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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH WAYNE ROBERSON,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

No. 2:17-cv-0531 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. ECF No. 5. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus unless “there is an absence of available State corrective process” or circumstances make the process ineffective to protect a petitioner’s rights. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent’s counsel.

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1 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion, thus, may not be implied or inferred. A
2 petitioner satisfies the exhaustion requirement by providing the highest state court with a full and
3 fair opportunity to consider all claims before presenting them to the federal court. Picard v.
4 Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985).

5 After reviewing the petition for habeas corpus, it appears that petitioner has failed to
6 exhaust state court remedies. ECF No. 1 at 2-13. The petition indicates that the claim has not
7 been presented to the California Supreme Court. Id. A search of the California Supreme Court's
8 docket also fails to return any evidence of a direct appeal or habeas petition filed by petitioner in
9 that court. Further, there are no allegations that state court remedies are not available to
10 petitioner. Instead, petitioner simply states that he thought his claims were "better off" in federal
11 court because they deal with his constitutional rights or that he is waiting for his attorney to act.
12 Id. at 6-7, 9-12.

13 The Ninth Circuit has held that a petitioner may seek a stay pursuant to Rhines v. Weber,
14 544 U.S. 269 (2005), to preserve the filing date of his federal petition, even when the petition
15 contains only unexhausted claims. Mena v. Long, 813 F.3d 907, 912 (9th Cir. 2016). In order to
16 obtain a stay under Rhines, petitioner must show that (1) good cause exists for his failure to have
17 first exhausted the claims in state court, (2) the claim or claims at issue potentially have merit,
18 and (3) there has been no indication that petitioner has intentionally delayed pursuing the
19 litigation. Rhines, 544 U.S. at 277-78.

20 Petitioner will be given an opportunity to notify the court that he has in fact exhausted his
21 state court remedies by presenting his claims to the California Supreme Court or that state court
22 remedies are unavailable. If petitioner cannot show that he has exhausted his state court remedies
23 or that they were unavailable, he may instead move for a stay and abeyance under Rhines.² If
24 petitioner fails to respond to this order, the court will proceed to order service of the petition
25 without a stay. Petitioner is advised that if he proceeds on the petition as is, based on his

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

28 ² A stay of the instant case is not required in order for petitioner to seek relief in the California
Supreme Court.

1 representation that the petition is fully unexhausted, the entire petition will be subject to dismissal
2 as unexhausted absent the state's express waiver of exhaustion and it is likely that the petition
3 will ultimately be dismissed.

4 Accordingly, IT IS HEREBY ORDERED that:

5 1. Petitioner's motion to proceed in forma pauperis (ECF No. 5) is granted.

6 2. Within thirty days of service of this order, petitioner shall either (1) advise the court
7 that he has exhausted his state court remedies or that they were unavailable to him or (2) file a
8 motion for stay and abeyance under Rhines while he returns to state court to exhaust his state
9 court remedies.

10 3. If petitioner does not respond to this order, the court will proceed to order service of
11 the petition without a stay and any unexhausted claims will be subject to dismissal unless the
12 respondent explicitly waives the exhaustion requirement.

13 DATED: June 13, 2017

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15 ALLISON CLAIRE
16 UNITED STATES MAGISTRATE JUDGE
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