

1 him a stay when his unexhausted claims are plainly meritless.
2 Cf. 28 U.S.C. § 2254(b)(2) (“An application for a writ of
3 habeas corpus may be denied on the merits, notwithstanding
4 the failure of the applicant to exhaust the remedies available
5 in the courts of the State”).

6 Rhines, 544 U.S. at 277. The Court went on to state that “it likely would be an abuse of
7 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner
8 had good cause for his failure to exhaust, his unexhausted claims are potentially
9 meritorious, and there is no indication that the petitioner engaged in intentionally dilatory
10 litigation tactics.” *Id.* at 278.

11 “[G]ood cause turns on whether the petitioner can set forth a reasonable excuse,
12 supported by sufficient evidence, to justify [the] failure” to exhaust his claims in state court.
13 *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014). The Ninth Circuit has held that the
14 application of an “extraordinary circumstances” standard does not comport with the “good
15 cause” standard prescribed by Rhines. *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir.
16 2005). Thus, a petitioner’s confusion over whether or not his petition would be timely filed
17 constitutes good cause for the petitioner to file his unexhausted petition in federal court.
18 *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005). Ineffective assistance of
19 postconviction counsel can also constitute good cause. *Blake v. Baker*, 745 F.3d 977,
20 982-83 (9th Cir. 2014). But a petitioner does not establish good cause simply by asserting
21 a conclusory and unsupported claim that his counsel was ineffective; he must also
22 develop his argument under the standards of *Strickland v. Washington*, 466 U.S. 668
23 (1984). See *Wooten v. Kirkland*, 540 F.3d 1019, 1024 n.2 (9th Cir. 2008).

24 The unexhausted claim of the petition, Claim 2, asserts appellate counsel was
25 ineffective for: (1) filing a deficient opening brief and no reply brief; (2) failing to obtain
26 materials that would have allowed petitioner to appeal issues involving jury selection,
27 including questions about gangs that were posed to the prospective jurors; (3) failing to
28 argue that the prosecution committed misconduct by misstating the law with respect to
the elements of first degree murder, manslaughter and the State’s burden of proof; and
(4) failing to argue that the prosecutor improperly commented on petitioner’s right to

1 remain silent, shifted the burden of proof and urged the jury to conduct its own testing of
2 the evidence. (ECF No. 47 at 30-34). On postconviction appeal, postconviction counsel
3 asserted generally that appellate counsel was ineffective, but argued specifically only that
4 counsel did not assert certain claims regarding “provocation.” (ECF No. 16-1 at 15 (Ex.
5 102)). Petitioner asserts that the ineffective assistance of his postconviction counsel in
6 failing to raise the claims in Claim 2 constitutes good cause justifying a Rhines stay.

7 Petitioner’s ineffective assistance of counsel claim is conclusory and insufficiently
8 developed or supported. While the court has conducted a preliminary review of the record
9 in order to evaluate whether postconviction counsel was ineffective for failing to raise the
10 arguments in Claim 2, it is beyond the scope of this stay motion to make a conclusive
11 ruling on the issue. Upon preliminary review of the record, and absent a strong showing
12 by petitioner, the court is not persuaded, for purposes of this motion, that postconviction
13 counsel was ineffective for failing to assert the arguments in Claim 2. The court concludes
14 petitioner has not established good cause, and the motion for a Rhines stay will therefore
15 be denied on that basis.

16 In the alternative, petitioner seeks to invoke the three-step procedure pursuant to
17 *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003). *King v. Ryan*, 564 F.3d 1133, 1135 (9th Cir.
18 2009). Under the three steps of the Kelly procedure, (1) the petitioner may amend his
19 petition to delete the unexhausted claims, (2) the court stays the petition and hold the
20 exhausted claims in abeyance while petitioner exhausts his unexhausted claims in state
21 court; and (3) following exhaustion, the petitioner amends his petition to re-attach the
22 newly exhausted claims. *Id.* Under Kelly, the petitioner is not required to show good
23 cause. *Id.* at 1140.

24 The court, in its discretion, will grant petitioner’s request to invoke the Kelly
25 procedure. The claims petitioner seeks to exhaust are not plainly meritless, and there is
26 no indication of dilatory tactics. Accordingly, petitioner will be granted leave to amend his
27 petition to delete Claim 2, and the petition will thereafter be stayed and abeyed pending
28 exhaustion of Claim 2 in state court. Following completion of state court proceedings on

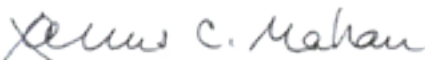
1 the unexhausted claim, petitioner may file a motion to reopen the action and amend the
2 petition to reassert Claim 2.

3 In granting the petitioner's alternative request, the court makes no representation
4 or holding that Claim 2 will be considered timely once re-attached to the petition.

5 In accordance with the foregoing, IT IS THEREFORE ORDERED that petitioner's
6 motion to stay and abey (ECF No. 62) is GRANTED IN PART and DENIED IN PART.
7 The motion for a Rhines stay is denied. The motion for a stay pursuant to the Kelly
8 procedure is granted. Petitioner may, within fifteen days of the date of this order, amend
9 his petition to delete Claim 2. After he has done so, the court will enter an order staying
10 these proceedings and holding petitioner's exhausted claims in abeyance until such time
11 as petitioner has filed a motion to re-open the action.

12 It is so ordered.

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14 DATED May 14, 2019.

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16 JAMES C. MAHAN
17 UNITED STATES DISTRICT JUDGE
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