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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD VINCENT ROOD,

Petitioner,

No. 2:12-cv-1476 GGH P

vs.

GARY SWARTHOUT,

Respondent.

ORDER

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

The petition contains one claim that appears fully exhausted, however petitioner also filed a motion to appoint counsel. Petitioner requests the appointment of counsel to look into new evidence that has been recently discovered so petitioner may bring additional claims. However, petitioner has not provided sufficient information to warrant the appointment of

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1 counsel.¹ There currently exists no absolute right to appointment of counsel in habeas
2 proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, 18 U.S.C.
3 § 3006A authorizes the appointment of counsel at any stage of the case “if the interests of justice
4 so require.” See Rule 8(c), Fed. R. Governing § 2254 Cases. In the present case, the court does
5 not find that the interests of justice would be served by the appointment of counsel at the present
6 time.

7 Petitioner may choose to exhaust the new claims himself in state court and then
8 amend the instant federal petition or proceed with the sole claim in the instant petition. In Rhines
9 v. Weber, 544 U.S. 269, 125 S.Ct. 1528 (2005) the United States Supreme Court found that a
10 stay and abeyance of a mixed federal petition should be available only in the limited
11 circumstance that good cause is shown for a failure to have first exhausted the claims in state
12 court, that the claim or claims at issue potentially have merit and that there has been no
13 indication that petitioner has been intentionally dilatory in pursuing the litigation. Rhines, supra,
14 at 277-78, 125 S.Ct at 1535.

15 If petitioner wishes to stay this action, he shall file a motion addressing the Rhines
16 factors. In the alternative, petitioner may proceed with a stay request as outlined in King v.
17 Ryan, 564 F.3d 1133 (9th Cir. 2009) citing Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). In
18 King, the Ninth Circuit held that in addition to the stay procedure authorized in Rhines, district
19 courts also have discretion to permit petitioners to follow the three-step stay-and-abeyance
20 procedure approved in Calderon v. U.S. Dist. Ct. (Taylor), 134 F.3d 981, 986 (9th Cir. 1998) and
21 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). Pursuant to the King procedure, (1) a petitioner
22 amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance
23 the amended, fully exhausted petition, allowing the petitioner the opportunity to proceed to state
24 court to exhaust the deleted claims; and (3) the petitioner later amends his petition and

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26 ¹ Petitioner states that the trial judge’s husband was a detective in the police department that arrested petitioner.

