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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD ALLEN DAVIS,

No. C-13-0408 EMC

Petitioner,

DEATH PENALTY CASE

v.

RON DAVIS, Warden, San Quentin State
Prison,

**ORDER DENYING RESPONDENT'S
MOTION TO DISMISS; AND
GRANTING PETITIONER'S MOTION
FOR STAY**

Respondent.

(Docket Nos. 36, 40)

United States District Court
For the Northern District of California

Petitioner Richard Allen Davis is a condemned prisoner at California's San Quentin State Prison. Petitioner has filed a habeas petition containing 37 claims. The parties agree that claims 1-3, 6, 8-10, 12-17, 19-24, 29, 32-34 and 36 are exhausted, claims 35 and 37 are unexhausted, and claims 4-5, 7, 11, 18, 25-28, 30-31 and 33 are partially exhausted. These claims allege, *inter alia*, that: Petitioner was denied the effective assistance of counsel throughout his trial, his representation was plagued by conflict of interest, trial counsel failed to adequately prepare his mental health experts, the prosecutor committed misconduct, aggravating evidence was improperly admitted, the evidence is insufficient to support the conviction, the jury received faulty jury instructions, the trial court inadequately responded to a question from the jury, the trial court failed to excuse impaired jurors, the trial court improperly restricted the presentation of mitigation evidence, the jury committed misconduct, and that the extreme delay between the imposition of the death sentence and execution is unconstitutional. Respondent waives exhaustion as to the unexhausted portion of claim 33. In a motion to dismiss filed on March 2, 2015, Respondent contends that Petitioner's

1 unexhausted/partially exhausted claims must be dismissed and litigation should proceed only on the
2 remaining exhausted claims. In a cross-motion for a stay filed on May 14, 2015, Petitioner counters
3 that the petition should instead be held in abeyance pending his exhaustion of claims in state court.
4 In a reply filed on June 11, 2015, Respondent requests that Petitioner’s motion for a stay be denied,
5 and that Petitioner be ordered to file an amended finalized petition containing only exhausted claims.
6 For the reasons stated below, Respondent’s motion to dismiss is **DENIED** and Petitioner’s motion
7 for a stay is **GRANTED**.

8 **I. BACKGROUND**

9 In September 1996, Petitioner was sentenced to death in Santa Clara County Superior Court
10 following a conviction of first degree murder of 12-year old Polly Klaas, as well as the burglary of
11 her home, kidnaping, an attempted lewd act against her, two counts of false imprisonment, two
12 counts of assault with a deadly weapon and three counts of robbery. The California Supreme Court
13 affirmed his conviction and death sentence on June 1, 2009. *People v. Davis*, 46 Cal. 4th 539
14 (2009). The United States Supreme Court denied certiorari on January 11, 2010. *Davis v.*
15 *California*, 558 U.S. 1124 (2010).

16 On November 5, 2007, while his direct appeal was pending, Petitioner filed a state habeas
17 petition. (ECF Doc. No. 2) The Supreme Court of California denied this petition on January 23,
18 2013.

19 Petitioner filed a request for appointment of federal habeas counsel and stay of execution in
20 this Court on January 29, 2013. His request for a stay was granted and his case was referred to the
21 Selection Board for recommendation of counsel. (ECF Doc. No. 4) The Court appointed counsel on
22 October 21, 2013. (ECF Doc. No. 8)

23 On January 23, 2014, prior to the expiration of the statute of limitations period, Petitioner
24 filed a preliminary petition. (ECF Doc. No. 9) On April 9, 2014, the parties filed a joint statement
25 wherein Petitioner sought leave to file motions for discovery, evidence preservation and equitable
26 tolling. (ECF Doc. No. 17) The Court denied without prejudice Petitioner’s request to file a
27 discovery motion, and granted his requests to file motions for evidence preservation and equitable
28 tolling. (ECF Doc. No. 19)

1 Petitioner filed a motion for equitable tolling on June 30, 2014. This motion was granted in
2 part and denied in part on September 15, 2014. Petitioner filed an amended petition on October 21,
3 2014, and further amended the petition on January 29, 2015. The instant briefing followed.

4 **II. LEGAL STANDARD**

5 Federal courts may not grant a writ of habeas corpus brought by a person in custody pursuant
6 to a state court judgment unless “the applicant has exhausted the remedies available in the courts of
7 the State.” 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is grounded in principles of
8 comity as it gives states the first opportunity to correct alleged violations of a prisoner’s federal
9 rights. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

10 The Supreme Court follows a rule of “total exhaustion” requiring that all claims in a habeas
11 petition be exhausted before a federal court may grant the petition. *Rose v. Lundy*, 455 U.S. 509,
12 522 (1982). A district court is permitted, however, to stay a mixed petition to allow a petitioner to
13 exhaust his claims in state court without running afoul of the one-year statute of limitations period to
14 file for federal habeas review imposed by the Antiterrorism and Effective Death Penalty Act of 1996
15 (“AEDPA”). *Rhines v. Weber*, 544 U.S. 269, 273-75 (2005). A district court must stay a mixed
16 petition if: (1) the petitioner has good cause for his failure to exhaust his claims, (2) the
17 unexhausted claims are potentially meritorious, and (3) there is no indication that the petitioner
18 intentionally engaged in dilatory tactics. *Id.* at 278.

19 The Supreme Court has not articulated with precision what constitutes “good cause” for
20 purposes of granting a stay under *Rhines*. In *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), the
21 Supreme Court stated in *dicta* that a “petitioner’s reasonable confusion about whether a state filing
22 would be timely will ordinarily constitute ‘good cause’ for him to file in federal court” without
23 exhausting state remedies first. More recently, in *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012),
24 the Supreme Court held that ineffective assistance of post-conviction counsel may constitute cause
25 for overcoming procedural default.

26 The Ninth Circuit has clarified that “good cause” for failure to exhaust does not require
27 “extraordinary circumstances.” *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005). Nonetheless,
28 the good cause requirement should be interpreted in light of the Supreme Court’s admonition that

1 stays be granted only in “limited circumstances” so as not to undermine AEDPA’s twin goals of
2 reducing delays in the execution of criminal sentences and streamlining federal habeas proceedings
3 by increasing a petitioner’s incentive to exhaust all claims in state court. *Wooten v. Kirkland*, 540
4 F.3d 1019, 1024 (9th Cir. 2008). A petitioner’s mistaken impression that his counsel included a
5 claim in an appellate brief does not qualify as “good cause” for failure to exhaust as such an
6 allegation could be raised by any petitioner, rendering stay-and-abeyance orders routine. *Id.*

7 More recently, in *Blake v. Baker*, 745 F.3d 977, 983 (9th Cir. 2014), the Ninth Circuit held
8 that “[ineffective assistance] by post-conviction counsel can be good cause for a *Rhines* stay,”
9 finding that such a conclusion was consistent with and supported by *Martinez*. The court found that
10 the “good cause element is the equitable component of the *Rhines* test,” and that “good cause turns
11 on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to
12 justify [the failure to exhaust.]” *Id.* at 982. The petitioner in *Blake* argued that he failed to exhaust
13 his ineffective assistance of trial counsel claim because state post-conviction counsel failed to
14 discover evidence that he suffered extreme abuse as a child, as well as organic brain damage and
15 psychological disorders. *Id.* He supported his argument with evidence of his abusive upbringing
16 and history of mental illness. In light of this showing, the Ninth Circuit found that the district court
17 abused its discretion in denying a stay and remanded the case. *Id.* at 983-84.

18 **III. DISCUSSION**

19 Respondent moves to dismiss Petitioner’s petition because it contains unexhausted claims.
20 Such a dismissal is unwarranted because a mixed petition may be stayed provided that Petitioner
21 meets the requirements set forth in *Rhines*, namely: (1) shows good cause for his failure to exhaust,
22 (2) establishes that his claims are potentially meritorious and (3) shows that he did not intentionally
23 engage in dilatory tactics. *Rhines*, 544 U.S. at 273-78. As discussed below, Petitioner meets the
24 requirements for a stay.

25 A. Good Cause

26 Petitioner contends that a variety of factors establish good cause for his failure to exhaust.
27 He asserts that: (1) state post-conviction counsel was ineffective, (2) post-conviction counsel
28 labored under a conflict of interest, (3) *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) imposed a

1 novel, unforeseen change in the law, and (4) it is not clear that the state courts would find his claims
2 procedurally barred. He also asserts that the Court has inherent power to stay this case. Because the
3 Court finds that ineffective assistance of post-conviction counsel adequately establishes good cause
4 for Petitioner's failure to exhaust, it will not address Petitioner's alternate arguments.

5 Petitioner alleges that state post-conviction counsel was ineffective for failing to investigate
6 and raise the completely and partially unexhausted claims contained in his finalized petition. In
7 particular, he asserts that counsel failed to interview mitigation witnesses, such as family and
8 friends, who could have testified regarding Petitioner's family history of physical, substance and
9 sexual abuse. Petitioner claims that post-conviction counsel failed to retain expert witnesses to
10 explore the mitigating effects of his drug and alcohol addiction, his neuropsychological impairments
11 and his Native American background. Additionally, post-conviction counsel allegedly failed to
12 present evidence demonstrating that trial counsel were in possession of evidence that could have
13 been used to impeach the State's expert Kathleen O'Meara's testimony that Petitioner did not suffer
14 extensive abuse as a child.

15 Petitioner further asserts that post-conviction counsel clearly recognized the need for an
16 adequate mitigation investigation. As early as 2005, counsel acknowledged that "[i]t may be that
17 renewed efforts to contact Rick's older brothers, and his mother, are in order, but it is also necessary
18 to attempt to contact other relatives who were around during Rick's early years." (ECF Doc. No.
19 40-1, Exh. 137) Seven months prior to the filing of the state habeas petition however, counsel wrote
20 a memo to his investigator, Sanford Glickman, stating that "the more I think about where we stand
21 on the investigation I assigned you in the Davis case, the more disappointed I am." (ECF Doc. No.
22 40-2, Exh. 138) He complained of Glickman's failure to obtain signatures on declarations, his lack
23 of preparation when interviewing witnesses, and postponement of assignments, resulting in a
24 situation where "as a result of the work you [Glickman] have done on this case I have nothing to
25 show for it . . . work on the Davis case is simply unacceptable to meet the standards for post-
26 conviction capital cases." *Id.* Petitioner contends that despite counsel's recognition of the
27 inadequacy of the investigation, he failed to remedy the situation, as none of the necessary
28 mitigation investigation was ever conducted.

1 Based on its review of the record, the Court finds that Petitioner has advanced a reasonable
2 excuse, supported by evidence, to justify his failure to exhaust his claims. *See Blake*, 745 F.3d 982.
3 Petitioner supports his allegations with memos from post-conviction counsel’s files documenting
4 failure to conduct an adequate investigation. Petitioner’s showing of post-conviction ineffective
5 assistance satisfies the *Rhines* good cause requirement.

6 Respondent faults Petitioner for failing to provide a declaration from post-conviction counsel
7 “shedding any light on his possible tactical considerations behind his alleged ineffectiveness,” but
8 fails to provide any authority establishing such a requirement. Respondent cites *Burt v. Titlow*, 134
9 S. Ct. 10, 17-18 (2013), in which the Supreme Court found that the absence of evidence that counsel
10 gave constitutionally adequate advice regarding whether to withdraw a guilty plea did not overcome
11 the strong presumption of counsel’s effectiveness. The Court did not establish a requirement that
12 ineffective assistance claims be supported by declarations from counsel. In any event, Petitioner has
13 submitted a declaration from post-conviction counsel as an attachment to his reply. (ECF Doc. No.
14 43, Exh. 139) The declaration states that post-conviction counsel had no strategic reason for failing
15 to interview mitigation witnesses, hire an addiction specialist, hire an expert on Native American
16 culture, or to have a thorough neuropsychological evaluation completed. *Id.*

17 Respondent further complains that “not one first time *Rhines* stay request in a capital case in
18 this district has been denied,” and that “this surely cannot be what the Supreme Court meant by the
19 concept of ‘limited circumstances’ in *Rhines*.” (ECF Doc. No. 42 at 9) The definition of good cause
20 need not, however, be limited “to only those excuses that arise infrequently.” *Blake*, 745 F.3d at
21 982. In the instant case, Petitioner has demonstrated good cause.

22 B. Merit of Claims

23 Petitioner argues that *Rhines* requires that at least one unexhausted claim be “potentially
24 meritorious,” and that one or more of his unexhausted claims meet this requirement. He focuses his
25 argument on claims 4, 5, 35 and 37. Respondent contends that Petitioner’s claims are not
26 meritorious.

27 Under the second prong of the *Rhines* test, a district court would abuse its discretion if it
28 were to grant a petitioner a stay when his claims are plainly “meritless.” *Rhines*, 544 U.S. at 277.

1 This rule has been interpreted to mean that a stay is appropriate as long as at least one claim is not
2 plainly meritless. *See, e.g., Petrosky v. Palmer*, No. 3-10-cv-0361, 2013 WL 5278736 *5 (D. Nev.
3 Sept. 16, 2013). Here, Petitioner has filed a lengthy petition containing allegations that are not
4 vague, conclusory or patently frivolous. For example, in claim 4, Petitioner alleges that he was
5 denied his right to conflict-free and effective legal representation at all stages of his trial
6 proceedings. Claim 4 contains seven subclaims, and is supported by numerous exhibits and citations
7 to controlling caselaw. Claim 5 alleges, in detail, that trial counsel were ineffective for failing to
8 properly select and prepare mental health experts to testify on Petitioner’s behalf. Claim 35 alleges
9 that appellate counsel was ineffective. Claim 37 alleges that Petitioner’s constitutional rights were
10 violated by the State’s presentation of fundamentally unreliable forensic evidence, specifically hair
11 comparison and fiber analysis. In all of these claims, Petitioner has articulated cognizable
12 constitutional claims supported by relevant legal authority, and has presented such evidence and
13 offers of proof as are presently available to him. Based on its review of the record, the Court cannot
14 conclude that Petitioner’s unexhausted claims are plainly meritless.

15 C. Absence of Dilatory Tactics

16 Under the third prong of the *Rhines* test, “it likely would be an abuse of discretion for a
17 district court to deny a stay and to dismiss a mixed petition if . . . there is no indication that the
18 petitioner engaged in intentionally dilatory litigation tactics.” *Id.* at 278. The Court already found
19 that Petitioner has been pursuing his rights diligently when it granted equitable tolling. (ECF Doc.
20 No. 25) Since then, Petitioner has been following this Court’s Habeas Local Rules in litigating his
21 petition. There is no further evidence that Petitioner has engaged in dilatory litigation tactics to date.
22 Petitioner satisfies the third prong of *Rhines*.

23 In addition, district courts have inherent power to control their dockets and stay proceedings.
24 *Ryan v. Gonzalez*, 133 S. Ct. 696, 708 (2013), quoting *Schriro v. Landrigan*, 550 U.S. 465, 473
25 (2007) (“the decision to grant a stay . . . is ‘generally left to the sound discretion of district
26 courts.’”). Here, granting Petitioner a stay promotes the interest of judicial economy, as it will
27 eliminate the possibility of piecemeal litigation. *Calderon v. United States District Court (Taylor)*,
28 134 F.3d 981, 987-88 (9th Cir. 1998). A stay will also promote comity, as it will provide the state

1 court the opportunity to rule on Petitioner’s claims first. *Rose*, 455 U.S. at 518. These factors
2 strongly favor the issuance of a stay.

3 **IV. CONCLUSION**

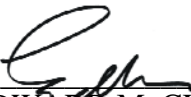
4 For the above-mentioned reasons, the Court finds as follows:

- 5 1. Respondent’s motion to dismiss is DENIED;
- 6 2. Petitioner’s motion for a stay is GRANTED;
- 7 3. Counsel for Petitioner shall file an exhaustion petition in state court within 90 days of
8 the date of this Order;
- 9 4. One hundred and twenty days after the entry of this Order, and every 90 days
10 thereafter until proceedings in his state exhaustion case are completed, Petitioner shall serve and file
11 in this Court a brief report updating the Court and the parties on the status of his pending state
12 habeas action. No later than 30 days after proceedings in his state case are completed, Petitioner
13 shall serve and file notice that proceedings are completed.

14 This order disposes of Docket Nos. 36 and 40.

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16 IT IS SO ORDERED.

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18 Dated: July 24, 2015

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21 EDWARD M. CHEN
22 United States District Judge
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