

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
FOR THE EASTERN DISTRICT OF CALIFORNIA

TYRONE ARTHUR DOUGLAS,
Petitioner,
v.
ERIC ARNOLD,
Respondent.

No. 2:17-cv-1592 GEB KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding pro se, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ Respondent moves to dismiss this action as premature because petitioner’s appeal of his current conviction is pending in the California Court of Appeal. Petitioner’s motions for appointment of counsel, and for stay pending his direct appeal, are also pending. For the reasons stated below, respondent’s motion should be granted, and petitioner’s motions for stay and for appointment of counsel should be denied without prejudice.

II. Motion to Dismiss & Motion for Stay

This court has authority under Rule 4 of the Rules Governing Section 2254 Cases to dismiss a petition if it “plainly appears from the face of the petition and any attached exhibits that

¹ This proceeding was referred to this court by Local Rule 302 under 28 U.S.C. § 636(b)(1).

1 the petitioner is not entitled to relief in the district court. . . .” Id. As a corollary to that rule, the
2 court may also consider a respondent’s motion to dismiss, filed in lieu of an answer, on the same
3 grounds. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to
4 evaluate a motion to dismiss for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599,
5 602-03 (9th Cir. 1989) (using Rule 4 as the procedural vehicle to review a motion to dismiss for
6 state procedural default).

7 Petitioner commenced this action on August 1, 2017. He challenges his March 21, 2014
8 conviction of criminal threats and false imprisonment. (ECF No. 1 at 1.) He was sentenced to a
9 determinate state prison term of fifteen years, appealed his sentence, and the appeal remains
10 pending in the California Court of Appeal. (ECF No. 19 at 5, referencing case number
11 C076525).²

12 It is premature for this court to review petitioner’s collateral attack on his conviction
13 before the state court has had the opportunity to adjudicate the claims raised in his direct appeal.
14 See Younger v. Harris, 401 U.S. 37 (1971). Under Younger, federal courts may not enjoin
15 pending state criminal proceedings except under extraordinary circumstances. Id. at 49, 53.
16 Younger abstention prevents a court from exercising jurisdiction when three criteria are met:
17 1) there are ongoing state judicial proceedings; 2) an important state interest is involved; and
18 3) there is an adequate opportunity to raise the federal question at issue in the state proceedings.
19 H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000).

20 All three of these criteria are satisfied here. First, petitioner has an appeal pending in the
21 California Court of Appeal. Second, California has “an important interest in passing upon and
22 correcting violations of a defendant’s rights.” Roberts v. Dicarlo, 296 F.Supp.2d 1182, 1185
23 (C.D. Cal. 2003). And third, the California state courts provide an adequate forum in which
24 petitioner may pursue his claims. See id. When the state proceedings have concluded and his

25
26 ² According the California Courts’ website, petitioner’s appeal remains pending as of November
27 8, 2017. Indeed, following extensive briefing, the state appellate court has scheduled oral
28 argument for Monday, December 11, 2017. On November 1, 2017, the California Supreme Court
denied petitioner’s petition for writ of mandate for the state appellate court to issue an opinion.
Id. Petitioner is represented by counsel in the appeal.

1 conviction becomes final, petitioner may seek federal habeas relief.

2 In his opposition, petitioner claims that Younger abstention does not apply because his
3 federal petition does not include the claims he is raising in his direct appeal. (ECF No. 21 at 2.)
4 The “[a]pparent finality” of a single claim, however, “is not enough.” Drury v. Cox, 457 F.2d
5 764, 764-65 (9th Cir. 1972) (per curiam). As another district court explained:

6 The Ninth Circuit has held unequivocally that the exhaustion
7 requirement is not satisfied if there is a pending proceeding in state
8 court, even if the issue the petitioner seeks to raise in federal court
9 has been finally determined by the highest available state court. See
10 Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983). This is
11 because the pending state action might result in reversal of the
12 conviction on some other ground, mooted the federal case. See *id.*
13 In Sherwood a direct appeal was pending although the federal
14 issues had been decided by the state courts via another procedural
15 route. Although the Younger abstention might seem a better
16 rationale for this requirement than exhaustion, see Phillips v.
17 Vasquez, 56 F.3d 1030, 1038-39 (9th Cir. 1995) (concurring
18 opinion), the requirement is nevertheless well-established in this
19 circuit.

20 Torres v. Yates, 2008 WL 2383871, at *2 (N.D. Cal. June 9, 2008). Under the Younger doctrine,
21 this court must abstain from granting petitioner any relief until his entire case has concluded in
22 state court. Id. As petitioner’s direct appeal is pending, his underlying action is ongoing, and this
23 court cannot enter judgment in petitioner’s favor, and this action must be dismissed.

24 In his motion for stay, petitioner seeks stay and abeyance under Rhines v. Weber, 544
25 U.S. 269 (2005), rather than dismissal of this action. (ECF No. 22.) However, a stay would be
26 inappropriate. Under the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), a one-year
27 limitations period for seeking federal habeas relief begins to run from “the date the judgment
28 became final on direct review.” 28 U.S.C. § 2244(d)(1)(A). Until petitioner’s new judgment and
sentence is rendered final “by conclusion of direct review or by the expiration of the time for
seeking such review,” AEDPA’s one-year statute of limitations period will not begin to run. See
Burton v. Stewart, 549 U.S. 147, 156-57 (2007). Because the statute of limitations period for the
filing of a federal habeas petition has not yet begun to run, it would be inappropriate to grant a
stay and abeyance. Bennett v. Fisher, 2015 WL 6523689, at *1 (E.D. Cal. Oct. 27, 2015) (stay
inappropriate where limitations period has not even begun to run); Henderson v. Martel, 2010

1 WL 2179913, at *6-7 (E.D. Cal. May 26, 2010) (denying petitioner’s renewed motion for a stay
2 and abeyance as premature).

3 Therefore, for all of the above reasons, IT IS HEREBY RECOMMENDED that
4 respondent’s motion to dismiss (ECF No. 17) be granted, petitioner’s motion for stay (ECF No.
5 22) be denied, and the petition be dismissed, without prejudice, as premature. See 28 U.S.C.
6 § 2254(a); Judice v. Vail, 430 U.S. 327, 337 (1977) (if Younger abstention applies, a court
7 should dismiss the action).

8 III. Motion for Appointment of Counsel

9 Petitioner has requested the appointment of counsel. There currently exists no absolute
10 right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460
11 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at any stage
12 of the case “if the interests of justice so require.” See Rule 8(c), Fed. R. Governing § 2254 Cases.
13 In light of the above recommendations, petitioner’s motion for appointment of counsel is
14 premature. Therefore, petitioner’s motion is denied without prejudice.

15 IV. Conclusion

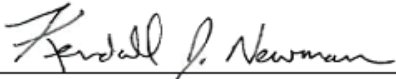
16 Accordingly, IT IS HEREBY ORDERED that petitioner’s request for appointment of
17 counsel (ECF No. 12) is denied without prejudice.

18 Further, IT IS RECOMMENDED that respondent’s motion to dismiss (ECF No. 17) be
19 granted, and this action be dismissed without prejudice.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
25 he shall also address whether a certificate of appealability should issue and, if so, why and as to
26 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
27 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
28 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after

1 service of the objections. The parties are advised that failure to file objections within the
2 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
3 F.2d 1153 (9th Cir. 1991).

4 Dated: November 9, 2017

5 
6 _____
7 KENDALL J. NEWMAN
8 UNITED STATES MAGISTRATE JUDGE

9 /doug1592.mtd.younger.110

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28