

1 Whether construed as a challenge to the district court proceedings in *Subia*, or instead, as
2 a second attack on his underlying state court conviction, this action must be dismissed. A section
3 2254 petition must challenge state court proceedings, not federal court proceedings. *See* 28
4 U.S.C. § 2254(d). Thus, petitioner’s use of section 2254 petition to challenge a decision of a
5 federal district court is improper. Moreover, a petition is second or successive if it makes “claims
6 contesting the same custody imposed by the same judgment of a state court” that the petitioner
7 previously challenged, and on which the federal court issued a decision on the merits. *Burton v.*
8 *Stewart*, 549 U.S. 147 (2007); *see also Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000). Before
9 filing a second or successive petition in a district court, a petitioner must obtain from the appellate
10 court “an order authorizing the district court to consider the application.” 28 U.S.C.
11 § 2244(b)(3)(A). Without an order from the appellate court, the district court is without
12 jurisdiction to consider a second or successive petition. *See Burton*, 549 U.S. 147.

13 To the extent petitioner challenges the same judgment now that he previously challenged
14 and which was adjudicated on the merits in *Subia*, the petition now pending is second or
15 successive. Petitioner offers no evidence that the appellate court has authorized this court to
16 consider a second or successive petition. Since petitioner has not demonstrated that the appellate
17 court has authorized this court to consider a second or successive petition, this action must be
18 dismissed for lack of jurisdiction. *See Burton*, 549 U.S. 147; *Cooper v. Calderon*, 274 F.3d 1270,
19 1274 (9th Cir. 2001) (per curiam).


20 Accordingly, it is hereby ORDERED that petitioner’s request for leave to proceed in
21 forma pauperis (ECF No. 2) is granted.

22 Further, for the reasons stated above, it is RECOMMENDED that this action be
23 dismissed.

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

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

7 Dated: October 15, 2013.

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9 EDMUND F. BRENNAN
10 UNITED STATES MAGISTRATE JUDGE
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