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

ANDY GRIFFITH,  
  
                    Petitioner,  
  
          v.  
  
DANIEL PARAMO, Warden,  
  
                    Respondent.

Case No. 1:14-cv-01561-LJO-BAM-HC  
  
FINDINGS AND RECOMMENDATIONS TO  
DISMISS THE PETITION FOR WRIT OF  
HABEAS CORPUS AS SUCCESSIVE (DOC.  
1), DECLINE TO ISSUE A CERTIFICATE  
OF APPEALABILITY, AND DIRECT THE  
CLERK TO CLOSE THE CASE  
  
**OBJECTIONS DEADLINE:**  
**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 through 304. Pending before the Court is the petition, which was filed on October 6, 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

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

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 the  
17 respondent's motion to dismiss, or after an answer to the petition  
18 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976  
19 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.  
20 2001).

21 A petition for habeas corpus should not be dismissed without  
22 leave to amend unless it appears that no tenable claim for relief  
23 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d  
24 13, 14 (9th Cir. 1971).

## 25 II. Background

26 Petitioner alleges that he is serving a sentence of forty years  
27 imposed in the Superior Court of the State of California, County of  
28 Tulare pursuant to his conviction on November 20, 1998, of multiple

1 counts of violating Cal. Pen. Code §§ 288(b) and 288.5. (Pet., doc.  
2 1, 1.) Petitioner challenges his conviction, attacking the giving  
3 of jury instructions 250.1 and 250.01 at his trial.

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

11 Petitioner raised similar issues in this Court in a habeas  
12 petition in Andy Griffith v. George Giurbino, Warden, case number  
13 1:01-cv-05735-HGB-HC, which was denied on the merits in an order  
14 dated April 25, 2002. (Doc. 24 at 3-8). Judgment was entered on  
15 April 29, 2002. (Doc. 25.) Petitioner's requests for a certificate  
16 of appealability from this Court and the Ninth Circuit Court of  
17 Appeals were denied. (Docs. 29 & 36.)

### 18 III. Successive Petition

19 Because the petition was filed after April 24, 1996, the  
20 effective date of the Antiterrorism and Effective Death Penalty Act  
21 of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh v.  
22 Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008  
23 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999). Under  
24 the AEDPA, a federal court must dismiss a second or successive  
25 petition that raises the same grounds as a prior petition. 28  
26 U.S.C. § 2244(b)(1). The Court must also dismiss a second or  
27 successive petition raising a new ground concerning the same  
28 judgment unless the petitioner can show that 1) the claim rests on a

1 new, retroactive, constitutional right or 2) the factual basis of  
2 the 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 allow  
9 a petitioner to file a second or successive petition. Section  
10 2244(b)(3)(A) provides, "Before a second or successive application  
11 permitted by this section is filed in the district court, the  
12 applicant shall move in the appropriate court of appeals for an  
13 order authorizing the district court to consider the application."  
14 In other words, a petitioner must obtain leave from the Ninth  
15 Circuit before he or she can file a second or successive petition in  
16 the district court. See, Felker v. Turpin, 518 U.S. 651, 656-57  
17 (1996). This Court must dismiss any claim presented in a second or  
18 successive habeas corpus application under section 2254 that was  
19 presented in a prior application unless the Court of Appeals has  
20 given Petitioner leave to file the petition. 28 U.S.C. §  
21 2244(b)(1). This limitation has been characterized as  
22 jurisdictional. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper  
23 v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

24 A disposition is "on the merits" if the district court either  
25 considered and rejected a claim, or determined that an underlying  
26 claim would not be considered by a federal court. McNabb v. Yates,  
27 576 F.3d 1028, 1029 (9th Cir. 2009) (citing Howard v. Lewis, 905  
28 F.2d 1318, 1322 (9th Cir. 1990)).

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

#### 12 IV. Certificate of Appealability

13 Unless a circuit justice or judge issues a certificate of  
14 appealability, an appeal may not be taken to the Court of Appeals  
15 from the final order in a habeas proceeding in which the detention  
16 complained of arises out of process issued by a state court. 28  
17 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336  
18 (2003). A district court must issue or deny a certificate of  
19 appealability when it enters a final order adverse to the applicant.  
20 Habeas Rule 11(a).

21 A certificate of appealability may issue only if the applicant  
22 makes a substantial showing of the denial of a constitutional right.  
23 § 2253(c)(2). Under this standard, a petitioner must show that  
24 reasonable jurists could debate whether the petition should have  
25 been resolved in a different manner or that the issues presented  
26 were adequate to deserve encouragement to proceed further. Miller-  
27 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.  
28 473, 484 (2000)). A certificate should issue if the Petitioner

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

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

12 Here, it does not appear that reasonable jurists could debate  
13 whether the petition should have been resolved in a different  
14 manner. Petitioner has not made a substantial showing of the denial  
15 of a constitutional right.

16 Accordingly, the Court should decline to issue a certificate of  
17 appealability.

18 V. Recommendations

19 Accordingly, it is RECOMMENDED that:

20 1) The petition for writ of habeas corpus be DISMISSED as  
21 successive; and

22 2) The Court DECLINE to issue a certificate of appealability;  
23 and

24 3) The Clerk be DIRECTED to close this action because the  
25 dismissal terminates the action in its entirety.

26 These findings and recommendations are submitted to the United  
27 States District Court Judge assigned to the case, pursuant to the  
28 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local

1 Rules of Practice for the United States District Court, Eastern  
2 District of California. Within thirty (30) days after being served  
3 with a copy, any party may file written objections with the Court  
4 and serve a copy on all parties. Such a document should be  
5 captioned "Objections to Magistrate Judge's Findings and  
6 Recommendations." Replies to the objections shall be served and  
7 filed within fourteen (14) days (plus three (3) days if served by  
8 mail) after service of the objections. The Court will then review  
9 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
10 The parties are advised that failure to file objections within the  
11 specified time may result in the waiver of rights on appeal.  
12 Wilkerson v. Wheeler, - F.3d -, -, no. 11-17911, 2014 WL 6435497, \*3  
13 (9th Cir. Nov. 18, 2014) (citing Baxter v. Sullivan, 923 F.2d 1391,  
14 1394 (9th Cir. 1991)).

15 IT IS SO ORDERED.

16 Dated: December 10, 2014

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE

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