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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT ALVIN WOOLEVER, JR.,
Petitioner,
v.
SAN JOAQUIN SUPERIOR COURT,
Respondent.

No. 2:15-cv-1615-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. 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 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 successive petition. *See Burton*, 549 U.S. 147.

1 In the present action, petitioner challenges a 2006 judgment of conviction entered in the
2 San Joaquin County Superior Court in case number SF100485A for various offenses. ECF No. 1
3 at 1. The court has examined its records, and finds that petitioner challenged the same judgment
4 of conviction in an earlier action. Specifically, in *Woolever v. Lopez*, No. 2:09-cv-126-CHS (E.D.
5 Cal.), the court considered petitioner’s challenge to the same judgment of conviction. *See*
6 *Woolever*, ECF No. 34 (March 8, 2011 order dismissing certain claims as barred by the statute of
7 limitations);¹ ECF No. 39 (August 3, 2011 order denying petition on the merits). Since petitioner
8 challenges the same judgment now that he previously challenged and which was adjudicated on
9 the merits, the petition now pending is second or successive.

10 Petitioner offers no evidence that the appellate court has authorized this court to consider
11 a second or successive petition. Since petitioner has not demonstrated that the appellate court has
12 authorized this court to consider a second or successive petition, this action must be dismissed for
13 lack of jurisdiction. *See Burton*, 549 U.S. 147; *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th
14 Cir. 2001) (per curiam).

15 Accordingly, it is hereby ORDERED that the Clerk of the Court randomly assign a United
16 States District Judge to this action.


17 Further, IT IS HEREBY RECOMMENDED that this action be dismissed for lack of
18 jurisdiction.

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

25 ¹ “[D]ismissal of a habeas petition as untimely constitutes a disposition on the merits and
26 [] a further petition challenging the same conviction [is] ‘second or successive’ for purposes of
27 28 U.S.C. § 2244(b).” *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009); *see also Murray v.*
28 *Greiner*, 394 F.3d 78, 81 (2d Cir. 2005) (dismissal of habeas petition as time barred constitutes an
adjudication on the merits that renders future petitions under § 2254 challenging the same
conviction ‘second or successive’ petitions under § 2244(b).”).

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

7 DATED: October 19, 2015.

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9 EDMUND F. BRENNAN
10 UNITED STATES MAGISTRATE JUDGE
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