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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CURTIS OWENS,)	1:11-cv-00002-LJO-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
KELLY HARRINGTON,)	
)	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 304. Pending before the Court is the petition, which was filed on January 3, 2011.

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

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 Kern Valley State Prison (KVSP)
24 serving a sentence of twenty-five (25) years to life imposed in
25 the Fresno County Superior Court on December 5, 1999, for
26 burglary, attempted burglary, and related offenses. (Pet. 1, 3.)
27 In the petition, Petitioner challenges his conviction on grounds
28 relating to the Superior Court’s destruction of trial exhibits.

1 (Pet. 6-8.)

2 The present petition is not the first petition filed with
3 respect to the judgment pursuant to which Petitioner is
4 incarcerated. The Court may take judicial notice of court
5 records. Fed. R. Evid. 201(b); United States v. Bernal-Obeso,
6 989 F.2d 331, 333 (9th Cir. 1993); Valerio v. Boise Cascade
7 Corp., 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d
8 699 (9th Cir. 1981). The Court will take judicial notice of its
9 own dockets.

10 On April 20, 2007, a first amended habeas petition
11 challenging Petitioner's 1999 convictions was denied by this
12 Court on the merits in Curtis Owens v. E. Roe, 1:03-cv-05327-LJO-
13 TAG. (Docs. 53, 54, 38.) The docket of that proceeding reflects
14 that a notice of appeal from this Court's judgment was filed on
15 May 22, 2007 (Doc. 59), and the appeal is presently pending.
16 A review through PACER of the Ninth Circuit's docket reflects
17 that the appeal proceeds as Owens v. Harrington in case number
18 07-16013; briefing appears to have been completed, but no
19 decision has issued.

20 III. Successive Petition

21 Because the petition in the present case was filed after the
22 enactment of the Antiterrorism and Effective Death Penalty Act of
23 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.
24 Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
25 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

26 A federal court must dismiss a second or successive petition
27 that raises the same grounds as a prior petition. 28 U.S.C.
28 § 2244(b)(1). The Court must also dismiss a second or successive

1 petition raising a new ground unless the petitioner can show that
2 1) the claim rests on a new, retroactive, constitutional right or
3 2) the factual basis of the claim was not previously discoverable
4 through due diligence, and the new facts establish by clear and
5 convincing evidence that but for the constitutional error, no
6 reasonable factfinder would have found the applicant guilty of
7 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

8 However, it is not the district court that decides whether a
9 second or successive petition meets these requirements, which
10 allow a petitioner to file a second or successive petition.
11 Section 2244(b)(3)(A) provides, "Before a second or successive
12 application permitted by this section is filed in the district
13 court, the applicant shall move in the appropriate court of
14 appeals for an order authorizing the district court to consider
15 the application." In other words, a petitioner must obtain leave
16 from the Ninth Circuit before he or she can file a second or
17 successive petition in district court. See Felker v. Turpin, 518
18 U.S. 651, 656-657 (1996). This Court must dismiss any claim
19 presented in a second or successive habeas corpus application
20 under section 2254 that was presented in a prior application
21 unless the Court of Appeals has given Petitioner leave to file
22 the petition. 28 U.S.C. § 2244(b)(1). This limitation has been
23 characterized as jurisdictional. Burton v. Stewart, 549 U.S.
24 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th
25 Cir. 2001).

26 A disposition is "on the merits" if the district court
27 either considered and rejected the claim, or determined that the
28 underlying claim would not be considered by a federal court.

1 McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing
2 Howard v. Lewis, 905 F.2d 1318, 1322 (9th Cir. 1990)).

3 Here, the first petition concerning the Fresno County
4 judgment was denied on the merits. The Court has considered the
5 pendency of the appeal from the judgment rendered by this Court
6 on the first petition. It is established that if a new petition
7 is filed when a previous habeas petition is still pending before
8 the district court without a decision having been rendered, then
9 the new petition should be construed as a motion to amend the
10 pending petition. Woods v. Carey, 525 F.3d 886, 888 (9th Cir.
11 2008). However, the Woods holding will not be extended to a
12 situation where the district court has ruled on the initial
13 petition, and proceedings have begun in the Court of Appeals.
14 Beaty v. Schriro, 554 F.3d 780, 782-83 & n.1 (9th Cir. 2009),
15 cert. denied, -- U.S. --, 130 S.Ct. 364, 175 L.Ed.2d 50 (2009).
16 The petition presently before the Court is thus considered a
17 successive petition because the district court denied the first
18 petition on the merits and entered judgment, and the appeal is
19 pending in the Ninth Circuit. Id.

20 Petitioner makes no showing that he has obtained prior leave
21 from the Ninth Circuit to file his successive petition attacking
22 the judgment. Accordingly, this court has no jurisdiction to
23 consider Petitioner's renewed application for relief from that
24 convictions under section 2254 and must dismiss the petition.
25 See, Felker v. Turpin, 518 U.S. 651, 656-57; Burton v. Stewart,
26 549 U.S. 147, 152; Cooper v. Calderon, 274 F.3d 1270, 1274. If
27 Petitioner desires to proceed in bringing this petition for writ
28 of habeas corpus, he must file for leave to do so with the Ninth

1 Circuit. See 28 U.S.C. § 2244(b)(3).

2 IV. Certificate of Appealability

3 Unless a circuit justice or judge issues a certificate of
4 appealability, an appeal may not be taken to the Court of Appeals
5 from the final order in a habeas proceeding in which the
6 detention complained of arises out of process issued by a state
7 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537
8 U.S. 322, 336 (2003). A certificate of appealability may issue
9 only if the applicant makes a substantial showing of the denial
10 of a constitutional right. 28 U.S.C. § 2253(c)(2). Under this
11 standard, a petitioner must show that reasonable jurists could
12 debate whether the petition should have been resolved in a
13 different manner or that the issues presented were adequate to
14 deserve encouragement to proceed further. Miller-El v. Cockrell,
15 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S. 473, 484
16 (2000)). A certificate should issue if the Petitioner shows that
17 jurists of reason would find it debatable whether the petition
18 states a valid claim of the denial of a constitutional right and
19 that jurists of reason would find it debatable whether the
20 district court was correct in any procedural ruling. Slack v.
21 McDaniel, 529 U.S. 473, 483-84 (2000).

22 In determining this issue, a court conducts an overview of
23 the claims in the habeas petition, generally assesses their
24 merits, and determines whether the resolution was wrong or
25 debatable among jurists of reason. Miller-El v. Cockrell, 537
26 U.S. at 336-37. It is necessary for an applicant to show more
27 than an absence of frivolity or the existence of mere good faith;
28 however, it is not necessary for an applicant to show that the

1 appeal will succeed. Id. at 338.

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

5 Here, Petitioner has not demonstrated that jurists of reason
6 would find it debatable whether or not the petition states a
7 valid claim of the denial of a constitutional right. Petitioner
8 has not made the substantial showing required for issuance of a
9 certificate of appealability.

10 V. Recommendation

11 Accordingly, it is RECOMMENDED that:

12 1) The petition be DISMISSED as successive; and

13 2) The Court DECLINE to issue a certificate of
14 appealability; and

15 3) The Clerk be DIRECTED to close this action because the
16 dismissal will terminate the action.

17 These findings and recommendations are submitted to the
18 United States District Court Judge assigned to the case, pursuant
19 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
20 the Local Rules of Practice for the United States District Court,
21 Eastern District of California. Within thirty (30) days after
22 being served with a copy, any party may file written objections
23 with the Court and serve a copy on all parties. Such a document
24 should be captioned "Objections to Magistrate Judge's Findings
25 and Recommendations." Replies to the objections shall be served
26 and filed within fourteen (14) days (plus three (3) days if
27 served by mail) after service of the objections. The Court will
28 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §

1 636 (b) (1) (C). The parties are advised that failure to file
2 objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
4 1153 (9th Cir. 1991).

5

6 IT IS SO ORDERED.

7 **Dated: January 18, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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