1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 JERRY F. STANLEY, No. 2:95-CV-1500 JAM CKD 12 Petitioner. **DEATH PENALTY CASE** 13 v. 14 WARDEN, San Quentin State Prison, **ORDER** 15 Respondent. 16 17 Petitioner, a state prisoner under sentence of death, has filed an application for a writ of 18 habeas corpus pursuant to 28 U.S.C. § 2254. In April 2013, the Court adopted the magistrate 19 judge's findings that Petitioner had not exhausted all claims in state court, and issued a stay 20 pending exhaustion. (ECF No. 903.) In October 2014, Respondent filed this motion to dismiss, 21 arguing that the admittedly lawful stay has "transformed into" an unlawful abuse of discretion. 22 (ECF No. 942.) The magistrate judge filed findings and recommendations suggesting that the 23 Court deny the motion. (ECF No. 965.) Respondent timely filed objections. (ECF No. 976.) 24 The Court has reviewed the file and finds the findings and recommendations to be 25 supported by the record and by the magistrate judge's analysis. Furthermore, for the reasons 26 discussed below, the Court overrules Respondent's objections. 27 Respondent raises two arguments in his objections. He first responds to the magistrate 28 judge's conclusion that his argument is "extremely belated" because he already "had an 1

opportunity to challenge the stay by objecting to the [January 2013] Findings and Recommendations" and "did not do so." F&R at 4:14-17. Respondent asserts that his motion is now timely, because the stay "was initially lawful but became unlawful when it became clear that it was indefinite[.]" Obj. at 4:2.

Respondent's argument fails because he cited no authority to support this theory that a stay that is "lawful" when issued can "transform[] into" an unlawful stay, or that a stay that is not an abuse of discretion can become "a clear abuse of discretion" at a later date. See Obj. at 2:14-15, 3:26. Respondent's argument relies on Rhines v. Weber, 544 U.S. 269 (2005) for the proposition that an indefinite stay constitutes an abuse of discretion. See Obj. at 2-3. Rhines indeed established the standard for issuing a stay to allow a petitioner to exhaust unexhausted claims in a "mixed" petition. See 544 U.S. at 277-78. But the case says nothing about whether or when a court abuses its discretion by failing to alter a stay that it previously issued. Respondent concedes that the stay was lawful as issued in 2013 and he cites no authority under which a court could find that the same stay has become unlawful two years later. The Court therefore overrules Respondent's first objection.

Respondent's second contention is that the magistrate judge erred by "impos[ing] the burden of show [sic] lack of merit on Respondent[.]" Obj. at 5:17. Respondent's brief then launches into a lengthy discussion of the merits, apparently in response to the magistrate judge's observation that his motion provided no basis or argument for the proposition that the claims are meritless. See F&R at 5; Obj. at 5-20. The Court overrules this objection and disregards the merits discussion, because whoever bears the burden of proving that the claims have or lack merit, the issue does not bear on the outcome of this motion to dismiss. Indeed, Respondent wishes the Court to consider the merits as part of the Rhines inquiry. See Obj. at 5. But as discussed above, Respondent has provided no legal basis for applying Rhines to this two-year-old stay. The Court therefore rejects Respondent's second argument.

1	Accordingly, IT IS HEREBY ORDERED that:
2	1. The findings and recommendations filed December 3, 2014 are adopted in full; and
3	2. Respondent's motion to dismiss (ECF No. 942) is DENIED.
4	DATED: March 18, 2015
5	/s/ John A. Mendez
6	UNITED STATES DISTRICT COURT JUDGE
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