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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PAUL GORDON WHITMORE,)	Civil No. 09-1324-MMA(WVG)
)	
Petitioner,)	ORDER GRANTING PETITIONER'S
v.)	MOTION TO HOLD FEDERAL HABEAS
)	PETITION IN ABEYANCE
)	(Doc. #34)
MATTHEW CATE, Warden,)	
)	
Respondent.)	
_____)	

On May 26, 2009, Petitioner Paul Gordon Whitmore ("Petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus ("Petition"). On October 19, 2009, Respondent filed an Answer to the Petition. On January 21, 2010, Petitioner filed a Motion for Stay and Abeyance Regarding Ground 4 ("Motion to Stay & Abey") that is now pending before the Court.

Petitioner's Motion seeks an order staying the proceedings so he can exhaust his state court remedies as to claim no. 4 in his Petition. Respondent does not oppose the Motion. For the reasons outlined below, the Court GRANTS Petitioner's Motion to Stay & Abey.

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2 Exhaustion

3 The exhaustion of available state remedies is a prerequisite to a
4 federal court's consideration of claims presented in a habeas corpus
5 proceeding. 28 U.S.C.A. § 2254(b) *Rose v. Lundy*, 455 U.S. 509, 522
6 (1982). In *Rose v. Lundy*, the Supreme Court held "a district court must
7 dismiss habeas petitions containing both unexhausted and exhausted
8 claims." *Id.* Such a dismissal leaves "the prisoner with the choice of
9 returning to state court to exhaust his claims or of amending or
10 resubmitting the habeas petition to present only exhausted claims to the
11 district court." *Id.* at 510.

12 Petitioner's Petition contains both exhausted and unexhausted
13 claims. In claim no. 4, Petitioner asserts:

14 his 6th and 14th Amendment rights to Due Process and
15 Fair Trial were denied when prosecutor was allowed
16 to use multiple images for each count of molest and
17 production of pornography."
18 Multiple images were allowed as the basis of most
19 charges of 288(a) and 311.4. Some counts has as many
20 as 70+ images for a single act. There is no way to
21 determine which image the jury member(s) thought
22 were 'pornographic' or 'proved' the molest acts
23 alleged. No effort was made to ensure each juror
24 agreed on each image. Individual acts must be proved
25 for conviction and each juror must agree on each
26 act. Procedure was hopelessly flawed.

(Petition at 6)

27 Here, in Petitioner's filings with the California Court of Appeal
28 and the California Supreme Court, Petitioner referenced his 6th and 14th
Amendment rights to due process. However, he did not assert his claim
in either court as an alleged violation of the United States
Constitution. Further, the claim presented to the California courts
does not describe the federal legal theory on which the claim is based.
Therefore, Petitioner's claim no. 4 was not fairly presented to the
California Supreme Court. As a result, the claim is unexhausted.

1 II

2 Stay and Abeyance

3 When *Rose v. Lundy* was decided, there was no statute of limitations
4 for filing a federal habeas corpus petition; after exhausting claims in
5 state court, a petitioner could return to federal court "with relative
6 ease." *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct 1528, 1533 (2005).
7 However, AEDPA changed many aspects of federal habeas corpus
8 proceedings, including the application of the one-year statute of
9 limitations for bringing a habeas corpus petition in federal court,
10 which is set forth in 28 U.S.C. §2244(d). In *Rhines*, the Supreme Court
11 recognized petitioners can effectively be denied the opportunity for
12 collateral review in federal court "[a]s a result of the interplay
13 between AEDPA's 1-year statute of limitations and [*Rose v. Lundy*]'s
14 dismissal requirement." *Rhines*, 125 S.Ct. at 1533-1534. Therefore, the
15 *Rhines* court held that federal courts have discretion to stay mixed
16 petitions and to hold habeas proceedings in abeyance while the
17 petitioner returns to state court to exhaust all claims. *Id.* at 1534-
18 1535.

19 The *Rhines* court also held that stay and abeyance "should be
20 available only in limited circumstances." *Id.* at 1535. If employed too
21 often, the procedure could undermine the purposes of AEDPA, namely, to
22 reduce delay and streamline federal habeas corpus proceedings. *Id.* at
23 1535. In this regard, the Supreme Court stated "it likely would be an
24 abuse of discretion for a district court to deny a stay and to dismiss
25 a mixed petition if the petitioner had good cause for his failure to
26 exhaust, his unexhausted claims are potentially meritorious, and there
27 is no indication that the petitioner engaged in intentionally dilatory
28 litigation tactics." *Id.*

1 Good Cause

2 Petitioner argues that he had good cause for his failure to exhaust
3 his unexhausted claim because his appellate attorney told him that the
4 issues in his case were exhausted and that he should file his Petition
5 for Writ of Habeas Corpus in federal court. He followed his attorney's
6 instructions. Respondent does not dispute Petitioner's argument.

7 Claim is Potentially Meritorious

8 Petitioner's claim is potentially meritorious. Specifically,
9 Petitioner asserts that the trial court allowed the jury to view
10 multiple images of children to determine guilt or innocence on each
11 count of child molestation and production of pornography. Petitioner
12 alleges that some of the presented images do not depict children in a
13 sexual situation. Therefore, it is unclear which images the jury used
14 to find Petitioner guilty on multiple counts of child molestation and
15 production of pornography. Respondent does not dispute Petitioner's
16 argument.

17 Intentionally Dilatory Litigation Tactics

18 It does not appear that Petitioner's raising of his unexhausted
19 claim at this time is the result of dilatory litigation tactics.

20 The Supreme Court in *Rhines* did not define "good cause," but did
21 acknowledge AEDPA's one-year statute of limitations "'serves the well-
22 recognized interest in the finality of state court judgments'" because
23 it "'reduces the potential for delay on the road to finality by
24 restricting the time that a prospective federal habeas petitioner has in
25 which to seek federal habeas review.'" *Rhines* 125 S.Ct. at 1534, quoting
26 *Duncan v. Walker*, 533 U.S. 167, 179 (2001). The Supreme Court also
27 suggested a broad definition of "good cause" would be contrary to AEDPA
28 because it would not "be compatible with AEDPA's purposes." *Id.* at 1534.

1 In a decision issued shortly after *Rhines*, the Supreme Court in
2 *dicta* addressed one circumstance which would qualify as "good cause" for
3 failing to exhaust state court remedies before a federal petition is
4 filed. In *Pace v. DiGuglielmo*, 125 S.Ct. 1807, 1810-1811 (2005), the
5 Supreme Court resolved a split among the circuits as to the application
6 of section 2244(d)(2), which tolls AEDPA's one-year statute of
7 limitations while a "properly filed application for State post-
8 conviction or other collateral review" is pending. 28 U.S.C.
9 2244(d)(2). In *Pace*, the court held that an application for state post-
10 conviction relief is not "properly filed" for purposes of
11 section 2244(d)(2) if it is considered untimely under state law. *Id.* at
12 1810. In reaching its decision, the *Pace* court addressed a fairness
13 argument by the petitioner who claimed a "petitioner trying in good
14 faith to exhaust state remedies may litigate in state court for years
15 only to find out at the end that he was never 'properly filed,' and thus
16 that his federal habeas petition is time barred." *Id.* at 1813 Citing
17 its prior decision in *Rhines*, the Supreme Court responded to the
18 petitioner's argument as follows: "A prisoner seeking state post-
19 conviction relief might avoid this predicament, however, by filing a
20 'protective' petition in federal court and asking the federal court to
21 stay and abey the federal habeas proceedings until state remedies are
22 exhausted.

23 Following the Supreme Court's decision in *Rhines*, the Ninth Circuit
24 held the "good cause" standard prescribed by *Rhines* is less stringent
25 than the "extraordinary circumstances" standard, which the Ninth Circuit
26 applies in the context of equitable tolling of AEDPA's one-year statute
27 of limitations. *Jackson v. Roe*, 425 F.3d 654, 661-662 (9th Cir. 2005).
28 "[E]quitable tolling of AEDPA's one-year statute of limitation is

1 available . . . only when 'extraordinary circumstances beyond a
2 prisoner's control make it impossible to file a petition on time.'" *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005),
3 quoting *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "That
4 determination is 'highly fact-dependent'" and the petitioner "'bears the
5 burden of showing that equitable tolling is appropriate.'" *Id.* quoting
6 *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005) and *Whalem/Hunt v.*
7 *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (*en banc per curiam*). For
8 example, "extraordinary circumstances" exist where a habeas petitioner
9 is denied access to legal materials for a significant period of time.
10 *Espinoza-Matthews*, 432 F.3d at 1027-1028; *Lott v. Mueller*, 304 F.3d 918,
11 921-925 (9th Cir. 2002).

12
13 District courts interpreting the *Rhines* "good cause" standard have
14 taken markedly different approaches. Despite the Ninth Circuit's
15 endorsement of a lenient standard in *Jackson*, some district courts in
16 the Ninth Circuit have applied a more stringent standard, finding "it
17 appropriate to look to procedural default case law for guidance in
18 determining whether petitioner has demonstrated the requisite 'good
19 cause' for failing to exhaust . . . unexhausted claims prior to filing
20 [a federal] habeas action." *Hernandez v. Sullivan*, 397 F.Supp.2d 1205,
21 1207 (C.D. Cal. 2005). For example, in *Johnson v. Sullivan*, 2006 WL
22 37037 (C.D. Cal. Jan. 4, 2006), petitioner argued that he had "good
23 cause" for his failure to exhaust because his appellate counsel was
24 ineffective on direct appeal and because he did not know the claim was
25 unexhausted when he filed his federal petition. *Id.* at *2. The
26 district court rejected the Ninth Circuit's conclusion in *Jackson* that
27 "good cause" is less stringent than the "extraordinary circumstances"
28 standard applied to determine whether a petitioner is entitled to

1 equitable tolling of the statute of limitations. *Id.* at *3 n.4.
2 Instead, the district court concluded "the good cause standard for
3 failure to exhaust may be analogized to the 'cause' required to overcome
4 a procedural bar." *Id.* at *3. In the procedural default context,
5 "'cause' usually means some objective factor external to the petitioner
6 which gave rise to the default." *Id.* at *3. Under this more stringent
7 standard, the district court concluded the petitioner had not
8 established good cause for failing to exhaust his state court remedies.
9 The district court reasoned that an error by appellate counsel on a
10 discretionary appeal was not enough to establish good cause because
11 "counsel's conduct did not prevent petitioner from seeking state habeas
12 relief on the unexhausted claim." *Id.* at *3. The district court also
13 concluded the petitioner's lack of knowledge was "not an objective
14 factor external to petitioner which prevented compliance with the
15 exhaustion requirement." *Id.* at *3. To justify its reliance on a more
16 stringent standard than the one set forth by the Ninth Circuit in
17 *Jackson v. Roe*, the district court reasoned it would defeat the purpose
18 of exhaustion if a petitioner's "lack of knowledge" could establish
19 "good cause" because "any petitioner could claim lack of knowledge to
20 continually amend their petition." *Id.* at *3.

21 Another court has opined that "good cause" should be determined by
22 alluding to "excusable neglect," noted in *Pioneer Inv. Services v.*
23 *Brunswick Assoc.*, 507 U.S. 394 (1993). *Corjasso v. Ayers*, 2006 WL 618380
24 (E.D. Cal. March 9, 2006) The *Corjasso* court indicated that it would
25 look to factors such as prejudice to the non-moving party, length of the
26 delay and its effect on efficient court administration, whether the
27 delay was caused by factors beyond the control of the movant, and good
28 faith. *Id.* at *1

1 In other contexts, the Ninth Circuit has held "good cause" requires
2 a showing of diligence. *Zivkovic v. Southern California Edison Co.*, 302
3 F.3d 1080, 1087-1088 (9th Cir. 2002); *Coleman v. Quaker Oats Co.*, 232
4 F.3d 1271, 1294-1295 (9th Cir. 2000); *United States v. Te Selle*, 34 F.3d
5 909, 910 -911 (9th Cir. 1994); *Johnson v. Mammoth Recreations, Inc.*, 975
6 F.2d 604, 609 (9th Cir.1992); *Fimbres v. United States*, 833 F.2d 138, 139
7 (9th Cir. 1987); *Townsel v. Contra Costa County*, 820 F.2d 319, 320-321
8 (9th Cir.1987); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir.1985).
9 "[C]arelessness is not compatible with a finding of diligence and offers
10 no reason for a grant of relief." *Johnson*, 975 F.2d at 609, citing
11 *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th
12 Cir.1992). Ignorance of the law and inadvertent failure to calendar a
13 deadline have also been found incompatible with diligence and good
14 cause. *Townsel*, 820 F.2d at 320-321; *Wei*, 763 F.2d at 372.

15 In this case, Petitioner requests that the Court hold his Petition
16 in abeyance while he returns to state court in order to exhaust his
17 state remedies for a claim that was presented to the state courts but
18 did not raise a question of federal law.

19 *Rhines* indicates that it applies to the question of whether a
20 district court has discretion to stay a *mixed* petition to allow the
21 petitioner to present his unexhausted claims to the state court, and
22 then return to federal court for review of the completely exhausted
23 petition. *Rhines* 125 S.Ct. at 1531.

24 In *Riner v. Crawford*, 415 F.Supp 2d 1207 (D. Nev. 2006), the court
25 held that the *Rhines* good cause standard applicable in consideration of
26 a petitioner's request for stay and abeyance of his federal habeas
27 petition:
28

1 requires the petitioner to show that he was prevented from
2 raising the claim, *either by his own ignorance or confusion*
3 *about the law or the status of his case, by circumstances*
4 *over which he had no control, such as actions by counsel,*
5 *either in contravention of the petitioner's clearly*
6 *expressed desire to raise the claim, or when petitioner*
7 *had no knowledge of the claim's existence.*
8 *Riner* 415 F. Supp. at 1211 (emphasis added)

9 See also *Franck v. Hubbard*, 2008 WL 755925 (S.D. Cal. Mar. 18, 2008);
10 *Lewis v. Dexter*, 2008 WL 901457 (C.D. Cal. Mar. 27, 2008); *Haithcock v.*
11 *Veal*, 2007 WL 935471 (S.D. Cal. Mar. 19, 2007); *Medina v. Woodford* 2006
12 WL 2844578 (N.D. Cal. Oct. 2, 2006).

13 Petitioner has shown a legitimate reason that warrants the delay of
14 the proceedings in this Court while he exhausts his claim in state
15 court. Petitioner has shown that he did not raise claim no. 4 in his
16 Petition to state a violation of the United States Constitution due to
17 his own ignorance and directions from his counsel that all of his claims
18 were exhausted. His reliance upon the advice of counsel was reasonable
19 and excuses his lack of diligence or ignorance.

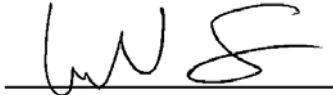
20 The Ninth Circuit has held that a federal court may deny an
21 unexhausted claim on the merits only when it is perfectly clear that the
22 petitioner does not raise even a colorable federal claim. *Cassett v.*
23 *Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) Therefore, if a petitioner
24 states a colorable claim, the claim is not plainly meritless. Here,
25 since Petitioner's claim appears to be at least "colorable," it is not
26 plainly meritless under *Rhines'* second prong. *Lugo v. Kirkland*, 2006 WL
27 449130 (N.D. Cal. Feb. 22, 2006) at *4

28 Consequently, the Court concludes that Petitioner has shown good
cause for his failure to exhaust claim no. 4 in his Petition. As a
result, there is no reason not to stay this action while Petitioner
exhausts his unexhausted claim. *Lugo* at *4, *Briscoe* at *1-2

1 authorities pertaining to the Motion, and GOOD CAUSE APPEARING, hereby
2 GRANTS Petitioner's Motion to Stay and Abey.

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DATED: February 2, 2010


Hon. William V. Gallo
U.S. Magistrate Judge