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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDGAR NAVA,)	1:10-cv-01769-AWI-SKO-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS PETITION AS SUCCESSIVE
v.)	PURSUANT TO 28 U.S.C. § 2244(b)
)	(Doc. 1) AND TO DECLINE TO ISSUE
)	A CERTIFICATE OF APPEALABILITY
FERNANDO GONZALEZ,)	
)	DEADLINE FOR OBJECTIONS:
Respondent.)	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 303. Pending before the Court is the petition filed on September 27, 2010.

I. Screening the Petition

Rule 4 of the 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

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

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

21 II. Background

22 Petitioner is serving a sentence of twenty-five (25) years
23 to life imposed in 2006 by the Kings County Superior Court for
24 assault by an inmate serving a life term and possession of a
25 stabbing instrument in violation of Cal. Pen. Code §§ 4500 and
26 4502. (Pet. 1.) He is also serving a sentence of eighty-seven
27 (87) years to life previously imposed in the Los Angeles County
28 Superior Court. (Pet. 10.)

1 The present petition is not the first petition filed with
2 respect to the judgment pursuant to which Petitioner is detained.
3 The Court may take judicial notice of court records. Fed. R.
4 Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333
5 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626,
6 635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).
7 The Court will take judicial notice of its own dockets.

8 On March 5, 2010, a habeas petition challenging Petitioner's
9 Kings County conviction and sentence was denied on the merits by
10 this Court in Edgar Nava v. Fernando Gonzales, 1:08-cv-1793-OWW-
11 JMD-HC. (Docs. 26, 28, 29.) Petitioner claimed that the jury
12 had applied an instruction in an unconstitutional manner. (Doc.
13 26, 5:24-26.) The Court denied the petition on the merits and
14 with prejudice. (Doc. 26, 8:8-10; doc. 28.)

15 III. Successive Petition

16 Because the petition was filed after April 24, 1996, the
17 effective date of the Antiterrorism and Effective Death Penalty
18 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
19 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
20 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

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

1 for the constitutional error, no reasonable factfinder would have
2 found the applicant guilty of the underlying offense. 28 U.S.C.
3 § 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 any claim
15 presented in a second or successive habeas corpus application
16 under section 2254 that was presented in a prior application
17 unless the Court of Appeals has given Petitioner leave to file
18 the petition. 28 U.S.C. § 2244(b)(1). This limitation has been
19 characterized as jurisdictional. Burton v. Stewart, 549 U.S.
20 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th
21 Cir. 2001).

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

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

1 that he has obtained prior leave from the Ninth Circuit to file
2 his successive petition attacking the conviction. That being so,
3 this 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, 656-57; 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. §
10 2244(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).

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IT IS SO ORDERED.

Dated: January 3, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE