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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GILBERTO BENITEZ,

Petitioner,

vs.

ROBERT HERNANDEZ, et al.,

Respondents.

Civil No. 08-0154 BTM (BLM)

**SUMMARY DISMISSAL OF  
SUCCESSIVE PETITION PURSUANT  
TO 28 U.S.C. § 2244(b)(3)(A)  
GATEKEEPER PROVISION**

Petitioner, Gilberto Benitez, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis. The Court does not rule on Petitioner's request to proceed in forma pauperis because this case is summarily dismissed pursuant to 28 U.S.C. § 2244(b)(3)(A) as indicated below.

**PETITION BARRED BY GATEKEEPER PROVISION**

The instant Petition is not the first Petition for a Writ of Habeas Corpus Petitioner has submitted to this Court challenging his May 16, 1996, conviction in San Diego Superior Court case No. SCD 111483. On October 7, 1998, Petitioner filed in this Court a Petition for Writ of Habeas Corpus in case No. 98cv1816. In that petition, Petitioner challenged his conviction in San Diego Superior Court case No. SCD 111483 as well. On June 26, 2002, this Court denied the petition on the merits. (*See* Order filed June 26, 2002 in case No. 98cv1816 K (BEN) [Doc. No. 62].) Petitioner appealed that determination. On February 18, 2004, the Ninth Circuit Court

1 of Appeals affirmed the District Court's dismissal. (*See* Order in *Mendez, aka Gilberto Benitez*  
2 *v. Roe, et al.*, No. 02-56372 (9th Cir. Feb. 18, 2004).)

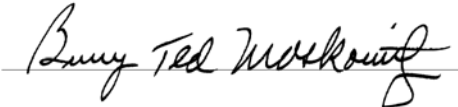
3 Petitioner is now seeking to challenge the same conviction he challenged in his prior  
4 federal habeas petition. Unless a petitioner shows he or she has obtained an Order from the  
5 appropriate court of appeals authorizing the district court to consider a successive petition, the  
6 petition may not be filed in the district court. *See* 28 U.S.C. § 2244(b)(3)(A). Here, there is no  
7 indication the Ninth Circuit Court of Appeals has granted Petitioner leave to file a successive  
8 petition.

9 **CONCLUSION**

10 Because there is no indication Petitioner has obtained permission from the Ninth Circuit  
11 Court of Appeals to file a successive petition, this Court cannot consider his Petition.  
12 Accordingly, the Court **DISMISSES** this action without prejudice to Petitioner filing a petition  
13 in this court if he obtains the necessary order from the Ninth Circuit Court of Appeals. **THE**  
14 **CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK NINTH**  
15 **CIRCUIT APPLICATION FOR LEAVE TO FILE SECOND OR SUCCESSIVE**  
16 **PETITION or MOTION UNDER 28 U.S.C. § 2254.**

17 **IT IS SO ORDERED.**

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19 DATED: January 30, 2008

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21 Honorable Barry Ted Moskowitz  
22 United States District Judge  
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