





1 0180 LJO SAB HC, 2013 WL 5969667, at \*1 (E.D. Cal. Nov. 8, 2013) (citing Rodriguez v.  
2 United States, 286 F.3d 972, 980 (7th Cir. 2002) and Caswell, 363 F.3d at 837-39)).

## 3 **II. Discussion**

4 Petitioner contends that none of the five factors counseling against amendment apply here.  
5 Respondent argues that amendment would be futile because petitioner failed to exhaust the claims  
6 raised in the supplemental petition. This court agrees.

7 Petitioner concedes that his claims are not exhausted.<sup>2</sup> (See ECF No. 204 at 4 (petitioner  
8 argues he should be given the opportunity to exhaust his new claims).) However, petitioner also  
9 makes a somewhat contradictory arguments that the exhaustion issue is premature because it is  
10 not clear from the face of the supplemental petition and should be addressed after briefing on the  
11 merits. (Id.) Petitioner cites no authority for this proposition and it is contrary to case law from  
12 this circuit. In Caswell, when considering a motion to amend the petition, the court analyzed the  
13 exhaustion status of the claims the petitioner sought to add. See 363 F.3d at 837-39.

14 It is well established that a federal court may not “adjudicate mixed petitions for habeas  
15 corpus, that is, petitions containing both exhausted and unexhausted claims.” Rhines v. Weber,  
16 544 U.S. 269, 273 (2005) (citing Rose v. Lundy, 455 U.S. 509, 518-19 (1982)). Historically,  
17 federal courts dismissed mixed petitions. See Rhines, 544 U.S. at 274; Rose, 455 U.S. at 522. In  
18 2005, the Supreme Court considered the propriety of staying a mixed petition. In Rhines, the  
19 Court held that stay and abeyance of a mixed petition is available in “limited circumstances”  
20 when “the district court determines there was good cause for the petitioner’s failure to exhaust his  
21 claims first in state court.” 544 U.S. at 277. Petitioner does not seek such a stay here.

22 This court finds amending the petition at this time would be futile. Absent an express  
23 waiver of exhaustion by respondent, which respondent has not made, petitioner cannot succeed on

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25 <sup>2</sup> Petitioner disputes respondent’s contention that petitioner is alleging his claims are “‘technically  
26 exhausted’ because they are now procedurally barred under [state] law.” Gray v. Netherland, 518  
27 U.S. 152, 162-63 (1996) (quoting Castille v. Peoples, 489 U.S. 436, 351 (1989)); see also 28  
28 U.S.C. § 2254(b)(1)(B)(i) (exhaustion not necessary if there is “an absence of available State  
corrective process”). Petitioner states that he “has a viable legal avenue to exhaust the claims in  
his supplemental petition in state court.” (ECF No. 204 at 2.) Accordingly, technical exhaustion  
is not an issue before the court and this court does not address it.

1 his unexhausted claims at this time. See Scott v. Baldwin, 225 F.3d 1020, 1023 n. 7 (9th Cir.  
2 2000) (The petitioner “cannot succeed on a [new] claim for the simple reason that it, obviously,  
3 has not been exhausted in state court.” (citing 28 U.S.C. § 2254(b)(1)(A) (providing that a state  
4 prisoner’s habeas petition “shall not be granted unless it appears that the applicant has exhausted  
5 the remedies available in the courts of the State”) and Jiminez v. Rice, 222 F.3d 1210, 1212 (9th  
6 Cir.2000), reh’g granted, opinion withdrawn on other grounds, 246 F.3d 1277 (9th Cir. 2001),  
7 and on reh’g, 276 F.3d 478 (9th Cir. 2001).); cf. 28 U.S.C. §2254(b)(3) (a state’s waiver of  
8 exhaustion must be expressly made); 28 U.S.C. § 2254(b)(2) (an unexhausted claim may be  
9 denied if it is meritless). Based on controlling authority, this court will recommend petitioner’s  
10 motion to amend the petition by filing a supplemental petition be denied without prejudice.

11 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s motion to supplement  
12 the petition (ECF No. 195) be denied without prejudice.

13 These findings and recommendations will be submitted to the United States District Judge  
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
15 after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. The document should be captioned  
17 “Objections to Magistrate Judge's Findings and Recommendations.” Any response to the  
18 objections shall be filed and served within seven days after service of the objections. The parties  
19 are advised that failure to file objections within the specified time may result in waiver of the  
20 right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In the  
21 objections, the party may address whether a certificate of appealability should issue in the event  
22 an appeal of the judgment in this case is filed. See Rule 11, Rules Governing § 2254 Cases (the

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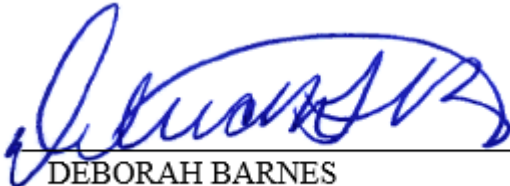
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1 district court must issue or deny a certificate of appealability when it enters a final order adverse  
2 to the applicant).

3 Dated: September 26, 2022

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6 DEBORAH BARNES  
7 UNITED STATES MAGISTRATE JUDGE  
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