

1 This Court previously granted Petitioner leave to file a third amended petition.
2 ECF No. 196. Petitioner filed that third amended petition in May 2006. ECF No. 182. Respondent
3 filed a motion to dismiss, arguing that the third amended petition contained unexhausted claims.
4 ECF No. 222. The Court, in 2008, issued findings and recommendations finding that some claims
5 were unexhausted and recommending that those claims be dismissed without prejudice. ECF No.
6 257. The District Judge adopted the findings and recommendations in April 2010 and dismissed
7 the claims without prejudice. ECF No. 300. Petitioner filed the pending motion to further amend
8 the petition in July 2011, asserting that the unexhausted claims had now been properly exhausted
9 in state court. ECF No. 336.

10 As relevant here, in September 2019, the Court ordered that Petitioner file a
11 supplemental brief to update the Court on the law, facts, and procedure then governing the
12 petition and motion to amend. ECF No. 386. Petitioner filed a supplemental brief on November 4,
13 2019. ECF No. 387. In his supplemental brief, Petitioner suggested that the pending motion to
14 amend be denied without prejudice. Id. at 1. Petitioner suggested denying the motion because, at
15 the time he filed the motion in July 2011, he was also pursuing discovery in California state court
16 under California Penal Code § 1054.9. Id. at 2. He expected that discovery would give rise to
17 additional claims that would have to be exhausted in state court. Id.

18 Petitioner also noted that he filed a fourth petition for a writ of habeas corpus in
19 the California Supreme Court on August 27, 2013. Id. He included sixteen new claims in that
20 petitioner based on information gleaned from discovery under § 1054.9. Id. The California
21 Supreme Court accepted briefing in the case but ultimately transferred the petition to the Butte
22 County Superior Court on May 22, 2019. Id. at 2–3. As of Petitioner’s November 2019 filing of
23 his supplemental brief, the Superior Court had not ruled upon the habeas petition. Id. at 3.
24 Petitioner further noted that if the Superior Court’s ruling on his petition was adverse, then this
25 case would be ripe for a more comprehensive motion to amend. Id. According to Petitioner, such
26 a motion to amend could include *all* the exhausted claims, including the sixteen new claims
27 presented in 2013, not just those in the motion now pending before this Court. Id. Finally,
28 Petitioner contends that Claim 33 of his current petition is ripe for disposition. Id. at 4.

1 Respondent filed a response to Petitioner’s supplemental brief on December 3,
2 2019. ECF No. 388. Respondent asks that, instead of denying the pending motion to amend
3 without prejudice, that the Court construe Petitioner’s supplemental brief as withdrawal of the
4 motion to amend altogether. Id. at 1. Respondent also asks that, to the extent Petitioner’s
5 supplemental brief might suggest staying the present case and holding it in abeyance until
6 Petitioner’s fourth habeas petition is resolved in state court, the Court not address abeyance unless
7 Petitioner files a formal motion requesting it. Id.

8 Petitioner replied on December 17, 2019. ECF No. 390. Petitioner opposed neither
9 dismissal of the motion to amend without prejudice nor deeming the motion withdrawn. Id. at 1.
10 Petitioner asks only that any decision by the Court be without prejudice to a new, comprehensive
11 motion to amend once the state court addresses the fourth habeas petition. Id.

12 Given the procedural history outlined above, the Court construes Petitioner’s
13 November 4, 2019, and December 17, 2019, filings, ECF Nos. 387 and 390, as a notice of
14 withdrawal of his motion for leave to amend, ECF No. 336.

15 Accordingly, IT IS HEREBY ORDERED that:

16 1. Petitioner’s motion for leave to amend, ECF No. 336, is withdrawn without
17 prejudice to Petitioner filing a comprehensive motion for leave to amend upon the conclusion of
18 proceedings in state court; and

19 2. Given the fluid state of the pleadings, the Court declines to address the
20 merits of Claim 33 at this time.

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23 Dated: December 17, 2020



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE