

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOV 28 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PEDRO RODRIGUEZ,

Petitioner-Appellant,

v.

COUNTY OF SAN DIEGO; MATT
GRECO, District Attorney,

Respondents-Appellees.

No. 17-55267

D.C. No. 3:16-cv-03131-BAS-MDD
Southern District of California,
San Diego

ORDER

Before: LEAVY and TALLMAN, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry No. 17) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PEDRO RODRIGUEZ,

Petitioner,

v.

DA MATT GRECO, et al.,

Respondent.

Case No.: 16cv3131 BAS (MDD)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

ABSTENTION

Further, the Petition must be dismissed because it is clear that this Court is barred from consideration of his claims by the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). Under *Younger*, federal courts may not interfere with ongoing state criminal proceedings absent extraordinary circumstances. *Id.* at 45-46; *see also* *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982)

1 (Younger “espouse[d] a strong federal policy against federal-court interference with
2 pending state judicial proceedings”). These concerns are particularly important in the
3 habeas context where a state prisoner’s conviction may be reversed on appeal, thereby
4 rendering the federal issue moot. *Sherwood v. Tompkins*, 716 F.2d 632, 634 (9th Cir.
5 1983).

6 Absent extraordinary circumstances, abstention under *Younger* is required when:
7 (1) state judicial proceedings are ongoing; (2) the state proceedings involve important
8 state interests; and (3) the state proceedings afford an adequate opportunity to raise the
9 federal issue. *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 799 (9th
10 Cir. 2001). All three of these criteria are satisfied here. At the time Petitioner filed the
11 instant Petition, he admits his criminal case is currently pending in state court. (See Pet.
12 at 1, ECF No. 1.) Thus Petitioner’s criminal case is still ongoing in the state courts.
13 Further, there is no question that the state criminal proceedings involve important state
14 interests.

15 Finally, Petitioner has failed to show that he has not been afforded an adequate
16 opportunity to raise the federal issues on direct appeal. Petitioner offers nothing to
17 support a contention that the state courts do not provide him an adequate opportunity to
18 raise his claims, and this Court specifically rejects such an argument. Indeed, Petitioner’s
19 claims that documents supporting the charges against him were forged are the type of
20 claims that are normally resolved at a state court trial. See *Drury v. Cox*, 457 F.2d 764,
21 764-65 (9th Cir. 1972) (“[O]nly in the most unusual circumstances is a defendant entitled
22 to have federal interposition by way of injunction or habeas corpus until after the jury
23 comes in, judgment has been appealed from that the case concluded in the state courts.”)

CONCLUSION

25 Because Petitioner has failed to demonstrate that extraordinary circumstances exist
26 which would relieve this Court of its obligation to abstain from interfering with ongoing
27 state criminal proceedings, his Petition is **DISMISSED** without prejudice. *Juidice v.*
28

1 *Vail*, 430 U.S. 327, 337 (1977) (holding that if *Younger* abstention applies, a court may
2 not retain jurisdiction but should dismiss the action).

3 **IT IS SO ORDERED.**

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5 **DATED: January 12, 2017**

6 
7 Hon. Cynthia Bashant
8 United States District Judge

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UNITED STATES COURT OF APPEALS

MAR 13 2017

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PEDRO RODRIGUEZ,

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Petitioner-Appellant,

D.C. No.

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3:16-cv-03131-BAS-MDD
Southern District of California,
San Diego

COUNTY OF SAN DIEGO and MATT
GRECO, District Attorney,

ORDER

Respondents-Appellees.

Before: Peter L. Shaw, Appellate Commissioner.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise under 28 U.S.C. § 2254. Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997); *see also Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (certificate of probable cause to appeal necessary to appeal denial of post-judgment motion for relief under Rule 60(b)); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270. A briefing schedule will be established after resolution of the certificate of appealability issue.

The Clerk shall send a copy of this order to the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 PEDRO RODRIGUEZ,

11 Petitioner,

12 v.

13 DA MATT GRECO, *et al.*,

14 Respondents.

15 Case No. 16-cv-03131-BAS-MDD

16 **ORDER DECLINING TO ISSUE
CERTIFICATE OF
APPEALABILITY**

17 [ECF Nos. 11, 12]

18 Petitioner Pedro Rodriguez, a state prisoner proceeding *pro se*, filed a Petition
19 for Writ of Habeas Corpus under 28 U.S.C. § 2254. On January 12, 2017, the Court
20 dismissed the Petition for two reasons. (ECF No. 2.) First, the Court noted Petitioner
21 had failed to pay the filing fee and had not moved to proceed *in forma pauperis*. (*Id.*)
22 Second, the Court concluded it is barred from considering Petitioner's claims under
23 the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The
24 Court reasoned this doctrine bars consideration of Petitioner's claims because his
25 criminal case is still ongoing in state court, the state criminal proceedings involve
26 important state interests, and Petitioner fails to demonstrate he has not been afforded
27 an adequate opportunity to raise his claims in the state proceeding. (*Id.*) Further,
28 Petitioner had not demonstrated extraordinary circumstances that would relieve the
Court of its obligation to abstain from ongoing state criminal proceedings. (*Id.*) Thus,

1 the Court dismissed the Petition without prejudice. (*Id.*) The Court later denied a
2 motion for relief from judgment under Federal Rule of Civil Procedure 60(b). (ECF
3 No. 8)

4 On February 27, 2017, Petitioner appealed the Court's dismissal of his
5 Petition. (ECF No. 9.) He also filed on March 1, 2017, a motion for a certificate of
6 appealability. (ECF No. 11.) On March 13, 2017, the Ninth Circuit issued an order
7 (i) noting that this Court had not issued or declined to issue a certificate of
8 appealability and (ii) remanding this case "for the limited purpose of granting or
9 denying a certificate of appealability." (ECF No. 12.)

10

11 **I. Appeal from Order Dismissing Petition**

12 A petitioner may not appeal "the final order in a habeas corpus proceeding in
13 which the detention complained of arises out of process issued by a State court"
14 unless "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. §
15 2253(c). "A certificate of appealability may issue . . . only if the applicant has made
16 a substantial showing of the denial of a constitutional right." *Id.* In *Slack v. McDaniel*,
17 529 U.S. 473, 484 (2000), the Supreme Court articulated a two-part standard
18 governing the issuance of a certificate of appealability when a district court denies a
19 habeas petition on procedural grounds. The Court stated:

20 When the district court denies a habeas petition on procedural grounds
21 without reaching the prisoner's underlying constitutional claim, a
22 [certificate of appealability] should issue when the prisoner shows, at
23 least, [1] that jurists of reason would find it debatable whether the petition
24 states a valid claim of the denial of a constitutional right and [2] that
jurists of reason would find it debatable whether the district court was
correct in its procedural ruling.

25 *Id.*

26 Here, the Court principally dismissed the Petition because the Court concluded
27 it is barred from considering Petitioner's claims based on *Younger* abstention. (ECF
28 No. 2 at 2:25–3:2.) Given that the Court did not reach the merits of Petitioner's

1 claims, the Court's decision constitutes a dismissal on procedural grounds. *See Slack*,
2 529 U.S. at 484; *accord Strickland v. Wilson*, 399 F. App'x 391, 395 (10th Cir. 2010)
3 (noting dismissal based on *Younger* abstention was a dismissal on procedural grounds
4 for certificate of appealability purposes). In applying the two-part standard
5 mentioned above, the Court finds issuing a certificate of appealability from its order
6 of dismissal is not appropriate. Reasonable jurists would not find debatable both
7 whether (1) the petition states a valid claim of the denial of a constitutional right and
8 (2) this Court's procedural ruling was correct. *See Slack*, 529 U.S. at 484. Thus, the
9 Court declines to issue a certificate of appealability from its order dismissing the
10 Petition without prejudice. *See* 28 U.S.C. § 2253(c).

11

12 **II. Appeal from Order Denying Rule 60(b) Motion**

13 In *Lynch v. Blodgett*, 999 F.2d 401, 402–03 (9th Cir. 1993), the Ninth Circuit
14 held that a certificate of probable cause—the predecessor to the certificate of
15 appealability under the former version of 28 U.S.C. § 2253—was required to appeal
16 the denial of a Rule 60(b) motion in a 28 U.S.C. § 2254 habeas proceeding. Since the
17 revision to 28 U.S.C. § 2253 as part of the Antiterrorism and Effective Death Penalty
18 Act of 1996 (“AEDPA”), the Ninth Circuit has only “implicitly held” that a petitioner
19 must now obtain a certificate of appealability in this context. *See United States v.*
20 *Winkles*, 795 F.3d 1134, 1140 (9th Cir. 2015) (discussing *Langford v. Day*, 134 F.3d
21 1381 (9th Cir.1998)). That said, in *United States v. Winkles*, the Ninth Circuit held a
22 petitioner must obtain a certificate of appealability to appeal the denial of a Rule
23 60(b) motion in an analogous context—a habeas proceeding under 28 U.S.C. § 2255.
24 795 F.3d at 1143. In that context, the court held a certificate should issue “if the
25 movant shows that (1) jurists of reason would find it debatable whether the district
26 court abused its discretion in denying the Rule 60(b) motion and (2) jurists of reason
27 would find it debatable whether the underlying section 2255 motion states a valid
28 claim of the denial of a constitutional right.” *Id.*

1 Several district courts have since concluded the Ninth Circuit's reasoning in
2 *Winkles* for habeas proceedings under 28 U.S.C. § 2255 is equally applicable to those
3 under 28 U.S.C. § 2254. *E.g.*, *Sakellaridis v. Davey*, No. 15-cv-01154-DAD-EPG-
4 HC, 2017 WL 272216, at *2 (E.D. Cal. Jan. 20, 2017); *Adams v. Hedgpeth*, No. LA
5 CV-1103852 VBF-FFM, 2016 WL 4035607, at *14 (C.D. Cal. June 8, 2016); *Ceja*
6 *v. Scribner*, No. LA CV 07-00606-VBF-KES, 2016 WL 3996152, at *8 (C.D. Cal.
7 Jan. 19, 2016). This Court agrees. In *Winkles*, the Ninth Circuit noted that "section
8 2255 'was intended to mirror § 2254 in operative effect,' and that the language used
9 in sections 2253(c)(1)(A) and (c)(1)(B) is functionally identical." 795 F.3d at 1141
10 (quoting *Jones v. Ryan*, 733 F.3d 825, 830 n.1 (9th Cir. 2013)). Accordingly, the
11 Court will adapt the standard from *Winkles* for § 2255 proceedings and apply it to the
12 Court's denial of Petitioner's Rule 60(b) motion in this § 2254 proceeding.

13 The Court denied Petitioner's Rule 60(b) motion because it concluded he had
14 not demonstrated the requisite extraordinary circumstances for relief. (ECF No. 8 at
15 2:14–21.) The Court finds Petitioner has not demonstrated that (1) jurists of reason
16 would find it debatable whether this Court abused its discretion in denying the Rule
17 60(b) motion, and (2) jurists of reason would find it debatable whether the Petition
18 states a valid claim of the denial of a constitutional right. *See Winkles*, 795 F.3d at
19 1143. Consequently, the Court declines to issue a certificate of appealability from its
20 order denying Petitioner's Rule 60(b) motion.

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1 **III. Conclusion**

2 In sum, in response to the Ninth Circuit's order (ECF No. 12), the Court
3 declines to issue a certificate of appealability from either (a) its order dismissing the
4 Petition without prejudice or (b) its order denying Petitioner's Rule 60(b) motion.
5 The Court therefore also **DENIES** Petitioner's motion for a certificate of
6 appealability (ECF No. 11).

7 **IT IS SO ORDERED.**

8
9 **DATED: May 8, 2017**

Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 31 2018

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Southern District of California,
San Diego

ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 23).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.