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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 GREGORY W. STEWART,

12 Petitioner,

13 v.

14 J. MACOMBER, Warden, et al.,

15 Respondents.
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Case No. 1:15-cv-00051-SKO-HC

ORDER DISMISSING THE PETITION FOR
WRIT OF HABEAS CORPUS AS SUCCESSIVE
(DOC. 1), DECLINING TO ISSUE A
CERTIFICATE OF APPEALABILITY, AND
DIRECTING THE CLERK TO CLOSE THE
CASE

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18 Petitioner is a state prisoner proceeding pro se and in forma
19 pauperis with a petition for writ of habeas corpus pursuant to 28
20 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has
21 consented to the jurisdiction of the United States Magistrate Judge
22 to conduct all further proceedings in the case, including the entry
23 of final judgment, by manifesting Petitioner's consent in a writing
24 signed by Petitioner and filed on January 23, 2015 (doc. 5).
25 Pending before the Court is the petition, which was filed on January
26 12, 2015.

27 I. Screening the Petition

28 Rule 4 of the Rules Governing § 2254 Cases in the United States

1 District Courts (Habeas Rules) requires the Court to make a
2 preliminary review of each petition for writ of habeas corpus. The
3 Court must summarily dismiss a petition "[i]f it plainly appears
4 from the petition and any attached exhibits that the petitioner is
5 not entitled to relief in the district court...." Habeas Rule 4;
6 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also
7 Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule
8 2(c) requires that a petition 1) specify all grounds of relief
9 available to the Petitioner; 2) state the facts supporting each
10 ground; and 3) state the relief requested. Notice pleading is not
11 sufficient; rather, the petition must state facts that point to a
12 real possibility of constitutional error. Rule 4, Advisory
13 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420
14 (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)).
15 Allegations in a petition that are vague, conclusory, or palpably
16 incredible are subject to summary dismissal. Hendricks v. Vasquez,
17 908 F.2d at 491.

18 The Court may dismiss a petition for writ of habeas corpus
19 either on its own motion under Habeas Rule 4, pursuant to the
20 respondent's motion to dismiss, or after an answer to the petition
21 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976
22 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.
23 2001). However, a petition for habeas corpus should not be
24 dismissed without leave to amend unless it appears that no tenable
25 claim for relief can be pleaded were such leave granted. Jarvis v.
26 Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

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1 II. Background

2 In the petition filed on January 12, 2015, Petitioner alleges
3 he is an inmate of the Folsom Prison who suffered a conviction of
4 possession of a controlled substance in 1994 in the Merced County
5 Superior Court and was sentenced to eight years in prison.
6 Petitioner challenges his conviction as resulting from proceedings
7 that denied his right to a fair trial because of conduct of a juror
8 in court, an unconstitutional search and seizure, the ineffective
9 assistance of counsel, and the insufficiency of the evidence to
10 establish possession of a controlled substance. (Pet., doc. 1 at 4-
11 5.)

12 The instant petition is not the first petition filed by
13 Petitioner in this Court that challenges the 1994 judgment. In
14 Gregory W. Stewart v. Joe McGrath, Warden, case number 1:00-cv-5452-
15 SMS, Petitioner's habeas corpus petition challenging his conviction
16 was dismissed because it was untimely filed. (Doc. 36 at 1-2, 5.)¹
17 Judgment was entered on September 26, 2002, and Petitioner's appeal
18 from the judgment terminated when the Ninth Circuit Court of Appeals
19 denied a certificate of appealability. (Doc. 37; doc. 55, filed
20 August 4, 2003.)

21 III. Successive Petition

22 Because the petition was filed after April 24, 1996, the
23 effective date of the Antiterrorism and Effective Death Penalty Act
24 of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh v.
25 Murphy, 521 U.S. 320, 327 (1997); Furman v. Wood, 190 F.3d 1002,

27 ¹ The Court may take judicial notice of court records. Fed. R. Evid. 201(b);
28 United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993); Valerio v. Boise
Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D.Cal. 1978), aff'd, 645 F.2d 699 (9th
Cir. 1981). The Court will take judicial notice of its own dockets.

1 1004 (9th Cir. 1999).

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

13 It is not the district court that decides whether a second or
14 successive petition meets these requirements which allow a
15 petitioner to file a second or successive petition. Section
16 2244(b))3)(A) provides, "Before a second or successive application
17 permitted by this section is filed in the district court, the
18 applicant shall move in the appropriate court of appeals for an
19 order authorizing the district court to consider the application."
20 Thus, a petitioner must obtain leave from the Ninth Circuit before
21 filing a second or successive petition in the district court. See,
22 Felker v. Turpin, 518 U.S. 651, 656-57 (1996). This Court must
23 dismiss any claim presented in a second or successive habeas corpus
24 application under section 2254 that was presented in a prior
25 application unless the Court of Appeals has given Petitioner leave
26 to file the petition. 28 U.S.C. § 2244(b)(1). This limitation is
27 jurisdictional. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper
28 v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

1 A disposition is "on the merits" if the district court either
2 considered and rejected a claim, or determined that an underlying
3 claim would not be considered by a federal court. McNabb v. Yates,
4 576 F.3d 1028, 1029 (9th Cir. 2009) (citing Howard v. Lewis, 905
5 F.2d 1318, 1322 (9th Cir. 1990)). A dismissal of a federal habeas
6 petition based on untimeliness is a determination "on the merits"
7 for purposes of the rule against successive petitions such that a
8 further petition challenging the same conviction is "second or
9 successive" for purposes of 28 U.S.C. § 2244(b). McNabb v. Yates,
10 576 F.3d at 1029-30. This is because such a dismissal is a
11 permanent and incurable bar to federal review of the underlying
12 claims. Id. at 1030.

13 Here, the first petition concerning Petitioner's conviction was
14 dismissed on the ground that it was untimely. Thus, the petition
15 was adjudicated on the merits. Petitioner makes no showing that he
16 has obtained prior leave from the Ninth Circuit to file his
17 successive petition attacking the judgment. Thus, this Court has no
18 jurisdiction to consider Petitioner's renewed application for relief
19 from the conviction under section 2254 and must dismiss the
20 petition. See, Felker v. Turpin, 518 U.S. 651, 656-57; Burton v.
21 Stewart, 549 U.S. 147, 152; Cooper v. Calderon, 274 F.3d 1270, 1274.
22 If Petitioner desires to proceed in bringing this petition for writ
23 of habeas corpus, he must file for leave to do so with the Ninth
24 Circuit.

25 IV. Certificate of Appealability

26 Unless a circuit justice or judge issues a certificate of
27 appealability, an appeal may not be taken to the Court of Appeals
28 from the final order in a habeas proceeding in which the detention

1 complained of arises out of process issued by a state court. 28
2 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336
3 (2003). A district court must issue or deny a certificate of
4 appealability when it enters a final order adverse to the applicant.
5 Habeas Rule 11(a).

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

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

25 Here, it does not appear that reasonable jurists could debate
26 whether the petition should have been resolved in a different
27 manner. Petitioner has not made a substantial showing of the denial
28 of a constitutional right. Accordingly, the Court will decline to

1 issue a certificate of appealability.

2 V. Disposition

3 Based on the foregoing, it is ORDERED that:

4 1) The petition for writ of habeas corpus is DISMISSED as
5 successive;

6 2) The Court DECLINES to issue a certificate of appealability;
7 and

8 3) The Clerk is DIRECTED to close this action because the
9 dismissal terminates the action in its entirety.

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12 IT IS SO ORDERED.

13 Dated: February 19, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE