

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KENYATTA QUINN MITCHELL,
Petitioner,
v.
CDCR DIRECTOR, et al.,
Respondents.

Case No.: 21-CV-1261 JLS (MDD)

**ORDER: (1) SUMMARILY
DISMISSING SUCCESSIVE
PETITION PURSUANT TO
28 U.S.C. § 2244(b)(3)(A)
GATEKEEPER PROVISION;
(2) DENYING REQUEST TO
PROCEED *IN FORMA PAUPERIS*
AS MOOT; AND (3) DECLINING
TO ISSUE CERTIFICATE OF
APPEALABILITY**

(ECF Nos. 1, 2)

Petitioner Kenyatta Quinn Mitchell (“Petitioner”), a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 that challenges his 2016 conviction in San Diego County Superior Court, case number SCN362476, for which he was sentenced to 17 years. See ECF No. 1 (“Pet.”) at 1. Petitioner has also filed a request to proceed *in forma pauperis* (“IFP”) (“IFP Mot.,” ECF No. 2), which the Court **DENIES AS MOOT** because this case is summarily dismissed pursuant to 28 U.S.C. § 2244(b)(3)(A), as discussed below.

///

1 **PETITION BARRED BY 28 U.S.C. § 2244(b)(3)(A) GATEKEEPER PROVISION**

2 Upon review, the instant Petition is not the first Petition for a Writ of Habeas Corpus
3 Petitioner has submitted to this Court challenging his 2016 conviction and sentence in San
4 Diego County Superior Court, case number SCN362476. On April 6, 2018, Petitioner filed
5 in this Court a Petition for a Writ of Habeas Corpus challenging his 2016 conviction and
6 sentence of 17 years in San Diego Superior Court, case number SCN362476, of which the
7 Court takes judicial notice. *See* ECF No. 1 in Civil Case No. 18-CV-697 WQH (BLM)
8 (S.D. Cal. filed Apr. 6, 2018); *see also United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.
9 1980) (“[A] court may take judicial notice of its own records in other cases, as well as the
10 records of an inferior court in other cases.”). On January 10, 2019, that petition was denied
11 on the merits. *See* ECF No. 30 in Civil Case No. 18-CV-697 WQH (BLM). On December
12 23, 2019, the Ninth Circuit Court of Appeals denied Petitioner’s request for a certificate of
13 appealability. *See Mitchell v. Dep’t of Corr. & Rehab.*, Case No. 19-55108, 2019 WL
14 7756435 (9th Cir. Dec. 23, 2019).

15 In the instant Petition, Petitioner again seeks to challenge this same 2016 conviction
16 and sentence. *See* Pet. at 1. Petitioner acknowledges that this is not his first federal petition
17 for a writ of habeas corpus challenging his 2016 conviction in San Diego Superior Court,
18 case number SCN362476, and acknowledges the prior federal petition was denied on the
19 merits. *See id.* at 5, 26. Petitioner also indicates that one or more of the same issues
20 presented in the instant Petition were raised in the prior federal petition. *Id.* However,
21 “[b]efore a second or successive application permitted by this section is filed in the district
22 court, the applicant shall move in the appropriate court of appeals for an order authorizing
23 the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A); *see also Burton*
24 *v. Stewart*, 549 U.S. 147, 153 (2007) (noting that a petition is “second or successive” where
25 the petitioner challenges “the same custody imposed by the same judgment of a state court”
26 as in a prior petition).

27 Even were Petitioner able to demonstrate that his Petition falls within the statutory
28 provisions allowing for permission to file a second or successive habeas petition, *see* 28

1 U.S.C. § 2244(b)(2)(A)-(B), Petitioner must still first obtain authorization from the Ninth
2 Circuit Court of Appeals to file a petition in this Court. *See* 28 U.S.C. § 2244(b)(3)(A);
3 *see also Morales v. Sherman*, 949 F.3d 474, 476 (9th Cir. 2020) (per curiam) (recognizing
4 that 28 U.S.C. § 2244(b)(3)(A) is “a provision that bars district courts from entertaining a
5 second or successive petition unless its filing has first been authorized by the court of
6 appeals”). In the instant case, Petitioner indicates he has not obtained permission from the
7 Ninth Circuit Court of Appeals to file a second or successive petition, *see* Pet. at 5, 26, and
8 the Court’s review of the Ninth Circuit’s electronic docket similarly fails to reflect that
9 Petitioner has sought or obtained such permission. Accordingly, this Court cannot consider
10 the instant Petition and **DISMISSES** it **WITHOUT PREJUDICE**.

11 **CERTIFICATE OF APPEALABILITY**

12 A certificate of appealability (“COA”) is required to appeal to the court of appeals
13 “the final order in a habeas corpus proceeding in which the detention complained of arises
14 out of process issued by a State court” and is warranted “only if the applicant has made a
15 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(1)(A) &
16 (c)(2). “When the district court denies a habeas petition on procedural grounds without
17 reaching the prisoner’s underlying constitutional claim, a COA should issue when the
18 prisoner shows, at least, that jurists of reason would find it debatable whether the petition
19 states a valid claim of the denial of a constitutional right and that jurists of reason would
20 find it debatable whether the district court was correct in its procedural ruling.” *Slack v.*
21 *McDaniel*, 529 U.S. 473, 484 (2000).

22 In the instant case, because Petitioner previously filed a petition challenging his 2016
23 conviction in case number SCN362476, which was denied on the merits, and there is no
24 indication Petitioner has received permission from the Ninth Circuit to file a second or
25 successive petition, the Court is not persuaded that Petitioner has shown that “jurists of
26 reason would find it debatable whether the district court was correct” in dismissing the
27 instant petition for lack of authorization. *See* 28 U.S.C. § 2244(b)(3)(A); *id.* § 2253(c);

28 ///

1 *Burton*, 549 U.S. at 153; *Slack*, 529 U.S. at 484. Accordingly, the Court **DECLINES** to
2 issue a COA.

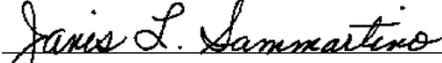
3 **CONCLUSION**

4 Because there is no indication that the Ninth Circuit Court of Appeals has granted
5 Petitioner leave to file a second or successive petition, this Court cannot consider the
6 Petition (ECF No. 1). Accordingly, the Court **DISMISSES** the instant Petition
7 **WITHOUT PREJUDICE** to Petitioner filing a petition in this Court if he obtains the
8 necessary order from the Ninth Circuit Court of Appeals and **DENIES** Petitioner's IFP
9 Motion (ECF No. 2) as moot. The Court further **DECLINES** to issue a COA.

10 The Court **DIRECTS** the Clerk of the Court to send Petitioner a blank Ninth Circuit
11 Application for Leave to File a Second or Successive Petition Under 28 U.S.C. § 2254
12 together with a copy of this Order.

13 **IT IS SO ORDERED.**

14 Dated: July 15, 2021

15 
16 Hon. Janis L. Sammartino
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28