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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

GERALD L. TUCKER, ALSO KNOWN AS  
FRED LEE,

Petitioner,

v.

MR. DANIEL PARAMO, WARDEN,

Respondent.

Case No. 1:14-CV-00071-AWI-SMS HC

FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITIONER’S STATE LAW  
CLAIMS AS SUCCESSIVE; DECLINE TO  
ISSUE A CERTIFICATE OF  
APPEALABILITY; AND DIRECT THE  
CLERK TO CLOSE THE CASE.

(Doc. 1)

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, which was filed on December 30, 2013, and transferred to this Court from the Sacramento Division on May 1, 2014.

**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 appears from the petition and any

1 attached exhibits that the petitioner is not entitled to relief in the district court....” Habeas Rule 4;  
2 *O’Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir.1990); *see also Hendricks v. Vasquez*, 908 F.2d 490  
3 (9th Cir. 1990). Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief available to  
4 the Petitioner; 2) state the facts supporting each ground; and 3) state the relief requested. Notice  
5 pleading is not sufficient; the petition must state facts that point to a real possibility of constitutional  
6 error. Rule 4, Advisory Committee Notes, 1976 Adoption; *O’Bremski v. Maass*, 915 F.2d at 420  
7 (quoting *Blackledge v. Allison*, 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)).  
8 Allegations in a petition that are vague, conclusory, or palpably incredible are subject to summary  
9 dismissal. *Hendricks v. Vasquez*, 908 F.2d at 491.

11 The Court may dismiss a petition for writ of habeas corpus either on its own motion under  
12 Habeas Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has  
13 been filed. Advisory Committee Notes to Habeas Rule 8, 1976 Adoption; *see Herbst v. Cook*, 260  
14 F.3d 1039, 1042–43 (9th Cir. 2001). A petition for habeas corpus, however, should not be dismissed  
15 without leave to amend unless it appears that no tenable claim for relief can be pleaded were such  
16 leave granted. *Jarvis v. Nelson*, 440 F.2d 13, 14 (9th Cir. 1971).

## 18 **II. Background**

19 Petitioner alleges that he is serving a life sentence imposed in 2002 in the Superior Court of  
20 the State of California, County of Tulare, for conviction of murder in violation of California Penal  
21 Code Section 187. In the petition, Petitioner challenges his conviction alleging trial error,  
22 ineffective assistance of counsel, and insufficiency of the evidence to support conviction.  
23

24 The present petition is not the first petition filed by Petitioner in which he has challenged this  
25 judgment. The Court may take judicial notice of court records. Fed.R.Evid. 201(b); *United States v.*  
26 *Bernal–Obeso*, 989 F.2d 331, 333 (9th Cir. 1993); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626,  
27 635 n. 1 (N.D. Cal. 1978), *aff’d*, 645 F.2d 699 (9th Cir. 1981). The Court will take judicial notice of  
28 its own dockets.

1           In *Gerald L. Tucker v. Stuart Ryan, Warden*, No. 1:04-CV-05662-OWW-DLB-HC, on  
2 March 29, 2006, the Court denied on the merits Petitioner’s petition for writ of habeas corpus  
3 challenging Petitioner’s homicide conviction. Petitioner filed an appeal, but on December 19, 2006,  
4 the United States Court of Appeals for the Ninth Circuit denied Petitioner’s request for a certificate  
5 of appealability. On September 23, 2013, Petitioner filed another petition for writ of habeas corpus.  
6 *See Tucker v. Brazelton*, No. 1:13-CV-01534-AWI, 2013 WL 5883766 (E.D. Cal. Oct. 30, 2013). In  
7 that case, the Court denied Petitioner’s petition as successive. *Id.*  
8

9 **III. Successive Petition**

10           Because this petition was filed after April 24, 1996, the effective date of the Antiterrorism  
11 and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA applies in this proceeding. *Lindh v.*  
12 *Murphy*, 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Furman v. Wood*, 190 F.3d  
13 1002, 1004 (9th Cir. 1999).

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

22           However, it is not the district court that decides whether a second or successive petition  
23 meets these requirements, which allow a petitioner to file a second or successive petition. Section  
24 2244(b)(3)(A) provides, “Before a second or successive application permitted by this section is filed  
25 in the district court, the applicant shall move in the appropriate court of appeals for an order  
26 authorizing the district court to consider the application.” In other words, a petitioner must obtain  
27 leave from the Ninth Circuit before he or she can file a second or successive petition in the district  
28

1 court. *See Felker v. Turpin*, 518 U.S. 651, 656–57, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). This  
2 Court must dismiss any claim presented in a second or successive habeas corpus application under  
3 section 2254 that was presented in a prior application unless the Court of Appeals has given  
4 Petitioner leave to file the petition. 28 U.S.C. § 2244(b)(1). This limitation has been characterized  
5 as jurisdictional. *Burton v. Stewart*, 549 U.S. 147, 152, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007);  
6 *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

7  
8 A disposition is “on the merits” if the district court either considered and rejected a claim, or  
9 determined that an underlying claim would not be considered by a federal court. *McNabb v. Yates*,  
10 576 F.3d 1028, 1029 (9th Cir. 2009) (citing *Howard v. Lewis*, 905 F.2d 1318, 1322 (9th Cir.1990)).  
11 A dismissal of a federal habeas petition on the ground of untimeliness is a determination “on the  
12 merits” for purposes of the rule against successive petitions such that a further petition challenging  
13 the same conviction is “second or successive” for purposes of 28 U.S.C. § 2244(b). *McNabb v.*  
14 *Yates*, 576 F.3d at 1029–30. Such a dismissal is a permanent and incurable bar to federal review of  
15 the underlying claims. *Id.* at 1030.

16  
17 As Judge Ishii recently found, Petitioner’s first petition concerning the Tulare County  
18 judgment (No. 1:04–CV–05662–OWW–DLB–HC, Doc. 45 at 5–15), was denied on the merits. *See*  
19 *Tucker v. Brazelton*, No. 1:13-CV-01534-AWI, 2013 WL 5883766 (E.D. Cal. Oct. 30, 2013).  
20 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file his  
21 successive petition attacking the conviction. On that basis, this Court has no jurisdiction to consider  
22 Petitioner’s renewed application for relief from the conviction under Section 2254 and should  
23 dismiss the petition. *See Felker v. Turpin*, 518 U.S. at 656–57, 116 S.Ct. 2333, 135 L.Ed.2d 827;  
24 *Burton v. Stewart*, 549 U.S. at 152, 127 S.Ct. 793, 166 L.Ed.2d 628; *Cooper v. Calderon*, 274 F.3d  
25 at 1274. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he must  
26 file for leave to do so with the Ninth Circuit.

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28 The Court concludes that dismissal is appropriate.

1 **IV. Certificate of Appealability**

2 Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be  
3 taken to the Court of Appeals from the final order in a habeas proceeding in which the detention  
4 complained of arises out of process issued by a state court. 28 U.S.C. § 2253(c)(1)(A); *Miller–El v.*  
5 *Cockrell*, 537 U.S. at 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A district court must issue or  
6 deny a certificate of appealability when it enters a final order adverse to the applicant. Habeas Rule  
7 11(a).

8  
9 A certificate of appealability may issue only if the applicant makes a substantial showing of  
10 the denial of a constitutional right. § 2253(c)(2). Under this standard, a petitioner must show that  
11 reasonable jurists could debate whether the petition should have been resolved in a different manner  
12 or that the issues presented were adequate to deserve encouragement to proceed further. *Miller–El v.*  
13 *Cockrell*, 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146  
14 L.Ed.2d 542 (2000)). A certificate should issue if the Petitioner shows that jurists of reason would  
15 find it debatable whether: (1) the petition states a valid claim of the denial of a constitutional right,  
16 and (2) the district court was correct in any procedural ruling. *Slack v. McDaniel*, 529 U.S. at 483–  
17 84.

18  
19 In determining this issue, a court conducts an overview of the claims in the habeas petition,  
20 generally assesses their merits, and determines whether the resolution was debatable among jurists of  
21 reason or wrong. *Id.* An applicant must show more than an absence of frivolity or the existence of  
22 mere good faith; however, the applicant need not show that the appeal will succeed. *Miller–El v.*  
23 *Cockrell*, 537 U.S. at 338.

24  
25 Here, reasonable jurists could not debate whether the petition should have been resolved in a  
26 different manner. Petitioner has not made a substantial showing of the denial of a constitutional  
27 right. Accordingly, a certificate of appealability should not issue.

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1 **V. Recommendations**

2 For all of these reasons, it is **RECOMMENDED** that:

- 3 1. Petitioner Gerald L. Tucker’s petition (Clerk’s Doc. No. 1) be **DISMISSED** as successive;  
4 2. The Court **DECLINE** to issue a certificate of appealability; and  
5 3. The Clerk be **DIRECTED** to close this action because dismissal will terminate the  
6 proceeding in its entirety.

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8 These findings and recommendations are submitted to the Hon. Anthony W. Ishii, United  
9 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of  
10 the Local Rules of Practice for the United States District Court, Eastern District of California.  
11 Within thirty (30) days after being served with a copy, any party may file written objections with the  
12 Court and serve a copy on all parties. Such a document should be captioned “Objections to  
13 Magistrate Judge's Findings and Recommendations.” Replies to the objections shall be served and  
14 filed within fourteen (14) days (plus three (3) days if served by mail) after service of the objections.  
15 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The  
16 parties are advised that failure to file objections within the specified time may waive the right to  
17 appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).  
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19  
20 IT IS SO ORDERED.

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22 Dated: June 13, 2014

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE