

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

DENNIS WALKER,	)	1:11-cv-00560-SKO-HC
	)	
Petitioner,	)	ORDER DISMISSING THE PETITION AS
	)	SUCCESSIVE PURSUANT TO 28 U.S.C.
	)	§ 2244(b) (Doc. 1)
v.	)	
	)	ORDER DECLINING TO ISSUE A
KATHERINE DICKINSON,	)	CERTIFICATE OF APPEALABILITY
	)	
Respondent.	)	ORDER DIRECTING THE CLERK TO
	)	CLOSE THE ACTION
	)	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on April 27, 2011 (doc. 3). Pending before the Court is the petition filed on April 5, 2011.

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.

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

17 Further, the Court may dismiss a petition for writ of habeas  
18 corpus either on its own motion under Habeas Rule 4, pursuant to  
19 the respondent's motion to dismiss, or after an answer to the  
20 petition has been filed. Advisory Committee Notes to Habeas Rule  
21 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
22 (9th Cir. 2001).

## 23 II. Background

24 Petitioner alleges that he is an inmate of the California  
25 Medical Facility at Vacaville, California, serving a sentence of  
26 twenty-five (25) years to life imposed by the Mariposa County  
27 Superior Court on April 2, 1992, pursuant to his conviction of  
28 two counts of first degree murder after entering a guilty plea.

1 (Pet 1.) Petitioner seeks the reversal of his conviction on the  
2 ground that he was misadvised of the consequences of his guilty  
3 plea, and he further challenges the trial court's denial of an  
4 application for writ of habeas corpus. (Pet. 4-5, 31, 41.)

5 The present petition is not the first petition filed with  
6 respect to the judgment pursuant to which Petitioner is detained.  
7 The Court may take judicial notice of court records. Fed. R.  
8 Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333  
9 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626,  
10 635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).  
11 The Court will take judicial notice of its own dockets.

12 On November 22, 2000, a habeas petition challenging  
13 Petitioner's Mariposa County convictions was denied on the merits  
14 by this Court in Dennis Walker v. Steven Cambra, Jr., 1:98-cv-  
15 0516-OWW-LJO. (Docs. 17, 20, 21.) The Court denied the petition  
16 on the merits and entered judgment for the respondent. (Id.)

### 17 III. Successive Petition

18 Because the instant petition was filed after April 24, 1996,  
19 the effective date of the Antiterrorism and Effective Death  
20 Penalty Act of 1996 (AEDPA), the AEDPA applies in this  
21 proceeding. Lindh v. Murphy, 521 U.S. 320, 327 (1997), cert.  
22 denied, 522 U.S. 1008 (1997); Furman v. Wood, 190 F.3d 1002, 1004  
23 (9th Cir. 1999).

24 Under the AEDPA, a federal court must dismiss a second or  
25 successive petition that raises the same grounds as a prior  
26 petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a  
27 second or successive petition raising a new ground unless the  
28 petitioner can show that 1) the claim rests on a new,

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

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

25       A disposition is "on the merits" if the district court  
26 either considered and rejected the claim, or determined that the  
27 underlying claim would not be considered by a federal court.  
28 McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing

1 Howard v. Lewis, 905 F.2d 1318, 1322 (9th Cir. 1990)).

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

#### 14 IV. Certificate of Appealability

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

1 jurists of reason would find it debatable whether the petition  
2 states a valid claim of the denial of a constitutional right and  
3 that jurists of reason would find it debatable whether the  
4 district court was correct in any procedural ruling. Slack v.  
5 McDaniel, 529 U.S. 473, 483-84 (2000).

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

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

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

22 Therefore, the Court will decline to issue a certificate of  
23 appealability.

24 V. Disposition

25 Accordingly, it is ORDERED that:

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

1           3) The Clerk is DIRECTED to close this case because the  
2 dismissal will terminate the action.

3  
4  
5 IT IS SO ORDERED.

6 **Dated: May 9, 2011**

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

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28