

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7  
8 EASTERN DISTRICT OF CALIFORNIA  
9

10 CRAIG ALLEN WARD, ) 1:10-cv-0633-OWW-SKO-HC  
11 )  
12 ) Petitioner, ) FINDINGS AND RECOMMENDATIONS TO  
13 ) DISMISS SUCCESSIVE PETITION  
14 ) PURSUANT TO 28 U.S.C. § 2244(b)  
15 ) v. ) (Doc. 4) AND TO DECLINE TO ISSUE  
16 ) A CERTIFICATE OF APPEALABILITY  
17 )  
18 ) ACTING WARDEN M. C. EVANS, )  
19 )  
20 ) Respondent. ) DEADLINE FOR OBJECTIONS:  
21 ) THIRTY (30) DAYS  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

17 Petitioner is a state prisoner proceeding pro se with a  
18 petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.  
19 The matter was referred to the Magistrate Judge pursuant to 28  
20 U.S.C. § 636(b) and Local Rules 302 and 304. Pending before the  
21 Court is the petition, which was filed on February 25, 2010, in  
22 the United States District Court for the Northern District of  
23 California and transferred to this Court on April 5, 2010.

24 I. Screening the Petition

25 Rule 4 of the Rules Governing § 2254 Cases in the United  
26 States District Courts (Habeas Rules) requires the Court to make  
27 a preliminary review of each petition for writ of habeas corpus.  
28 The Court must summarily dismiss a petition "[i]f it plainly

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

16 Further, the Court may dismiss a petition for writ of habeas  
17 corpus either on its own motion under Habeas Rule 4, pursuant to  
18 the respondent's motion to dismiss, or after an answer to the  
19 petition has been filed. Advisory Committee Notes to Habeas Rule  
20 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
21 (9th Cir. 2001).

## 22 II. Background

23 Petitioner is an inmate of Folsom State Prison who was  
24 sentenced to twenty-six (26) years to life in the Kern County  
25 Superior Court in 1995 for receiving stolen property with prior  
26 convictions in violation of Cal. Pen. Code §§ 496, 667.5, and  
27 667. (Pet. 2.)

28 The present petition is not the first petition filed with

1 respect to the judgment pursuant to which Petitioner is detained.  
2 The Court may take judicial notice of court records. Fed. R.  
3 Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333  
4 (9<sup>th</sup> Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626,  
5 635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).  
6 The Court will take judicial notice of its own dockets.

7 On June 22, 1999, a habeas petition challenging Petitioner's  
8 Kern County conviction and sentence was denied on the merits by  
9 this Court in Craig Allen Ward v. Gail Lewis, 1:98-cv-5355-AWI-  
10 SMS-P. (Docs. 18, 30, 31.)

11 Further, additional dockets reflect that Petitioner filed  
12 other petitions addressing his Kern County sentence which were  
13 dismissed as successive. (Craig Allen Ward v. Gail Lewis, 1:98-  
14 cv-05984-OWW-HGB-P, docs. 14, 16, 18; Craig Allen Ward v. M.C.  
15 Kramer, 1:06-cv-01738-OWW-LJO-HC, docs. 7, 10, 11.)

### 16 III. Successive Petition

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

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

1 convincing evidence that but for the constitutional error, no  
2 reasonable factfinder would have found the applicant guilty of  
3 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

4       However, it is not the district court that decides whether a  
5 second or successive petition meets these requirements, which  
6 allow a petitioner to file a second or successive petition.  
7 Section 2244(b)(3)(A) provides, "Before a second or successive  
8 application permitted by this section is filed in the district  
9 court, the applicant shall move in the appropriate court of  
10 appeals for an order authorizing the district court to consider  
11 the application." In other words, a petitioner must obtain leave  
12 from the Ninth Circuit before he or she can file a second or  
13 successive petition in district court. See Felker v. Turpin, 518  
14 U.S. 651, 656-657 (1996). This Court must dismiss claims in a  
15 second or successive habeas corpus application under section 2254  
16 unless the Court of Appeals has given Petitioner leave to file  
17 the petition. 28 U.S.C. § 2244(b)(1). This limitation has been  
18 characterized as jurisdictional. Burton v. Stewart, 549 U.S.  
19 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th  
20 Cir. 2001).

21       A disposition of a first petition is "on the merits" if the  
22 district court either considered and rejected the claim, or  
23 determined that the underlying claim would not be considered by a  
24 federal court. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir.  
25 2009) (citing Howard v. Lewis, 905 F.2d 1318, 1322 (9th Cir.  
26 1990)).

27       Here, the first petition concerning the Kern County judgment  
28 was denied on the merits. Petitioner makes no showing that he

1 has obtained prior leave from the Ninth Circuit to file his  
2 successive petition attacking the conviction. Accordingly, this  
3 Court has no jurisdiction to consider Petitioner's renewed  
4 application for relief from that conviction under Section 2254  
5 and must dismiss the petition. See Felker v. Turpin, 518 U.S.  
6 651, 656-657; Burton v. Stewart, 549 U.S. 147, 152; Cooper v.  
7 Calderon, 274 F.3d 1270, 1274. If Petitioner desires to proceed  
8 in bringing this petition for writ of habeas corpus, he must file  
9 for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244  
10 (b) (3).

#### 11 IV. Certificate of Appealability

12 Unless a circuit justice or judge issues a certificate of  
13 appealability, an appeal may not be taken to the Court of Appeals  
14 from the final order in a habeas proceeding in which the  
15 detention complained of arises out of process issued by a state  
16 court. 28 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537  
17 U.S. 322, 336 (2003). A certificate of appealability may issue  
18 only if the applicant makes a substantial showing of the denial  
19 of a constitutional right. 28 U.S.C. § 2253(c) (2). Under this  
20 standard, a petitioner must show that reasonable jurists could  
21 debate whether the petition should have been resolved in a  
22 different manner or that the issues presented were adequate to  
23 deserve encouragement to proceed further. Miller-El v. Cockrell,  
24 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S. 473, 484  
25 (2000)). A certificate should issue if the Petitioner shows that  
26 jurists of reason would find it debatable whether the petition  
27 states a valid claim of the denial of a constitutional right and  
28 that jurists of reason would find it debatable whether the

1 district court was correct in any procedural ruling. Slack v.  
2 McDaniel, 529 U.S. 473, 483-84 (2000).

3 In determining this issue, a court conducts an overview of  
4 the claims in the habeas petition, generally assesses their  
5 merits, and determines whether the resolution was wrong or  
6 debatable among jurists of reason. Miller-El v. Cockrell, 537  
7 U.S. at 336-37. It is necessary for an applicant to show more  
8 than an absence of frivolity or the existence of mere good faith;  
9 however, it is not necessary for an applicant to show that the  
10 appeal will succeed. Id. at 338.

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

14 Here, Petitioner has not demonstrated that jurists of reason  
15 would find it debatable whether or not the petition states a  
16 valid claim of the denial of a constitutional right. Petitioner  
17 has not made the substantial showing required for issuance of a  
18 certificate of appealability.

19 V. Recommendation

20 Accordingly, it is RECOMMENDED that:

21 1) The petition be DISMISSED as successive; and

22 2) The Court DECLINE to issue a certificate of  
23 appealability; and

24 3) The Clerk close this action because the dismissal will  
25 terminate the action.

26 These findings and recommendations are submitted to the  
27 United States District Court Judge assigned to the case, pursuant  
28 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of

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

14  
15 IT IS SO ORDERED.

16 **Dated: January 3, 2011**

**/s/ Sheila K. Oberto**  
**UNITED STATES MAGISTRATE JUDGE**