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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JOHN MICHAEL BEAMES,  
  
Petitioner,  
  
v.  
  
KEVIN CHAPPELL, Warden of the California  
State Prison at San Quentin,  
  
Respondent.

Case No. 1:10-cv-01429-AWI-SAB  
DEATH PENALTY CASE  
  
ORDER VACATING MARCH 4, 2014  
ORDER (ECF No. 81)  
  
ORDER WITHDRAWING NUNC PRO  
TUNC UNEXHAUSTED CLAIMS  
(ECF No. 78)  
  
ORDER DENYING AS MOOT  
RESPONDENT’S MOTION TO DISMISS  
FEDERAL HABEAS CORPUS PETITION  
(ECF No. 100)

On October 27, 2014, Respondent Kevin Chappell, Warden of California State Prison at San Quentin (“Respondent”) moved to dismiss the federal habeas petition of John Michael Beames (“Petitioner”) because it includes unexhausted claims that have not been stayed in abeyance or withdrawn. Petitioner filed an opposition on November 21, 2014. Respondent filed a reply to the opposition on November 25, 2014.

The motion to dismiss seeks reconsideration of and relief from the undersigned’s March 4, 2014 order overruling Respondent’s objections to proceeding with the mixed federal petition and rejecting Petitioner’s withdrawal of unexhausted claims and scheduling a May 19, 2015 evidentiary hearing on exhausted claim 11. Accordingly, the motion has been referred to

1 the undersigned, (ECF No. 107), who having reviewed the record finds this matter suitable for  
2 decision without oral argument. Local Rule 230(g).

3 **I.**

4 **BACKGROUND AND CASE HISTORY**

5 This action was commenced on August 9, 2010 with an application for appointment of  
6 counsel, a stay of execution, and a motion to proceed in forma pauperis. On August 12, 2010,  
7 the Court granted the motion for in forma pauperis status, issued a temporary stay of execution,  
8 and referred the case to the Selection Board for the Eastern District for recommendation of  
9 counsel. (ECF No. 4.) On September 10, 2010, the Court filed an order appointing CJA  
10 counsel Timothy Brosnan and the Federal Defender. (ECF No. 5.) Assistant Federal  
11 Defenders Harry Simon and Matthew Scoble have been assigned to the case on behalf of the  
12 Federal Defender. Through counsel, Petitioner filed his federal petition on July 27, 2011 (ECF  
13 No. 18) and an exhaustion petition before the California Supreme Court on the same day.

14 No stay and abeyance of federal proceedings was requested following Petitioner's filing  
15 of the exhaustion petition. This Court reviewed the federal petition, and in an order filed  
16 August 2, 2011 (ECF No. 37), directed the Respondent to file an answer to claim 11.<sup>1</sup> The  
17 Respondent did so on August 29, 2011.

18 On November 23, 2011, the Court determined that claim 11 had been exhausted. (ECF  
19 No. 48).

20 On December 21, 2011, the Court denied Respondent's request to file a motion to  
21 dismiss unexhausted claims and ordered that Petitioner "shall notify the Court of his intention  
22 regarding the unexhausted claims (i.e., whether to seek stay and abeyance, withdraw the  
23 unexhausted claims, etc.) within thirty (30) days of the order on exhaustion." (ECF No. 51.)  
24 Petitioner concedes this deadline expired on June 18, 2012, without his responding or seeking  
25 an extension. (ECF No. 105 at 133, n.3.)

26 The Court, on May 17, 2012, found that claims 4, 5, (plus 11), 29, 30, 37, 41, 43M and

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28 <sup>1</sup> Claim 11 alleges ineffective assistance of counsel at the guilt phase by failing to present evidence challenging  
pathology regarding cause of death.

1 44 had been exhausted, but the remaining claims had not been exhausted.<sup>2</sup> (ECF No. 56.) In  
2 that same order, the Court directed the parties to brief the merits of claim 11. On October 23,  
3 2013, the Court issued an order granting Petitioner further factual development of claim 11.  
4 (ECF No. 70.)

5 Respondent objected to any proceeding on the merits because the petition included  
6 unexhausted claims, and Petitioner had not responded to the Court's December 21, 2011 order  
7 to notify of intentions regarding the unexhausted claims. Petitioner responded by filing a  
8 February 12, 2014 notice with the Court withdrawing the unexhausted claims, i.e. claims 1, 2,  
9 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 23, 24, 25, 26, 27, 35D, 42 and 49, pending before the  
10 California Supreme Court in In Re Beames, Case No. S195127, with the intent to amend the  
11 claims back into the federal petition once adjudicated by the California Supreme Court. (ECF  
12 No. 78.) Respondent did not object to the claim withdrawal, but reserved the right to oppose  
13 any future attempt to amend the petition to add withdrawn claims. (ECF No. 79.)

14 On March 4, 2014, the Court rejected Petitioner's withdrawal of unexhausted claims,  
15 overruled the Respondent's objection to proceeding with the evidentiary hearing for exhausted  
16 claim 11, and scheduled events for a May 11, 2015 evidentiary hearing on claim 11. (ECF No.  
17 81.)

18 On September 18, 2014, the Respondent's writ of mandamus, seeking an order vacating  
19 the March 4, 2014 order and dismissing unexhausted claims, was rejected by the Ninth Circuit  
20 because "the state has not demonstrated that this case warrants the intervention of this court by  
21 means of the extraordinary remedy of mandamus." (ECF No. 105 at 242.)

## 22 II.

### 23 LEGAL STANDARD

#### 24 A. Motion to Dismiss

25 A motion to dismiss may be used to dispose of claims in a federal habeas corpus  
26 proceeding on procedural grounds, including failure to exhaust state remedies. White v. Lewis,

27 \_\_\_\_\_  
28 <sup>2</sup> Beames concedes in his February 12, 2014 notice of claim withdrawal (doc. 78) that claims 1, 2, 6, 8, 9, 10, 12,  
13, 14, 15, 16, 17, 18, 23, 24, 25, 26, 27, 35D, 42, and 49 are unexhausted.

1 874 F.2d 599, 602-03 (9th Cir. 1989); Rule 4, foll. 28 U.S.C. § 2254, Cases and Advisory  
2 Committee Notes; see also Murray v. Carrier, 477 U.S. 478, 483 (1986).

3 Under 28 U.S.C. § 2254(b)(1)(A), the federal courts are not to grant a writ of habeas  
4 corpus brought by a person in custody pursuant to a state court judgment unless “the applicant  
5 has exhausted the remedies available in the courts of the State.” This exhaustion requirement  
6 is “grounded in principles of comity” as it gives the state “the first opportunity to address and  
7 correct alleged violations of state prisoner's federal rights.” Coleman v. Thompson, 501 U.S.  
8 722, 731 (1991).

### 9 **B. Reconsideration**

10 Rule 60(b)(6) allows the Court to relieve a party from an order for any reason that  
11 justifies relief. Rule 60(b)(6) is to be used sparingly as an equitable remedy to prevent  
12 manifest injustice and is to be utilized only where extraordinary circumstances exist. Harvest  
13 v. Castro, 531 F.3d 737, 749 (9th Cir. 2008). The motion must be brought within a reasonable  
14 time. Fed. R. Civ. P. 60(c)(1).

15 Local Rule 230(j) requires, in relevant part, that Plaintiff show “what new or different  
16 facts or circumstances are claimed to exist which did not exist or were not shown upon [the]  
17 prior motion, or what other grounds exist for the motion,” and “why the facts or circumstances  
18 were not shown at the time of the prior motion.”

## 19 **III.**

### 20 **ARGUMENTS**

#### 21 **A. Respondent's Moving Argument**

22 Respondent argues this Court cannot adjudicate a mixed petition. Doing so is contrary  
23 to long established Supreme Court precedent and puts the Court in the position of reviewing  
24 claim 11 without a complete state court record. As Petitioner has not sought stay and  
25 abeyance, the mixed petition must be dismissed without prejudice unless Petitioner amends the  
26 federal petition to delete the unexhausted claims. Petitioner's prior request to the Court to  
27 withdraw unexhausted claims is, according to Respondent, an admission the mixed petition  
28 cannot be litigated.

1 Respondent also argues that proceeding on the mixed petition effectively bypasses  
2 AEDPA’s one year limitations period because Petitioner will not be required to establish  
3 relation-back as he would upon an amendment to add back exhausted claims.

4 Respondent also argues that he has not expressly waived exhaustion and cannot be  
5 estopped to assert it.

6 **B. Petitioner’s Opposition Argument**

7 Petitioner responds that this Court can proceed to adjudicate the merits of the mixed  
8 federal petition as long as relief on the petition is not granted.

9 Petitioner also responds that Respondent has not diligently sought dismissal of  
10 unexhausted claims and is not prejudiced by litigation of the mixed petition - claim 11 is fully  
11 exhausted - the state exhaustion petition is fully briefed.

12 Petitioner also responds that it is likely the state petition claims will be exhausted  
13 before the Court rules on the merits of claim 11. If not, this Court may then dismiss  
14 unexhausted claims and any error corrected on appeal.

15 **C. Respondent’s Reply Argument**

16 Respondent replies that Petitioner did not timely comply with the Court’s December 21,  
17 2011 order to notify of intentions regarding unexhausted claims. This noncompliance delayed  
18 the Respondent’s objections to unexhausted claims and his motion to dismiss them.

19 Respondent also replies that the instant motion and arguments based on Rose and  
20 Rhines were not previously presented to this Court or ruled upon by it, such that the motion  
21 does not seek reconsideration of the Court’s March 4, 2014 order.

22 **IV.**

23 **DISCUSSION**

24 **A. Reconsideration of March 4, 2014 Order**

25 The Court has reconsidered its March 4, 2014 order following review of the instant  
26 motion, the parties’ arguments and authorities and upon further review of the record. The  
27 Court based its order upon the codified exhaustion requirement that “[a]n application for a writ  
28 of habeas corpus . . . shall not *be granted* unless . . . the applicant has exhausted the remedies

1 available in the courts of the State”, 28 U.S.C. 2254(b)(1)(A) (emphasis added), and upon  
2 “considerations of comity.” (ECF No. 81 at 5:3-11.)

3 However, comity is fostered where district courts refrain from adjudicating mixed  
4 petitions, Rose v. Lundy, 455 U.S. 509, 510 (1982),<sup>3</sup> absent express waiver of exhaustion, or  
5 where the unexhausted claims do not rise to the level of alleged deprivations of constitutional  
6 rights, 28 U.S.C. § 2254(b)(2)(3); Acosta-Huerta v. Estelle, 7 F.3d 139, 142 (9th Cir. 1992), or  
7 “in rare cases where exceptional circumstances of peculiar urgency are shown.” Hendricks v.  
8 Zenon, 993 F.2d 664, 673 (9th Cir. 1993), citing Granberry v. Greer, 481 U.S. 129, 134 (1987).  
9 Rose imposes a general rule of “total exhaustion.” Rose, 455 U.S. at 522. This rule of  
10 deference to principles of comity ensures that state courts have the initial opportunity to review  
11 federal constitutional challenges to state convictions. Newton v. Phelps, 943 F.Supp.2d 494,  
12 499 (D. Del. 2013). As the Rose court explained:

13 The exhaustion doctrine is principally designed to protect the state courts' role  
14 in the enforcement of federal law and prevent disruption of state judicial  
15 proceedings. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S.  
16 484, 490–491 (1973). Under our federal system, the federal and state courts  
17 [are] equally bound to guard and protect rights secured by the Constitution. Ex  
18 parte Royall, [117 U.S. 241, 251 (1886)]. Because it would be unseemly in our  
19 dual system of government for a federal district court to upset a state court  
conviction without an opportunity to the state courts to correct a constitutional  
violation, federal courts apply the doctrine of comity, which „teaches that one  
court should defer action on causes properly within its jurisdiction until the  
courts of another sovereignty with concurrent powers, and already cognizant of  
the litigation, have had an opportunity to pass upon the matter. Darr v. Burford,  
339 U.S. 200, 204 (1950).

20 Rose, 455 U.S. 518.

21 In this case, there is not a sufficient basis under the standards above to adjudicate the  
22 mixed federal petition. Respondent has not waived exhaustion. Though the record reflects that  
23 Respondent arguably delayed in objecting to proceeding on the mixed petition, nothing  
24 suggests an express waiver of exhaustion. AEDPA, amended § 2254, prohibits implied  
25 waivers of exhaustion. Section 2254(b)(3) provides: “A State shall not be deemed to have  
26 waived the exhaustion requirement or be estopped from reliance upon the requirement unless  
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28 <sup>3</sup>In accord see Jackson v. Roe, 425 F.3d 654, 658 (9th Cir. 2005); see also Local Rule 190(e)(1).

1 the State, through counsel, expressly waives the requirement.”

2 The Court does not have any basis upon which to find the unexhausted claims have  
3 merit. The unexhausted claims have not been answered or substantively briefed.

4 Petitioner has not alleged exceptional circumstances for adjudicating the mixed claims.  
5 To the contrary, Petitioner noticed withdrawal of unexhausted claims on February 12, 2014.

6 Additionally, Petitioner has not requested or demonstrated entitlement to stay and  
7 abeyance. See Rhine v. Weber, 544 U.S. 269, 273-75 (2005). The Court is not required to sua  
8 sponte consider whether it should stay and abey a mixed habeas petition. Robbins v. Carey,  
9 481 F.3d 1143, 1147 (9th Cir. 2007). Rather, Petitioner sought to withdraw unexhausted  
10 claims.

11 Accordingly, upon reconsideration the Court finds the March 4, 2014 order  
12 improvidently issued. There is no clear basis to deviate from the general rule of total  
13 exhaustion or to find an exception to it. Moreover, proceeding on the mixed federal petition  
14 relies upon an incipient state record and potentially prejudices the Respondent’s assertion of  
15 any otherwise available limitations defense. Concurrent state and federal proceedings are not  
16 likely to further judicial economy and efficient case management.

17 Petitioner is entitled to proceed on the exhausted claims by amending his federal  
18 petition to delete unexhausted claims. Nowaczyk v. Warden, New Hampshire State Prison,  
19 299 F.3d 69, 76 (1st Cir. 2002). Plaintiff’s February 12, 2014 notice withdrawing the  
20 unexhausted claims serves this purpose. See James v. Giles, 221 F.3d 1074, 1077-78 (9th Cir.  
21 2000) (finding petitioner has right to delete unexhausted claims from mixed petition in lieu of  
22 suffering dismissal).

23 **B. Motion to Dismiss Mixed Petition**

24 Respondent’s motion to dismiss the mixed federal petition is moot upon withdrawal of  
25 the unexhausted claims. Respondent will have the opportunity to oppose any attempt by  
26 Petitioner to add withdrawn claims back into the federal petition.

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V.

**ORDER**

For the reasons stated, it is HEREBY ORDERED that:

1. The Court's March 4, 2014 order (ECF No. 81) is vacated;<sup>4</sup>
2. The federal petition (ECF No. 18) is amended nunc pro tunc for Petitioner's withdrawal of claims 1, 2, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 23, 24, 25, 26, 27, 35D, 42 and 49 (ECF No. 78), without prejudice to Petitioner seeking leave to add the withdrawn claims back into the federal petition;
3. Respondent's motion to dismiss (ECF No. 100) is denied as moot, without prejudice to Respondent's opposing any attempt by Petitioner to add the withdrawn claims back into the federal petition; and
4. The Parties are directed to meet and confer regarding further Phase III case management for discussion at status conference set for April 1, 2015, at 10:30 a.m., in Department 9 before United States Magistrate Judge Stanley A. Boone.

IT IS SO ORDERED.

Dated: January 28, 2015

  
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SENIOR DISTRICT JUDGE

<sup>4</sup> Dates scheduled in the March 4, 2014 order were previously vacated. (See ECF No. 109.)