



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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9 LEVAR BROWN,

10 Petitioner,

11 v.

12 LEROY BACA,

13 Respondent.

Case No. CV 13-0745-VAP (MLG)

MEMORANDUM OPINION AND ORDER
DISMISSING PETITION WITHOUT
PREJUDICE AND DENYING CERTIFICATE
OF APPEALABILITY

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16 **I. Factual and Procedural Background**

17 Levar Brown filed this petition for writ of habeas corpus,
18 pursuant to 28 U.S.C. § 2241, on February 4, 2013. The petition
19 reveals that Petitioner is awaiting trial in the Los Angeles County
20 Superior Court on one count of murder. Although the petition is
21 difficult to understand, it sets out a litany of complaints regarding
22 the pretrial proceedings in the pending criminal case. Petitioner
23 claims that he has been denied the right to a speedy trial, that he
24 is subject to excessive bail, that the police have conspired to
25 falsely accuse him of murder, and that he has been denied the
26 effective assistance of counsel.

27 This petition mirrors two prior petitions filed by this
28 petitioner, both of which were dismissed without prejudice based on

1 the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 43-54
2 (1971).¹ Because the current petition challenges a pending state
3 criminal case and because no judgment has been entered in that case,
4 this Court will not intervene in those state court proceedings, and
5 the petition will be dismissed without prejudice.

6 7 **II. Screening Requirement**

8 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in
9 the United States District Court, a district court may summarily
10 dismiss a habeas corpus petition, before the respondent files an
11 answer, "[if it plainly appears from the face of the petition ...
12 that the petitioner is not entitled to relief." The notes to Rule 4
13 state: "a dismissal may be called for on procedural grounds, which
14 may avoid burdening the respondent with the necessity of filing an
15 answer on the substantive merits of the petition." See *Boyd v.*
16 *Thompson*, 147 F.3d 1124, 1127-28 (9th Cir. 1998). It is beyond
17 question that the is not cognizable under either 28 U.S.C. § 2241 or
18 28 U.S.C. § 2254. Accordingly, summary dismissal of the petitions is
19 warranted.²

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21 ¹ See *Brown v. Superior Court*, Case No. CV 12-3593-VAP (MLG); *Brown*
22 *v. Baca*, Case No. CV 12-8475-VAP (MLG).

23 ² Petitioner has consented to the exercise of consent jurisdiction
24 by the United States Magistrate Judge. "Upon the consent of the
25 parties," a magistrate judge "may conduct any or all proceedings in a
26 jury or nonjury civil matter and order the entry of judgment in the
27 case." 28 U.S.C. § 636(c)(1). Here, Petitioner is the only "party" to
28 the instant proceeding and has consented to the jurisdiction of the
undersigned United States Magistrate Judge. Respondent has not yet been
served with the Petition and therefore is not a party to this
proceeding. See, e.g., *Travelers Cas. & Sur. Co. of Am. v. Brenneke*,
551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal court is without
personal jurisdiction over a defendant unless the defendant has been
served in accordance with Fed. R. Civ. P. 4." (internal quotation marks
omitted)). Thus, all parties have consented pursuant to 28 U.S.C. §
636(c)(1). See, e.g., *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995)
(holding that magistrate judge had jurisdiction to dismiss prison
inmate's action under 42 U.S.C. § 1983 as frivolous without consent of

1 **III. The Court Will Abstain from Intervening in the Pending State**
2 **Proceedings.**

3 Federal courts generally abstain from interfering with pending
4 state criminal proceedings before the entry of a judgment of
5 conviction. *Braden*, 410 U.S. at 489. In *Younger v. Harris*, 401 U.S.
6 37, 43-54 (1971), the Supreme Court strictly limited a federal
7 court's ability to intervene in an ongoing state criminal proceeding.
8 A federal court must abstain from addressing an asserted violation
9 of a federal constitutional right where (1) state judicial
10 proceedings are still pending, (2) the state proceedings implicate
11 important state interests, and (3) the state proceedings offer an
12 adequate opportunity to put forward the federal question. *Middlesex*

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14 defendants because defendants had not been served yet and therefore
15 were not parties); *United States v. Real Property*, 135 F.3d 1312, 1317
16 (9th Cir. 1998) (holding that magistrate judge had jurisdiction to
17 enter default judgment in an in rem forfeiture action even though
18 property owner had not consented to it because 28 U.S.C. § 636(c)(1)
19 only requires the consent of the "parties" and the property owner,
20 having failed to comply with the applicable filing requirements, was
21 not a "party"); see also *Patrick Collins, Inc. v. Doe*, 2011 U.S. Dist.
22 LEXIS 125671, at *4 n.1 (N.D. Cal. Oct. 31, 2011) ("Here, Plaintiff has
23 consented to magistrate jurisdiction and the Doe Defendants have not
24 yet been served. Therefore, the Court finds that it has jurisdiction
25 under 28 U.S.C. § 636(c) to decide the issues raised in the instant
26 motion(s)."); *Third World Media, LLC v. Doe*, 2011 WL 4344160, at *3
27 (N.D. Cal. Sept. 15, 2011) ("The court does not require the consent of
28 the defendants to dismiss an action when the defendants have not been
served and therefore are not parties under 28 U.S.C. § 636(c).");
Kukiela v. LMA Prof'l Recovery Group, 2011 U.S. Dist. LEXIS 85417, at
*1 n.1 (D. Ariz. Aug. 1, 2011) ("Plaintiff consented to proceed before
a United States Magistrate Judge for all proceedings in this case,
including entry of final judgment, pursuant to 28 U.S.C. §636(c)(1).
(Doc. 7.) Because Defendant did not appear and establish its standing
as a party in this action, the Magistrate Judge has jurisdiction to
enter the requested default judgment."); *Quigley v. Geithner*, 2010 WL
3613901, at *1 (D. Idaho Sept. 8, 2010) ("Plaintiff, the only party
appearing in this case, has consented to the jurisdiction of a United
States Magistrate Judge to enter final orders in this case."); *Ornelas*
v. De Frantz, 2000 WL 973684, at *2 n.2 (N.D. Cal. June 29, 2000) ("The
court does not require the consent of defendants in order to dismiss
this action because defendants have not been served, and, as a result,
are not parties under the meaning of 28 U.S.C. § 636(c).").

1 *County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432
2 (1982); *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223-24
3 (9th Cir. 1994). All three elements must be present in order for
4 abstention to be appropriate. *Agriesti v. MGM Grand Hotels, Inc.*, 53
5 F.3d 1000, 1001 (9th Cir. 1995).

6 Only when a person subject to state criminal prosecution can
7 show that he will suffer irreparable injury, which is both great and
8 immediate, may intervention be warranted. *Younger v. Harris*, 401 U.S.
9 at 46. Irreparable injury has been found where a state is attempting
10 to hold a second trial after a defendant has been tried on the same
11 offense, *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992).
12 Special circumstances which might warrant federal intervention before
13 trial also include proven harassment and bad faith prosecutions.
14 *Carden v. Montana*, 626 F.2d 82, 84 (9th Cir. 1980). However, the
15 Ninth Circuit has held that in the absence of irreparable injury or
16 a bad faith prosecution, "abstention principles generally require a
17 federal district court to abstain from exercising jurisdiction over
18 a habeas petition in which the petitioner raises a claim under the
19 Speedy Trial Clause as an affirmative defense to state prosecution."
20 *Brown v. Ahern*, 676 F.3d 899, 903 (9th Cir. 2012); *Carden v. Montana*,
21 626 F.2d 82, 83-84 (9th Cir. 1980).

22 In addition, although there is no exhaustion requirement under
23 section 2241(c)(3), principles of comity and federalism require a
24 federal court to abstain from deciding pre-conviction habeas corpus
25 challenges unless a petitioner demonstrates that (1) he has exhausted
26 available state judicial remedies, and (2) "special circumstances
27 warrant federal intervention." See *Carden*, 626 F.2d at 83-84. Here,
28 Petitioner has not raised these claims for relief in the California

1 Court of Appeal or Supreme Court.

2 Regardless, Petitioner has failed to demonstrate any special
3 circumstance or irreparable injury that would warrant federal
4 intervention and which cannot be addressed by the state courts in an
5 orderly fashion. It is clear from the petition itself and the two
6 prior petitions that Petitioner simply is unhappy with the superior
7 court's rulings on pretrial matters and believes that the federal
8 courts should now intervene in his favor. Petitioner has therefore
9 failed to present any compelling reason for this federal court to
10 interfere with the ongoing state criminal proceeding.

11 All three elements warranting abstention are present. State
12 judicial proceedings are on-going; the state proceedings involve the
13 enforcement of state criminal laws, an important state interest; and
14 Petitioner will have an adequate opportunity to raise his
15 constitutional claims on appeal in the California courts, after he
16 is sentenced. Accordingly, the Court finds that abstention is proper
17 with respect to the still-pending failure to register charge.

18
19 **III. Conclusion**

20 For the reasons stated above, this petition is **DISMISSED** without
21 prejudice. A certificate of appealability will not issue. Reasonable
22 jurists would not find the dismissal of the petition as successive
23 debatable or wrong.

24 Dated: February 8, 2013



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Marc L. Goldman
United States Magistrate Judge