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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FERMIN LEDESMA,  
Petitioner,  
v.  
RONALD DAVIS, Warden of San  
Quentin State Prison,  
Respondent.

Case No. 07-cv-02130-PJH

**ORDER GRANTING MOTION TO  
HOLD FEDERAL HABEAS  
PROCEEDINGS IN ABEYANCE AND  
DENYING MOTION TO DISMISS  
RE: DKT. NO. 24**

**INTRODUCTION**

Petitioner Fermin Ledesma, a condemned prisoner at California’s San Quentin State Prison, has filed a request to stay his federal habeas petition pending the completion of exhaustion proceedings in state court. Respondent opposes petitioner’s motion and requests that the petition be dismissed. For the reasons outlined below, petitioner’s motion is **GRANTED**. Respondent’s request to dismiss the petition is **DENIED**.

**BACKGROUND**

Petitioner has been convicted and sentenced to death twice. Petitioner was initially convicted of first degree murder, kidnapping and robbery in Santa Clara County. Special circumstance allegations of the intentional killing of a witness, felony-murder robbery and felony-murder kidnapping were found true and petitioner was sentenced to death in March 1980. Petitioner filed an appeal and a simultaneous state habeas petition. The California Supreme Court consolidated the proceedings and issued a ruling granting the habeas petition and vacating petitioner’s conviction on the grounds that he

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1 received ineffective assistance of counsel at trial. *People v. Ledesma*, 43 Cal. 3d 171  
2 (1987).

3 On retrial, petitioner was once again convicted of first degree murder, kidnapping  
4 and two counts of robbery. The jury found true two special circumstances of intentional  
5 killing of a witness and murder in the commission of a robbery. Petitioner was sentenced  
6 to death on October 30, 1989. On direct appeal, the California Supreme Court reversed  
7 one of the robbery counts as well as the robbery special circumstance, but affirmed the  
8 conviction and death sentence. *People v. Ledesma*, 39 Cal. 4th 641 (2006). The United  
9 States Supreme Court denied certiorari on April 2, 2007. *Ledesma v. California*, 549 U.S.  
10 1324 (2007).

11 On October 31, 2006, petitioner filed a shell state habeas petition. (ECF Doc. No.  
12 15, Ex. D) The shell petition was filed before the California Supreme Court appointed  
13 counsel to represent petitioner in his state habeas proceedings. On December 20, 2007,  
14 the California Supreme Court appointed Terry J. Amdur as petitioner's state habeas  
15 counsel.

16 Petitioner filed a request for appointment of federal habeas counsel and stay of  
17 execution in this Court on April 17, 2007. This request was granted on May 1, 2007.  
18 (ECF Docket No. 3) His case was referred to the Selection Board for recommendation of  
19 counsel.

20 With the assistance of counsel, Petitioner filed an amended state habeas petition  
21 on December 10, 2010. On July 15, 2015, the California Supreme Court denied this  
22 petition. An amended order denying the petition was entered on July 31, 2015.

23 On December 11, 2015, the Court appointed counsel to represent petitioner in his  
24 federal habeas proceedings. Petitioner subsequently filed a request for equitable tolling,  
25 which was granted on May 17, 2016. (ECF Doc. No. 17) Petitioner filed a federal  
26 habeas petition on December 7, 2016. (ECF Doc. No. 18)

27 On December 9, 2016, petitioner filed an exhaustion petition in state court. On  
28 that same day, he filed a motion to hold federal proceedings in abeyance pending the

1 completion of state exhaustion proceedings. This motion was denied without prejudice  
2 because it was filed prior to the parties' meet-and-confer period on exhaustion as  
3 required by Capital Habeas Corpus Local Rule 2254-29(b). Subsequent to the Court's  
4 order, the parties met and conferred regarding the exhaustion status of petitioner's  
5 claims. The parties now agree as to the exhaustion status of all claims.

6 Petitioner renewed his request for a stay on March 5, 2017. (ECF Doc. No. 24)  
7 Respondent filed a response on March 13, 2017. (ECF Doc. No. 26) Petitioner filed a  
8 reply on March 16, 2017. (ECF Doc. No. 27)

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**LEGAL STANDARD**

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

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

1           The Ninth Circuit has clarified that “good cause” for failure to exhaust does not  
2 require “extraordinary circumstances.” *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir.  
3 2005). Nonetheless, the good cause requirement should be interpreted in light of the  
4 Supreme Court’s admonition that stays be granted only in “limited circumstances” so as  
5 not to undermine the AEDPA’s twin goals of reducing delays in the execution of criminal  
6 sentences, and streamlining federal habeas proceedings by increasing a petitioner’s  
7 incentive to exhaust all claims in state court. *Wooten v. Kirkland*, 540 F.3d 1019, 1024  
8 (9th Cir. 2008). A petitioner’s mistaken impression that his counsel included a claim in an  
9 appellate brief does not qualify as “good cause” for failure to exhaust as such an  
10 allegation could be raised by any petitioner, rendering stay-and-abeyance orders routine.  
11 *Id.* More recently, in *Blake v. Baker*, 745 F. 3d 977, 983 (9th Cir. 2014), the Ninth Circuit  
12 held that “[ineffective assistance] by post-conviction counsel can be good cause for a  
13 *Rhines* stay,” finding that such a conclusion was consistent with and supported by  
14 *Martinez*.

### DISCUSSION

17           Petitioner alleges that new evidence, new law, ineffective assistance of post-  
18 conviction counsel and California’s timeliness rules all constitute good cause for his  
19 failure to exhaust. Respondent disagrees, but concedes that petitioner’s unexhausted  
20 claims “may not be ‘plainly meritless’, and it does not appear that petitioner has engaged  
21 in abusive litigation tactics.” (ECF Doc. No. 26 at 7)

22           As discussed below, California’s timeliness rules provide petitioner good cause for  
23 a stay under *Rhines*. The Court will not address petitioner’s other alleged bases for good  
24 cause.

25           Petitioner alleges that because California’s untimeliness rules are unclear, he is  
26 compelled by *Pace* to file a mixed petition to avoid risking the loss of his rights and  
27 remedies. In *Pace*, the United States Supreme Court discussed, albeit in dicta, the  
28 predicament a prisoner could face if he litigated in state court for years only to find out

1 that his petition was untimely and therefore not “properly filed” and not entitled to  
2 statutory tolling under 28 U.S.C. § 2244(d)(2). 544 U.S. at 416. The Court stated a  
3 “prisoner seeking state postconviction relief might avoid this predicament, however, by  
4 filing a ‘protective’ petition in federal court and asking the federal court to stay and abey  
5 the federal habeas proceedings until state remedies are exhausted.” *Id. citing Rhines*,  
6 544 U.S. at 278. The Court in *Pace* went on to state that “[a] petitioner’s reasonable  
7 confusion about whether a state filing would be timely will ordinarily constitute ‘good  
8 cause’ under *Rhines* for him to file in federal court.” *Id.*

9 Petitioner’s predicament is the type of situation referenced in *Pace*. If he were to  
10 raise his unexhausted claims in a successive habeas petition in state court before filing  
11 his federal petition, he would risk missing the AEDPA’s one-year limitation period if his  
12 claims are found to be untimely in state court. Petitioner safeguards against such an  
13 eventuality by filing his federal petition first and seeking the instant stay.

14 Respondent argues that petitioner cannot reasonably harbor any confusion about  
15 whether his state filing will be timely because California’s discretionary untimeliness rules  
16 have been determined to be “adequate”, i.e. firmly established and regularly followed, by  
17 the United States Supreme Court in *Walker v. Martin*, 562 U.S. 307 (2011). *Walker’s*  
18 holding, however, pertains to the doctrine of procedural default and does necessarily  
19 shed light on whether petitioner’s exhaustion petition will, in fact, be deemed timely.  
20 Under *Walker*, discretionary rules like California’s timeliness rules can still be deemed  
21 adequate. 562 U.S. 320; see also *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir.  
22 1990) (“[u]ncertainty is not enough to disqualify a state’s procedural ground as one  
23 ‘adequate’ under federal law”). Thus, in petitioner’s case, the state court, could in its  
24 discretion, find petitioner’s exhaustion petition to be untimely.

25 For the above-mentioned reasons, the Court finds that petitioner has  
26 demonstrated good cause for a stay.

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**CONCLUSION**

For the above-mentioned reasons, the Court find as follows:

- 1) Petitioner's motion for a stay is GRANTED;
- 2) Respondent's request to dismiss the petition is DENIED;
- 3) Thirty days after the entry of this Order, and every 90 days thereafter until proceedings in his state exhaustion case are completed, petitioner shall serve and file a brief report updating the Court on the status of his pending state habeas action. No later than 30 days after proceedings in his state case are completed, petitioner shall serve and file notice that proceedings are completed.

**IT IS SO ORDERED.**

Dated: April 6, 2017



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PHYLLIS J. HAMILTON  
United States District Judge