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2                   IN THE UNITED STATES DISTRICT COURT  
3                   FOR THE NORTHERN DISTRICT OF CALIFORNIA

4 RAYMOND E. LOPEZ,

No. C 13-0649 TEH (PR)

5                   Petitioner,

ORDER GRANTING PETITIONER'S  
APPLICATION TO PROCEED IN FORMA  
6 PAUPERIS; DENYING WITHOUT  
7 PREJUDICE REQUEST TO STAY  
8 FEDERAL PROCEEDINGS

v.

9 GREG D. LEWIS, Warden,

10                   Respondent.

Docket ## 2, 3

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United States District Court  
For the Northern District of California

On February 13, 2013, Petitioner Raymond E. Lopez, an inmate at Pelican Bay State Prison, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On the same date, Petitioner filed an application to proceed in forma pauperis (IFP) and a request to stay his petition in order to exhaust unexhausted claims. For the following reasons, the Court grants Petitioner's application to proceed IFP and DENIES WITHOUT PREJUDICE his request to stay his petition.

I

Petitioner's federal petition provides the following information.

On July 17, 2009, the Superior Court of Santa Clara County sentenced Petitioner to twenty-six years to life in prison pursuant to a conviction by a jury on one count of first degree murder with the personal use of a deadly weapon. In 2010, the California Court of Appeal affirmed the judgment. In his petition for review in the California Supreme Court, Petitioner presented two claims: (1) the

1 finding of premeditation and deliberation was based on insufficient  
2 evidence; and (2) the trial court gave the jury inadequate answers  
3 to its questions. On December 14, 2011, his petition for review was  
4 denied by the California Supreme Court. Petitioner filed the  
5 instant federal petition on February 13, 2013.

6 II

7 This Court may entertain a petition for a writ of habeas  
8 corpus "in behalf of a person in custody pursuant to the judgment of  
9 a State court only on the ground that he is in custody in violation  
10 of the Constitution or laws or treaties of the United States." 28  
11 U.S.C. § 2254(a). It shall "award the writ or issue an order  
12 directing the respondent to show cause why the writ should not be  
13 granted, unless it appears from the application that the applicant  
14 or person detained is not entitled thereto." Id. § 2243. Summary  
15 dismissal is appropriate only where the allegations in the petition  
16 are vague or conclusory, palpably incredible, or patently frivolous  
17 or false. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

18 The petition alleges seven claims, only one of which  
19 appears to have been exhausted. In his brief request for a stay,  
20 Petitioner merely indicates, "I have other constitutional violations  
21 of structural dimensions, that my appellate attorney failed to  
22 present on my direct appeal, and I need to present these claims to  
23 the state courts in order to further present them before this  
24 court." The request for a stay does not indicate what claims  
25 Petitioner wishes to exhaust, if the claims are close to being  
26 exhausted or even if Petitioner has filed a petition in state court.

1           There are two kinds of stays available in a habeas action:  
2 the Rhines stay and the King/Kelly stay.<sup>1</sup> A stay under Rhines v.  
3 Weber, 544 U.S. 269 (2005), "is only appropriate when the district  
4 court determines there was good cause for the petitioner's failure  
5 to exhaust his claims first in state court," the claims are not  
6 meritless, and there are no intentionally dilatory litigation  
7 tactics by the petitioner. Id. at 277-78. Any such stay must be  
8 limited in time to avoid indefinite delay. Id.

9           The King/Kelly stay is the second kind of stay and is an  
10 alternative method to deal with a petitioner who has some  
11 unexhausted claims he wants to present in his federal habeas action.  
12 Under the procedure outlined in Kelly v. Small, 315 F.3d 1063 (9th  
13 Cir. 2003), overruled on other grounds by Robbin v. Carey, 481 F.3d  
14 1143 (9th Cir. 2007), "(1) a petitioner amends his petition to  
15 delete any unexhausted claims; (2) the court stays and holds in  
16 abeyance the amended, fully exhausted petition, allowing the  
17 petitioner the opportunity to proceed to state court to exhaust the  
18 deleted claims; and (3) the petitioner later amends his petition and  
19 re-attaches the newly-exhausted claims to the original petition."  
20 King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009) (citing Kelly, 315  
21 F.3d at 1070-71). A petitioner seeking to avail himself of the  
22 Kelly three-step procedure is not required to show good cause as

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25           <sup>1</sup>Litigants and courts often refer to the procedure as a "stay and  
26 abeyance." The phrase refers to the district court "stay[ing] the  
27 petition and hold[ing] it in abeyance while the petitioner returns to  
28 state court to exhaust." Rhines v. Weber, 544 U.S. 269, 275 (2005).  
For convenience, the court refers to the combined procedure as a stay.

1 under Rhines, but rather must eventually show that the amendment of  
2 any newly exhausted claims back into the petition satisfies both  
3 Mayle v. Felix, 545 U.S. 644, 659 (2005), by sharing a "common core  
4 of operative facts" and Duncan v. Walker, 533 U.S. 167 (2001), by  
5 complying with the statute of limitations. Id. at 1141-43.

6           Petitioner does not satisfy the requirements for a stay  
7 under Rhines because the failure of appellate counsel to present the  
8 claims to state court does not amount to good cause for Petitioner  
9 not to have exhausted them before filing his federal petition. See  
10 Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008) (upholding  
11 denial of stay because petitioner's incorrect impression that  
12 counsel had raised claims to the California Supreme Court on direct  
13 appeal did not establish good cause under Rhines for failure to  
14 exhaust claims earlier). Any failure of counsel to present the  
15 claims fails to explain why Petitioner did not present the claims to  
16 state court in a habeas petition himself. Furthermore, Petitioner  
17 does not indicate that the claims he wishes to exhaust are not  
18 meritless and that he has not engaged in intentional dilatory  
19 litigation tactics.

20           Petitioner's motion also does not suffice to obtain a  
21 King/Kelly stay because it appears that his petition contains  
22 exhausted and unexhausted claims; under King/Kelly, the petition  
23 must contain only unexhausted claims.

24           Therefore, Petitioner's request for a stay is DENIED  
25 WITHOUT PREJUDICE to refileing a new motion for a stay that complies  
26 with the requirements under Rhine or King/Kelly. A stay pursuant to  
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1 King/Kelly does not toll the federal limitations period with respect  
2 to the unexhausted claims. See King, 564 F.3d at 1141 (explaining  
3 that demonstrating timeliness when requesting amendment of newly  
4 exhausted claims back into federal petition often will be  
5 problematic given the AEDPA one-year statute of limitations).

6 III

7 For the foregoing reasons and for good cause shown,

8 1. Petitioner's motion for leave to proceed IFP is  
9 GRANTED. (Docket #2).


10 2. Petitioner's request for a stay is DENIED WITHOUT  
11 PREJUDICE. (Docket #3).

12 3. Within twenty eight (28) days from the date of this  
13 Order, Petitioner must either pursue one of the options described  
14 above or inform the Court that he only wishes to proceed on the  
15 exhausted claims that are presented in his petition. If Petitioner  
16 chooses this last option, he must indicate which of the claims in  
17 his petition are exhausted.

18 4. This Order terminates Docket ## 2 and 3.

19 IT IS SO ORDERED.

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21 DATED 3/18/2013

  
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THELTON E. HENDERSON  
United States District Judge

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