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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JAMES MCNEIL,

12 Petitioner,

13 vs.

14 J. WALKER, Warden,

15 Respondent.  
16

Civil No. 09-2339 WQH (WMc)

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

17 On October 19, 2009, 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 challenging his  
19 March 29, 2000 San Diego County Superior Court conviction and sentence for indecent  
20 exposure in case number SCD147489. (See Petition at 2.)

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

22 The instant Petition is not the first Petition for a Writ of Habeas Corpus Petitioner has  
23 submitted to this Court challenging his March 29, 2000 conviction in San Diego Superior Court.  
24 On September 27, 2005, Petitioner filed in this Court a Petition for Writ of Habeas Corpus in SO.  
25 DIST. CA. CIVIL CASE NO. 05cv1852. (See Petition in SO. DIST. CA. CIVIL CASE NO. 05cv1852  
26 J (PCL), filed 9/27/05.). In that petition, Petitioner challenged his conviction and sentence in  
27 San Diego Superior Court case No. SCD-147486. (Id. at 3.) On August 31, 2005, this Court  
28 dismissed the petition because it had been filed well after the expiration of the one-year statute

1 of limitations. (See Order filed 8/31/05 in SO. DIST. CA. CIVIL CASE NO. 05cv1852 J (PCL).)  
2 Petitioner has not appealed that determination.

3 **INSTANT PETITION BARRED BY GATEKEEPER PROVISION**

4 Petitioner is now seeking to challenge the same conviction he challenged in his prior  
5 federal habeas petition. Unless a petitioner shows he or she has obtained an order from the  
6 appropriate court of appeals authorizing the district court to consider a successive petition, the  
7 petition may not be filed in the district court. See 28 U.S.C. § 2244(b); Murray v. Greiner, 394  
8 F.3d 78 (2d Cir. 2005) (holding that dismissal for failure to comply with one-year statute of  
9 limitations renders subsequent petitions challenging the same conviction or sentence “second  
10 or successive” under 2244(b)); Reyes v. Vaughn, 276 F.Supp.2d 1027, 1029 (C. D. Cal. 2003)  
11 (same). 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 Circuit  
15 Court of Appeals to file a successive petition, this Court cannot consider his Petition.  
16 Accordingly, the Court **DISMISSES** this action without prejudice to Petitioner filing a petition  
17 in this court if he obtains the necessary order from the Ninth Circuit Court of Appeals. For  
18 Petitioner’s convenience, the Clerk of Court shall attach to this Order a blank Ninth Circuit  
19 Application for Leave to File Second or Successive Petition.)

20 The Clerk shall close the file.

21 **IT IS SO ORDERED.**

22 DATED: November 9, 2009

23   
24 **WILLIAM Q. HAYES**  
United States District Judge