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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 JAMES EDWARD KUZYK, ) No. ED CV 08-01148-VBF (VBK)  
12 )  
13 ) Petitioner, ) MEMORANDUM AND ORDER DENYING  
14 ) v. ) RESPONDENT'S MOTION TO DISMISS  
15 ) L. T. EDWARDS, ) AND GRANTING PETITIONER'S REQUEST  
16 ) Respondent. ) FOR A STAY  
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17 **INTRODUCTION**

18 On August 25, 2008, James Edward Kuzyk (hereinafter referred to as  
19 "Petitioner") filed a "Petition for Writ of Habeas Corpus by a Person in  
20 State Custody" pursuant to 28 U.S.C. §2254 ("Petition") in the United  
21 States District Court for the Central District of California.  
22 Petitioner raised the following claims: (1) "Does it violate federal due  
23 process to limit witnesses from testifying for defense or not allow  
24 recorded statements of that witness to be heard in the trial court?; (2)  
25 does it violate federal due process of law to prevent a defendant or  
26 witnesses from testifying or being questioned about manufacturing  
27 evidence found in a bag in the garage where all other items used to  
28 manufacture were found?; (3) does it violate the defendant's federal due

1 process and substantive constitutional rights for the Court to allow  
2 prosecutorial misconduct and deny the defendant's request for curative  
3 instructions to the jury?; (4) does it violate the defendant's federal  
4 due process and substantive constitutional rights for the Judge to deny  
5 jury instruction of law when they [sic] asked the Court a question of  
6 law and answer with his own opinion?; and (5) does it violate the  
7 defendant's federal due process and substantive constitutional rights  
8 for the trial court to allow the admission of improperly presented prior  
9 crime evidence to violate Evidence Code §352 in the defendant's trial?"  
10 (See Petition at 5-6 and attached pages.)

11 On October 15, 2008, Respondent filed a document entitled "Answer  
12 to Petition for Writ of Habeas Corpus" and "Memorandum of Points and  
13 Authorities in Support of Answer to Petition for Writ of Habeas Corpus;"  
14 and "Notice of Lodgment." Respondent requests the Court to dismiss the  
15 Petition on the grounds that Petitioner has failed to exhaust all of his  
16 claims. It appears that Respondent's "Answer" was intended to be a  
17 Motion to Dismiss. Respondent contends that Petitioner has not  
18 exhausted Grounds 3 and 4. Respondent notes that Petitioner concedes  
19 that these claims have not been presented to the California Supreme  
20 Court. (See Petition at 6.)

21 On November 5, 2008, Petitioner filed a "Notice of Lodgment and  
22 Opposition to the Motion to Dismiss," which included several letters:  
23 (1) a letter dated January 30, 2008 from Petitioner to his attorney  
24 regarding his California Court of Appeal Case No. EO41486; (2) a letter  
25 to Petitioner from his appellate attorney dated January 9, 2007; (3) a  
26 letter from Petitioner to his appellate attorney dated March 4, 2008;  
27 (4) a letter dated April 9, 2007 from Petitioner to his appellate  
28 attorney; and (5) a letter from his appellate attorney to Petitioner

1 dated April 16, 2007. Petitioner in his Opposition requests the Court  
2 grant him a Stay.

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4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 On March 16, 2004 during a parole search of the garage of the home  
6 where Petitioner had been living for the past year, Sheriff's deputies  
7 found evidence of all five steps in the methamphetamine manufacturing  
8 process, but no finished methamphetamine. According to the  
9 prosecution's expert, the reason for the absence of methamphetamine was  
10 that the person making it made a mistake at some point during the  
11 process and ended up with pseudoephedrine instead. (Lodgment 1, Appendix  
12 A at 2-4.)

13 A jury subsequently convicted Petitioner of manufacturing  
14 methamphetamine and possessing ephedrine with the intent to manufacture  
15 methamphetamine. (Lodgment 1, Appendix A at 6.) The jury further found  
16 true the allegation that the manufacturing and possession of offenses  
17 took place in a structure where children were present and that  
18 Petitioner had sustained a prior conviction for manufacturing  
19 methamphetamine. (Id.) The trial court subsequently sentenced  
20 Petitioner to prison for 13 years. (Id.)

21 Petitioner appealed, claiming (a) the trial court erred in  
22 admitting evidence of his prior conviction for manufacturing  
23 methamphetamine, and (b) the trial court erred in excluding two critical  
24 items of defense evidence that tended to prove that he had been framed  
25 by Joseph Simon, the owner of the home that Petitioner had been living  
26 in at the time of the search. These two items were (1) that Simon's 13-  
27 year-old son had walked in the room while Petitioner and Simon's wife  
28 were having sex and may have told Simon about it; and (2) that a bag

1 depicted in a photograph offered into evidence by the prosecutor did not  
2 belong to Petitioner. (Lodgment 1, Appendix A at 2, 10.) The California  
3 Court of Appeal rejected these claims and affirmed the conviction in an  
4 unpublished opinion filed on December 19, 2007. (Lodgment 1, Appendix  
5 A.)

6 Petitioner petitioned for review on the same claims raised in the  
7 Court of Appeal. (Lodgment 1.) On February 27, 2008, the California  
8 Supreme Court denied the Petition for Review. (Lodgment 2.)

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10 **DISCUSSION**

11 Respondent contends that the within Petition is a "mixed" petition  
12 as it is unexhausted and should be dismissed. Specifically, Respondent  
13 contends that Petitioner has not exhausted Grounds 3 and 4.

14 Petitioner concedes that two of his five claims have not been  
15 presented to the California Supreme Court. (Petition at 6.) Petitioner  
16 requests a Stay in light of Rhines v. Weber, 544 U.S. 269, 125 S.Ct.  
17 1528, 1535 (2005), wherein the United States Supreme Court held that a  
18 federal district court may stay a mixed habeas petition to allow a  
19 petitioner to present unexhausted claims to the state court. A District  
20 Court should stay, rather than dismiss, a mixed habeas petition if the  
21 Petitioner has good cause for his failure to exhaust, his unexhausted  
22 claims are meritorious, and there is no indication that the petitioner  
23 engaged in intentionally dilatory litigation tactics. Id. at 278.

24 In Rhines, the Supreme Court noted that because of the total  
25 exhaustion requirement in Rose v. Lundy, 455 U.S. 509, 518-19, 102 S.Ct.  
26 1198 (1982) and AEDPA's one-year statute of limitations, petitioners  
27 with mixed petitions "run the risk of forever losing their opportunity  
28 for any federal review of their unexhausted claims." Rhines, 125 S.Ct.

1 at 1533. This risk arises because a petitioner could be faced with a  
2 choice of either striking his unexhausted claims and going forward with  
3 an exhausted petition or allowing the whole petition to be dismissed,  
4 without prejudice, as mixed. Under the first option, if Petitioner's  
5 original petition had already been decided on the merits, he could not  
6 include the newly exhausted claims in a subsequent petition, as the  
7 second petition would be subject to the strict limitations AEDPA places  
8 on successive petitions. See 28 U.S.C. §2244(b). The second option  
9 available under Rose is no more desirable for a petitioner given the  
10 fact that AEDPA's one-year statute of limitations will likely have run  
11 before a petitioner is able to fully exhaust state court remedies on the  
12 mixed petition and return to federal court. Rhines, 125 S.Ct. at 1533-  
13 34.

14 In light of the above circumstances, Rhines concluded that a  
15 District Court has discretion to stay a mixed petition to allow a  
16 petitioner time to return to state court to present unexhausted claims.  
17 In making this determination, however, the Court held that the stay and  
18 abeyance procedure must be applied consistently with AEDPA's twin  
19 purposes: "reducing delays in the execution of state and federal  
20 criminal sentences" and encouraging "petitioners to seek relief from  
21 state courts in the first instant." Rhines, 125 S.Ct. at 1534. As a  
22 result, Rhines cautioned, a stay and abeyance should be available only  
23 in limited circumstances, and is appropriate only when the District  
24 Court determines that there was "good cause" for the failure to exhaust.  
25 Rhines, 125 S.Ct. at 535. See also Wooten v. Kirkland, 540 F.3d 1019  
26 (9<sup>th</sup> Cir. 2008) (District Court must stay a mixed habeas petition  
27 containing both exhausted and unexhausted claims only if: (1) the  
28 petitioner has good cause for his failure to exhaust his claims in state

1 court; (2) the unexhausted claims are potentially meritorious; and (3)  
2 there is no indication that the petitioner intentionally engaged in  
3 dilatory litigation tactics.).

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5 **STAY AND ABEYANCE**

6 **A. Good Cause Standard.**

7 In Riner v. Crawford, 415 F.Supp.2d 1207, 1211 (D. Nev. 2006), the  
8 District Court held that "the good cause standard applicable in  
9 consideration of a request for a stay and abeyance of a federal habeas  
10 petition requires the petitioner to show that he was prevented from  
11 raising the claim, either by his own ignorance or confusion about the  
12 law or the status of the case or by circumstances over which he has  
13 little or no control, such as the actions of counsel either in  
14 contravention of the petitioner's clearly expressed desire to raise the  
15 claim or when petitioner had no knowledge of the claim's existence."  
16 Id. at 1211. In Jackson v. Roe, 425 F.3d 654, 661-62 (9<sup>th</sup> Cir. 2005),  
17 the Ninth Circuit held that "good cause" for failure to exhaust does not  
18 require extraordinary circumstances.

19 Here, Petitioner's good cause for failing to exhaust his claims is  
20 that he twice asked appellate counsel to include Grounds 3 and 4 in the  
21 direct appeal (see Petition at 6); however, appellate counsel refused to  
22 include these grounds. (See Notice of Lodgment and Opposition to the  
23 Motion to Dismiss at 2 and attached exhibits.) Petitioner again  
24 requested appellate counsel in his letters dated April 9, 2007, January  
25 30, 2008 and March 4, 2008 to raise his claims re prosecutorial  
26 misconduct and jury instructions in the state courts. Petitioner  
27 contends that his appellate attorney ineffectively failed to present all  
28 of Petitioner's claims.



