

1 769 F.2d 1350, 1356 (9th Cir. 1985) (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 611
2 (1974); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Ingraham v. Wright, 430 U.S. 651, 674
3 (1977)).

4 In addition to failing to state a claim as currently pled, the petition indicates that petitioner
5 has failed to exhaust his state court remedies. ECF No. 1 at 5-7. The exhaustion of state court
6 remedies is a prerequisite to the granting of a petition for writ of habeas corpus unless “there is an
7 absence of available State corrective process” or circumstances make the process ineffective to
8 protect a petitioner’s rights. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be
9 waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion,
10 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
11 providing the highest state court with a full and fair opportunity to consider all claims before
12 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
13 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985).

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

21 If petitioner chooses to amend the petition to attempt to state a claim, then he must notify
22 the court in the petition that he has in fact exhausted his state court remedies by presenting his
23 claims to the California Supreme Court or that state court remedies are unavailable. If petitioner
24 cannot show that he has exhausted his state court remedies or that they were unavailable, he may
25 instead move for a stay and abeyance under Rhines at the same time he files the amended
26 petition. If the amended petition states a ground for relief and petitioner fails to show that he

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

1 exhausted his claims or move for a stay, the court will proceed to order service of the petition
2 without a stay. Petitioner is advised that if he proceeds without addressing the exhaustion of his
3 state court remedies, based on his representation that the petition is fully unexhausted, the entire
4 petition will be subject to dismissal as unexhausted absent the state's express waiver of
5 exhaustion and it is likely that the petition will ultimately be dismissed.

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

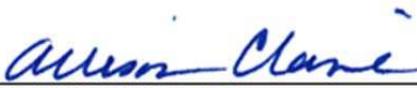
7 1. Petitioner's motion to proceed in forma pauperis (ECF No. 5) is granted.

8 2. Petitioner's application for writ of habeas corpus is dismissed with leave to amend
9 within thirty days of service of this order. Any amended petition must bear the case number
10 assigned to this action and the title "Amended Petition."

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

15 4. The Clerk of the Court is directed to send petitioner the court's form for application for
16 writ of habeas corpus.

17 DATED: June 28, 2017

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19 ALLISON CLAIRE
20 UNITED STATES MAGISTRATE JUDGE
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