1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 KENNETH WAYNE ROBERSON, No. 2:17-cv-0531 AC P 12 Petitioner. 13 v. **ORDER** 14 PEOPLE OF THE STATE OF CALIFORNIA, 15 Respondent. 16 17 By order filed June 13, 2017, the undersigned found that the petition appeared to be fully 18 unexhausted and petitioner was ordered to either advise the court that he had exhausted his state 19 court remedies or to file a motion for stay and abeyance under Rhines v. Weber, 544 U.S. 269 20 (2005). ECF No. 6. Petitioner was advised of what he would need to show if he was going to 21 seek a stay under Rhines. Id. He has now filed a motion requesting a stay under Rhines, but has 22 not addressed any of the three factors necessary for obtaining such a stay. ECF No. 7. 23 Accordingly, the motion will be denied and petitioner will be given an opportunity to file a 24 motion for a Rhines stay that addresses the necessary factors. 25 Petitioner is reminded that in order to obtain a stay under Rhines, he must show that (1) 26 good cause exists for his failure to have first exhausted the claims in state court, (2) the claim or 27 claims at issue potentially have merit, and (3) there has been no indication that he has 28 intentionally delayed pursuing the litigation. Rhines, 544 U.S. at 277-78. If petitioner does not

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address each of these factors, the court will proceed to order service of the petition without a stay. Petitioner is advised that if he proceeds on the petition as is, based on his representation that the petition is fully unexhausted, the entire petition will be subject to dismissal as unexhausted absent the state's express waiver of exhaustion and it is likely that the petition will ultimately be dismissed. Petitioner is further advised that he does not require and should not wait for an order from this court to exhaust his claims in state court.

## Accordingly, IT IS HEREBY ORDERED that:

- 1. Petitioner's motion for stay (ECF No. 7) is denied without prejudice.
- 2. Within thirty days of service of this order, petitioner may file a motion for stay and abeyance under <u>Rhines</u> while he returns to state court to exhaust his state court remedies.
- 3. If petitioner does not file a motion for stay or if he does not address all three <u>Rhines</u> factors, the court will proceed to order service of the petition without a stay and any unexhausted claims will be subject to dismissal unless the respondent explicitly waives the exhaustion requirement.

ALLISON CLAIRE

UNITED STATES MAGISTRATE JUDGE