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5 UNITED STATES DISTRICT COURT  
6 NORTHERN DISTRICT OF CALIFORNIA  
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8 CLEMETH RAY CASTILLE,

No. C 06-6236 MHP (pr)

9 Petitioner,

**ORDER DENYING MOTION FOR  
STAY AND REQUIRING TRAVERSE**

10 v.

11 MICHAEL KNOWLES, warden,

12 Respondent.  
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14 Petitioner has moved for a stay of the proceedings in this habeas action so that he may  
15 return to state court to exhaust state court remedies as to a new claim he wants this court to  
16 consider.

17 A district court may stay a habeas action to allow the petitioner to exhaust his  
18 unexhausted claims in state court. Rhines v. Webber, 544 U.S. 269, 277-78 (2005). In  
19 Rhines, the Court discussed the stay-and-abeyance procedure for mixed habeas petitions.  
20 Rhines cautioned district courts against being too liberal in allowing a stay because a stay  
21 works against several of the purposes of the Antiterrorism and Effective Death Penalty Act  
22 of 1996 ("AEDPA") in that it "frustrates AEDPA's objective of encouraging finality by  
23 allowing a petitioner to delay the resolution of the federal proceedings" and "undermines  
24 AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's  
25 incentive to exhaust all his claims in state court prior to filing his federal petition." Rhines,  
26 544 U.S. at 277. A stay and abeyance "is only appropriate when the district court determines  
27 there was good cause for the petitioner's failure to exhaust his claims first in state court," the  
28 claims are not plainly meritless, and there are no intentionally dilatory litigation tactics by the  
petitioner. Id. at 277-78. Castille's request falters under the Rhines requirement that the

1 claim(s) the petitioner wants to exhaust not be plainly meritless.

2 The only new claim that Castille identified is a claim under Cunningham v. California,  
3 549 U.S. 270 (2007). The court repeatedly informed Castille that, in his motion for stay, he  
4 had to identify each and every claim he wanted to exhaust in state court. See Nov. 16, 2007  
5 Order, p. 1; May 9, 2008 Order Extending Deadlines, p. 2. In his motion for a stay, the only  
6 claim he identified is the Cunningham claim.

7 In a line of Supreme Court cases that started with Apprendi v. New Jersey, 530 U.S.  
8 466 (2000), and the most recent of which was Cunningham, the Supreme Court articulated a  
9 rule that, "under the Sixth Amendment, any fact that exposes a defendant to a greater  
10 potential sentence [than the statutory maximum] must be found by a jury, not a judge, and  
11 established beyond a reasonable doubt, not merely by a preponderance of the evidence."  
12 Cunningham, 549 U.S. at 281. The relevant statutory maximum "is not the maximum  
13 sentence a judge may impose after finding additional fact, but the maximum he may impose  
14 without any additional findings." Id. at 283 (quoting Blakely v. Washington, 542 U.S. 296  
15 303-04 (2004)). In Cunningham, the Court held that California's determinate sentencing law  
16 ("DSL") violated the Sixth Amendment because it allowed the sentencing court to impose an  
17 upper term sentence based on aggravating facts that it found to exist by a preponderance of  
18 the evidence. The sentencing scheme at issue directed the trial court to start with a "middle  
19 term" and then move to an "upper term" only if it found aggravating factual circumstances  
20 beyond the elements of the charged offense. See id. at 279. Concluding that the middle term  
21 was the relevant statutory maximum, and noting that aggravating facts were found by a judge  
22 and not the jury, the Supreme Court held that the California sentencing law violated the rule  
23 set out in Apprendi. Cunningham, 549 U.S. at 293.

24 Staying this action while Castille exhausts a Cunningham claim is not appropriate  
25 because the claim appears plainly meritless, see Rhines, 544 U.S. at 277, and he will be  
26 unable to show that an eventual rejection of it by the state court would be contrary to or an  
27 unreasonable application of clearly established federal law, as set forth by the Supreme  
28 Court.. Cunningham dealt with a part of California's sentencing law (i.e., the sentence triad

1 of lower/middle/upper terms) not at issue in the present case. Castille's Cunningham claim  
2 has no potential merit because his sentence is life without parole; he was not sentenced under  
3 the sentencing triad part of California's sentencing scheme. Cunningham will not enable  
4 Castille to challenge the life without parole sentence that was imposed after the jury found  
5 him guilty of first degree murder, and found true the special circumstances and arming  
6 allegations. There is no need to stay this action for him to exhaust a plainly meritless claim.

7 For the foregoing reasons, petitioner's motion for a stay and abeyance is DENIED.  
8 (Docket # 28.) In light of the denial of the motion for a stay, it is time for petitioner to file  
9 his traverse. Petitioner must file and serve his traverse no later than **thirty days** from the  
10 date of this order.

11 IT IS SO ORDERED.

12 DATED: November 14, 2008

  
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Marilyn Hall Patel  
United States District Judge

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