

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROMAN SUNDAY,  
Petitioner,  
v.  
R. DAVIS,  
Respondent.

Case No. [16-cv-06901-WHO](#) (PR)

**ORDER OF DISMISSAL**

**INTRODUCTION**

Petitioner Roman Sunday has filed a habeas petition challenging the same state convictions he challenged in a prior (and now closed) habeas action, *Sunday v. Sisto*, No. C 07-05308 SBA. The instant petition will be dismissed as second or successive to the prior petition. If Sunday wishes to file a successive habeas petition, he must obtain permission from the Ninth Circuit Court of Appeals.

**BACKGROUND**

Sunday’s prior habeas petition was dismissed as untimely, and judgment was entered in favor of respondent, in September 2010. (*Sunday*, No. C 07-05308 SBA, Dkt. Nos. 30 and 31.) Sunday appealed, but the Ninth Circuit terminated his appeal when it declined to issue a certificate of appealability. (*Id.*, Dkt. No. 41.) Sunday filed a petition for a writ of certiorari to the U.S. Supreme Court, which was denied. (*Id.*, Dkt. No. 43.)

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**DISCUSSION**

The instant petition is barred by the rule against filing a second or successive petition. As noted, in 2007 Sunday filed a petition regarding the same convictions at issue in the instant action, which was dismissed as untimely. A dismissal for untimeliness “constitutes a disposition on the merits.” *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). Therefore, a “further petition challenging the same conviction would be ‘second or successive’ for purposes of 28 U.S.C. § 2244(b).” *Id.*

In order to file a second or successive petition, Sunday must obtain an order from the Court of Appeals authorizing the district court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). Sunday has not shown that he has received such authorization. Accordingly, the instant petition must be dismissed as second or successive, the filing of which has not been authorized by the Court of Appeals.

Accordingly, the petition is **DISMISSED**.

**CONCLUSION**

The instant petition is **DISMISSED** as second or successive, the filing of which has not been authorized by the Court of Appeals.


A certificate of appealability will not issue. Sunday has not shown “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The order to show cause (Dkt. No. 6) is **DISCHARGED**.

The Clerk shall enter judgment in favor of respondent, and close the file.

**IT IS SO ORDERED.**

**Dated:** April 27, 2017

  
WILLIAM H. ORRICK  
United States District Judge