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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 TRAVIS NEAL ELLIOTT,

8 Petitioner,

9 v.

10 ROBERT FOX,

11 Respondent.

Case No. [17-cv-05253-EMC](#)

**ORDER DENYING PETITIONER'S
MOTION TO VACATE JUDGMENT**

Docket No. 8

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13 This action was dismissed on September 26, 2017, because the petition for writ of habeas
14 corpus was a second or successive petition, and Petitioner had not first obtained permission from
15 the United States Court of Appeals to file such a petition. *See* 28 U.S.C. § 2244(b)(3)(A).

16 Petitioner has filed a motion to vacate the judgment and order of dismissal. Docket No. 8.
17 He argues that he does not need permission to file a second or successive petition because his
18 claims are not the same as the claims asserted in his first petition for writ of habeas corpus.

19 In federal court terminology, a successive petition raises “previously rejected claims,” and
20 an abuse of the writ occurs when a later petition asserts new “claims that could have been raised in
21 an earlier action.” *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-32 (2013). A later petition that
22 contains new claims and is an abuse of the writ sometimes is called an “abusive petition,” or a
23 “second or subsequent” petition. *See McCleskey v. Zant*, 499 U.S. 467, 470, 485 (1991) (“The
24 doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain
25 a claim presented for the first time in a second or subsequent petition for a writ of habeas
26 corpus.”); 28 U.S.C. § 2244(b) (limiting consideration of a “claim presented in a second or
27 successive” petition).

28 Here, Petitioner is challenging the same murder conviction that he challenged in his first

1 federal petition for writ of habeas corpus. The fact that the claims in his 2017 petition may be new
2 does not allow him to avoid the need to obtain permission because the rule requiring permission
3 applies to a petition that is a second petition *or* a successive petition, or a mixture of both. If his
4 petition contains only new claims, it is referred to as a second petition. He therefore must obtain
5 permission from the United States Court of Appeals to file that second petition before he can file
6 the petition in this Court. The motion to vacate the judgment and order of dismissal is **DENIED**.
7 Docket No. 8.

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9 **IT IS SO ORDERED.**

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11 Dated: November 13, 2017

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14 EDWARD M. CHEN
15 United States District Judge
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