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6 UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA
8

9 ANTHONY SILVA,

10 Petitioner,

11 v.

12 A. SOTO,

13 Respondent.
14

Case No. 1:16-cv-00209-LJO-JDP

FINDINGS AND RECOMMENDATIONS
THAT COURT ABSTAIN FROM
EXERCISING JURISDICTION AND
DISMISS CASE WITHOUT PREJUDICE

OBJECTIONS DUE IN 14 DAYS

15 Petitioner Anthony Silva, a state prisoner without counsel, seeks a writ of habeas corpus
16 under 28 U.S.C. § 2254. Because petitioner is still challenging his conviction in state court, we
17 ordered the parties to show cause why this court should not abstain from exercising jurisdiction
18 over this case and dismiss it without prejudice. ECF No. 31. No party has responded to the
19 order to show cause or objected to the dismissal of this case without prejudice. We
20 recommend that the court abstain from exercising jurisdiction and dismiss this case without
21 prejudice for the reasons discussed below.

22 **I. Background**

23 We draw the following facts from an opinion of the California Court of Appeal, Fifth
24 District (“Court of Appeal”). *See People v. Silva*, No. F073195, 2018 WL 948214, at *1 (Cal.
25 Ct. App. Feb. 20, 2018):

26 In *People v. Silva* (Dec. 8, 2014, F066141), the Fresno County
27 District Attorney alleged [that petitioner] robbed his former friend,
28 Jerry Manning, Jr. (Jerry Jr.) of a wallet and cell phone and then shot
and wounded both Jerry Jr. and Jerry Manning, Sr. (Jerry Sr.) in
November 2011. A jury trial was held in Fresno Superior Court in

1 which the identity of the gunman was disputed. The jury convicted
2 [petitioner] of two counts of attempted murder (§§ 664, 187,
3 subd. (a)), discharging a firearm at an occupied vehicle (§ 246), and
4 second degree robbery (§ 211), with enhancements for personal
5 discharge of a weapon causing great bodily injury (§ 12022.53,
6 subd. (d)). [Petitioner] was sentenced to a prison term of 50 years
7 to life, plus 11 years 4 months. [The Court of Appeal] affirmed the
8 judgment, which has become final.

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10 On August 31, 2015, [petitioner] filed a request *in propria persona*
11 in the Fresno Superior Court for appointment of counsel and for
12 DNA testing. [Petitioner] cited section 1405, which authorizes
13 postconviction motions for DNA testing and appointment of counsel
14 for indigent prisoners who seek to file such motions. [Petitioner]
15 requested appointment of counsel and stated he met all of the
16 requirements for DNA testing pursuant to section 1405, subdivision
17 (d)(1).

18 [Petitioner] stated he was not the person who committed the crime,
19 identity was a significant issue in the case, DNA testing would show
20 he did not commit the crime, and his trial counsel was ineffective.
21 [Petitioner] identified the evidence to be tested—a black “Central
22 Grizzlies” sweatshirt, blue jeans, and two T-shirts. [Petitioner]
23 described how the clothing was relevant to his case and why DNA
24 may shed light on the identity of the gunman. Eyewitnesses had
25 described the perpetrator as wearing a black and white mask, a black
26 Central Grizzlies sweatshirt, and blue jeans, and had pointed a police
27 officer toward the direction in which the suspect fled.

28 In following the gunman’s path, the officer found the black Central
Grizzlies sweatshirt, blue jeans, and T-shirts, along with Jerry Jr.’s
stolen wallet in a plastic grocery bag inside a city garbage can near
the crime scene. Jerry Jr.’s wallet had been tested and contained
DNA from one male and one female; [petitioner] was not the male
DNA contributor. [The Court of Appeal’s] opinion noted there was
a mixture of DNA on the wallet that did not belong to Jerry Jr. or to
[petitioner]. None of the clothing, however, was tested for DNA.
[Petitioner] stated his belief that DNA test results will show
someone else was in possession of the victim’s wallet; he had not
previously filed a postconviction motion for DNA testing.

At trial, the prosecutor argued the sweatshirt belonged to [petitioner]
because he had attended Central High School. [Petitioner] described
why the witnesses who claimed he was the gunman lacked
credibility, and he asserted DNA testing of the clothing would
undermine the prosecution’s claim that he was the gunman.

The prosecutor filed an opposition brief. The prosecutor reported
the items of clothing at issue were still in police custody. The
prosecutor did not address [petitioner]’s request for counsel to
investigate and, if appropriate, prepare a full section 1405 motion.
The prosecutor asserted the court should deny [petitioner]’s motion
for DNA testing on the merits, focusing on the argument that DNA
analysis would not raise a reasonable probability that the verdicts or
sentence would have been more favorable if the results of DNA

1 testing had been available at the time of the trial. The prosecutor
2 asserted the items of clothing were not material to the issue of
3 identity because they could not conclusively be linked to the
4 gunman. The prosecutor argued that even if [petitioner]’s DNA was
5 not on the clothing, and even if the clothing contained a third party’s
6 DNA, those results would not cast doubt on the identity of the
7 gunman because other evidence inculpated [petitioner].

8 [Petitioner] filed a reply brief *in propria persona* wherein he
9 renewed his request that the court appoint counsel to brief his motion
10 pursuant to section 1405 and asserted he was entitled to DNA testing
11 pursuant to section 1405. [Petitioner] also attempted to rebut the
12 prosecutor’s arguments that the court should deny DNA testing
13 without appointing counsel. [Petitioner] included excerpts of the
14 reporter’s transcripts in which the police officer who searched the
15 garbage can stated his attention had been drawn to the sweatshirt
16 because it “matched the description given by one of the witnesses,”
17 and the items of clothing and the wallet were found within the same
18 plastic grocery bag.

19 On December 21, 2015, the trial court issued an order denying
20 [petitioner]’s request for appointment of counsel, without discussing
21 the criteria set forth in section 1405, subdivision (b), or stating why
22 [petitioner] failed to meet those criteria. The court stated it was
23 denying [petitioner]’s motion for DNA testing on the merits because
24 it was not reasonably probable a more favorable result would have
25 been achieved had the evidence been available at the time of trial.
26 The court cited section 1405, subdivision (g)(5), and *Richardson v.*
27 *Superior Court* (2008) 43 Cal.4th 1040, 1051.)

28 *Silva*, 2018 WL 948214, at *1-2. The Court of Appeal reversed and remanded, directing the
trial court to appoint counsel to assist petitioner with his post-conviction proceeding and DNA
testing. *Id.* at *6. The trial court has appointed counsel for petitioner, and the matter is
pending in state court. *See generally People v. Silva*, No. F11907044 (Fresno Super. Ct.
Oct. 16, 2018).

21 **II. Discussion**

22 Principles of comity and federalism require federal courts to abstain from interfering with
23 pending state criminal proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971); 28 U.S.C.
24 § 2283. Federal courts abstain from addressing asserted violations of federal constitutional
25 rights when “(1) there is an ongoing state judicial proceeding; (2) the proceeding implicates
26 important state interests; (3) there is an adequate opportunity in the state proceedings to raise
27 constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect
28 of enjoining the ongoing state judicial proceeding.” *Arevalo v. Hennessy*, 882 F.3d 763, 765

1 (9th Cir. 2018). When these requirements are met, a district court must dismiss the action and
2 lacks the discretion to do otherwise, absent extraordinary circumstances. *See Cook v. Harding*,
3 190 F. Supp. 3d 921, 935, 938 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).
4 Extraordinary circumstances include a “showing of bad faith, harassment, or some other
5 extraordinary circumstance that would make abstention inappropriate.” *Arevalo*, 882 F.3d at
6 766. The principles of *Younger* abstention “apply in full force” even when a state proceeding
7 began after the federal action. *M&A Gabae v. Cmty. Redevelopment Agency of City of Los*
8 *Angeles*, 419 F.3d 1036, 1039 (9th Cir. 2005) (quoting *Hicks v. Miranda*, 422 U.S. 332, 349
9 (1975)); *see also Hoyer v. City of Oakland*, 653 F.3d 835, 844 n.5 (9th Cir. 2011) (“That the
10 state court proceedings have now ended is not alone a sufficient reason that *Younger* does not
11 apply.”).

12 Abstention can also be appropriate based on considerations of judicial economy, “wise
13 judicial administration,” and avoiding duplicative litigation. *See Colorado River Water*
14 *Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Supreme Court in
15 *Colorado River* identified four factors that a federal court may consider in deciding whether to
16 abstain: (1) whether the state court first assumed jurisdiction over property; (2) the
17 inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and
18 (4) the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 818-19. The
19 Supreme Court subsequently added two more factors: (5) whether federal or state law provides
20 the rule of decision on the merits and (6) whether the state court proceedings are inadequate to
21 protect the federal litigant’s rights. *See Moses H. Cone Memorial Hosp. v. Mercury Const.*
22 *Corp.*, 460 U.S. 1, 23 (1983). The Ninth Circuit considers an additional factor: (7) prevention
23 of forum shopping. *See Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1367-68 (9th Cir.
24 1990). No single factor is dispositive. *See Colorado River*, 424 U.S. at 818-19.

25 Here, abstention is appropriate under both *Younger* and *Colorado River*. As for *Younger*
26 abstention, petitioner is still challenging his conviction through a DNA test in state court. The
27 state proceeding implicates the important state interest of fair adjudication of criminal charges.
28 The proceeding allows petitioner—who is now represented by counsel in state court—an

1 adequate opportunity to raise constitutional challenges. The requested relief from this court—
2 habeas relief—would have the practical effect of enjoining the state proceeding because the
3 state proceeding would be moot.

4 Abstention under *Colorado River* is appropriate as well. If petitioner succeeds in his
5 state-court proceeding, his petition in this case would be moot. This federal court’s decision
6 would be on the merits. The state proceeding is adequate to protect petitioner’s federal rights.
7 Other factors may weigh against abstention, but the critical concern here under *Colorado*
8 *River*—avoiding duplicative proceedings—weighs heavily in favor of abstention.

9 **III. Findings and recommendations**

10 The court should dismiss this case without prejudice because both *Younger and Colorado*
11 *River* counsel in favor of abstention. Under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the
12 Local Rules of Practice for the United States District Court, Eastern District of California,
13 these findings and recommendations are submitted to the United States District Court Judge
14 presiding over this case. Within fourteen days of the service of the findings and
15 recommendations, any party may file written objections to the findings and recommendations
16 with the court and serve a copy on all parties. That document must be captioned “Objections
17 to Magistrate Judge’s Findings and Recommendations.” The presiding District Judge will then
18 review the findings and recommendations under 28 U.S.C. § 636(b)(1)(C).

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20 IT IS SO ORDERED.

21 Dated: January 8, 2019

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23 UNITED STATES MAGISTRATE JUDGE
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