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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE ELIAS SARMIENTO,

Petitioner,

v.

CHRISTIAN PFEIFFER and
XAVIER BECERRA,

Respondents.

Case No.: 3:20-cv-00930-WQH-AGS

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Stay and Abeyance filed by Petitioner Jose Elias Sarmiento (ECF No. 4) and the Report and Recommendation issued by the Magistrate Judge (ECF No. 14).

The duties of the district court in connection with a report and recommendation of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b). The district judge must “make a de novo determination of those portions of the report . . . to which objection is made” and “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). The district court need not review de novo those portions of a Report and Recommendation to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir.

1 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (“Neither the
2 Constitution nor the [Federal Magistrates Act] requires a district judge to review, de novo,
3 findings and recommendations that the parties themselves accept as correct.”).

4 The record reflects that no objections have been filed by either party. The Court has
5 reviewed the Report and Recommendation, the record, and the submissions of the parties.

6 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 14) is
7 ADOPTED in its entirety. Petitioner’s Motion for Stay is GRANTED IN PART and
8 DENIED IN PART. Petitioner’s Motion for Stay pursuant to *Kelly v. Small*, 315 F.3d 1063
9 (9th Cir. 2003), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir.
10 2007) is GRANTED. Petitioner’s Motion for Stay pursuant to *Rhines v. Weber*, 544 U.S.
11 269 (2005) is DENIED.

- 12 1. Within 30 days of the entry of this Order, Petitioner shall file a Notice of
13 Dismissal to dismiss without prejudice his unexhausted claims (grounds two and
14 three of his First Amended Petition). If Petitioner fails to timely withdraw his
15 unexhausted claims, the Court will dismiss the entire mixed Petition.
- 16 2. The parties shall jointly file periodic status reports summarizing Petitioner’s
17 efforts to exhaust his dismissed claims. The first report shall be filed on or before
18 March 1, 2021 and subsequent reports shall be filed every three months thereafter
19 (e.g., June 1, 2021, September 1, 2021, etc.).
- 20 3. Within 45 days of the state court’s decision resolving Petitioner’s claims,
21 Petitioner shall file a motion requesting that the stay be lifted and that he be
22 granted leave to file an amended petition. The request shall include Petitioner’s
23 proposed amended petition and demonstrate that the new claims are timely
24 or relate back to the pending Petition.

25 Dated: February 16, 2021

26 
27 Hon. William Q. Hayes
28 United States District Court