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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL SUTTON

Petitioner,

v.

WILLIAM D. GORE, WARDEN

Respondent.

Case No.: 16cv1854-JAH (AGS)

**ORDER ADOPTING THE
MAGISTRATE JUDGE’S REPORT
AND RECOMMENDATION AND
GRANTING THE WARDEN’S
MOTION TO DISMISS
PETITIONER’S FIRST AMENDED
HABEAS PETITION [DOC NO. 24]**

BACKGROUND

On July 16, 2016, Petitioner Michael Sutton, a state prisoner proceeding pro se (“Petitioner”), concurrently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and a motion for leave to proceed in forma pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). See Doc. Nos. 1-2. Petitioner’s IFP motion was granted, but the case was nevertheless dismissed without prejudice for failure to allege exhaustion of state judicial remedies. See Doc. No. 4. Petitioner timely filed his amended habeas petition on September 1, 2016. See Doc. No. 5. Thereafter, on November 3, 2016, Warden William D. Gore (“Respondent”), timely filed his motion to dismiss the amended petition, arguing that the petition was improperly brought because Petitioner failed to exhaust his state court remedies. See Doc. No. 9 (citing 28 U.S.C. § 2254(b); Picard v. Connor, 404 U.S. 270,

1 275 (1971); *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008)). On March 31, 2017,
2 Petitioner filed his response in opposition to Respondent’s motion. See Doc. No. 16. On
3 July 7, 2017, the Honorable Andrew G. Schopler, United States Magistrate Judge, ordered
4 Petitioner to file proof that he has exhausted his state court remedies or show cause why
5 his case should not be dismissed for failure to exhaust.¹ See Doc. Nos. 22, 23.

6 On July 27, 2017, pursuant to 28 U.S.C. § 636(b)(1), Judge Schopler, submitted a
7 report and recommendation (“Report”) to this Court recommending that Respondent’s
8 motion to dismiss Petitioner’s habeas petition be granted. See Doc. No. 24. Judge Schopler
9 found that Petitioner failed to provide evidence that he exhausted his claims despite his
10 opportunity to do so. *Id.* Pursuant to Fed. R. Civ. P. 72(b)(2), objections to the Report were
11 due no later than August 10, 2017. No objections were timely received. Accordingly, for
12 the reasons set forth below, this Court **ADOPTS** the Magistrate Judge’s Report in its
13 entirety, and **DISMISSES WITHOUT PREJUDICE** Petitioner’s amended habeas
14 petition.

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20 ¹ The docket indicates that Judge Schopler’s order to show cause was sent to
21 Petitioner at the Vista Detention Center, in Vista, California; but was returned as
22 undeliverable. See Doc. No. 23. Here, the Court notes that “[a] party proceeding pro se
23 must keep the court and opposing parties advised as to current address. If mail directed to
24 a pro se plaintiff by the clerk at the plaintiff’s last designated address is returned by the
25 Post Office, and if such plaintiff fails to notify the court and opposing parties within 60
26 days thereafter of the plaintiff’s current address, the court may dismiss the action without
27 prejudice.” See CivLR 83.11(b); see also *Carey v. King*, 856 F.2d 1439 (9th Cir. 1988) (“A
28 party, not the district court, bears the burden of keeping the court apprised of any changes
in his mailing address.”). Sixty days have passed since the Report was returned as
undeliverable by the Post Office. Petitioner has failed to comply with CivLR 83.11
requiring that a pro se party keep the court and opposing parties advised as to his current
address.

1 **DISCUSSION**

2 The district court’s role in reviewing a magistrate judge’s report and
3 recommendation is set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28
4 U.S.C. § 636(b)(1). When a party objects to the magistrate judge’s report and
5 recommendation, the district court “shall make a de novo determination of those portions
6 of the report . . . to which objection is made,” and may “accept, reject, or modify, in whole
7 or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. §
8 636(b)(1); see also Fed. R. Civ. P. 72(b)(3).

9 When no objections are filed, the district court is not required to review the
10 magistrate judge’s report and recommendation. See *Wang v. Masaitis*, 416 F.3d 992, 1000
11 n. 13 (9th Cir. 2005) (stating that “de novo review of a [magistrate judge’s report and
12 recommendation] is only required when an objection is made”); *United States v. Reyna–*
13 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that 28 U.S.C. § 636(b)(1)(c)
14 “makes it clear that the district judge must review the magistrate judge’s findings and
15 recommendations de novo if objection is made, but not otherwise”). This rule of law is well
16 established within the Ninth Circuit and this district. See *Hasan v. Cates*, No. 11–cv–1416,
17 2011 WL 2470495 (S.D. Cal. June 22, 2011) (Whelan, T.) (adopting in its entirety, and
18 without review, a report and recommendation because neither party filed objections to the
19 report despite having the opportunity to do so); accord *Ziemann v. Cash*, No. 11–cv–2496,
20 2012 WL 5954657 (S.D. Cal. Nov. 26, 2012) (Benitez, R.); *Rinaldi v. Poulos*, No. 08–cv–
21 1637, 2010 WL 4117471 (S.D. Cal. Oct. 18, 2010) (Lorenz, J.).

22 Here, the record reflects that no party filed objections to the Report. Thus, in the
23 absence of any objections, the Court **ADOPTS** the Report. For the reasons stated in the
24 Report, which is incorporated herein by reference, the amended petition is **DISMISSED**
25 **WITHOUT PREJUDICE**. The Clerk of Court shall enter judgment reflecting the
26 foregoing.

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IT IS SO ORDERED.

DATED: September 21, 2017

A handwritten signature in black ink, appearing to read "John A. Houston", written over a horizontal line.

JOHN A. HOUSTON
United States District Judge

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