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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANDRE L. MURPHY, SR.,)	1:11-cv-00013-OWW-SMS-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
T. 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 in this Court on December 20, 2010, and transferred to this division on January 4, 2011.

II. 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

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 serving a sentence of thirty-nine (39) years
24 to life imposed in 1999 by the Fresno County Superior Court for
25 assault with great bodily injury. (Pet. 1.) In the petition,
26 Petitioner challenges his 1999 conviction on grounds of
27 ineffective assistance of counsel.

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 (9th 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 September 26, 2006, a habeas petition challenging
8 Petitioner's Fresno County conviction and sentence was denied on
9 the merits by this Court in Andre L. Murphy, Sr. v. D. L.
10 Runnels, 1:05-cv-00186-AWI-TAG. (Docs. 16-18.) The Court denied
11 the petition on the merits and with prejudice on the basis of
12 untimeliness. (Doc. 16, 3-13; Doc. 18.)

13 III. Successive Petition

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

19 Under the AEDPA, a federal court must dismiss a second or
20 successive petition that raises the same grounds as a prior
21 petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a
22 second or successive petition raising a new ground unless the
23 petitioner can show that 1) the claim rests on a new,
24 retroactive, constitutional right or 2) the factual basis of the
25 claim was not previously discoverable through due diligence, and
26 the new facts establish by clear and convincing evidence that but
27 for the constitutional error, no reasonable factfinder would have
28 found the applicant guilty of the underlying offense. 28 U.S.C.

1 § 2244(b)(2)(A)-(B).

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

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

24 Here, the first petition concerning the Fresno County
25 judgment was denied on the merits. A dismissal of a federal
26 habeas petition on the ground of untimeliness is a determination
27 "on the merits" for purposes of the rule against successive
28 petitions such that a further petition challenging the same

1 conviction is "second or successive" for purposes of 28 U.S.C. §
2 2244(b). McNabb v. Yates, 576 F.3d 1028, 1029-30 (9th Cir.
3 2009). This is because such a dismissal is a permanent and
4 incurable bar to federal review of the underlying claims. Id. at
5 1030.

6 Petitioner makes no showing that he has obtained prior leave
7 from the Ninth Circuit to file his successive petition attacking
8 the conviction. That being so, this court has no jurisdiction to
9 consider Petitioner's renewed application for relief from that
10 conviction under section 2254 and must dismiss the petition.
11 See, Felker v. Turpin, 518 U.S. 651, 656-57; Burton v. Stewart,
12 549 U.S. 147, 152; Cooper v. Calderon, 274 F.3d 1270, 1274. If
13 Petitioner desires to proceed in bringing this petition for writ
14 of habeas corpus, he must file for leave to do so with the Ninth
15 Circuit. See 28 U.S.C. § 2244(b) (3).

16 III. Certificate of Appealability

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

1 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S. 473, 484
2 (2000)). A certificate should issue if the Petitioner shows that
3 jurists of reason would find it debatable whether the petition
4 states a valid claim of the denial of a constitutional right and
5 that jurists of reason would find it debatable whether the
6 district court was correct in any procedural ruling. Slack v.
7 McDaniel, 529 U.S. 473, 483-84 (2000).

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

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

19 Here, Petitioner has not demonstrated that jurists of reason
20 would find it debatable whether or not the petition states a
21 valid claim of the denial of a constitutional right. Petitioner
22 has not made the substantial showing required for issuance of a
23 certificate of appealability.

24 IV. Recommendation

25 Accordingly, it is RECOMMENDED that:

- 26 1) The petition be DISMISSED as successive; and
- 27 2) The Court DECLINE to issue a certificate of
28 appealability; and

1 3) The Clerk close this action because the dismissal will
2 terminate the action.

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

19
20 IT IS SO ORDERED.

21 **Dated:** January 5, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE