



1 each of his claims in his 90-page petition. Instead of clearly and individually stating each of his  
2 claims in the court’s form application for writ of habeas corpus, petitioner refers to a brief that  
3 lists additional claims but does not clearly indicate whether each individual claim has been  
4 exhausted.<sup>1</sup> In its current form, the petition contains both exhausted and unexhausted claims.

5 The exhaustion of state court remedies is a prerequisite to the granting of a petition for  
6 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must  
7 be waived explicitly by respondents’ counsel. 28 U.S.C. § 2254(b)(3).<sup>2</sup> A waiver of exhaustion,  
8 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by  
9 providing the highest state court with a full and fair opportunity to consider all claims before  
10 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.  
11 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

12 The state court has had an opportunity to rule on the merits when the petitioner has fairly  
13 presented the claim to that court. The fair presentation requirement is met where the petitioner  
14 has described the operative facts and legal theory on which his claim is based. Picard, 404 U.S. at  
15 277-78. Generally, it is “not enough that all the facts necessary to support the federal claim were  
16 before the state courts . . . or that a somewhat similar state-law claim was made.” Anderson v.  
17 Harless, 459 U.S. 4, 6 (1982). Instead,

18 [i]f state courts are to be given the opportunity to correct alleged  
19 violations of prisoners’ federal rights, they must surely be alerted to  
20 the fact that the prisoners are asserting claims under the United States  
21 Constitution. If a habeas petitioner wishes to claim that an  
evidentiary ruling at a state court trial denied him the due process of  
law guaranteed by the Fourteenth Amendment, he must say so, not  
only in federal court, but in state court.

22 <sup>1</sup> It appears that petitioner is attempting to allege a total of six grounds for relief. See ECF  
23 No. 34 at 47. Petitioner admittedly agrees that claims two through five are unexhausted. Id.  
24 Petitioner attempts to raise the following six claims: “1) The evidence was insufficient to support  
25 his first-degree murder conviction; 2) The trial court erred by not instructing the jury sua sponte  
26 on felony murder; 3) The trial court erred in failing to instruct the jury sua sponte on the lesser  
27 included offense of voluntary and involuntary manslaughter; 4) The trial court erred in failing to  
instruct the jury sua sponte on “accomplice after the fact,” [] 5) The trial court erred in failing to  
instruct the jury sua sponte on the natural and probable consequences doctrine[;]” and 6) a claim  
for ineffective assistance of counsel. Id.

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

1 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus  
2 must include reference to a specific federal constitutional guarantee, as well as a statement of the  
3 facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152, 116 S. Ct. 2074,  
4 2081 (1996). The United States Supreme Court has held that a federal district court may not  
5 entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with  
6 respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982). A mixed petition  
7 containing both exhausted and unexhausted claims must be dismissed.

8 The court finds that petitioner has failed to exhaust state court remedies as to claims two  
9 through six. Accordingly, the petition is a mixed petition containing both exhausted and  
10 unexhausted claims and must be dismissed. Good cause appearing, petitioner will be granted  
11 thirty days to file an amended petition raising only exhausted claims.<sup>3</sup> Petitioner must clearly  
12 show that each claim has been exhausted in his amended petition.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. The Findings and Recommendations issued February 6, 2019, is VACATED;  
15 2. Petitioner’s application for writ of habeas corpus is dismissed with leave to amend  
16 within thirty days from the date of this order;<sup>4</sup>

17 3. **Petitioner must state each claim individually on the habeas form provided;**  
18 petitioner may not simply refer the court to arguments in an attached brief. For each specific  
19 claim set forth in the form, **petitioner shall attach proof that each claim has been exhausted**  
20 **with the California Supreme Court** either on direct review (in which case show where the  
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22 <sup>3</sup> Petitioner is cautioned that if he chooses to proceed on an amended petition raising only  
23 exhausted claims he will risk forfeiting consideration of the unexhausted claims in this or any  
24 other federal court. See McCleskey v. Zant, 499 U.S. 467 (1991); see also Rose, 455 U.S. at 520-  
25 21; Rule 9(b), Rules Governing Section 2254 Cases.

26 Petitioner is further cautioned that the habeas corpus statute imposes a one year statute of  
27 limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the one  
28 year period will start to run on the date on which the state court judgment became final by the  
conclusion of direct review or the expiration of time for seeking direct review, although the  
statute of limitations is tolled while a properly filed application for state post-conviction or other  
collateral review is pending. 28 U.S.C. § 2244(d).

<sup>4</sup> By setting this deadline the court is making no finding or representation that the petition is  
not subject to dismissal as untimely.

1 petition for review contains the federal claim), or in state habeas corpus by providing the state  
2 habeas petition directed to that Court as well as the ruling of that Court. Petitioner must follow  
3 these instructions; the court will not again issue them. Petitioner is cautioned that failure to  
4 follow these instructions will result in a dismissal of the petition;

5 4. Any amended petition must bear the case number assigned to this action and the title  
6 “Second Amended Petition”; and

7 5. The Clerk of the Court is directed to send petitioner the court’s form application for  
8 writ of habeas corpus.

9 Dated: February 22, 2019

10 /s/ Gregory G. Hollows  
11 UNITED STATES MAGISTRATE JUDGE  
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