

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCT 3 2018

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

RUBEN R. HERRERA,

No. 18-15677

Petitioner-Appellant,

D.C. No. 1:17-cv-00972-MJS
Eastern District of California,
Fresno

v.

BRANDON PRICE,

ORDER

Respondent-Appellee.

Before: GRABER and M. SMITH, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 6) 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.

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RUBEN R. HERRERA,

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Petitioner-Appellant,

v.

D.C. No. 1:17-cv-00972-MJS
Eastern District of California,
Fresno

BRANDON PRICE,

ORDER

Respondent-Appellee.

Before: PAEZ and RAWLINSON, Circuit Judges.

The request for a certificate of appealability 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); *Wilson v. Belleque*, 554 F.3d 816, 825-26 (9th Cir. 2009).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

RUBEN HERRERA,

CASE NO: 1:17-CV-00972-MJS

v.

BRANDON PRICE,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 2/12/18**

Marianne Matherly
Clerk of Court

ENTERED: February 12, 2018

by: /s/ S. Martin-Gill
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUBEN HERRERA,
Petitioner,
v.
BRANDON PRICE, Executive Director
Respondent.

Case No. 1:17-cv-00972-MJS

**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS AND DISMISSING
PETITION FOR WRIT OF HABEAS CORPUS
(ECF NO. 10)**

CLERK TO CLOSE CASE

Petitioner is a detainee proceeding with counsel on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Respondent Brandon Price, Executive Director of Coalinga State Hospital, is represented by Julie Anne Hokins of the Attorney General's Office for the State of California. All parties have consented to Magistrate Judge jurisdiction for all purposes pursuant to 28 U.S.C. § 636(c). (ECF Nos. 3, 7.)

Briefly stated, Petitioner is in the custody of the California Department of State Hospitals pending a jury trial on a petition for commitment as a Sexually Violent Predator under California's Sexually Violent Predator Act ("SVPA"), California Welfare & Institutions Code § 6600 et seq. Petitioner contends he is statutorily ineligible for SVPA

1 commitment because he was not convicted of a "sexually violent offense." Accordingly,
2 he contends, his detention is unlawful. He further contends that the SVPA petition
3 violates his due process rights and the bar against double jeopardy. He asks this court to
4 order dismissal of the petition and his release from custody. (ECF No. 1.)

5 Before the Court is Respondent's motion to dismiss the petition pursuant to
6 Younger v. Harris, 401 U.S. 37 (1971). (ECF No. 10.) The motion is submitted and
7 stands ready for adjudication. For the reasons stated below, Respondent's motion will be
8 granted and the petition will be dismissed.

9 **I. Factual and Procedural History**

10 On October 14, 2004, Petitioner was convicted pursuant to a plea agreement of a
11 lewd act with a child of 14 or 15 years when the person is at least 10 years older than
12 the child, and sodomy by a person over 21 years with a person who is under the age of
13 sixteen. (ECF No. 1-2 at 30-33.) He was sentenced to a two year term of incarceration
14 but, due to time served, was immediately released on parole. Thereafter, he was twice
15 taken into custody for parole violations (failure to register, removal of GPS monitoring
16 device, and absconding from parole supervision). (ECF No. 1 at 8-9.)

17 On December 4, 2007, while Petitioner was in custody on the parole violations,
18 the Fresno County District Attorney filed a petition for civil commitment of Petitioner
19 pursuant to the SVPA. (ECF No. 1-2 at 5-7.) On January 16, 2008, the Fresno County
20 Superior Court found probable cause to support the commitment petition and ordered
21 Petitioner detained at Coalinga State Hospital. (Id. at 9-12.)

22 Petitioner since has challenged the petition in a number of ways. On October 28,
23 2009, he filed a motion to dismiss the commitment petition and/or to overturn the finding
24 of probable cause. (Id. at 36-54.) Therein, he argued, *inter alia*, that he had not been
25 convicted of an offense that would render him eligible for SVPA commitment. The
26 Superior Court denied the motion on December 9, 2009. (Id. at 81.)

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1 On July 27, 2011, Petitioner challenged the denial of his motion by filing in the
2 California Court of Appeal for the Fifth Appellate District a petition for writ of mandate or
3 prohibition. (Id. at 90, 106-29.) The Court of Appeal denied the petition on October 7,
4 2011. (Id. at 90.) Petitioner sought review in the California Supreme Court; the petition
5 was denied on November 22, 2011. (Id. at 90-91, 132.)

6 On December 30, 2011, Petitioner, proceeding pro se, filed a petition for writ of
7 habeas corpus in this court in Case No. 1:11-cv-02166-LJO-DLB. (Id. at 87-134.) On
8 March 7, 2012, the petition was dismissed without prejudice on the basis of Younger
9 abstention. Herrera v. Ahlin, No. 1:11-cv-02166-LJO-DLB (E.D. Cal. Mar. 7, 2012).

10 On August 24, 2016,¹ Petitioner filed a petition for writ of habeas corpus in the
11 Fresno County Superior Court, again arguing that he lacked a conviction for a sexually
12 violent offense and thus was ineligible for commitment under the SVPA. (Id. at 166-69.)
13 On September 19, 2016, the Superior Court denied the petition. (Id. at 199-205.)

14 Petitioner then pursued this claim through the Fifth District Court of Appeal and
15 the California Supreme Court. (Id. at 326-27.) The Fifth District Court of Appeal denied
16 the petition and, on March 22, 2017, the California Supreme Court denied review. (Id.:
17 id. at 208.)

18 Petitioner filed the instant petition on July 20, 2017. (ECF No. 1.) On October 10,
19 2017, Respondent was ordered to respond to the petition, and to specifically address
20 whether the Court should abstain from entertaining the petition pursuant to Younger.
21 (ECF No. 4.) Respondent then filed the instant motion to dismiss. (ECF No. 10.)
22 Petitioner filed an opposition. (ECF No. 11.) Respondent filed no reply and the time for
23 doing so has passed.

24 II. Discussion

25 “Younger abstention is a jurisprudential doctrine rooted in overlapping principles
26 of equity, comity, and federalism.” San Jose Silicon Valley Chamber of Commerce
27

28 ¹ In the intervening five year period, Petitioner challenged the SVPA proceedings on other grounds.

1 Political Action Comm. v. San Jose, 546 F.3d 1087, 1091 (9th Cir. 2008). The Younger
2 doctrine extends to state civil judicial proceedings if the following four factors are met:
3 (1) there is an ongoing state-initiated judicial proceeding; (2) the proceeding implicates
4 important state interests; (3) the federal litigant is not barred from litigating federal
5 constitutional issues in the state proceeding; and (4) federal court action would enjoin
6 the proceeding or have the practical effect of doing so, i.e., would interfere in a way that
7 Younger disapproves. Gilbertson v. Albright, 381 F.3d 965, 978 (9th Cir. 2004) (en
8 banc).

9 Here, the first element is satisfied because there is an ongoing state-initiated civil
10 commitment proceeding pending against Petitioner. Although many years have passed
11 since the SVPA petition was first filed, no final judgment has been entered, and the case
12 is still ongoing for the purposes of Younger abstention. See San Jose Silicon Valley
13 Chamber of Commerce Political Action Comm., 546 F.3d 1087, 1093. See also Williams
14 v. King, 696 F. App'x 283, 284 (9th Cir.), cert. denied, 138 S. Ct. 506 (2017). Petitioner
15 concedes this point. (ECF No. 11 at 3.)

16 The second element also is satisfied: The SVPA proceeding implicates "the
17 important state interests of protecting the public from sexually violent offenders and
18 providing such offenders with mental health treatment." Smith v. Plummer, 458 F. App'x
19 642, 643-44 (9th Cir. 2011). See also, e.g., Arceo v. King, No. 2:14-cv-2712-GEB-DBP,
20 2016 WL 7384024, at *2 (E.D. Cal. Dec. 21, 2016), report and recommendation adopted,
21 No. 2017 WL 6888521 (E.D. Cal. Feb. 24, 2017). Nonetheless, Petitioner contends that
22 this element is not satisfied because he is not a sexually violent offender, and thus there
23 is no important interest in protecting the public from him. (ECF No. 11 at 3.) But, this
24 rationale would apply in every case where a petitioner disputes whether he meets the
25 SVPA criteria, thus eviscerating the Younger doctrine. The argument is therefore
26 unconvincing.

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1 As to the third element, Petitioner argues that the state court proceedings are
2 inadequate because his efforts to raise his constitutional claims in state court have been
3 unsuccessful. However, there is no question that Petitioner has been afforded the
4 opportunity to raise his federal constitutional claims in the state proceedings and indeed
5 has done so, in some regard, through every level of the California judicial system.
6 Petitioner has not shown that "state procedural law barred presentation of [his] claims,"
7 Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 (1987), or that "extraordinary
8 circumstances" rendered the California courts "incapable of fairly and fully adjudicating"
9 his federal constitutional issues, Kugler v. Helfant, 421 U.S. 117, 124 (1975). Petitioner
10 "obviously disagrees vigorously with the result that he has achieved thus far in California.
11 However, his lack of success does not render the forum inadequate." Baffert v. California
12 Horse Racing Bd., 332 F.3d 613, 621 (9th Cir. 2003).

13 As to the fourth element, if this Court were to grant Petitioner the relief he seeks, it
14 would have the practical effect of enjoining the state SVPA proceedings. Smith, 458 F.
15 App'x at 643-44.

16 Finally, although Younger abstention provides an equitable exception in cases
17 where extraordinary circumstances threaten great, immediate and irreparable injury, see
18 Younger, 401 U.S. at 45-46, 53-54 (irreparable injury shown where statute flagrantly and
19 patently violative of express constitutional prohibitions); Perez v. Ledesma, 401 U.S. 82,
20 85 (1971) (federal injunctive relief in pending state prosecutions proper in cases of
21 proven harassment or prosecutions undertaken by state officials in bad faith without
22 hope of obtaining a valid conviction), petitioner fails to demonstrate that this is such a
23 case. Petitioner has not shown bad faith or harassment by state officials responsible for
24 his commitment proceedings, nor other extraordinary circumstances to indicate
25 irreparable injury. See Kugler, 421 U.S. at 124. He argues primarily that he is suffering
26 irreparable injury just by being detained and forced to face the SVPA proceeding
27 pending against him. However, Younger makes clear that any injury suffered by a
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1 petitioner as a result of being forced to defend himself against a state prosecution
2 brought in good faith does not rise to the level of "irreparable injury," even where the
3 petitioner alleges the prosecution is unlawful. Younger, 401 U.S. at 46 ("No citizen or
4 member of the community is immune from prosecution, in good faith, for his alleged
5 criminal acts. The imminence of such a prosecution even though alleged to be
6 unauthorized and hence unlawful is not alone ground for relief in equity . . ." (internal
7 quotation marks omitted)). Furthermore, the Court must reject Petitioner's claim that the
8 SVPA proceedings are causing irreparable injury to his Fifth Amendment right to avoid
9 being twice put in jeopardy for the same offense. See Hydrick v. Hunter, 500 F.3d 978,
10 993 (9th Cir. 2007) (civil nature of SVPA proceedings forecloses challenges based on
11 violation of Double Jeopardy clause), vacated on other grounds by Hunter v. Hydrick,
12 556 U.S. 1256 (2009).

13 **III. Conclusion and Order**

14 Based on the foregoing, the Court must abstain under Younger from reaching the
15 merits of Petitioner's claims. Accordingly, it is HEREBY ORDERED that Respondent's
16 motion to dismiss (ECF No. 10) is GRANTED, and the petition is dismissed without
17 prejudice.

18 The Clerk of Court is directed to close the case.

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20 **IT IS SO ORDERED.**

21 Dated: February 11, 2018

22 /s/ Michael J. Song
23 UNITED STATES MAGISTRATE JUDGE
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