

United States District Court
For the Northern District of California

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E-FILED on 5/13/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RAYMOND HOUSTON,
Petitioner,
v.
ROBERT J. HERNANDEZ,
Respondent.

No. C-07-04511 RMW

ORDER GRANTING PETITIONER'S
MOTION TO AMEND AND DENYING
RESPONDENT'S MOTION TO DISMISS


[Re Docket No. 18]

Respondent moves to dismiss the petition for writ of habeas corpus on the ground that it contains unexhausted claims. Petitioner admits that the petition contains unexhausted claims and requests the opportunity to amend the petition to strike any reference to the unexhausted claims. The Ninth Circuit has "consistently held that district courts must allow petitioners to amend their mixed petitions to strike their unexhausted claims as an alternative to suffering dismissal." *Guillory v. Roe*, 329 F.3d 1015, 1016 (9th Cir. 2003). The court therefore grants petitioner's motion to amend the petition, striking the unexhausted claims (claims 3, 5, and 7), and denies respondent's motion to dismiss the petition for failure to exhaust state remedies.

Petitioner shall file with the court an amended petition raising only exhausted claims (claims 1, 2, 4, and 6) within 10 days of the issuance of this order. Respondent shall have 60 days from the

1 filing of the amended petition to file an answer conforming in all respects to Rule 5 of the Rules
2 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.
3 Respondent shall file with the answer a copy of all portions of the state record that have been
4 transcribed previously and that are relevant to a determination of the issues presented by the petition.
5 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the court and
6 serving it on respondent within 30 days of his receipt of the answer.
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11 DATED: 5/13/10



RONALD M. WHYTE
United States District Judge

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1 **Notice of this document has been electronically sent to:**

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6

7 Counsel are responsible for distributing copies of this document to co-counsel that have not
8 registered for e-filing under the court's CM/ECF program.

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11 **Dated:** 5/13/10

CCL
Chambers of Judge Whyte

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