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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD TERRELL,

Petitioner,

No. CIV S-11-2095 KJM EFB P

vs.

MIKE MCDONALD,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner, a state prisoner without counsel, has filed a petition for a writ of habeas corpus. See 28 U.S.C. § 2254. Petitioner seeks leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(a). Examination of the *in forma pauperis* affidavit reveals that petitioner is unable to afford the costs of suit. However, the court has reviewed the petition as required by Rule 4 of the Rules Governing Section 2254 Proceedings, and finds that the petition is second or successive and must therefore be dismissed.

A petition is second or successive if it makes “claims contesting the same custody imposed by the same judgment of a state court” that the petitioner previously challenged, and on which the federal court issued a decision on the merits. *Burton v. Stewart*, 549 U.S. 147 (2007); see also *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000). Before filing a second or successive petition in a district court, a petitioner must obtain from the appellate court “an order authorizing

1 the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Without an order  
2 from the appellate court, the district court is without jurisdiction to consider a second or  
3 successive petition. *See Burton*, 549 U.S. 147.

4 In the present action, petitioner challenges a judgment of conviction entered in the San  
5 Joaquin County Superior Court conviction on or around February 13, 2003, for second degree  
6 robbery with two prior strikes, and for which petitioner was sentenced to a state prison term of  
7 25 years to life. Pet. at 1. The court has examined its records, and finds that petitioner  
8 challenged the same conviction in an earlier action, which was assigned case number Civ. S-07-  
9 0784-MJP. *See Terrell v. Woodford*, No. Civ. S-07-0784-MJP, Dckt. No. 3 at 5 (March 27, 2007  
10 petition). The court denied that petition on its merits. *See id.*, Dckt. No. 33 (order denying  
11 petition for writ of habeas corpus).

12 Since petitioner challenges the same judgment now that he previously challenged and  
13 which was adjudicated on the merits, the petition now pending is second or successive.  
14 Petitioner offers no evidence that the appellate court has authorized this court to consider a  
15 second or successive petition. Since petitioner has not demonstrated that the appellate court has  
16 authorized this court to consider a second or successive petition, this action must be dismissed  
17 for lack of jurisdiction. *See Burton*, 549 U.S. 147; *Cooper v. Calderon*, 274 F.3d 1270, 1274  
18 (9th Cir. 2001) (per curiam).

19 Accordingly, it is hereby ORDERED that petitioner’s request for leave to proceed *in*  
20 *forma pauperis* is granted.

21 Further, it is hereby RECOMMENDED that this action be dismissed for lack of  
22 jurisdiction.

23 These findings and recommendations are submitted to the United States District Judge  
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
25 after being served with these findings and recommendations, any party may file written  
26 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
2 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
3 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
4 his objections petitioner may address whether a certificate of appealability should issue in the  
5 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing  
6 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it  
7 enters a final order adverse to the applicant).

8 Dated: August 30, 2011.

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10 EDMUND F. BRENNAN  
11 UNITED STATES MAGISTRATE JUDGE  
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