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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL B. NORDLOF,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

No. C 07-4899 MMC (PR)

**ORDER DIRECTING PETITIONER
TO FILE SECOND AMENDED
PETITION; DENYING WITHOUT
PREJUDICE RESPONDENT'S
MOTION TO DISMISS; SETTING
BRIEFING SCHEDULE**

(Docket No. 13)

On September 21, 2007, petitioner, a California prisoner incarcerated at Corcoran State Prison and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. After reviewing the petition, which contained seven claims for relief, the Court ordered respondent to file an answer showing cause why the petition should not be granted, or in the alternative, a motion to dismiss on procedural grounds. Thereafter, by order filed August 19, 2008, and prior to respondent's filing a response to the original petition, the Court granted petitioner's motion to file a first amended petition containing twenty claims for relief.

Now pending before the Court is respondent's motion to dismiss the first amended petition ("FAP") as unexhausted and untimely. In so moving, respondent argues that the twenty claims raised in the FAP are wholly distinct from the seven claims raised in the original petition, and that the FAP supercedes the original petition. In opposition, petitioner

1 asserts he did not intend the FAP to supercede the original petition but, rather, that the FAP
2 and original petition be considered together. In reply, respondent argues petitioner should
3 not be allowed to reinstate the claims from the original petition.

4 Generally, the filing of a new petition cancels out the old petition, and such amended
5 petition constitutes a waiver of any omitted claims that had been included in previous
6 versions of the petition. See Sechrest v. Ignacio, 549 F.3d 789, 804 (9th Cir. 2008). Where
7 the omission of claims from an amended petition is not voluntary, however, the earlier claims
8 are not deemed waived. Id.

9 Here, petitioner, a prisoner proceeding pro se, states he did not intend the filing of the
10 FAP to result in omission of the claims from the original petition. Consequently, in light of
11 petitioner's pro se status, and good cause appearing, the Court hereby ORDERS petitioner to
12 file, within **thirty** days of the date this order is filed, a second amended petition containing
13 all claims petitioner intends to raise in the instant action. Petitioner is advised that the second
14 amended petition will supercede both the original petition and the FAP, and may not
15 incorporate by reference any parts of either the original petition or the FAP.

16 In filing the second amended petition, petitioner shall use the court's form habeas
17 corpus petition, a copy of which is provided herewith, and include in the caption both the
18 case number of this action, No. C 07-4899 MMC (PR), and the heading "SECOND
19 AMENDED PETITION." Additionally, petitioner must serve a copy of the second amended
20 petition on respondent's counsel. **If petitioner fails to file a timely second amended**
21 **petition in conformity with this order, the action will be dismissed without prejudice**
22 **and the case will be closed.**

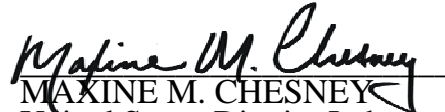
23 Based on the foregoing, respondent's motion to dismiss the FAP as unexhausted and
24 untimely is hereby DENIED without prejudice. Within **ninety** days of the date respondent is
25 served with the second amended petition, respondent shall file a response thereto. Within
26 **thirty** days of the date such response is filed, petitioner shall file with the Court and serve on
27 respondent a responsive pleading. If respondent files a motion to dismiss, respondent shall
28 file a reply to petitioner's opposition within **fifteen** days of the date such opposition is filed.

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This order terminates Docket No. 13.

IT IS SO ORDERED.

DATED: April 23, 2009


MAKINE M. CHESNEY
United States District Judge