1 2 3 4 5 6 7 UNITED STATES DISTRICT COURT 8 SOUTHERN DISTRICT OF CALIFORNIA 9 JAMES LYNN O'HINES, Civil No. 10-1026 DMS (WMc) 10 Petitioner, SUMMARY DISMISSAL OF 11 VS. SUCCESSIVE PETITION PURSUANT TO 28 U.S.C. 12 GROONO, Warden, et al., 2244(b)(3)(A) GATEKEEPER 13 Respondents. 14 On May 10, 2010, Petitioner, James Lynn O'Hines, a state prisoner proceeding pro se, 15 has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On May 18, 2010, 16 this Court dismissed the Petition without prejudice for failure to satisfy the filing fee 17 requirement, failure to use a proper form, failure to name a proper respondent, failure to allege 18 exhaustion and failure to state a cognizable claim. The Court also noted that because Petitioner 19 failed to clearly indicate what state court conviction he was challenging, it was unclear from the 20 face of the Petition whether the District Court for the Southern District of California was the 21 proper venue for Petitioner's action. (See Order filed 5/18/10 (doc. no. 2).) Petitioner was 22 advised that in order to have his case reopened he must satisfy the filing fee requirement and file 23 a First Amended Petition which cured the pleading deficiencies outlined in the Order no later 24 than July 20, 2010. 25 On July 16, 2010, Petitioner filed a request to proceed in forma pauperis and, after 26 receiving an extension of time, Petitioner filed a First Amended Petition on July 22, 2010. The 27 Court does not rule on Petitioner's request to proceed in forma pauperis because, based on the 28

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information provided in the First Amended Petition, the Court finds this case must be summarily dismissed pursuant to 28 U.S.C. § 2244(b)(3)(A) as indicated below.

## PETITION BARRED BY GATEKEEPER PROVISION

The instant First Amended Petition is not the first Petition for a Writ of Habeas Corpus Petitioner has submitted to this Court challenging his 1998 conviction in San Diego Superior Court case No. SRF122463. On April 14, 2008, Petitioner filed in this Court a Petition for Writ of Habeas Corpus in case No. 08cv0698. In that petition, Petitioner challenged his conviction in San Diego Superior Court case No. SRF122463 as well. On January 22, 2009, this Court denied the petition on the merits, determining that Petitioner was no longer "in custody" for the 1998 conviction which was the subject of his petition. (See Order filed Jan. 22, 2009 in case No. 08cv0698 BEN (PCL) [Doc. No. 35].) Petitioner did not appeal that determination.

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

## **CONCLUSION**

Because there is no indication Petitioner has obtained permission from the Ninth Circuit Court of Appeals to file a successive petition, this Court cannot consider his First Amended Petition. Accordingly, the Court **DISMISSES** this action without prejudice to Petitioner filing a petition in this court if he obtains the necessary order from the Ninth Circuit Court of Appeals. For Petitioner's convenience, the Clerk of Court shall attach a blank Ninth Circuit Application for Leave to File Second or Successive Petition.

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IT IS SO ORDERED.

DATED: September 14, 2010

HON. DANA M. SABRAW United States District Judge