

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 27 2022

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

JAMES MICHAEL FAYED,

Petitioner-Appellant,

v.

WARDEN SAN QUENTIN STATE
PRISON,

Respondent-Appellee.

No. 22-99010

D.C. No. 2:22-cv-05120-SPG
Central District of California,
Los Angeles

ORDER

Before: SCHROEDER and BYBEE, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

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.

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JAMES MICHAEL FAYED,

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D.C. No. 2:22-cv-05120-SPG
Central District of California,
Los Angeles

v.

WARDEN SAN QUENTIN STATE
PRISON,

ORDER

Respondent-Appellee.

Before: TALLMAN and BRESS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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).

Any pending motions are denied as moot.

DENIED.

- MOTION FOR "EN-BANC" REHEARING
MAILED (LEGAL MAIL) 9/28/22

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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES MICHAEL FAYED,
Petitioner,
vs.
RON BROOMFIELD, Warden,
California State Prison at San Quentin
Respondent.

Case No. 2:22-cv-05120-SPG
DEATH PENALTY CASE
ORDER DISMISSING PETITION
FOR WRIT OF HABEAS CORPUS

I. BACKGROUND

In May 2011, a jury convicted Petitioner James Michael Fayed of the July 28, 2008, first degree murder of his wife, Pamela Fayed. He was also convicted of conspiracy to commit murder. The jury found true the special circumstances that the murder was committed for financial gain and by means of lying in wait. Following the penalty phase of the trial, the jury returned a verdict of death. On April 2, 2020, the California Supreme Court affirmed the conviction and sentence on direct appeal. *People v. Fayed*, 9 Cal. 5th 147 (2020). His conviction and sentence became final when his Petition for Writ of Certiorari to the United States

1 Supreme Court was denied on January 11, 2021.¹ *Fayed v. California*, 141 S.Ct.
2 1050 (2021).

3 State habeas counsel has not yet been appointed for Petitioner;² however, the
4 California Appellate Project filed a habeas petition asserting a limited number of
5 claims (a “shell” petition³) on his behalf on March 10, 2020.⁴

6 The current proceedings were initiated on April 20, 2022, when Petitioner
7 filed a document titled “‘Petition for’ Writ of Habeas Corpus (The Great Writ)”
8 (“Petition”) in the United States District Court for the Northern District of
9 California. (ECF No. 1 (“Pet.”)). Because federal courts in California traditionally
10 have chosen to hear habeas corpus petitions challenging a conviction or sentence in
11 the district of conviction, and because Petitioner was convicted in Los Angeles
12 County, on July 18, 2022, his federal habeas corpus case was ordered transferred to
13 United States District Court for the Central District of California. (ECF No. 15).

14 **II. DISCUSSION**

15 In his pro se filing, Petitioner states that “this petition is *not* a challenge to
16 his conviction in state court” and it is not “filed in place of a state court collateral
17 challenge.” (Pet. at 3 (emphasis added)). He nevertheless asks the Court to review
18 his petition and provide relief under 28 U.S.C. § 2254. (Pet. at 2).

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20 ¹ The docket in petitioner’s case on direct appeal is found on the California Supreme Court website located at:
https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1997783&doc_no=S198132&request_token=NiIwLSEmPkw3WzBFSCMtWEhJQFg0UDxfKiBeQzITUCAgCg%3D%3D.

21 ² California Supreme Court Policies Regarding Cases Arising from Judgments of Death state that the “appointment
22 of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of
23 appellate counsel, or at the earliest practicable time thereafter.” (Policy 3.2-1.) The policies contemplate different
24 timeliness measures for the filing of the state habeas petition based on the type of appointment that is made. If
25 direct appeal counsel is also appointed as state habeas counsel, then the habeas petition must be filed within 180
26 days of the date filing of the reply brief on direct appeal. (Policy 3.1-1.2.) On the other hand, if habeas counsel is
27 appointed apart from direct appeal counsel, then the petition is not due until 36 months after the date on which
28 habeas counsel was appointed. (Policy 3.1-1.2.)

³ The California Supreme Court has acknowledged the difficulty in finding qualified attorneys to take capital habeas
cases and that this has created some significant delays in the appointment of counsel. *In re Jiminez*, 50 Cal. 4th 951,
957 (2010). For this reason, it has permitted petitioners to file and then later amend such “shell” petitions with more
extensively researched pleadings, thus making the filing of the “shell” petition timely under state law and thus
sufficient to toll the federal statute of limitations. *Id.*

⁴ The docket in petitioner’s state habeas case is found on the California Supreme Court website located at:
https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2314690&doc_no=S261155&request_token=NiIwLSEmPkw3WzBFSCMtVEhJQFg0UDxTJSJOqz9SICAgCg%3D%3D.

1 The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”),
2 codified at 28 U.S.C. § 2254, limits the federal courts’ ability to entertain habeas
3 corpus petitions by state prisoners. A primary goal of the AEDPA is the promotion
4 of comity, finality, and federalism, giving the state courts the first opportunity to
5 review claims and correct any constitutional infirmities in the first instance. *Cullen*
6 *v. Pinholster*, 563 U.S. 170, 185 (2011). As codified by the AEDPA, the
7 exhaustion doctrine provides that before a federal court may grant habeas corpus
8 relief to a state prisoner, the prisoner must “exhaust[] the remedies available in the
9 courts of the State.”⁵ 28 U.S.C. § 2254(b)(1)(A); *see also Muhammad v. Close*,
10 540 U.S. 749, 751 (2004) (per curiam) (“Federal petitions for habeas corpus may
11 be granted only after other avenues of relief have been exhausted.”). Exhaustion
12 requires that a petitioner “fairly present his claim in each appropriate state court
13 (including a state supreme court with powers of discretionary review), thereby
14 alerting that court to the federal nature of the claim.” *Baldwin v. Reese*, 541 U.S.
15 27, 29 (2004) (internal quotation marks omitted); *see also O’Sullivan v. Boerckel*,
16 526 U.S. 838, 845-47 (1999); *Weaver v. Thompson*, 197 F.3d 359, 365 (9th Cir.
17 1999). The requirement has long been recognized as “one of the pillars of federal
18 habeas corpus jurisprudence.” *Calderon v. United States Dist. Ct. (Taylor)*, 134
19 F.3d 981, 984 (9th Cir. 1998).

20 “An applicant shall not be deemed to have exhausted the remedies available
21 in the courts of the State ... if he has the right under the law of the State to raise, by
22 any available procedure, the question presented.” 28 U.S.C. § 2254(c). In
23 Petitioner’s case, only two years have passed since Petitioner’s conviction and
24 sentence became final on direct appeal, and he still has an available state court
25 remedy in the form of state habeas corpus proceedings. A shell petition has been
26 filed in state court on his behalf, and it remains pending. *See Schnepf v. Oregon*,

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28 ⁵ The only exception to the “complete exhaustion” requirement exists in those cases where the petitioner can demonstrate either that there is an absence of available state corrective process or circumstances exist that render such process ineffective to protect his rights. 28 U.S.C. § 2254(b)(1)(B).

1 333 F.2d 288, 288 (9th Cir.1964) (per curiam) (state prisoner did not exhausted
2 state remedies where post-conviction proceeding was pending in state court).
3 Because the California Supreme Court has not yet had an opportunity to review
4 Petitioner's habeas claims, the instant petition is premature and must be dismissed
5 without prejudice for failure to exhaust state remedies.

6 **III. CONCLUSION**

7 Petitioner has presented an unexhausted petition to this Court, both because
8 his claims have not been fairly presented to the state's highest court, and because
9 he still has state habeas corpus proceedings pending. *See* 28 U.S.C.
10 §§ 2254(b)(1)(A), (c); *Baldwin*, 541 U.S. at 29; *Schnepp*, 333 F.2d at 288.
11 Accordingly, the Petition for Writ of Habeas Corpus is **DISMISSED** without
12 prejudice to Petitioner reasserting these claims after the exhaustion requirements
13 set forth in federal statute and controlling case law have been met. The Court *sua*
14 *sponte* deems Petitioner to have requested a Certificate of Appealability pursuant
15 to 28 U.S.C. § 2253, and that request is **DENIED**. The Court concludes that no
16 jurist of reason could disagree with this Court's evaluation of Petitioner's claims or
17 would conclude the issues presented in the Petition should proceed further. *See*
18 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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20 **IT IS SO ORDERED.**

21 Dated: August 11, 2022

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HON. SHERILYN PEACE GARNETT
UNITED STATES DISTRICT JUDGE