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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 HUTTON F. MILLER,

12 Petitioner,

13 v.

14 STU SHERMAN, Warden,

15 Respondent.

Case No.: 17cv1323 JAH (JLB)

**ORDER DISMISSING HABEAS  
PETITION WITHOUT PREJUDICE  
AS SECOND OR SUCCESSIVE**

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17 On June 28, 2017 Petitioner, a state prisoner proceeding pro se, filed a Petition for  
18 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In this action Petitioner is  
19 challenging his October 26, 1999, San Diego County Superior Court conviction and  
20 sentence in Case No. SCE195569. (ECF No. 1 at 1.)

21 **PRIOR FEDERAL HABEAS PETITIONS DENIED ON THE MERITS**

22 On June 20, 2008, Petitioner filed in this Court a Petition for Writ of Habeas  
23 Corpus in So. Dist. Ca. Civil Case No. 08cv1093 BEN (POR). (See Petition in So. Dist.  
24 Ca. Civil Case No. 08cv1093 BEN (POR), ECF No. 1.) In that petition, Petitioner also  
25 challenged his conviction and sentence in San Diego Superior Court case No.  
26 SCE195569. On May 27, 2010, this Court dismissed the petition because it had been  
27 filed after the expiration of the one-year statute of limitations. (See Order filed 5/27/10 in  
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1 So. Dist. Ca. Civil Case No. 08cv1093 BEN (POR), ECF No. 40.) Petitioner did not  
2 appeal that decision.

3 **INSTANT PETITION BARRED BY GATEKEEPER PROVISION**

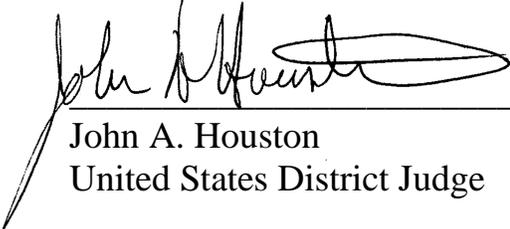
4 Petitioner is now seeking to challenge the same conviction he challenged in his  
5 prior federal habeas petition. Unless a petitioner shows he or she has obtained an order  
6 from the appropriate court of appeals authorizing the district court to consider a  
7 successive petition, the petition may not be filed in the district court. See 28 U.S.C.  
8 § 2244(b); McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding that dismissal  
9 for failure to comply with one-year statute of limitations renders subsequent petitions  
10 challenging the same conviction or sentence “second or successive” under 2244(b)).  
11 Here, there is no indication the Ninth Circuit Court of Appeals has granted Petitioner  
12 leave to file a successive petition.

13 **CONCLUSION**

14 Because there is no indication Petitioner has obtained permission from the Ninth  
15 Circuit Court of Appeals to file a successive petition, this Court cannot consider his  
16 Petition. Accordingly, the Court **DISMISSES** this action without prejudice to Petitioner  
17 filing a petition in this court if he obtains the necessary order from the Ninth Circuit  
18 Court of Appeals. **The Clerk of Court is directed to mail Petitioner a blank Ninth**  
19 **Circuit Application for Leave to File Second or Successive Petition together with a**  
20 **copy of this Order.**

21 **IT IS SO ORDERED.**

22 DATED: July 10, 2017

23   
24 John A. Houston  
25 United States District Judge  
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