



1 to petitioner's ability to pay. Also, because the Sacramento County Superior Court judge failed to  
2 render a sentence on Count 4 of the conviction, the entire sentence was subject to reconsideration  
3 on remand. ECF No. 15-2. From the exhibits attached to the habeas petition, it appears that with  
4 the exception of the ineffective assistance of counsel claim, the above issues were completely  
5 exhausted and denied on the initial Petition for Review. On November 15, 2019, the Sacramento  
6 County Superior Court resentenced petitioner. ECF No. 15-5. Respondent avers that a second  
7 appeal was filed with respect to the resentencing.

8 *Motion to Dismiss*

9 Respondent has filed a Motion to Dismiss (ECF No. 13) asserting that because petitioner  
10 has an appeal pending on the resentencing, this court should order a dismissal pursuant to  
11 Younger v. Harris, 401 U.S. 37 (1971) (regarding federal interference with ongoing state  
12 proceedings). However, the Court of Appeal decided its case a few weeks after the Motion to  
13 Dismiss was filed, and a few days after the respondent's Reply. See ECF No. 20 at 6-9 (Court of  
14 Appeal's June 17, 2021 resentencing decision). It is unknown whether petitioner has sought a  
15 petition for review on the resentencing issue(s). However, liberally interpreting petitioner's first  
16 opposition, petitioner appears to be requesting a stay of his petition pending conclusion of the  
17 state proceedings. ECF No. 14.

18 Respondent is incorrect that Younger requires an abstention dismissal of a habeas petition  
19 if any state proceedings in a criminal case remain to be completed. The United States Supreme  
20 Court recognized in Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) that a protective habeas  
21 petition could be filed even though state proceedings were ongoing, or about to proceed, so long  
22 as petitioner then moved for a stay of the federal proceedings. This is not to say that a protective  
23 filing of a petition is always acceptable; it depends in large part on the status of the state court  
24 proceedings including the degree of prematurity and procedural problems which might arise if the  
25 federal petition is not filed. Here, the state proceedings have largely been completed. Petitioner

26 ///

27 ///

28 ///

1 may have been reasonably confused about the necessity of filing a federal petition on the  
2 conviction issues which were exhausted some time ago.<sup>1</sup>

3 But, in any event, and more importantly, dismissal of this case at this time on abstention  
4 grounds would be an inefficient waste of time and judicial resources. There is no likelihood of  
5 this court making a final ruling on any substantive issue prior to the time a petition for review  
6 after resentencing is filed, or petitioner makes a determination not to file a petition for review on  
7 the resentencing issues. Given the order below, there is no possibility that this federal court will  
8 be countenancing an interference with ongoing state court proceedings.

9 Accordingly, the undersigned recommends denial of respondent's Motion to Dismiss.

10 *Order*

11 Therefore, within fourteen days of the filed date of this order, as set forth herein,  
12 petitioner is ordered to inform the court whether he has, for exhaustion purposes, sought to file a  
13 petition for review in the California Supreme Court regarding the latest appellate "resentencing"  
14 ruling. If petitioner has not yet filed a petition for review, but will be doing so in the near future,  
15 petitioner shall so state. If petitioner's answer is, "yes," or "I will be filing a petition for review,"  
16 the court will construe the response as an operative motion for a stay. If this motion for stay is  
17 filed, respondent shall brief within thirty days from the filed date of the motion to stay, an  
18 opposition to the motion, or a statement of non-opposition.

19 If petitioner's answer is "no," i.e., "I have not, nor do I intend to, file a petition for  
20 review", petitioner shall strike from the petition any issue that has not been fully exhausted with  
21 the California Supreme Court by filing an amended petition raising only exhausted claims.  
22 Petitioner shall specifically review the ineffective assistance of counsel issue, and only raise, if he  
23 so desires, those specific ineffective assistance issues which were raised with the California  
24 Supreme Court. By reviewing petitioner's first "after conviction" Petition for Review, (ECF No.  
25

---

26 <sup>1</sup> In all likelihood, however, petitioner's conviction is not final until he has exhausted the  
27 resentencing issue on direct review. See Jones v. California, Case No. CV 18-0407 SS, 2018 WL  
28 5917871, at \*3 (C.D. Cal. June 4, 2018). It is also possible, at this time, however, that any  
petition for review yet to be filed might be considered untimely, and hence not properly filed if  
attempted at this time.

1 1 commencing at 205), the undersigned cannot find any ineffective assistance of counsel issue.  
2 Respondent shall file an answer within thirty days from the filed date of the negative response.

3 By making this order, the undersigned is not making any final pronouncement on the  
4 exhausted status of the ineffective assistance of counsel claim(s), nor is the undersigned  
5 intimating any opinion on the merits of exhausted issues.

6 *This order, as outlined above, is effective immediately and, unless stayed by the assigned*  
7 *district judge, its timing does not depend upon the conclusion of proceedings with respect to*  
8 *district court review of the Findings and Recommendation regarding the Motion to Dismiss.*

9 *Conclusion*

10 In accordance with the above, IT IS HEREBY ORDERED that parties shall comply with  
11 the ORDER regarding future proceedings herein as set forth above.

12 Additionally, IT IS HEREBY RECOMMENDED that the Respondent's Motion to  
13 Dismiss, ECF No. 13 should be DENIED.

14 This Findings and Recommendation are submitted to the United States District Judge  
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
16 after being served with these Findings and Recommendations, any party may file written  
17 objections with the court and serve a copy on all parties. Such a document should be captioned  
18 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
19 shall be served and filed within fourteen days after service of the objections. The parties are  
20 advised that failure to file objections within the specified time may waive the right to appeal the  
21 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 Dated: August 5, 2021

23 /s/ Gregory G. Hollows  
24 UNITED STATES MAGISTRATE JUDGE  
25  
26  
27  
28