

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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|-----------------|---|--------------------------|
| SCOTT E. FELIX, |) | No.: C 10-2823 LHK (PR) |
| |) | |
| Petitioner, |) | |
| |) | ORDER GRANTING MOTION TO |
| v. |) | DISMISS |
| |) | |
| DR. S. MAYBERG, |) | |
| |) | |
| Respondent. |) | |

Petitioner, who is civilly committed, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In its order re-opening the case, the Court found that Petitioner has not exhausted the state remedies for his second claim as required by § 2254(b)(1). ECF No. 22. The Court directed Respondent to either file a motion to dismiss or expressly waive the exhaustion requirement of § 2254. Id. Respondent declines to waive the exhaustion requirement. ECF No. 33. Respondent moves to dismiss on the grounds that the petition included claims that are not exhausted or alternatively to dismiss only the unexhausted claim. ECF No. 33. In Petitioner’s response to Respondent’s motion, Petitioner indicated his intent to dismiss the unexhausted claim. ECF No. 33.

A mixed petition is not fatal to a habeas action. “[Petitioners] who . . . submit mixed petitions . . . are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims.” *Rose v. Lundy*, 455 U.S. 509, 520 (1982). “[D]istrict courts must

1 provide habeas litigants with the opportunity to amend their mixed petitions by striking
2 unexhausted claims as an alternative to suffering dismissal.” Anthony v. Cambra, 236 F.3d 568,
3 574 (9th Cir. 2000). Here, the parties agree that Petitioner has submitted a mixed petition. ECF
4 No. 31 at 5; ECF No. 33 at 2.

5 Because Petitioner has indicated his willingness to dismiss the unexhausted claim, the Court
6 GRANTS Respondent’s motion to dismiss as to the unexhausted claim only. The Court DENIES
7 Respondent’s alternative request to dismiss the entire petition. Petitioner may proceed with his
8 exhausted claims, specifically claims 1, 3, and 5.

9 **CONCLUSION**

10 For the foregoing reasons, the Court orders as follows:

- 11 1. Respondent’s motion to dismiss claim 2 – the unexhausted claim – is GRANTED.
- 12 2. Respondent shall file with the Court and serve on Petitioner, within **sixty days** of the date
13 this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing Section
14 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall
15 file with the answer and serve on Petitioner a copy of all portions of the underlying record that
16 have been transcribed previously and that are relevant to a determination of the issues presented by
17 the petition. If Petitioner wishes to respond to the answer, he shall do so by filing a traverse with
18 the Court and serving it on Respondent within **thirty days** of the date the answer is filed.
- 19 3. It is Petitioner's responsibility to prosecute this case. Petitioner is reminded that all
20 communications with the Court must be served on Respondent by mailing a true copy of the
21 document to Respondent's counsel. Petitioner must keep the court and all parties informed of any
22 change of address by filing a separate paper captioned “Notice of Change of Address.” He must
23 comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of
24 this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

25 **IT IS SO ORDERED.**

26
27 Dated: August 26, 2013

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LUCY H. KOH
United States District Judge