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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD W. DEMARTHRA, JR.,  
Petitioner,  
v.  
PEOPLE OF THE STATE OF CALIFORNIA,  
Respondent.

No. 2:16-cv-0790 TLN AC P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

The instant petition challenges petitioner’s conviction in Sacramento County Superior Court for assault with a deadly weapon and related offenses. ECF No. 1 at 2. The petition sets forth three grounds for relief. In Grounds One and Two, petitioner asserts that the admission of the complaining witness’ preliminary hearing testimony, in lieu of his live testimony at trial, violated petitioner’s Sixth and Fourteenth Amendment rights. See id. at 3-4. Ground One alleges that the prosecution failed to show that the witness was unavailable at trial, while Ground Two alleges that petitioner did not have the opportunity to cross examine the witness during the

1 preliminary hearing. See id. In Ground Three, petitioner asserts that there was insufficient  
2 evidence to support his conviction for assault. Id. at 6.

3 The petition indicates that all of the above grounds were raised on direct appeal, and that  
4 Grounds One and Two were included in the petition for review filed in the California Supreme  
5 Court. See ECF No. 1 at 7. However, petitioner did not list Ground Three (insufficiency of the  
6 evidence to support the assault conviction) as one of the issues raised in his petition to the  
7 California Supreme Court. See id. Accordingly, it is not clear whether Ground Three is  
8 exhausted.

9 Petitioner is advised that the exhaustion of state court remedies is a prerequisite to the  
10 granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be  
11 waived, it must be waived explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).<sup>1</sup> A waiver  
12 of exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion  
13 requirement by providing the highest state court with a full and fair opportunity to consider all  
14 claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971);  
15 Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985).

16 Thus, if Ground Three *has* been presented to the California Supreme Court, then Ground  
17 Three is likely exhausted.

18 However, if Ground Three *has not* been presented to the California Supreme Court, then  
19 Ground Three is unexhausted, and petitioner's options are: (1) to seek a stay of all claims pending  
20 exhaustion of Ground Three; (2) to voluntarily dismiss Ground Three and seek a stay of Grounds  
21 One and Two only pending exhaustion of Ground Three; or (3) to dismiss Ground Three and  
22 proceed on Grounds One and Two without a stay.

23 If petitioner wishes the petition to be maintained as a mixed petition of both exhausted and  
24 unexhausted claims, he may seek a stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005). In  
25 Rhines, the United States Supreme Court found that a stay and abeyance of a mixed federal  
26 petition should be available only in the limited circumstance that (1) good cause is shown for a

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27 <sup>1</sup> A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. §  
28 2254(b)(2).

1 failure to have first exhausted the claims in state court, (2) the claim or claims at issue potentially  
2 have merit, and (3) there has been no indication that petitioner has intentionally delayed pursuing  
3 the litigation. Id., at 277-78.

4 Alternatively, petitioner may seek to stay an exhausted-claims-only petition pursuant to  
5 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir.  
6 2009) (citing three-step procedure of Kelly). Pursuant to the Kelly procedure, the court may stay  
7 a petition containing only exhausted claims while allowing the petitioner to proceed to state court  
8 to exhaust additional claims. Id. (citing Kelly, 315 F.3d at 1070-71). The procedure under a Kelly  
9 stay is as follows: “(1) a petitioner amends his petition to delete any unexhausted claims; (2) the  
10 court stays and holds in abeyance the amended, fully exhausted petition, allowing the petitioner  
11 the opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later  
12 amends his [federal] petition” to reincorporate the newly exhausted claims. Id. The Kelly stay-  
13 and-abeyance procedure has no requirement of a good cause showing or that the claims are  
14 potentially meritorious. However, using the Kelly procedure means that any newly exhausted  
15 claims later added to the federal petition by amendment must relate back to the claims in the  
16 stayed petition; in other words, “the Kelly procedure, unlike the Rhines procedure, does nothing  
17 to protect a petitioner’s unexhausted claims from untimeliness in the interim.” Id. at 1141.

18 In the event petitioner chooses to voluntarily dismiss Ground Three and proceed on an  
19 exhausted-claims-only petition without a stay, he is cautioned that any future attempt to amend  
20 the petition to add newly-exhausted claims might face challenges based on timeliness, the  
21 limitations applicable to second or successive petitions, and/or other procedural hurdles,  
22 depending on the circumstances.

#### 23 Directions to Petitioner

24 Within twenty-eight days from the date of this order, petitioner must file a notice with the  
25 court indicating whether Ground Three is exhausted. In other words, **petitioner must tell the**  
26 **court whether Ground Three (insufficiency of the evidence to support the assault**  
27 **conviction) was included in the petition for review filed in the California Supreme Court.**  
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1 If Ground Three *was* presented to the California Supreme Court, then Ground Three is  
2 likely exhausted, and the court will order service of the petition as is.


3 If Ground Three *was not* presented to the California Supreme Court, petitioner must  
4 inform the court as to how he wants to proceed. If petitioner wants to stay this case while  
5 exhausting Ground Three in state court, he must specify whether he seeks a stay under Rhines or  
6 under Kelly. If he wishes to proceed in this court on a mixed petition, he must file a motion for a  
7 stay addressing the Rhines factors, showing good cause for his failure to have first exhausted  
8 Ground Three in state court, that the claims potentially have merit, and that there is no evidence  
9 he has intentionally delayed pursuing the litigation. In the alternative, petitioner may request a  
10 Kelly stay. As previously noted, a Kelly stay does not guarantee the timeliness of claims  
11 exhausted in the future and then re-presented to this court.

12 If petitioner fails to respond to this order, the court will proceed to order service of the  
13 petition without a stay. If it becomes apparent that Ground Three is unexhausted, it is likely that  
14 Ground Three will ultimately be dismissed.

15 In accordance with the above, IT IS HEREBY ORDERED that:

- 16 1. Petitioner's motion to proceed in forma pauperis is granted (ECF No. 7);
- 17 2. Within twenty-eight days from the filing date of this order, petitioner shall file a notice  
18 with the court indicating whether Ground Three is exhausted. If Ground Three is  
19 unexhausted, petitioner shall inform the court how he wishes to proceed as to Ground  
20 Three.
- 21 3. If petitioner seeks a stay, within twenty-eight days of the filing date of this order,  
22 petitioner shall file a motion for a stay in accordance with this order.

23 DATED: May 16, 2016

24   
25 ALLISON CLAIRE  
26 UNITED STATES MAGISTRATE JUDGE  
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