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

ANTHONY ALVAREZ,

Petitioner,

v.

MICHAEL SMELESKY, Warden

Respondent.

Civil No. 08-2422 L (CAB)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

FAILURE TO USE PROPER FORM

Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of California. See Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted upon a court-approved form and in accordance with the instructions approved by the Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved form.

GATEKEEPER PROVISION

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Further, it appears that Petitioner is challenging the same conviction he challenged in a Petition for Writ of Habeas Corpus filed in this Court in case number 06cv2112 WQH (JMA). In that petition, Petitioner challenged his conviction in San Diego Superior Court case No. SCD 174061. On August 10, 2007, this Court denied the petition on the merits. (*See* Order filed August 10, 2007, in case No. 06cv2112 WQH (JMA) [Doc. No. 12].) Petitioner appealed that determination. On August 1, 2008, the Ninth Circuit Court of Appeals denied the certificate of appealability. (*See* Order in *Alvarez v. Almager*, No. 07-56714 (9th Cir. Aug. 1, 2008).) In the current Petition, Petitioner states he is challenging a conviction in San Diego, but does not state what case number he is challenging. (Pet. at 1.) If Petitioner is attempting to raise a second, or successive, challenge to the same San Diego Superior Court conviction he must show that he has obtained an Order from the appropriate court of appeals authorizing the district court to consider a successive petition, or the petition may not be filed in the district court. *See* 28 U.S.C. § 2244(b)(3)(A).¹

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¹A blank Ninth Circuit Application for Leave to File a Second or Successive Petition will be sent to Petitioner along with a copy of this Order.

1 **CONCLUSION AND ORDER**


2 For the foregoing reasons, the Court **DISMISSES** the Petition for Petitioner's failure to
3 (1) satisfy the filing fee requirement, and (2) use a court-approved form. If Petitioner wishes to
4 proceed with this case, he must submit, **no later than March 16, 2009**,

- 5 (a) a First Amended Petition on a court-approved form stating that he is challenging
6 a different San Diego Superior Court conviction than he previously challenged in
7 case number 06cv2112 WQH (JMA), **OR**
8 (b) a First Amended Petition on a court-approved form along with an Order from the
9 Ninth Circuit Court of Appeals stating that Petitioner may file a successive
10 petition with this Court, **AND**
11 (c) either the \$5.00 fee or adequate proof of his inability to pay the fee, along with a
12 copy of this Order.

13 **The Clerk of Court is directed to send a blank Southern District of California First**
14 **Amended Petition and In Forma Pauperis Application to Petitioner along with a copy of**
15 **this Order. The Clerk of Court is further directed to send Petitioner a blank Ninth Circuit**
16 **Application for Leave to File Second or Successive Petition .**

17 **IT IS SO ORDERED.**

18 **DATED: January 9, 2009**

19 
20 **M. James Lorenz**
21 **United States District Court Judge**