



1 Weber, 544 U.S. 269 (2005) stating that until he saw the respondent’s Motion to Dismiss he had  
2 “thought [the claims] were already exhausted before filing in this Court, . . .” ECF No. 15 at  
3 1:23-27 and that he was “totally surprised when he learned that is petition contained unexhaustion  
4 [sic] claim . . .”. Id. at 2:11-13. Rhines does not, however, grant an open-ended right to stay and  
5 abeyance, instead requiring that the district court must determine “there was good cause for the  
6 petitioner’s failure to exhaust his claims first in state court.”

7 At this point, petitioner has not shown good cause, i.e., any believable cause. How could  
8 petitioner “not know” these claims were unexhausted and be “totally surprised” when he saw the  
9 Motion to Dismiss? He in fact referenced the issues on appeal in his petition, ECF 4 at 16  
10 (electronic pagination): ((1) allowing a co-defendant to present hearsay evidence; (2) excluding  
11 third party culpability evidence; and (3) refusal to declare a mistrial.”). Moreover, it is  
12 inconceivable that petitioner, serving a life without parole sentence, was oblivious to his appeal  
13 and the issues raised *at the the time* the appeal was adjudicated. Petitioner had to have known  
14 that the two issues he raises here in the petition were not exhausted long before the petition was  
15 filed.

16 The question here, then, is whether the proffered, but disingenuous, “surprise” constitutes  
17 “good cause” for a failure to exhaust any omitted claims before proceeding in federal court. As  
18 the Rhines court pointed out, if the stay and abeyance procedure is “employed too frequently, [it]  
19 has the potential to undermine” the twin purposes of AEDPA – “to protect[] a state prisoner’s  
20 ability later to seek relief” through tolling of the limitation provision while still serving the  
21 exhaustion requirement.” 544 U.S. at 276. The answer to this question clearly rests on petitioner.  
22 As the Court stated in Rose v. Lundy, 455 U.S. 509, 520 (1982), decided before the Rhines case  
23 permitted stay and abeyance to diminish the danger of lost habeas claims, potential petitioners  
24 must, “before [they] bring any claims to federal court, be sure that [they] have first taken each one  
25 to state court.” Rhines asks nothing more than that a petitioner adequately state a valid reason for  
26 having failed to follow this course.

27 The undersigned is tempted to simply recommend a dismissal of the petition as totally  
28 unexhausted. However, due to the fact that petitioner raises a fabricated evidence claim (Claim

1 1), and petitioner is serving a life sentence, petitioner will be given one more opportunity to state  
2 why the claims he presently raises were not raised on appeal, or in a state habeas petition long  
3 ago.

4 In light of the foregoing IT IS HEREBY ORDERED that:

5 1. Petitioner shall, within 30 days of the filing of this Order, advise the court as to the  
6 time at which petitioner became aware of the issues raised in the petition, and why those claims  
7 could not have been raised earlier either on appeal or in a state habeas petition.

8 2. Petitioner is warned that failure to respond timely to this Order will lead to the  
9 recommendation that his petition be dismissed with prejudice.

10 **IT IS SO ORDERED.**

11 Dated: August 7, 2017

12 /s/ Gregory G. Hollows  
13 UNITED STATES MAGISTRATE JUDGE

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