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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

STEVEN A. MENDEZ,)	Case No. CV 16-8253-JPR
)	
Petitioner,)	
)	MEMORANDUM DECISION AND ORDER
v.)	GRANTING RESPONDENT'S MOTION TO
)	DISMISS AND DISMISSING PETITION
PEOPLE OF THE STATE OF)	FOR WRIT OF HABEAS CORPUS WITHOUT
CALIFORNIA,)	PREJUDICE
)	
<u>Respondent.</u>)	

On November 4, 2016, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody, raising two claims. Petitioner consented to having the assigned U.S. Magistrate Judge conduct all further proceedings in his case, including entering final judgment. On December 8, 2016, Respondent filed a motion to dismiss the Petition as fully unexhausted; he also consented to proceed before the Magistrate Judge. On January 13, 2017, after Petitioner failed to timely respond to the motion, the Court ordered Respondent to re-serve it on him at what appeared to be his new place of incarceration and sua sponte extended the time for Petitioner to oppose the motion. Still, he failed to

1 file opposition or respond in any way.

2 The Petition is, as Respondent argues, fully unexhausted.
3 Petitioner apparently pleaded guilty to second-degree robbery in
4 July 2016. (Pet. at 2.) Although the Petition indicates that
5 Petitioner did not appeal (id.), he apparently attempted to do
6 so, but the appeal was dismissed on December 20, 2016, because it
7 was untimely and Petitioner had not obtained a certificate of
8 probable cause. See Cal. App. Cts. Case Info., [http://](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2171119&doc_no=B279243)
9 [appellatecases.courtinfo.ca.gov/search/case/](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2171119&doc_no=B279243)
10 [dockets.cfm?dist=2&doc_id=2171119&doc_no=B279243](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2171119&doc_no=B279243) (last visited
11 Feb. 21, 2017). He also has never filed any sort of petition in
12 the state supreme court. Id. (search in supreme-court database
13 under Petitioner's name). Accordingly, the Petition's two claims
14 are necessarily unexhausted. See Greene v. Lambert, 288 F.3d
15 1081, 1086 (9th Cir. 2002) (to exhaust habeas claim, petitioner
16 must fairly present it to state's highest court). Fully
17 unexhausted habeas petitions should be dismissed unless the
18 petitioner obtains a stay under Rhines v. Weber, 544 U.S. 269
19 (2005). See Mena v. Long, 813 F.3d 907, 908, 910-11 (9th Cir.
20 2016). Here, Respondent alerted Petitioner in his motion to
21 dismiss to Petitioner's need to obtain a Rhines stay (see Mot. at
22 4-5), but Petitioner never requested one. Accordingly, the
23 Petition must be dismissed without prejudice.¹ Should Petitioner
24

25 ¹ In ground one of the Petition, Petitioner asserts that he
26 was on suicide watch at the time of his guilty plea because he
27 had "over dosed the night before"; he also alleges that he has a
28 "history of mental illness at the E.O.P. level of care." (Pet.
at 5.) Petitioner has presented no evidence to support these

(continued...)

1 subsequently exhaust his claims in state court, he may file
2 another federal habeas petition.² The Court takes no position on
3 whether any such petition would be timely.

4 **ORDER**

5 IT IS ORDERED that Judgment be entered dismissing the
6 Petition without prejudice.

7
8 DATED: February 21, 2017


9 _____
10 JEAN ROSENBLUTH
11 U.S. MAGISTRATE JUDGE

12
13 _____
14 ¹ (...continued)
15 allegations, however. See Allen v. Calderon, 408 F.3d 1150, 1153
16 (9th Cir. 2005) (holding that "substantial evidence" of
17 debilitating mental illness must be presented to warrant
18 competency evaluation); Haworth v. Montgomery, 517 F. App'x 577,
19 578 (9th Cir. 2013) (affirming district court's dismissal of pro
20 se civil complaint without holding competency hearing under Allen
21 even though plaintiff submitted "documents demonstrating that she
22 suffered from severe depression and recurring suicidal
23 ideations"). E.O.P. is the lowest level of care for prisoners
24 who are being treated for mental illness outside the general
25 prison population. See Coleman v. Brown, 28 F. Supp. 3d 1068,
26 1074-75 (E.D. Cal. 2014). Petitioner's ability to file this
27 habeas Petition as well as one in Los Angeles County Superior
28 Court in September 2016 (see Pet. at 3) suggests that he is and
has been capable of exhausting his claims and responding to the
motion to dismiss but has simply chosen not to do so. See Dowdy
v. Curry, 617 F. App'x 772, 773 (9th Cir. 2015) (rejecting
petitioner's argument that "mental illness prevented him from"
timely seeking habeas relief in light of his active filings in
state and federal court during relevant period), cert. denied,
136 S. Ct. 1199 (2016).

² Any new petition should name as the respondent the warden
of the facility where Petitioner is then incarcerated. See Fed.
R. Civ. P. 25(d).