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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID ERNESTO MACKEY,  
Petitioner,  
v.  
BRANDON PRICE, et al.,  
Respondents.

Case No.: 20cv0962-LAB (DEB)

**ORDER ADOPTING REPORT AND  
RECOMMENDATION, AND  
GRANTING MOTION TO DISMISS**

**[DOCKET NUMBERS 9, 14.]**

David Ernesto Mackey, who is in the custody of the State of California Department of State Hospitals, filed a petition for writ of habeas corpus under 28 U.S.C. 2254. Mackey was convicted in 1994 of forcible rape, and served his sentence. As a condition of parole, he was hospitalized as a mentally disordered offender. Before the termination of his parole in 2012, following a court trial, he was found to be suffering from a severe mental disorder and represented a substantial danger of physical harm to others, and was recommitted to Atascadero State Hospital. In 2013, Mackey pursued state habeas petitions in lower courts challenging the November 26, 2012 civil commitment order. In late 2019 and early 2020, Mackey filed petitions in San Diego County Superior Court requesting compassionate release, which were denied first for lack of venue and second because he had not provided the required documentation.

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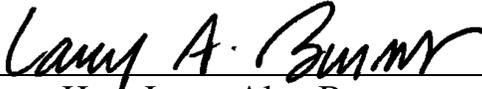
1 Respondent filed a motion to dismiss the petition as unexhausted. (Docket no. 9.)  
 2 The petition and any dispositive motions were referred to Magistrate Judge Daniel Butcher  
 3 for report and recommendation. On December 4, Judge Butcher issued his report and  
 4 recommendation (the “R&R”), recommending that the motion to dismiss be granted  
 5 because all claims in the petition were unexhausted. Mackey filed two pages of objections,  
 6 making clear he has not yet submitted his claims to the California Supreme Court. He  
 7 acknowledges the R&R’s finding that the records show he presented his claims only to the  
 8 lower California courts, and says he “will present to the California Supreme Court . . . a  
 9 petition for writ of habeas corpus . . . . in the highest state court.” (Docket no. 15  
 10 (Objections) at 1–2.) Mackey believes his collateral attack on his previous criminal  
 11 conviction amounts to exhaustion. (Docket no. 10 (Opp’n to Mot. to Dismiss), at 1–2.)  
 12 But he has already served his sentence for that conviction, and his conviction and sentence  
 13 are not the subject of his petition. Rather, he is challenging his civil commitment and  
 14 requesting compassionate release. For reasons the R&R correctly sets forth, the claims in  
 15 his petition are unexhausted, and dismissal is required.

16 Furthermore, Mackey’s challenge to the November 26, 2012 civil commitment order  
 17 is time-barred.

18 The Court **ADOPTS** the R&R and **GRANTS** the motion to dismiss. The petition is  
 19 **DISMISSED** for failure to exhaust.

20  
 21 **IT IS SO ORDERED.**

22 Dated: January 4, 2021

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 25 Hon. Larry Alan Burns  
 26 Chief United States District Judge  
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