



1 The Warden filed an opposition to the motion for stay and abeyance April  
2 2, 2009.

3 Catlin asserts stay and abeyance of his federal proceedings are  
4 justified as he has been diligent, it will serve comity, preserve judicial  
5 resources, and will not prejudice the Warden. Catlin argues there is good  
6 cause to support granting stay and abeyance, as confusion about whether  
7 his state petition will be deemed timely is reasonable due to the vagueness  
8 and complexity of California’s procedural bar rules, he was unable to  
9 earlier exhaust these claims because of ineffective representation on  
10 appeal, and these claims are potentially meritorious.

11 The Warden contends the stay and abeyance procedure is only  
12 available in “limited circumstances” under *Rhines*, where there is good  
13 cause for the failure to exhaust the claims in state court, the claims are  
14 potentially meritorious, and there is no indication of intentionally dilatory  
15 litigation tactics. The Warden observes Catlin has not yet filed his  
16 exhaustion petition in state court, so it is uncertain what precise claims he  
17 wants to file and when he intends to file them. The Warden does not  
18 dispute that Catlin’s currently unexhausted federal claims may be  
19 potentially meritorious, and agrees there is no evidence to suggest Catlin  
20 has intentionally engaged in dilatory litigation tactics, but submits Catlin  
21 has not shown good cause for failing to earlier exhaust these claims.

22 **Standards for Stay and Abeyance**

23 When a court is presented with a mixed petition, it may not grant  
24 relief on any of the unexhausted claims. 28 U.S.C. § 2254(b)(1).<sup>1</sup> Under  
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26 <sup>1</sup> Subsection (b)(2) of § 2254, however, permits a district court to deny  
an unexhausted claim on the merits.

1 *Rhines*, abeyance may be ordered if there is good cause for the petitioner’s  
2 failure to first exhaust his claims in state court, if the claims are not plainly  
3 meritless, and if the mixed petition is not stayed indefinitely. 544 U.S. at  
4 277-78. While the Court in *Rhines* did not define good cause, *Pace v.*  
5 *Digluglielmo*, 544 U.S. 408 (2005), provides guidance by suggesting that  
6 good cause is satisfied by the existence of “reasonable confusion about  
7 whether a state filing would be timely.” *Id.* at 416.

### 8 **Timeliness Issues**

9 Under the Timeliness Standards adopted by the California Supreme  
10 Court for filing habeas corpus petitions, a petition filed within 180 days  
11 after the final due date for the reply brief on direct appeal is considered  
12 presumptively timely. The language used by the Supreme Court is that it  
13 would be “presumed to be filed without substantial delay.” Supreme  
14 Court Policies, Policy 3, Standard 1-1.1. A state habeas corpus petition  
15 filed more than 180 days after the final due date for an appellant’s reply  
16 brief nonetheless “may establish absence of substantial delay if it alleges  
17 with specificity facts showing the petition was filed within a reasonable  
18 time after petitioner or counsel (a) knew, or should have known, the facts  
19 supporting a claim and (b) became aware, or should have become aware,  
20 of the legal basis for the claim.” *Id.*, Standard 1-1.2. A petition filed after  
21 substantial delay may still be considered timely where the petitioner  
22 establishes “good cause for the delay” by a “showing of particular  
23 circumstances sufficient to justify substantial delay.” *Id.*, Standard 1-2. A  
24 state petition that is not presumptively timely, or does not demonstrate the  
25 absence of substantial delay, or does not show particular circumstances to  
26 justify substantial delay “may be denied as untimely.” *Id.*, Standard 1-3

1 (emphasis added). The Policies further allow for tolling of the 180-day  
2 presumptively timely period when the court authorizes the appellant to  
3 file supplemental briefing. *Id.*, Standard 1-4.

#### 4 **Analysis**

5 The Warden only contests Catlin’s showing of good cause for stay  
6 and abeyance of the federal proceedings. The Warden argues Catlin’s  
7 criticism of state appellate and habeas counsel is simply “Monday morning  
8 quarterbacking,” that most of the substance of his federal claims were  
9 presented to the state, and the showing of good cause is largely based on  
10 federal counsels’ ability to file a “better” habeas petition. The Warden  
11 contends endorsement of such a broad interpretation of good cause would  
12 allow for routine stays of mixed petitions, thus undermining the goals of  
13 the AEDPA, delaying the execution of sentences, and reducing the  
14 incentive to exhaust all claims in state court.<sup>2</sup>

15 There can be no serious dispute that the Timeliness Standards for  
16 capital habeas corpus petitions in the California Supreme Court lack  
17 definite time limits. Only the presumptively timely period of 180 days  
18 provides any quantitative, objective guidance. The other standards,  
19 establishing the absence of substantial delay and showing good cause for  
20 substantial delay are subjective. This has long been a concern of federal  
21 courts analyzing California timeliness standards. *See Morales v. Calderon*,  
22 85 F.3d 1387, 1390-93 (9th Cir. 1996) (finding uncertainty and vagueness in  
23 the California timeliness standards in the context of determining adequacy  
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25 <sup>2</sup> If the Warden is concerned about delay, and believes the majority of  
26 the substance of the federal claims has been presented to the state court, he  
can elect to waive exhaustion and proceed to the merits of Catlin’s federal  
petition.

1 of untimely procedural bars). The recitation in the Supreme Court Policies  
2 of three different kinds of situations establishing petition timeliness, plus  
3 the potential for equitable tolling, demonstrates reasonable confusion.

4 The Warden asserts California’s procedural bars are not as vague as  
5 Catlin claims, citing *Evans v. Chavis*, 546 U.S. 189 (2006). However, this  
6 case does not assist the Warden. The issue there was whether Chavis was  
7 entitled to statutory tolling of the one-year statute of limitations imposed  
8 by the AEDPA for a federal petition that had been filed over four years  
9 after the AEDPA’s effective date. *Id.*, at 200. The Ninth Circuit found  
10 Chavis’ federal petition timely, holding his state collateral review  
11 proceedings were “pending” for three years and 130 days. The Supreme  
12 Court reversed, explaining the discrepancy between their holding and the  
13 Ninth Circuit’s of the timeliness of Chavis’ state-court review petition as  
14 due to “the *uncertain scope* of California’s ‘reasonable time’ standard.” *Id.*,  
15 at 198 (emphasis added). Although *Chavis* provides some clarification of  
16 what is a reasonable time to file a notice of appeal in the higher court after  
17 an adverse lower court decision, it does not clarify California’s timeliness  
18 standards. See *In re Sanders*, 21 Cal. 4th 697, 703 (1999) (Brown, J.,  
19 concurring and dissenting) (describing California’s rules as “a Byzantine  
20 system of procedural hurdles, each riddled with exceptions and fact-  
21 intensive qualifications, which only undermine their intended purpose of  
22 integrity of judgments, finality, and comity.”).

### 23 **Order**

24 The facts presented and reviewed demonstrate Catlin has met the  
25 three requirements for holding his federal petition in abeyance under  
26 *Rhines*: (1) good cause is established based on diligence in pursuing

1 exhaustion of state remedies and reasonable confusion about the California  
2 timeliness standards; (2) the Warden does not dispute that the  
3 unexhausted claims, set forth in this Court's February 19, 2009 order, may  
4 be potentially meritorious; and (3) the parties agree there is no evidence  
5 Catlin has intentionally engaged in dilatory litigation tactics. Catlin shall  
6 file a state petition presenting his unexhausted claims within 60 days of the  
7 date of this order. When the California Supreme Court renders a final  
8 decision on the exhaustion petition, Catlin is directed to immediately notify  
9 the Court of the result so further appropriate action can be taken and  
10 federal proceedings resumed if necessary.

11 The motion to hold federal proceedings in abeyance pending  
12 resolution of Catlin's state post-conviction petition is granted. During the  
13 pendency of state post-conviction proceedings, Catlin will file quarterly  
14 status reports in this court beginning in July, 2009.

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16 IT IS SO ORDERED.

17 **Dated:** April 14, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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