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

LISA MURAWSKI,

Petitioner,

No. CIV S-08-0207 GEB EFB P

vs.

TINA HORNBEAK,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254. Respondent moves to dismiss the petition on the grounds that it is second or successive and untimely. *See* 28 U.S.C. § 2244(b), 2244(d). As explained below, the petition is second or successive, and this court lacks jurisdiction to consider it.

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 the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Without an order from the appellate court, the district court is without jurisdiction to consider a second or

1 successive petition. *See Burton*, 549 U.S. 147.

2 On May 18, 1998, in the Shasta County Superior Court, petitioner was sentenced to a
3 determinate state prison term of thirty-eight years. *See Pet.* at 1, Ex. C (Abstract of Judgment).

4 On January 26, 2004, petitioner filed a petition for writ of habeas corpus in this court challenging
5 that judgment of conviction. *Murawski v. Henry*, No. 2:04-cv-00176 EJG PAN, Docket No. 1.¹

6 On December 28, 2004, judgment was entered dismissing the petition as untimely. *See id.* at
7 Docket Nos. 8, 9. The current petition also challenges the constitutionality of the sentence
8 petitioner received on May 18, 1998. *Pet.* at 1.

9 In her opposition to respondent’s motion, petitioner does not assert that she was not the
10 petitioner in *Murawski v. Henry*, No. 2:04-cv-00176 EJG PAN. Neither does she assert that the
11 current petition challenges a different judgment. Rather, she argues the merits of her claims and
12 concedes that she has not obtained authorization from the Ninth Circuit Court of Appeals for this
13 court to consider the petition. *Pet.’s Traverse* at 2:18-21.

14 Clearly, the petition filed in this action successive to *Murawski v. Henry*, No. 2:04-cv-
15 00176 EJG PAN. *See Murray v. Greiner*, 394 F.3d 78, 81 (2d Cir. 2005) (dismissal of habeas
16 petition as time barred “constitutes an adjudication on the merits that renders future petitions
17 under § 2254 challenging the same conviction ‘second or successive’ petitions under
18 § 2244(b).”). Therefore, petitioner cannot proceed with this claim until receiving permission
19 from the Ninth Circuit Court of Appeals. *See* 28 U.S.C. § 2244. This court lacks jurisdiction
20 over the petition and respondent’s motion to dismiss must be granted.

21 Accordingly, it is hereby RECOMMENDED that:

22 1. Respondent’s June 6, 2008 motion to dismiss be granted; and,

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26 ¹ A court may take judicial notice of its own records in other cases. *United States v. Wilson*, 631 F.2d 118, 119-20 (9th Cir. 1980).

1 2. This action be dismissed on the ground that the petition is second or successive and
2 petitioner has not demonstrated that the Ninth Circuit has granted her leave to file it in this court.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days after
5 being served with these findings and recommendations, any party may file written objections
6 with the court and serve a copy on all parties. Such a document should be captioned “Objections
7 to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the
8 specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158
9 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 Dated: January 27, 2009.

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12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
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