

1 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES AS TO**
2 **ALL CLAIMS IN THE PETITION**

3 In addition, habeas petitioners who wish to challenge either their state court
4 conviction or the length of their confinement in state prison must first exhaust state judicial
5 remedies. 28 U.S.C. §§ 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133–34 (1987).
6 To exhaust state judicial remedies, a California state prisoner must present the California
7 Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or
8 her federal habeas petition. 28 U.S.C. §§ 2254(b), (c); *Granberry*, 481 U.S. at 133–34.
9 Moreover, to properly exhaust state court remedies a petitioner must allege, in state court,
10 how one or more of his or her federal rights have been violated. The Supreme Court in
11 *Duncan v. Henry* reasoned: “If state courts are to be given the opportunity to correct alleged
12 violations of prisoners’ federal rights, they must surely be alerted to the fact that the
13 prisoners are asserting claims under the United States Constitution.” 513 U.S. 364, 365–66
14 (1995) (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an
15 evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed
16 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in
17 state court.” *Id.* at 366 (emphasis added).

18 Of the five claims presented in the Petition, Petitioner indicates he has presented
19 claims one, two, and three to the California Supreme Court, but has not indicated that he
20 presented claims four and five to that court. (*See* Pet. at 20–26.) It appears, therefore, that
21 Petitioner has filed a “mixed” petition; that is, one which presents both exhausted and
22 unexhausted claims. In *Rose v. Lundy*, the United States Supreme Court held that a mixed
23 petition is subject to dismissal because it violates the “total exhaustion rule” required in
24 habeas petitions brought pursuant to § 2254, but that a petitioner must be permitted an
25 opportunity to cure that defect prior to dismissal. 455 U.S. 509, 514–20 (1982).

26 Having preliminarily determined the Petition contains unexhausted claims (grounds
27 four and five) and exhausted claims (grounds one, two and three), the Court notifies
28 Petitioner of his options.

1 **(i) First Option: Allege Exhaustion**

2 Petitioner may file further papers with this Court to demonstrate that he has in fact
3 exhausted the claims the Court has determined are unexhausted. If Petitioner chooses this
4 option, his papers are due no later than **July 7, 2017**. Respondent may file a reply by
5 **August 7, 2017**.

6 **(ii) Second Option: Voluntarily Dismiss the Petition**

7 Petitioner may voluntarily dismiss his entire federal petition and return to state court
8 to exhaust any unexhausted claim(s). He may thereafter file a new federal petition in this
9 Court containing only exhausted claims. *See Rose*, 455 U.S. at 520–21 (stating that a
10 petitioner who files a mixed petition may dismiss his petition to “return[] to state court to
11 exhaust his claims”). If Petitioner chooses this option, he must file a pleading with this
12 Court no later than **July 7, 2017**. Respondent may file a reply by **August 7, 2017**.

13 Petitioner is cautioned that any new federal petition must be filed before expiration
14 of the one-year statute of limitations. Ordinarily, a petitioner has one year from when his
15 conviction became final to file his federal petition, unless he can show that statutory or
16 equitable “tolling” applies. *Duncan v. Walker*, 533 U.S. 167, 176 (2001); 28 U.S.C.
17 § 2244(d).¹ The statute of limitations does not run while a properly filed state habeas corpus

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19 ¹ 28 U.S.C. § 2244(d) provides:

20 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus
21 by a person in custody pursuant to the judgment of a State court. The limitation period shall
run from the latest of—

22 (A) the date on which the judgment became final by the conclusion of direct review
23 or the expiration of the time for seeking such review;

24 (B) the date on which the impediment to filing an application created by State action
25 in violation of the Constitution or laws of the United States is removed, if the
applicant was prevented from filing by such State action;

26 (C) the date on which the constitutional right asserted was initially recognized by
27 the Supreme Court, if the right has been newly recognized by the Supreme Court
and made retroactively applicable to cases on collateral review; or

28 (D) the date on which the factual predicate of the claim or claims presented could
have been discovered through the exercise of due diligence.

1 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th
2 Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is
3 ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for
4 placement into the record] are in compliance with the applicable laws and rules governing
5 filings”); *Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005) (holding that a state
6 application for post-conviction relief which is ultimately dismissed as untimely was neither
7 “properly filed” nor “pending” while it was under consideration by the state court, and
8 therefore does not toll the statute of limitations), *as amended* 439 F.3d 993. However,
9 absent some other basis for tolling, the statute of limitations continues to run while a federal
10 habeas petition is pending. *Duncan*, 533 U.S. at 181–82.

11 **(iii) Third Option: Formally Abandon Unexhausted Claim(s)**

12 Petitioner may formally abandon his unexhausted claim(s) and proceed with his
13 exhausted one(s). *See Rose*, 455 U.S. at 510, 520–21 (stating that a petitioner who files a
14 mixed petition may “resubmit[] the habeas petition to present only exhausted claims”). If
15 Petitioner chooses this option, he must file a pleading with this Court no later than **July 7,**
16 **2017**. Respondent may file a reply by **August 7, 2017**.

17 Petitioner is cautioned that once he abandons his unexhausted claim(s), he may lose
18 the ability to ever raise it/them in federal court. *See Slack v. McDaniel*, 529 U.S. 473, 488
19 (2000) (stating that a court’s ruling on the merits of claims presented in a first § 2254
20 petition renders any later petition successive); *see also* 28 U.S.C. § 2244 (a)–(b).²

22 (2) The time during which a properly filed application for State post-conviction or other
23 collateral review with respect to the pertinent judgment or claim is pending shall not be
counted toward any period of limitation under this subsection.

24 ² 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus
25 application under § 2254 shall be dismissed unless:

26 (A) the applicant shows that the claim relies on a new rule of constitutional law, made
retroactive to cases on collateral review by the Supreme Court, that was previously
unavailable; or

27 (B) (i) the factual predicate for the claim could not have been discovered previously
28 through the exercise of due diligence; and

1 **(iv) Fourth Option: File a Motion to Stay the Federal Proceedings**

2 Petitioner may, along with a First Amended Petition, file a motion to stay this federal
3 proceeding while he returns to state court to exhaust his unexhausted claim(s). There are
4 two methods potentially available to Petitioner, the “stay and abeyance” procedure and the
5 “withdrawal and abeyance” procedure.

6 If Petitioner wishes to use the “stay and abeyance” procedure he should ask the Court
7 to stay his mixed petition while he returns to state court to exhaust. Under this procedure
8 he must demonstrate there are arguably meritorious claim(s) which he wishes to return to
9 state court to exhaust, that he is diligently pursuing his state court remedies with respect to
10 those claim(s), and that good cause exists for his failure to timely exhaust his state court
11 remedies. *Rhines v. Webber*, 544 U.S. 269, 277–78 (2005).

12 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must
13 voluntarily withdraw his unexhausted claim(s), ask the Court to stay the proceedings and
14 hold the fully-exhausted petition in abeyance while he returns to state court to exhaust, and
15 then seek permission to amend his petition to include the newly exhausted claim(s) after
16 exhaustion is complete. *King v. Ryan*, 564 F.3d. 1133, 1135 (9th Cir. 2009). Although
17 under this procedure Petitioner is not required to demonstrate good cause for his failure to
18 timely exhaust, the newly exhausted claim(s) must be either timely under the statute of
19 limitations or “relate back” to the claim(s) in the fully-exhausted petition, that is, they must
20 share a “common core of operative facts” with the previously exhausted claim(s). *King*,
21 564 F.3d at 1141 (quoting *Mayle v. Felix*, 545 U.S. 644, 659 (2005)).

22 If Petitioner chooses this fourth option, he must file a pleading with this Court no later
23 than **July 7, 2017**. Respondent may file a reply by **August 7, 2017**.

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27 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as
28 a whole, would be sufficient to establish by clear and convincing evidence that, but
for constitutional error, no reasonable factfinder would have found the applicant
guilty of the underlying offense.

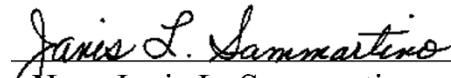
1 **CONCLUSION AND ORDER**

2 For the foregoing reasons, the Court **DISMISSES** this case **WITHOUT**
3 **PREJUDICE**. If Petitioner wishes to proceed with this case, he must, **no later than July**
4 **7, 2017**: (1) pay the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the
5 fee; **AND** (2) choose one of the options outlined above. Petitioner is cautioned that if he
6 fails to respond to this Order, the Petition will remain dismissed without prejudice.³ *See*
7 *Rose*, 455 U.S. at 522.

8 The Clerk of Court shall send a blank Southern District of California *In Forma*
9 *Pauperis* Application to Petitioner along with a copy of this Order.

10 **IT IS SO ORDERED.**

11 Dated: May 9, 2017

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13 Hon. Janis L. Sammartino
United States District Judge

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³ Although the dismissal is “without prejudice,” Petitioner is again cautioned that any later federal petition
28 may be barred by the statute of limitations. *See* 28 U.S.C. § 2244(d)(1)–(2); *see also* footnote two of this
Order, *supra*.