

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DARRYL ERIC PUGH,  
Petitioner,  
v.  
S. HATTON,  
Respondent.

Case No. [17-cv-01400-RS](#) (PR)

**ORDER OF DISMISSAL**

**INTRODUCTION**

Petitioner has filed a habeas petition challenging the same state convictions he challenged in a prior (and now closed) habeas action, *Pugh v. Falkner*, No. C 07-03579 VRW. The instant petition will be dismissed as second or successive to the prior petition. If petitioner wishes to file a successive habeas petition, he must obtain permission from the Ninth Circuit Court of Appeals.

**BACKGROUND**

Petitioner’s prior petition was dismissed as untimely, and judgment was entered in favor of respondent, in June 2008. (*Pugh*, No. C 07-03579 VRW, Dkt. Nos. 10 and 11.) It appears petitioner did not appeal the judgment.

1 **DISCUSSION**

2 The petition will be dismissed as second or successive. As noted, in 2007 petitioner  
3 filed a petition regarding the same convictions at issue in the instant action, which was  
4 dismissed as untimely. A dismissal for untimeliness “constitutes a disposition on the  
5 merits.” *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). Therefore, a “further  
6 petition challenging the same conviction would be ‘second or successive’ for purposes of  
7 28 U.S.C. § 2244(b).” *Id.*

8 In order to file a second or successive petition, petitioner must obtain an order from  
9 the Court of Appeals authorizing the district court to consider the petition. *See* 28 U.S.C.  
10 § 2244(b)(3)(A). Petitioner has not shown that he has received such authorization.  
11 Accordingly, the instant petition must be dismissed as second or successive, the filing of  
12 which has not been authorized by the Court of Appeals.

13 **CONCLUSION**

14 The instant petition is **DISMISSED** as second or successive, the filing of which has  
15 not been authorized by the Court of Appeals. If petitioner wishes to file a second or  
16 successive habeas petition, he first must obtain permission from the Ninth Circuit Court of  
17 Appeals.

18 A certificate of appealability will not issue. Petitioner has not shown “that jurists of  
19 reason would find it debatable whether the petition states a valid claim of the denial of a  
20 constitutional right and that jurists of reason would find it debatable whether the district  
21 court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).  
22 The Clerk shall enter judgment in favor of respondent, and close the file.

23 **IT IS SO ORDERED.**

24 **Dated:** May 22, 2017



RICHARD SEEBORG  
United States District Judge