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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SHANNON SHIMP,	)	Civil No. 12cv01537 AJB(RBB)
	)	
Petitioner,	)	<b>ORDER DENYING PETITIONER'S</b>
	)	<b>MOTION FOR STAY AND ABEYANCE</b>
v.	)	<b>FILED IN CONJUNCTION WITH</b>
	)	<b>PETITION FOR WRIT OF HABEAS</b>
DANIEL PARAMO, KAMALA HARRIS,	)	<b>CORPUS [ECF NO. 3]</b>
	)	
Respondents.	)	
_____	)	

Petitioner Shannon Shimp, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus on June 21, 2012 [ECF Nos. 1, 5].<sup>1</sup> There, Petitioner challenges his convictions for vehicular manslaughter on several bases.<sup>2</sup> In ground one, he alleges that he is actually innocent. (Id. at 9.) In ground two, he contends that the trial court erred by failing to

<sup>1</sup> Because Shimp's Petition and "Motion for Stay and Abeyance filed in Conjunction with Petition for Writ of Habeas Corpus" are not consecutively paginated, the Court will cite to each using the page numbers assigned by the electronic case filing system.

<sup>2</sup> At the same trial where Shimp was found guilty of vehicular manslaughter, he was also convicted of driving under the influence of alcohol and driving with a blood alcohol content of .08 or more and causing injury. (Lodgment No. 8, Clerk's Tr. vol. 1, 153-54, Sept. 17, 2009.) Shimp does not appear to challenge these other convictions in his federal petition.

1 instruct the jury on excusable homicide. (Id. at 18.) Petitioner  
2 asserts, in ground three, that his manslaughter convictions were  
3 obtained as a result of prosecutorial misconduct. (Id. at 30.)  
4 The fourth claim for relief is that Shimp's trial counsel was  
5 ineffective for failing to raise grounds one, two, and three. (Id.  
6 at 37.) In ground five of the Petition, he argues that his  
7 appellate counsel was ineffective for failing to raise grounds one,  
8 two, three, and four. (Id. at 38.) Finally, the sixth claim is  
9 that Shimp was wrongfully sentenced because he had "no prior moving  
10 violations of any kind." (Id. at 39.)

11 On the same day that he filed his Petition, Shimp also filed a  
12 "Motion for Stay and Abeyance Filed in Conjunction with Petition  
13 for Writ of Habeas Corpus" [ECF No. 3]. There, he asks the Court  
14 to stay his federal petition while he exhausts five of the  
15 aforementioned claims in state court. (Mot. Stay & Abeyance 1-2,  
16 ECF No. 3.)

17 On June 26, 2012, the Court issued an order setting a briefing  
18 schedule for the motion to stay [ECF No. 6]. The Court cautioned  
19 that in Petitioner's Motion for Stay, he had "not presented any  
20 facts in an attempt to demonstrate good cause for his failure to  
21 timely exhaust his state court remedies." (Order Setting Briefing  
22 Schedule 3, ECF No. 6.) Shimp was given three weeks, until July  
23 17, 2012, to file supplemental briefing to cure these deficiencies.  
24 (Id.) Respondents were also ordered to file any response to the  
25 motion by August 7, 2012. (Id.)

26 Neither Petitioner nor Respondents filed a response. On  
27 September 14, 2012, the Court held a status conference for  
28 Respondents to address why they failed to address Shimp's Motion

1 for Stay. (Mins., Sept. 14, 2012, ECF No. 9.) As a result of the  
2 hearing, the Court extended the deadline for Respondents Paramo and  
3 Harris to file a response; Petitioner was also given an extension  
4 to file a reply. (Id.)

5 On September 20, 2012, Respondents filed a "Response to Motion  
6 for Stay and Abeyance of Petition for Writ of Habeas Corpus" [ECF  
7 No. 10]. There, they argue that Shimp should not be granted a stay  
8 under Rhines v. Weber, 544 U.S. 269 (2005), because he has not  
9 shown good cause for his failure to raise his unexhausted claims in  
10 state court at an earlier time. (Resp. Mot. Stay 4, ECF No. 10.)  
11 Paramo and Harris state that Petitioner may, however, be eligible  
12 for a stay pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir.  
13 2003), overruled on other grounds by Robbins v. Carey, 481 F.3d  
14 1143, 1149 (9th Cir. 2007). Shimp did not file a reply.

15 The Court finds Petitioner's motion suitable for resolution on  
16 the papers. See S.D. Cal. Civ. R. 7.1(d)(1) (providing that  
17 motions may be decided without oral argument); Broadnax v. Cate,  
18 Civil No. 12cv560 GPC (RBB), 2012 WL 5335289, at \*2-3, (S.D. Cal.  
19 Oct. 26, 2012) (resolving motion to stay with an order instead of a  
20 report and recommendation). Upon review of Shimp's Petition, the  
21 lodgments, the Motion for Stay, and Paramo and Harris's Response to  
22 Motion, and for the reasons discussed below, Petitioner's "Motion  
23 for Stay and Abeyance Filed in Conjunction with Petition for Writ  
24 of Habeas Corpus" [ECF No. 3] is **DENIED**.

#### 25 I. FACTUAL AND PROCEDURAL BACKGROUND

26 Shimp spent the afternoon of July 22, 2008, drinking at a bar  
27 in Ramona, California. (Lodgment No. 4, People v. Shimp, No.  
28 D056650, slip op. at 2 (Cal. Ct. App. Apr. 26, 2011).) He then

1 proceeded to drive home. (Id.) While driving, he crossed a  
2 double-yellow line to pass several cars in front of him, lost  
3 control of his vehicle, and struck an oncoming car. (Id.) The  
4 driver of that vehicle, Ian Kinney, was killed. (Id.) Kinney's  
5 passenger, Tessa Medearis, was injured in the collision but  
6 survived. (Id.) Shimp's passenger, Joseph Edwards, was also  
7 killed. (Id.) At the time of the incident, Petitioner's blood-  
8 alcohol content was more than twice the legal limit. (Id.)  
9 Methamphetamine was also found in his system. (Id.)

10 On September 17, 2009, in the Superior Court of California,  
11 County of San Diego, a jury convicted Shimp of two counts of gross  
12 vehicular manslaughter while intoxicated; driving under the  
13 influence of alcohol and causing injury; and driving with a blood  
14 alcohol content of .08 or more and causing injury. (Lodgment No.  
15 8, Clerk's Tr. vol. 1, 149, 151, 153-54, Sept. 17, 2009.) The jury  
16 found that Shimp personally inflicted great bodily injury upon  
17 Joseph Edwards, Tessa Medearis, and Ian Kinney, and that Petitioner  
18 caused death or bodily injury to more than one victim. (Id.) On  
19 January 8, 2010, Shimp was sentenced to sixteen years in prison for  
20 the vehicular manslaughter of Ian Kinney. (Id. vol. 2, 291, Jan.  
21 8, 2010.) Sentencing was stayed as to the remaining convictions.  
22 (Id.)

23 Petitioner appealed the vehicular manslaughter convictions on  
24 July 23, 2010; they were affirmed by Division One of the California  
25 Court of Appeal, Fourth Appellate District, on April 26, 2011.  
26 (See Lodgment No. 1, Appellant's Opening Brief, People v. Shimp,  
27 No. D056650 (Cal. Ct. App. Apr. 26, 2011); Lodgment No. 4, People  
28 v. Shimp, No. D056650, slip op. at 1, 7.) On June 6, 2011, he

1 petitioned the California Supreme Court for review. (Lodgment No.  
2 5, Petition for Review, People v. Shimp, No. SD2010700429 (Cal.  
3 July 13, 2011).) The California Supreme Court denied the petition  
4 without opinion on July 13, 2011. (Lodgment No. 6, People v.  
5 Shimp, No. S193717, order at 1 (Cal. July 13, 2011).)

6 Shimp then filed a Petition for Writ of Habeas Corpus in this  
7 Court on June 21, 2012 [ECF No. 1]. Petitioner maintains that he  
8 has also filed a state habeas corpus petition, but provides no  
9 proof of that filing. (See Pet. 3, ECF No. 1.)

## 10 II. LEGAL STANDARD FOR EXHAUSTION

11 Before a federal court may grant habeas relief on a claim, a  
12 petitioner must exhaust all available state judicial remedies. 28  
13 U.S.C.A. § 2254(b)(1)(A) (West 2006); Rhines, 544 U.S. at 273-74  
14 (referring to total exhaustion requirement of Rose v. Lundy, 455  
15 U.S. 509, 522 (1982), abrogated on other grounds by Rhines, 544  
16 U.S. 269). A claim is exhausted only when a petitioner has fairly  
17 presented it to the state courts. Duncan v. Henry, 513 U.S. 364,  
18 365 (1995) (citing Picard v. Connor, 404 U.S. 270, 275 (1971)). To  
19 meet the fair presentation requirement, the petitioner must "alert  
20 the state courts to the fact that he [is] asserting a claim under  
21 the United States Constitution." Hiivala v. Wood, 195 F.3d 1098,  
22 1106 (9th Cir. 1999) (citing Duncan, 513 U.S. at 365-66). The  
23 petitioner must "provide the state courts with a 'fair opportunity'  
24 to apply controlling legal principles to the facts bearing upon his  
25 constitutional claim." Anderson v. Harless, 459 U.S. 4, 6 (1982)  
26 (citing Picard, 404 U.S. at 276-77). By giving state courts the  
27 "'opportunity to pass upon and correct' alleged violations of its  
28 prisoners' federal rights," comity is promoted, and disruption of

1 state judicial proceedings is prevented. Duncan, 513 U.S. at 365  
2 (quoting Picard, 404 U.S. at 275); see also Rose, 455 U.S. at 518;  
3 Fields v. Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005).

4 Constitutional claims raised in federal proceedings must be  
5 presented to the state courts first. Baldwin v. Reese, 541 U.S.  
6 27, 31-32 (2004). The highest state court must have an opportunity  
7 to consider the factual and legal bases of a petitioner's claims  
8 before they are presented to the federal court. Weaver v.  
9 Thompson, 197 F.3d 359, 364 (9th Cir. 1999) (citing Picard, 404  
10 U.S. at 276; Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996));  
11 see also Duncan, 513 U.S. at 365; Scott v. Schriro, 567 F.3d 573,  
12 582 (9th Cir. 2009); Davis v. Silva, 511 F.3d 1005, 1008 (9th Cir.  
13 2008). A claim is not exhausted if it is pending before the  
14 state's highest court. See Rose, 455 U.S. at 515 ("[A]s a matter  
15 of comity, federal courts should not consider a claim in a habeas  
16 corpus petition until after the state courts have had an  
17 opportunity to act . . . ."); Anderson v. Morrow, 371 F.3d 1027,  
18 1036 (9th Cir. 2004) ("AEDPA's exhaustion requirement entitles a  
19 state to pass on a prisoner's federal claims before the federal  
20 courts do so."). "It follows, of course, that once the federal  
21 claim has been fairly presented to the state courts, the exhaustion  
22 requirement is satisfied." Picard, 404 U.S. at 275.

23 Courts may deny an application for habeas relief on the merits  
24 even if the petitioner has not yet exhausted his state judicial  
25 remedies. 28 U.S.C.A. § 2254(b)(2). But courts have no authority  
26 to grant relief on unexhausted claims. Id. § 2254(b)(1)(A).

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III. DISCUSSION

A. Whether Shimp's Petition Should be Stayed

In his Motion for Stay, Petitioner states that he has exhausted his instructional error claim, but not his remaining claims. (Mot. Stay & Abeyance 1-2, ECF No. 3.) Accordingly, he requests a stay of his federal habeas corpus petition while he proceeds to exhaust his unexhausted claims in state court. (Id. at 2.) Shimp contends that he has diligently pursued these causes of action and that they are meritorious. (Id.) Moreover, he alleges that he has already filed a state habeas corpus petition in an attempt to exhaust his claims. (Id.)

Respondents argue that Petitioner's request for a stay may be analyzed under the tests described in Rhines and Kelly. (Resp. Mot. Stay 3, ECF No. 10.) Under the Rhines test, Respondents maintain that Shimp is not entitled to a stay because he has not shown good cause for his failure to previously exhaust his claims in state court. (Id. at 4.) Paramo and Harris submit that under Kelly, however, Petitioner may be entitled to a stay. (Id. at 4-5.)

1. **Legal standards applicable to Shimp's Motion for Stay**

A "mixed" petition contains both exhausted and unexhausted claims. See Rose, 455 U.S. at 510. As noted, Shimp states that his Petition contains exhausted and unexhausted claims. (Mot. Stay & Abeyance 2, ECF No. 3.) Respondents appear to agree. (See Resp. Mot. Stay 3, ECF No. 10 (citing to case law applicable to mixed petitions).) Indeed, the record supports these contentions. While Petitioner's instructional error claim was raised on direct appeal and in his petition for review filed with the California Supreme

1 Court, his actual innocence, prosecutorial misconduct, ineffective  
2 assistance of trial counsel, ineffective assistance of appellate  
3 counsel, and wrongful sentence claims were not. (See Lodgment No.  
4 1, Appellant's Opening Brief at i, 25, People v. Shimp, No.  
5 D056650; Lodgment No. 5, Petition for Review at i, 5, People v.  
6 Shimp, No. SD2010700429.)

7 Mixed petitions may be stayed pursuant to the tests described  
8 in either Rhines or Kelly. King v. Ryan, 564 F.3d 1133, 1141  
9 (2009). Petitioner does not articulate under which test he seeks  
10 to stay his Petition. (See generally Mot. Stay & Abeyance 1-2, ECF  
11 No. 3.) The Court will therefore analyze Shimp's request under  
12 both Rhines and Kelly.

13 **2. Whether a stay is appropriate under Rhines**

14 In Rhines, the Supreme Court held that district courts have  
15 the discretion to stay a mixed habeas petition and hold it in  
16 abeyance to allow a petitioner to present unexhausted claims to  
17 state court. Rhines, 544 U.S. at 275. "Once the petitioner  
18 exhausts his state remedies, the district court will lift the stay  
19 and allow the petitioner to proceed in federal court." Id. at 275-  
20 76. "When a petitioner has not exhausted his state remedies before  
21 filing a federal habeas petition, a district court may hold the  
22 federal petition in abeyance, issue a stay of execution, and allow  
23 the petitioner an opportunity to exhaust his state remedies."  
24 Neuschafer v. Whitley, 860 F.2d 1470, 1472 n.1 (9th Cir. 1988).  
25 Nevertheless, federal courts are not required to "tolerate needless  
26 piecemeal litigation, [or] to entertain collateral proceedings  
27 whose only purpose is to vex, harass, or delay." Sanders v. United  
28 States, 373 U.S. 1, 18 (1963).



1           The Supreme Court explained in Rhines that any stay and  
2           abeyance must be consistent with the provisions of the  
3           Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).  
4           Rhines, 544 U.S. at 276. AEDPA contains a one-year limitations  
5           period; this underscores the statute's goal of reducing delays in  
6           the execution of criminal sentences and the "'well-recognized  
7           interest in the finality of state court judgments.'" Id. (quoting  
8           Duncan v. Walker 533 U.S. 167 (2001)). The Rhines Court explained  
9           that, if granted too frequently, a stay and abeyance would  
10          undermine AEDPA's purposes. Id. at 277. Consequently, "stay and  
11          abeyance should be available only in limited circumstances." Id.

12          Still, when a petitioner shows good cause for his failure to  
13          exhaust, presents potentially meritorious claims, and demonstrates  
14          that he has not engaged in dilatory litigation tactics, "it likely  
15          would be an abuse of discretion for a district court to deny a  
16          stay." Id. at 278. "In such a case, the petitioner's interest in  
17          obtaining federal review of his claims outweighs the competing  
18          interests in finality and speedy resolution of federal petitions."  
19          Id. Rhines underscores the importance of reducing delays in the  
20          execution of state criminal sentences. Furthermore, the interest  
21          in recognizing the finality of state court judgments is fostered.  
22          Id. at 276.

23                           **a.     Good Cause**

24          Petitioner does not address the issue of good cause in his  
25          Motion for Stay, and he did not file a reply to Paramo and Harris's  
26          Response. (See generally Mot. Stay & Abeyance 1-2, ECF No. 3.) He  
27          does generally assert, however, that he has "diligently pursued his  
28

1 claims and has filed a Petition in California Superior Court on the  
2 unexhausted claims." (Id. at 2.)

3 Respondents argue that Shimp has failed to establish good  
4 cause for a stay. (Resp. Mot. Stay 4, ECF No. 10.) To support  
5 this contention, they cite the Court's June 27, 2012 Order which  
6 states, "'Petitioner has not presented any facts in an attempt to  
7 demonstrate good cause for his failure to timely exhaust his state  
8 court remedies. Although Petitioner generally maintains that he  
9 was diligent in pursuing his state court remedies, he does not  
10 allege any facts in support of this contention.'" (Id. (quoting  
11 Order Setting Briefing Schedule 3, ECF No. 6).)

12 Under Rhines, a court must consider whether "there was good  
13 cause for the petitioner's failure to exhaust his claims first in  
14 state court." Rhines, 544 U.S. at 277. Neither the Supreme Court  
15 nor the Ninth Circuit has defined what constitutes "good cause" for  
16 failure to exhaust. The Ninth Circuit merely opined that good  
17 cause requires something less than a showing of "extraordinary  
18 circumstances." Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir.  
19 2005).

20 Good cause for not previously exhausting a claim has long been  
21 relevant in deciding whether to grant a stay of a habeas petition.  
22 Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993)  
23 (holding that district court abused its discretion when it denied  
24 the petitioner's request for a stay to permit new counsel to raise  
25 claims overlooked by prior counsel); see Guillory v. Roe, 329 F.3d  
26 1015, 1018 (9th Cir. 2003) (discussing tolling and stating that  
27 "relevant measure of diligence is how quickly a petitioner sought  
28 to exhaust the claims dismissed as unexhausted, and how quickly he

1 returned to federal court after doing so[ ]"). See generally  
2 Duncan, 533 U.S. at 181 (noting that AEDPA's clear purpose was to  
3 encourage litigants to exhaust claims in state court before  
4 bringing federal habeas petition).

5       The good cause standard was recently analyzed in Wooten v.  
6 Kirkland, 540 F.3d 1019 (9th Cir. 2008). There, petitioner's  
7 attorney filed a direct appeal in the California Court of Appeal  
8 and a petition for review in the California Supreme Court, both of  
9 which were denied. Id. at 1022. Although Wooten was "under the  
10 impression" that his counsel presented all of his claims at both  
11 levels of appeal, one claim was omitted from the state supreme  
12 court petition. Id. On federal habeas review, the district court  
13 held that the omitted claim was not exhausted. Id. It denied  
14 petitioner's motion to stay and hold the case in abeyance while he  
15 returned to state court, concluding that Wooten failed to establish  
16 good cause for his failure to exhaust. Id. at 1023. The Ninth  
17 Circuit upheld the district court's decision, stating the  
18 following:

19       To accept that a petitioner's "impression" that a claim  
20 had been included in an appellate brief constitutes "good  
21 cause" would render stay-and-abey orders routine.  
22 Indeed, if the court was willing to stay mixed petitions  
23 based on a petitioner's lack of knowledge that a claim  
24 was not exhausted, virtually every habeas petitioner, at  
25 least those represented by counsel, could argue that he  
26 thought his counsel had raised an unexhausted claim and  
27 secure a stay. Such a scheme would run afoul of Rhines  
28 and its instruction that district courts should only stay  
mixed petitions in "limited circumstances."

Id. at 1024 (quoting Rhines, 544 U.S. at 277).

Wooten declined to adopt a "broad interpretation of 'good  
cause.'" Id. To do so would "allow[ ] for routine stays of mixed  
petitions[ ] [and] would also be undermining the goals of AEDPA."

1 Id. (holding that good cause was not established when petitioner  
2 mistakenly believed that his attorney exhausted all claims);  
3 compare Riner v. Crawford, 415 F. Supp. 2d 1207, 1211 (D. Nev.  
4 2006) (finding good cause, pre-Wooten, when a petitioner shows "he  
5 was prevented from raising the claim, either by his own ignorance  
6 or confusion about the law or the status of his case . . . .").

7 Here, Shimp does not address whether good cause exists for his  
8 failure to previously exhaust his new claims in state court. (See  
9 generally Mot. Stay & Abeyance 1-2, ECF No. 3.) While he generally  
10 maintains that he has "diligently pursued his claims and has filed  
11 a Petition in California Superior Court on the unexhausted  
12 claims[,]" he does not explain how he acted diligently. (See id.  
13 at 2.) Absent any explanation from Shimp, the Court cannot  
14 conclude that he has shown good cause for his failure to exhaust.  
15 See Velasquez v. Virga, No. 1:12-cv-01326 AWI MJS HC, 2012 WL  
16 4210453, at \*2 (E.D. Cal. Sept. 18, 2012) ("Petitioner provides no  
17 excuse or reasoning for not presenting the claims to the California  
18 Supreme Court. This Court is bound to find that he has not shown  
19 good cause for a stay under Rhines."); Peregrina v. Knipp, No.  
20 1:11-cv-02139 MJS HC, 2012 WL 3879935, at \*2 (E.D. Cal. Sept. 6,  
21 2012) ("Inasmuch as Petitioner provides no explanation for why he  
22 did not present the claim to the California Supreme Court, this  
23 Court is bound to find that he has not shown good cause for a stay  
24 under Rhines."). Further, Shimp provides no evidence showing that  
25 he actually filed a state habeas corpus petition. (See generally  
26 Mot. Stay & Abeyance 1-2, ECF No. 3.)

27 Moreover, the Court infers from Petitioner's conduct that he  
28 has abandoned any attempt to seek a stay under Rhines. Shimp was

1 warned in the Court's June 26, 2012 Order that he had failed to  
2 establish good cause to stay his Petition. (Order Setting Briefing  
3 Schedule 3, ECF No. 6 ("Nonetheless, Petitioner has not presented  
4 any facts in an attempt to demonstrate good cause for his failure  
5 to timely exhaust his state court remedies.")) Sua sponte, the  
6 Court gave Petitioner an opportunity to file additional briefing to  
7 establish good cause. (Id.) Shimp chose not to supplement his  
8 motion.

9 Because Petitioner has failed to show good cause for his  
10 failure to exhaust, the Court need not consider whether his  
11 arguments are plainly meritless or whether he engaged in  
12 intentionally dilatory litigation tactics. Wooten, 540 F.3d at  
13 1023 ("[T]he district court did not abuse its discretion in  
14 concluding that Wooten did not have 'good cause' for failing to  
15 exhaust his cumulative error claim. As a result, we need not reach  
16 the other two factors in the Rhines test."). Thus, to the extent  
17 Shimp seeks a stay under Rhines, his "Motion for Stay and Abeyance  
18 Filed in Conjunction with Petition for Writ of Habeas Corpus" [ECF  
19 No. 3] is **DENIED**.

20 **3. Whether a stay is appropriate under Kelly**

21 Alternatively, a mixed petition may be stayed pursuant to the  
22 three-step approach outlined in Kelly v. Small, 315 F.3d 1063.  
23 Under this method, a petitioner must first amend his petition to  
24 remove any unexhausted claims. King, 564 F.3d at 1135 (citing  
25 Kelly, 315 F.3d at 1070-71). Next, "the court stays and holds in  
26 abeyance the amended, fully exhausted petition, allowing the  
27 petitioner the opportunity to proceed to state court to exhaust the  
28 deleted claims . . . ." (Id.) After they are exhausted, the

1 petitioner amends the original petition to include the newly-  
2 exhausted claims. (Id.) A Kelly stay is appropriate when an  
3 outright dismissal of the entire petition will make it difficult  
4 for the petitioner to return to federal court and raise any claims  
5 within AEDPA's one-year statute of limitations. King, 564 F.3d at  
6 1141.

7 "A petitioner seeking to use the Kelly procedure will be able  
8 to amend his unexhausted claims back into his federal petition once  
9 he has exhausted them only if those claims are determined to be  
10 timely. And demonstrating timeliness will often be problematic  
11 under the now-applicable legal principles." Id. at 1140-41. A  
12 petitioner proceeding under Kelly must therefore amend his petition  
13 to re-allege his deleted claims within AEDPA's one-year statute of  
14 limitations. Solorzano v. Small, No. 1:08-cv-01949 MJS HC, 2012 WL  
15 1076099, at \*3 (E.D. Cal. Mar. 29, 2012); Rodriguez v. Small, No.  
16 1:09-cv-00424 YNP [DLB] (HC), 2009 WL 3763531, at \*1 (E.D. Cal.  
17 Nov. 9, 2009); Faulkner v. Mule Creek State Prison, No.  
18 1:08-cv-00806 YNP DLB (HC), 2009 WL 1844329, at \*2 (E.D. Cal. June  
19 26, 2009).

20 **a. Statute of limitations**

21 Shimp does not request a Kelly stay, nor does he request to  
22 amend his Petition to withdraw his unexhausted claims. (See  
23 generally Mot. Stay & Abeyance 1-2, ECF No. 3.) Rather,  
24 Respondents raise the issue in their September 20, 2012 Response to  
25 Motion. (See Resp. Mot. Stay 4, ECF No. 10.) There, Paramo and  
26 Harris maintain that Petitioner must amend his petition before the  
27 expiration of the statute of limitations. (Id.)

28

1 Respondents state that the California Supreme Court denied  
2 Shimp's petition for review on July 13, 2011. (Id.) "Adding  
3 ninety days for certiorari, . . . the date of finality is October  
4 11, 2011. Shimp has one year from that date, that is until October  
5 11, 2012, in which to amend his fully exhausted claims back into  
6 his federal petition." (Id. at 4-5.) Respondents contend that  
7 although Petitioner alleges that he filed a writ of habeas corpus  
8 in state court prior to that date, they were unable to locate that  
9 petition. (Id. at 5 n.1.)<sup>3</sup>

10 A petitioner seeking to use the Kelly procedure and amend his  
11 petition must demonstrate that the unexhausted claims are timely.  
12 King, 564 F.3d at 1140-41. Shimp's Petition is subject to the  
13 Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996  
14 because it was filed after April 24, 1996. 28 U.S.C.A. § 2244  
15 (West 2006); Woodford v. Garceau, 538 U.S. 202, 204 (2003) (citing  
16 Lindh v. Murphy, 521 U.S. 320, 326 (1997)). All federal habeas  
17 petitions are subject to AEDPA's one-year statute of limitations.  
18 As amended, § 2244(d) provides:

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

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

26 <sup>3</sup> Respondents filed their response on September 20, 2012,  
27 twenty-one days prior to the expiration of the statute of  
28 limitations. (See id. at 1.) Although expiration of the  
limitations period was imminent, they did not discuss how this  
would affect Shimp's request for a stay. (See id. at 1-5.) After  
the statute of limitations lapsed, Respondents did not file a  
supplemental brief clarifying whether they still did not oppose  
Shimp's request to stay his Petition, or the extent to which  
statutory tolling, equitable tolling, or the relation-back doctrine  
applied.

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

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

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

9 28 U.S.C.A. § 2244(d)(1) (West 2006).

10 On April 26, 2011, the California Court of Appeal issued its  
11 opinion on Petitioner's direct appeal from the judgment of  
12 conviction. (Lodgment No. 4, People v. Shimp, No. D056650, slip  
13 op. at 1.) The court affirmed the superior court's judgment. (Id.  
14 at 1, 7.) Shimp filed a petition for review, which the California  
15 Supreme Court denied on July 13, 2011. (Lodgment No. 5, Petition  
16 for Review, People v. Shimp, No. SD2010700429; Lodgment No. 6,  
17 People v. Shimp, No. S193717, order at 1.) He did not file a  
18 petition for a writ of certiorari with the United States Supreme  
19 Court.

20 United States Supreme Court Rule 13 provides that a petition  
21 for certiorari must be filed within ninety days of the entry of an  
22 order denying discretionary review by the state supreme court. See  
23 S. Ct. R. 13. When a habeas petitioner seeks discretionary review  
24 by the state's highest court but does not file a petition with the  
25 United States Supreme Court, the judgment becomes final when the  
26 prisoner's time to petition the Supreme Court expires. See  
27 Gonzalez v. Thaler, \_\_ U.S. \_\_, \_\_, 132 S. Ct. 641, 653-54 (2012).

28



1 Shimp's judgment became final for the purposes of AEDPA on  
2 October 11, 2011, ninety days after the California Supreme Court  
3 denied his petition for review. See id.; see also S. Ct. R. 13.  
4 Pursuant to § 2244(d), the statute of limitations for federal  
5 habeas corpus began to run on October 12, 2011, the day after the  
6 judgment became final. 28 U.S.C.A. § 2244(d)(1)(A); see Corjasso  
7 v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (explaining that the  
8 one-year statute of limitations under AEDPA begins to run the day  
9 after the conviction becomes final). The statute of limitations  
10 period would therefore have expired on October 11, 2012. See  
11 Patterson v. Stewart, 251 F.3d 1243, 1245-46 (9th Cir. 2001)  
12 (quoting Fed. R. Civ. P. 6(a)) ("In computing any period of time  
13 prescribed or allowed . . . by any applicable statute, the day of  
14 the act, event, or default from which the designated period of time  
15 runs shall not be included.") Thus, at the time Shimp filed his  
16 federal petition and motion to stay on June 21, 2012, AEDPA's one-  
17 year statute of limitations had not expired.

18 Even so, Petitioner did not complete any of the steps required  
19 by Kelly prior to the expiration of AEDPA's one-year statute of  
20 limitations. See Solorzano, 2012 WL 1076099, at \*3 (noting that a  
21 petitioner must withdraw his unexhausted claims from his federal  
22 petition, exhaust them in state court, and amend them back into his  
23 federal petition prior to the expiration of the statute of  
24 limitations); Rodriguez, 2009 WL 3763531, at \*1 (same); Faulkner,  
25 2009 WL 1844329, at \*2 (same). Shimp made no attempt to withdraw  
26 his unexhausted claims from his Petition prior to October 11, 2012.  
27 Even assuming the Court would have allowed Petitioner to amend his  
28 Petition prior to October 11, 2012, Shimp provides no evidence that

1 his new claims were fully exhausted by that date. Finally, he did  
2 not attempt to amend his petition to re-allege any newly-exhausted  
3 claims. Accordingly, Petitioner has failed to meet the timeliness  
4 requirement under Kelly.

5 A federal petition for writ of habeas corpus may be dismissed  
6 with prejudice when it was not filed within AEDPA's one-year  
7 statute of limitations. Jiminez v. Rice, 276 F.3d 478, 483 (9th  
8 Cir. 2001). The statute of limitations is a threshold issue that  
9 must be resolved before the merits of individual claims. White v.  
10 Klitzkie, 281 F.3d 920, 921-22 (9th Cir. 2002). Shimp has not  
11 satisfied the test for a stay under Kelly; nevertheless, a stay may  
12 be available, if he can show he is eligible for statutory or  
13 equitable tolling or that an amended petition that includes his  
14 newly exhausted claims will relate back to his original claim for  
15 habeas relief.

16 **i. Statutory tolling**

17 Neither Petitioner nor Respondents address whether statutory  
18 tolling applies. As discussed, however, Shimp does state that  
19 after his petition for review was denied by the California Supreme  
20 Court on July 13, 2011, he subsequently filed a state habeas corpus  
21 petition to exhaust his unexhausted claims. (Mot. Stay & Abeyance  
22 2, ECF No. 3.) That petition, if it exists, may provide a basis  
23 for statutory tolling.

24 The statute of limitations under AEDPA is tolled during  
25 periods in which a "properly filed" habeas corpus petition is  
26 "pending" in the state court. 28 U.S.C.A. § 2244(d)(2). The  
27 statute specifically provides, "The time during which a properly  
28 filed application for State post-conviction or other collateral

1 review with respect to the pertinent judgment or claim is pending  
2 shall not be counted toward any period of limitation under this  
3 subsection." Id.; see also Pace v. DiGuglielmo, 544 U.S. 408, 410  
4 (2005). "[A]n application is 'properly filed' when its delivery  
5 and acceptance are in compliance with the applicable laws and rules  
6 governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000)  
7 (explaining that typical filing requirements include all relevant  
8 time limits).

9       The interval between the disposition of one state petition and  
10 the filing of another may be tolled under "interval tolling."  
11 Carey v. Saffold, 536 U.S. 214, 223 (2002). "[T]he AEDPA statute  
12 of limitations is tolled for 'all of the time during which a state  
13 prisoner is attempting, through proper use of state court  
14 procedures, to exhaust state court remedies with regard to a  
15 particular post-conviction application.'" Nino v. Galaza, 183 F.3d  
16 1003, 1006 (9th Cir. 1999) (quoting Barnett v. Lamaster, 167 F.3d  
17 1321, 1323 (10th Cir. 1999)); see also Carey, 536 U.S. at 219-22.  
18 The statute of limitations is tolled from the time the first state  
19 habeas petition is filed until state collateral review is  
20 concluded, but it is not tolled before the first state collateral  
21 challenge is filed. Thorson v. Palmer, 479 F.3d 643, 646 (9th Cir.  
22 2007) (citing Nino, 183 F.3d at 1006).

23       Here, while Shimp claims to have filed a state habeas corpus  
24 petition, he has not provided the Court with any evidence  
25 supporting this assertion. (See Pet. 3, ECF No. 1; see also Mot.  
26 Stay & Abeyance 1-2, ECF No. 3.) In the seven months since his  
27 Petition and Motion for Stay were simultaneously filed, Petitioner  
28 has failed to provide this Court with a case number, a copy of the

1 state court filing, an identification of the county in which it was  
2 filed, or a filing date. Since filing his federal petition, Shimp  
3 has had ample time to supplement his motion, but he has chosen not  
4 to do so. Absent any evidence of post-conviction or other  
5 collateral review, Petitioner is not entitled to statutory tolling.  
6 See Allen v. Paramo, No. 1:12-CV-01235 AWI GSA HC, 2012 WL 6516767,  
7 at \*3 (E.D. Cal. Dec. 13, 2012); Williams v. Allison, No. ED CV  
8 12-0036 GHK (FMO), 2012 WL 3779094, at \*4 (C.D. Cal. July 30,  
9 2012); Vigil v. Gipson, No. CV 11-10360 RGK (JCG), 2012 WL 1163633,  
10 at \*3 (C.D. Cal. Mar. 13, 2012). Shimp has failed to meet his  
11 burden of proving that a properly filed state habeas corpus  
12 petition tolled AEDPA's one-year statute of limitations. See Banjo  
13 v. Ayers, 614 F.3d 964, 967 (9th Cir. 2010) (citing Smith v.  
14 Duncan, 297 F.3d 809, 814 (9th Cir. 2002)) (holding that a  
15 petitioner has the burden of demonstrating that the limitations  
16 period was sufficiently tolled).

17 **ii. Equitable tolling**

18 Neither the Petitioner nor the Respondents address whether  
19 equitable tolling applies. Equitable tolling of the statute of  
20 limitations is appropriate when the petitioner can show "(1) that  
21 he has been pursuing his rights diligently, and (2) that some  
22 extraordinary circumstance stood in his way." Holland v. Florida,  
23 560 U.S. \_\_, \_\_, 130 S. Ct. 2549, 2562 (2010) (quoting Pace, 544  
24 U.S. at 418); see also Lawrence v. Florida, 549 U.S. 327, 335  
25 (2007). The petitioner bears the burden of establishing the  
26 elements. Roberts v. Marshall, 627 F.3d 768, 771 (9th Cir. 2010).  
27 A petitioner is entitled to equitable tolling of AEDPA's statute of  
28 limitations where "extraordinary circumstances beyond a prisoner's

1 control make it impossible'" to file a timely petition. Spitsyn v.  
2 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (quoting Brambles v.  
3 Duncan, 330 F.3d 1197, 1202 (9th Cir. 2003)).

4 "[T]he threshold necessary to trigger equitable tolling  
5 [under AEDPA] is very high, lest the exceptions swallow the rule.'" Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting  
6 United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000)).  
7 The failure to file a timely petition must be the result of  
8 external forces, not the result of the petitioner's lack of  
9 diligence. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).  
10 "Determining whether equitable tolling is warranted is a  
11 'fact-specific inquiry.'" Spitsyn, 345 F.3d at 799 (quoting Frye  
12 v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)). If a petitioner  
13 makes a "'good-faith allegation that would, if true, entitle him to  
14 equitable tolling[,]" the petitioner should receive an evidentiary  
15 hearing. Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006)  
16 (alteration in original) (quoting Laws v. LaMarque, 351 F.3d 919,  
17 921 (9th Cir. 2003)).

18  
19 Shimp does not allege that he is entitled to equitable  
20 tolling. (See generally Mot. Stay & Abeyance 1-2, ECF No. 3.) He  
21 claims to have filed a state habeas corpus petition, but Petitioner  
22 provides no proof that he filed the petition. (See generally id.)  
23 Thus, there is no indication that he has pursued his actual  
24 innocence, prosecutorial misconduct, ineffective assistance of  
25 trial counsel, ineffective assistance of appellate counsel, or  
26 wrongful sentencing claims in state court, whether diligently or  
27 otherwise. Further, except for the ineffective assistance of  
28 appellate counsel claim, Shimp's other claims could have been

1 raised on direct appeal and prior to filing his federal Petition  
2 for Writ of Habeas Corpus. See Holland, 560 U.S. at \_\_, 130 S. Ct.  
3 at 2562; (see also Lodgment No. 1, Appellant's Opening Brief at i,  
4 People v. Shimp, No. D056650; Lodgment No. 5, Petition for Review  
5 at i, People v. Shimp, No. SD2010700429.) Petitioner would not be  
6 expected to question his appellate attorney's actions while he was  
7 represented, but Shimp provides no evidence that he filed a state  
8 habeas corpus petition after the California Supreme Court denied  
9 his petition for review. See Doe v. Busby, 661 F.3d 1001, 1012-15  
10 (9th Cir. 2010) (discussing equitable tolling and what is  
11 reasonable diligence when faced with egregious attorney  
12 misconduct). Accordingly, Petitioner has not demonstrated that he  
13 was reasonably diligent in pursuing these claims or that  
14 extraordinary circumstances "stood in his way." See Holland, 560  
15 U.S. at \_\_, 130 S. Ct. at 2562.

16 **b. Relation back**

17 Neither party addresses whether Shimp's new claims relate back  
18 to his exhausted claim of instructional error.

19 The Federal Rules of Civil Procedure apply to federal habeas  
20 cases through Federal Rule of Civil Procedure 81(a)(4), 28 U.S.C. §  
21 2242, and Habeas Corpus Rule 12. See 28 U.S.C.A. § 2242 (West  
22 2012); Rules Governing § 2254 Cases, Rule 12, 28 U.S.C. foll. §  
23 2254; Fed. R. Civ. P. 81(a)(4). "Amendments made after the statute  
24 of limitations has run relate back to the date of the original  
25 pleading if the original and amended pleadings '[arise] out of the  
26 conduct, transaction, or occurrence." Mayle v. Felix, 545 U.S.  
27 644, 655 (2005) (citing Fed. R. Civ. P. 15(c)(2)). The applicable  
28 test is whether the claim arises out of a "common 'core of

1 operative facts' uniting the original and newly asserted claims."  
2 Id. at 659 (citations omitted).

3 A claim does not arise out of a common core of operative facts  
4 when the claim is "'supported by facts that differ in both time and  
5 type from those the original pleading set forth.'" Schneider v.  
6 McDaniel, 674 F.3d 1144, 1150 (9th Cir. 2012) (citing Mayle, 545  
7 U.S. at 650). "If the newly exhausted claim is not timely under  
8 the AEDPA or the relation-back doctrine does not apply, it may not  
9 be added to the existing petition and a stay is inappropriate."  
10 Garcia v. Evans, No. 1:08-cv-1819 AWI DLB HC, 2012 U.S. Dist. LEXIS  
11 3620, at \*5-6 (E.D. Cal. Jan. 6, 2012).

12 In his motion, Petitioner does not address whether his  
13 unexhausted claims "relate back" to his sole exhausted claim of  
14 instructional error. (See generally Mot. Stay & Abeyance 1-2, ECF  
15 No. 3.) "As the moving party, Petitioner bears the burden of  
16 presenting or demonstrating these other claims 'relate back.'"  
17 Zaragoza v. Martel, No. 09cv01598-DMS (WMc), 2011 WL 1486528, at \*3  
18 (S.D. Cal. Jan. 31, 2011) (citing King, 564 F.3d at 1135-43); see  
19 also Henry v. Cate, NO. CIV. 10-2398-JLS WVG, 2011 WL 7461905, \*2  
20 (S.D. Cal. Aug. 22, 2011) (holding that petitioner bears the burden  
21 of proving relation back); Olivera v. Scribber, No. CV F 04-5217  
22 OWW WMW HC, 2008 WL 828748, at \*7 (E.D. Cal. Mar. 27, 2008) (same).  
23 Absent any showing that his new claims are related to his  
24 instructional error claim, Shimp fails to meet the threshold for  
25 invoking the relation-back doctrine. See Zaragoza v. Martel, 2011  
26 WL 1486528, at \*3. Thus, to the extent Petitioner seeks to stay  
27 his Petition under Kelly, his "Motion for Stay and Abeyance Filed  
28

1 in Conjunction with Petition for Writ of Habeas Corpus" [ECF No. 3]  
2 is **DENIED**.

3 **IV. CONCLUSION**

4 Shimp's Petition is a mixed petition, and therefore it may be  
5 stayed under either Rhines or Kelly. Petitioner has failed to  
6 establish good cause for his failure to present the unexhausted  
7 claims to the California Supreme Court, pursuant to Rhines.  
8 Additionally, AEDPA's statute of limitations has expired, and Shimp  
9 has not sufficiently demonstrated that he is entitled to statutory  
10 or equitable tolling, or that the relation-back doctrine applies to  
11 his new claims. As a result, he is not entitled to a stay under  
12 Kelly. Petitioner's "Motion for Stay and Abeyance Filed in  
13 Conjunction with petition for Writ of Habeas Corpus" [ECF No. 3] is  
14 **DENIED**.

15  
16 Dated: February 11, 2013

  
RUBEN B. BROOKS  
United States Magistrate Judge

17  
18 cc: Judge Battaglia  
19 All parties of record  
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