have found the applicant guilty of
4 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However,
5 it is not the district court that decides whether a second or
6 successive petition meets these requirements, which allow a
7 petitioner to file a second or successive petition.

8 Section 2244(b)(3)(A) provides, "Before a second or
9 successive application permitted by this section is filed in the
10 district court, the applicant shall move in the appropriate court
11 of appeals for an order authorizing the district court to
12 consider the application." In other words, a petitioner must
13 obtain leave from the Ninth Circuit before he or she can file a
14 second or successive petition in district court. See Felker v.
15 Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss
16 any claim presented in a second or successive habeas corpus
17 application under section 2254 that was presented in a prior
18 application unless the Court of Appeals has given Petitioner
19 leave to file the petition. 28 U.S.C. § 2244(b)(1). This
20 limitation has been characterized as jurisdictional. See, United
21 States v. Key, 205 F.3d 773, 774-75 (5th Cir. 2000); Pratt v.
22 United States, 129 F.3d 54, 57 (1st Cir. 1997); Nunez v. United
23 States, 96 F.3d 990, 991 (7th Cir. 1996); Greenawalt v. Stewart,
24 105 F.3d 1268, 1277 (9th Cir. 1997), cert. denied, 117 S.Ct. 794
25 (1997) (recognizing the limitation as one affecting the scope of
26 the writ).

27 A subsequent petition is not subject to the bar of § 2244 if
28 the original petition was not adjudicated on its merits and was

1 dismissed for failure to exhaust state remedies. Slack v.
2 McDaniel, 529 U.S. 473, 485-86 (2000). A dismissal of a § 2254
3 petition because it does not state a claim for habeas relief is a
4 dismissal on the merits for the purpose of 28 U.S.C. § 2244.
5 Dellenbach v. Hanks, 76 F.3d 820, 822-23 (7th Cir. 1996)
6 (distinguishing between a dismissal for failure to state a claim
7 and a dismissal because insufficient substantiation of a claim
8 was provided); see, Williams v. Armontrout, 855 F.2d 578, 580
9 (8th Cir. 1988) (dismissal for legal insufficiency, or not
10 stating facts constituting a violation of constitutional rights
11 as a matter of law, was held to be a decision on the merits);
12 cf., Del Campo v. Kennedy, 491 F.Supp.2d 891, 902 (N.D.Cal. 2006)
13 (citing Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399
14 n. 3 (1981), and noting that historically, courts have considered
15 a dismissal of a civil claim with prejudice for failure to state
16 claim to be a dismissal on the merits for res judicata purposes).

17 B. The Disposition of the Previous Petition

18 In Mimms v. Galaza, no. 1:08-cv-0532-AWI-WMW-HC, the motion
19 to dismiss was granted because the petition failed to state a
20 claim for habeas relief, and the petition was denied for
21 Petitioner's procedural default of failing to exhaust
22 administrative remedies. The respondent had moved to dismiss for
23 failure to state a claim and to exhaust state remedies and
24 procedural default. (Mot. to Dismiss, doc. 10, 3-5.) The
25 Magistrate Judge had recommended dismissal because of failure to
26 state a claim. (Doc. 13, filed January 12, 2009.) In the
27 dispositive order, the Court adopted the Magistrate Judge's
28 findings and recommendations in full. (Doc. 17, 2). The Court

1 further concluded that Petitioner had procedurally defaulted on
2 his claim in the California Supreme Court because that court
3 denied Petitioner's habeas petition with a citation to In re
4 Dexter, 25 Cal.3d 921 (1979), which holds that a litigant is not
5 entitled to judicial relief unless he or she has exhausted
6 available administrative remedies. (Id.)

7 In summary, in the previous action, this Court considered
8 Petitioner's claim that his confinement was unlawful and violated
9 the Constitution because his maximum release date of February 10,
10 2007, was changed to his earliest possible release date. (No.
11 1:08-cv-0532-AWI-WMW-HC, doc. 13, 4.) The Court adjudicated both
12 the failure of the petition to state a claim and the failure to
13 exhaust state administrative remedies. (Id., docs. 13, 17, 18.)

14 C. Failure to State a Claim

15 In the findings and recommendations filed in Mimms v.
16 Galaza, the Court reasoned that Petitioner had not stated
17 sufficient, specific facts to specify a constitutional or legal
18 basis for relief. (Id., doc. 13, 4-5.) It thus appears that the
19 initial petition was dismissed in part because of an insufficient
20 specification of facts, and not necessarily because Petitioner's
21 claim, even if factually supported, could not constitute a claim
22 warranting habeas relief.

23 Accordingly, the Court concludes that to the extent that the
24 initial petition was dismissed for failure to state a claim, it
25 was not a dismissal for legal insufficiency as a matter of law.
26 Thus, it did not constitute an adjudication on the merits that
27 would render the present petition successive and result in an
28 absence of subject matter jurisdiction in this Court.

1 D. Failure to Exhaust Administrative Remedies

2 1. Legal Standards

3 This Court cannot hear a federal petition for writ of habeas
4 corpus unless the highest state court was given a full and fair
5 opportunity to hear a claim. 28 U.S.C. § 2254(a). The “fair
6 presentation” requirement is not satisfied if the state’s highest
7 court does not reach the merits of a claim due to the procedural
8 context in which it was presented. Roettgen v. Copeland, 33 F.3d
9 36, 38 (9th Cir. 1994). Generally, a dismissal without prejudice
10 for a lack of exhaustion of state remedies is not an adjudication
11 on the merits. See, Slack v. McDaniel, 529 U.S. 473, 485-87
12 (2000) (holding that the dismissal of a prior petition for
13 failure to exhaust state remedies was not an adjudication on the
14 merits, and thus a later petition was not a second or successive
15 petition). If the petitioner fails to exhaust but may be able to
16 exhaust in the future, the petition should be dismissed, not
17 procedurally barred. Castille v. Peoples, 489 U.S. 346, 351
18 (1989). Where a petitioner fails to exhaust his claim properly
19 in state court and the claim “can no longer be raised because of
20 a failure to follow the prescribed procedure for presenting such
21 an issue, however, the claim is procedurally barred and the
22 petition must be denied.” Johnson v. Lewis, 929 F.2d 460, 463
23 (9th Cir. 1991).

24 2. Petitioner’s Exhaustion of Administrative
25 Remedies

26 In the present petition, Petitioner alleges only that he
27 initially filed a grievance and resubmitted a claim:

28 10. On or about May 1, 2007, Petitioner submitted
 appeal (602) at Corcoran prison. Petitioner argued that

1 prison officials unlawfully altered his maximum
2 term of imprisonment.

3 11. On or about June 1, 2007, prison officials responded
4 to the 602 on the informal level. In pursuant (sic)
5 to section 667(E) of the Penal Code prison officials
6 calculated Petitioner's term. At the conclusion it was
7 determined that February 10, 2009, was Petitioner's maximum
8 term of imprisonment (see exhibit-A-calculation worksheet)

9 12. On or about August 1, 2007, Petitioner
10 resubmitted the 602. However on the first level of
11 the 602 prison officials cancel. Prison officials
12 claimed petitioner failed to attend a hearing.

13 (Pet. 8.)

14 Petitioner then addresses exhaustion in the state courts,
15 but he does not allege that any additional efforts were
16 undertaken. He alleges that he filed a habeas corpus petition in
17 the California Supreme Court on October 17, 2007, which was
18 denied on or about April 1, 2008, in case no. S157285. (Pet. 9.)

19 Although Petitioner did not submit a copy of the California
20 Supreme Court's order denying the petition, the Court takes
21 judicial notice of the motion to dismiss and supporting exhibits
22 filed by the respondent in Mimms v. Galaza, no. 1:08-cv-00532-
23 AWI-WMW-HC, and specifically Doc. 10-8, page 2, consisting of a
24 copy of the California Supreme Court docket, which reflects that
25 in California Supreme Court case no. S157285, on April 9, 2008,
26 the Supreme Court denied Petitioner's petition for writ of habeas
27 corpus, which had been filed on October 17, 2007. The notes to
28 the denial state, "(See In re Dexter (1979) 25 Cal. 3d 921.)"

29 3. Analysis

30 In this case, the California Supreme Court denied
31 Petitioner's state petition with a citation to In re Dexter, 25
32 Cal.3d 921, 925 (1979), which holds that "a litigant will not be

1 afforded judicial relief unless he has exhausted available
2 administrative remedies." Petitioner thus failed to exhaust his
3 administrative remedies before seeking collateral review in the
4 state courts.

5 Further, at the time Petitioner filed his petition, the
6 claim could no longer be raised because of Petitioner's failure
7 to follow the prescribed procedure of exhausting prison
8 administrative remedies. Cal. Code Regs. tit 15, § 3084.3 sets
9 forth possible grounds for rejection of administrative appeals in
10 the prison context, which include bypassing informal attempts at
11 resolution and untimeliness. Section 3084.3(c)(6) provides for
12 rejection if "[t]ime limits for submitting the appeal are
13 exceeded and the appellant had the opportunity to file within the
14 prescribed time constraints." Cal. Code Regs. tit. 15, § 3084.6
15 provides in pertinent part that an appellant must submit an
16 appeal within fifteen (15) working days of the event or decision
17 being appealed, or of receiving an unacceptable lower level
18 appeal decision.

19 Presenting the habeas petition to the California Supreme
20 Court without exhausting the prison's administrative remedies
21 essentially foreclosed any consideration of the merits of the
22 petition. Thus, the petition was not "fairly presented" and,
23 therefore, is barred from federal habeas review. Castille, 489
24 U.S. at 351; Roettgen, 33 F.3d at 38; see, Saunders v. Garrison,
25 2008 WL 5219876, *3 (E.D.Cal. 2008). Because Petitioner could
26 not have timely exhausted his claims, he was precluded from
27 curing his procedural default, and his claim can no longer be
28 raised. This Court has already expressly denied a petition

1 raising the same claim and has adjudicated Petitioner's
2 procedural default on the merits.

3 Pursuant to 28 U.S.C. § 2244(b)(1), this Court must dismiss
4 any claim presented in a second or successive habeas corpus
5 application under Section 2254 that was presented in a prior
6 application unless the Court of Appeals has given Petitioner
7 leave to file the petition. The present petition asserts the
8 same claim as in the previous petition, and no leave to proceed
9 has been given to Petitioner from the Court of Appeals.

10 Therefore, the Court concludes that the petition must be
11 dismissed pursuant to § 2244(b)(1) as a successive petition.

12 Further, because the Court must dismiss the petition, the
13 Court will not consider Petitioner's motion for summary judgment
14 filed on October 8, 2009 (doc. 7); motion for temporary
15 restraining order filed on February 11, 2010 (doc. 8); and motion
16 for an evidentiary hearing filed on March 17, 2010 (doc. 9). The
17 motions will be disregarded.

18 IV. Certificate of Appealability

19 Unless a circuit justice or judge issues a certificate of
20 appealability, an appeal may not be taken to the court of appeals
21 from the final order in a habeas proceeding in which the
22 detention complained of arises out of process issued by a state
23 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537
24 U.S. 322, 336 (2003). A certificate of appealability may issue
25 only if the applicant makes a substantial showing of the denial
26 of a constitutional right. § 2253(c)(2). Under this standard, a
27 petitioner must show that reasonable jurists could debate whether
28 the petition should have been resolved in a different manner or

1 that the issues presented were adequate to deserve encouragement
2 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
3 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
4 certificate should issue if the Petitioner shows that jurists of
5 reason would find it debatable whether the petition states a
6 valid claim of the denial of a constitutional right and that
7 jurists of reason would find it debatable whether the district
8 court was correct in any procedural ruling. Slack v. McDaniel,
9 529 U.S. 473, 483-84 (2000). In determining this issue, a court
10 conducts an overview of the claims in the habeas petition,
11 generally assesses their merits, and determines whether the
12 resolution was debatable among jurists of reason or wrong. Id.
13 It is necessary for an applicant to show more than an absence of
14 frivolity or the existence of mere good faith; however, it is not
15 necessary for an applicant to show that the appeal will succeed.
16 Id. at 338.

17 A district court must issue or deny a certificate of
18 appealability when it enters a final order adverse to the
19 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

20 Here, it does not appear that reasonable jurists could
21 debate whether the petition should have been resolved in a
22 different manner. Petitioner has not made a substantial showing
23 of the denial of a constitutional right. Accordingly, the Court
24 will decline to issue a certificate of appealability.

25 V. Recommendation

26 Accordingly, it is RECOMMENDED that:

- 27 1) The petition be DISMISSED as successive;
28 2) The Court DISREGARD Petitioner's motion for summary

1 judgment filed on October 8, 2009 (doc. 7); motion for temporary
2 restraining order filed on February 11, 2010 (doc. 8); and motion
3 for an evidentiary hearing filed on March 17, 2010 (doc. 9);

4 3) The Court DECLINE to issue a certificate of
5 appealability; and

6 4) The Clerk close this action because the dismissal will
7 terminate the action.

8 These findings and recommendations are submitted to the
9 United States District Court Judge assigned to the case, pursuant
10 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
11 the Local Rules of Practice for the United States District Court,
12 Eastern District of California. Within thirty (30) days after
13 being served with a copy, any party may file written objections
14 with the Court and serve a copy on all parties. Such a document
15 should be captioned "Objections to Magistrate Judge's Findings
16 and Recommendations." Replies to the objections shall be served
17 and filed within fourteen (14) days (plus three (3) days if
18 served by mail) after service of the objections. The Court will
19 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
20 636 (b) (1) (C). The parties are advised that failure to file
21 objections within the specified time may waive the right to
22 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
23 1153 (9th Cir. 1991).

24
25 IT IS SO ORDERED.

26 **Dated: July 14, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE