

OCT 03 2016

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

## NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. ELLIOTT,

Petitioner-Appellant,

v.

DWIGHT NEVEN, Warden,

Respondent-Appellee.

No. 14-17291

D.C. No. 3:11-cv-00041-MMD

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Miranda M. Du, District Judge, Presiding

Submitted September 27, 2016\*\*

Before: TASHIMA, SILVERMAN, and M. SMITH, Circuit Judges.

Nevada state prisoner Robert W. Elliott appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253. We review de novo a dismissal for failure to exhaust, *see Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2010), and we vacate and

---

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

remand.

Elliott contends that the district court erred in dismissing his habeas petition as unexhausted because it had discretion to stay the proceedings. After the district court dismissed Elliott's petition, this court held in *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016), that "a district court has the discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in *Rhines* [*v. Weber*, 544 U.S. 269 (2005)]." We, therefore, vacate and remand for the district court to determine in the first instance whether Elliott is entitled to a stay and for any further proceedings.

Elliott's request for judicial notice of state court records is granted.

In light of our disposition of this appeal, we deny Elliott's request to expand the certificate of appealability. See 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999).

**VACATED and REMANDED.**