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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

RICHARD CHARLES BUCHANAN,  
  
Petitioner,  
  
vs.  
  
MATTHEW CATE, Secretary,  
  
Respondent.

Civil No. 10cv0423-BTM (NLS)

**ORDER:**  
**(1) DECLINING TO ADOPT THE FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE;**  
**(2) GRANTING MOTION FOR STAY AND ABEYANCE; AND**  
**(3) ISSUING A STAY**

Petitioner, a California prisoner proceeding pro se, initiated this action on February 12, 2010, by constructively filing a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, contemporaneously with a Motion for Stay and Abeyance.<sup>1</sup> (Doc. Nos. 1-2.) Petitioner challenges a 2006 conviction from the San Diego County Superior Court which resulted in a sentence of 45 years-to-life in state prison. (Pet. at 1-2.) The Petition contains nine claims, only two of which were presented to the California Supreme Court on direct appeal, and the parties agree that the Petition is “mixed” because it contains two exhausted claims and seven unexhausted claims.

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<sup>1</sup> Petitioner is entitled to the benefit of the “mailbox rule” which provides for constructive filing of court documents as of the date they are submitted to the prison authorities for mailing to the court. *Anthony v. Cambra*, 236 F.3d 568, 574-75 (9th Cir. 2000). The Court will use the constructive filing dates throughout this Order.

1           Petitioner's direct appeal ended on November 19, 2008, when the California Supreme  
2 Court denied his petition for review. His conviction became final for the purposes of AEDPA's  
3 one-year statute of limitations on February 17, 2009, the last day he could have filed a petition  
4 for a writ of certiorari in the United States Supreme Court. Bowen v. Roe, 188 F.3d 1157, 1159  
5 (9th Cir. 1999). Thus, it appears Petitioner initiated this action several days before the statute  
6 of limitations was set to expire. However, as discussed below, it is unclear whether the statute  
7 of limitations has actually expired, because on September 17, 2009, with five months remaining  
8 on the statute of limitations, Petitioner initiated his first full round of state post-conviction  
9 review by filing a habeas petition in the trial court in which he claims to have presented six of  
10 the seven unexhausted claims. (Pet's Motion for Stay [Doc. No. 2] Ex. A.) That habeas petition  
11 was denied on December 29, 2009, on the merits and with a citation to In re Dixon, 41 Cal.2d  
12 756 (1953). (Lodgment No. 11.) Petitioner states that he is in the process of preparing a habeas  
13 petition to be filed in the state appellate court, and requests this Court stay his mixed Petition  
14 while he concludes his first full round of state habeas proceedings.<sup>2</sup> (Pet's Motion for Stay,  
15 attached 2/9/10 Decl. of Pet. at 3.)

16           Petitioner contends that his claims are meritorious, that he has acted diligently in  
17 presenting them to the state courts, and that he has provided the state courts with adequate  
18 justification for any delay. (Id. at 1-2 and attached 2/9/10 Decl. of Pet. at 1-4.) He attaches his  
19 declaration filed in the state court in which he argued that he should not be held responsible for  
20 the failure to raise the claims on direct appeal because: (1) he is overwhelmed by the lengthy and  
21 ponderous litigation of his criminal case; (2) he suffers from improperly treated health problems  
22 which have interfered with his ability to do legal work while incarcerated; (3) his appointed  
23 appellate attorney was replaced without explanation; (4) jail officials limited his access to a law

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25           <sup>2</sup> A review of the California Supreme Court website indicates that while this Motion has been  
26 pending, Petitioner filed a habeas petition in the appellate court on May 12, 2010, which was denied on  
27 May 27, 2010, both on procedural grounds and on the merits, and that he filed a petition for review of  
28 that order in the state supreme court on June 17, 2010, which is currently pending after a court-ordered  
response was filed on July 14, 2010. See <http://www.courtinfo.ca.gov> (last visited July, 16, 2010);  
Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002) (court may take judicial notice of relevant state  
court documents which have a direct relationship to calculation of the statute of limitations). As will  
be discussed, it is unclear at this time whether Petitioner will be entitled to statutory tolling of the  
limitations period during this first full round of state post-conviction review.

1 library and interfered with access to his case file, which is incomplete; (5) he was misled and  
2 distracted by an undercover FBI informant/agent; and (6) he has unsuccessfully attempted to  
3 retain counsel. (Id., attached 9/13/09 Decl. of Pet. at 1-5.)

4 Respondent opposes a stay, contending that: (1) the unexhausted claims all involve trial  
5 issues which Petitioner should have been aware of at the time of trial, and he has not shown good  
6 cause for the ten-month delay between the conclusion of his direct appeal and the filing of a  
7 habeas petition in the trial court; (2) Petitioner has failed to show that the claims are not plainly  
8 meritless; and (3) a stay is unnecessary because five months remained on the statute of  
9 limitations when Petitioner began exhausting his claims, and the limitations period is arguably  
10 tolled by his state habeas proceedings. (Opp. [Doc. No. 5] at 3-8.) Respondent argues that the  
11 denial of the pro se habeas petition by the trial court with a citation to Dixon, which Respondent  
12 contends stands for the proposition that a claim is procedurally defaulted if it could have been  
13 but was not raised on direct appeal, demonstrates that Petitioner did not establish good cause in  
14 the state court for failing to raise the claims on direct appeal. (Opp. at 7-8.)

15 Petitioner replies that a stay is necessary to protect his right to raise his claims on federal  
16 habeas because he risks a determination that the federal statute of limitations will not be tolled  
17 during his round of state habeas review if the petitions are denied by the state courts on  
18 procedural grounds, which could result in the claims being time-barred or procedurally defaulted  
19 in this Court. (Pet.'s Reply [Doc. No. 21] at 1-2.) He also contends that the denial of his claims  
20 with a citation to Dixon demonstrates that his appellate counsel rendered ineffective assistance  
21 by failing to present the claims on direct appeal. (Id. at 3-5.)

22 Presently before the Court is a Report and Recommendation (“R&R”) submitted by  
23 United States Magistrate Judge Nita L. Stormes. (Doc. No. 18.) The Magistrate Judge  
24 recommends denying Petitioner’s stay motion on the basis that Petitioner has not shown good  
25 cause for the delay in exhausting his claims. (R&R at 6.) The Magistrate Judge recommends  
26 that the Petition be dismissed unless Petitioner chooses one of three options: (1) abandon his  
27 unexhausted claims and proceed only with the exhausted claims; (2) voluntarily dismiss the  
28 Petition and file a new federal petition after exhausting his state court remedies; or (3) request

1 permission to utilize the “withdrawal and abeyance” procedure by withdrawing the unexhausted  
2 claims, requesting the Court to stay the proceedings while he exhausts his state court remedies,  
3 and requesting permission to file an amended petition which includes all exhausted claims after  
4 the claims are exhausted. (R&R at 7-9.) Petitioner has filed Objections to the R&R contending  
5 that the Magistrate Judge erred in finding that he has not shown good cause for the failure to  
6 raise the claims on direct appeal. (Doc. No. 23.)

7 The Court has reviewed the R&R and the Objections thereto pursuant to 28 U.S.C.  
8 § 636(b)(1), which provides that: “A judge of the court shall make a de novo determination of  
9 those portions of the report or specified proposed findings or recommendations to which  
10 objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the  
11 findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

12 For the following reasons, the Court **DECLINES TO ADOPT** the Magistrate Judge’s  
13 findings and conclusions, **GRANTS** Petitioner’s Motion and **ISSUES** a stay.

#### 14 **I. Legal Standards**

15 The United States Supreme Court has held that district courts have limited discretion to  
16 stay federal habeas proceedings and hold a mixed habeas petition in abeyance while a petitioner  
17 returns to state court for purposes of exhaustion. Rhines v. Weber, 544 U.S. 269, 276-78 (2005).  
18 The Rhines Court cautioned that: “Stay and abeyance, if employed too frequently, has the  
19 potential to undermine [AEDPA’s] twin purposes” of reducing delay and promoting the finality  
20 of state convictions, and the overuse of the procedure would frustrate “AEDPA’s objective of  
21 encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings.”  
22 Id. at 277. Nevertheless, the Court noted that a district court would likely abuse its discretion  
23 in denying such a stay where “the petitioner had good cause for his failure to exhaust, his  
24 unexhausted claims are potentially meritorious, and there is no indication that the petitioner  
25 engaged in intentionally dilatory litigation tactics.” Id. at 278. The Supreme Court has not  
26 articulated what constitutes good cause under Rhines, but the Ninth Circuit has held that it is a  
27 less stringent standard than what constitutes good cause to establish equitable tolling, which  
28 requires that extraordinary circumstances beyond a petitioner’s control be the proximate cause

1 of the delay. Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). In addition, the Ninth  
2 Circuit has “left for another day” the determination whether the “withdrawal and abeyance”  
3 procedure remains viable after Rhines. Jackson, 425 F.3d at 661.

4 Although the Ninth Circuit has not defined the exact contours of the good cause element,  
5 the Magistrate Judge noted that several district courts have weighed in on what constitutes good  
6 cause under Rhines, ranging from requiring an “objective factor external to the petitioner” on  
7 one end of the spectrum to “excusable neglect” on the other. (R&R at 5-6.) In fact, one district  
8 court has simply required “a prima facie case that a justifiable, legitimate reason exists which  
9 warrants the delay of federal proceedings while exhaustion occurs.” Briscoe v. Scribner, 2005  
10 WL 3500499 at \*2 (E.D. Cal. 2005) (unpublished memorandum).

## 11 **II. Analysis**

12 The determination as to whether a stay is appropriate in this case involves a number of  
13 considerations not addressed in the R&R, due in part to the fact that Petitioner presented his  
14 claims to the state supreme court after the R&R was filed. In addition, it appears that a  
15 determination as to whether Petitioner can establish good cause under Rhines is premature. For  
16 these reasons, the Court **DECLINES TO ADOPT** the findings and conclusions of the  
17 Magistrate Judge, and will address Petitioner’s Motion in the first instance.

18 Before turning to application of Rhines, the Court notes that the parties can only assume  
19 at this point that the claims are unexhausted. The claims may in fact be exhausted if Petitioner  
20 no longer has state court remedies available.<sup>3</sup> While this Motion has been pending, Petitioner  
21 filed a petition for review in the state supreme court, which itself is now pending. A copy of that  
22 petition has not been lodged with this Court, and it is unclear whether any or all the unexhausted

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24 <sup>3</sup> The exhaustion requirement is satisfied if Petitioner no longer has state court remedies  
25 available to him. Cassett v. Stewart, 406 F.3d 614, 621 n.5 (9th Cir. 2005) (“A habeas petitioner who  
26 has defaulted his federal claims in state court meets the *technical* requirements for exhaustion; there are  
27 no state remedies any longer ‘available’ to him.”), quoting Coleman v. Thompson, 501 U.S. 722, 732  
28 (1991); see also 28 U.S.C.A. § 2254(c) (West 2006) (“An applicant shall not be deemed to have  
exhausted the remedies available in the courts of the State, within the meaning of this section, if he has  
the right under the law of the State to raise, by any available procedure, the question presented.”) In such  
a situation the claims would likely be procedurally defaulted in this Court. Coleman, 501 U.S. at 735  
n.\* (holding that a procedural default arises when a petitioner has “failed to exhaust state remedies and  
the court to which the petitioner would be required to present his claims in order to meet the exhaustion  
requirement would now find the claims procedurally barred.”).

1 claims were presented. Assuming the unexhausted claims were presented in the petition for  
2 review, Petitioner will have exhausted his state court remedies as soon as the state supreme court  
3 rules on his petition. If the state supreme court imposes a procedural bar, however, it might  
4 establish that Petitioner did not have state court remedies available to him at the time he  
5 attempted to exhaust his claims. The state supreme court may also address the merits of the  
6 claims, reopen the proceedings or even grant relief, thereby impacting Rhines' "finality of  
7 judgment" consideration. In any case, it appears that Petitioner will shortly have exhausted his  
8 state court remedies as to all his claims, whether because he would have received a judicial  
9 determination by the state's highest court, or because the state courts will have imposed a  
10 procedural bar indicating that Petitioner did not have available state remedies at the time he  
11 presented his unexhausted claims, or because he will have used his one full round of state post-  
12 conviction relief and will no longer have state court remedies available.

13         Assuming the claims are unexhausted, and Rhines applies, the Court must first consider  
14 whether the claims are plainly meritless and whether Petitioner has engaged in dilatory litigation  
15 tactics. Rhines, 544 U.S. at 277-78. The unexhausted claims allege prosecutorial misconduct,  
16 use of perjured testimony, violations of Brady v. Maryland, 373 U.S. 83, 87 (1963), judicial bias,  
17 and shackling in view of the jury. (See Pet. at 6-9.) The claims are not plainly without merit.  
18 See e.g. Cassett, 406 F.3d at 624 (finding that a claim is colorable within the meaning of 28  
19 U.S.C. § 2254(b)(2) unless "it is perfectly clear that the petitioner has no hope of prevailing.")  
20 Moreover, Petitioner initiated his first full round of state post-conviction review with five  
21 months remaining on the statute of limitations, and he is diligently proceeding through that  
22 process. Thus, there is nothing in the record to support a finding that Petitioner has engaged in  
23 dilatory litigation tactics. See Rhines, 544 U.S. at 277-78.

24         The next Rhines consideration is whether Petitioner has established good cause for the  
25 delay in exhausting his state court remedies. Assuming the claims should have been presented  
26 on direct appeal, as appears likely, Respondent contends the delay should be measured from the  
27 date direct appeal concluded until Petitioner filed his first state habeas petition, approximately  
28 ten months. The delay Rhines sought to avoid, however, arises from a "balance between the

1 congressional intent behind AEDPA - to reduce delays in the execution of state and federal  
2 criminal sentences, . . . and the preservation of petitioner’s rights to federal review of their  
3 claims.” Valdovinos v. McGrath, 598 F.3d 568, 574 (9th Cir. 2010), quoting Rhines, 544 U.S.  
4 at 276-77.) If Petitioner is entitled to statutory tolling during his complete first full round of  
5 state habeas proceedings and the statute of limitations has therefore not yet expired, or if the  
6 state supreme court reopens state proceedings or grants relief, there may be no “delay”  
7 whatsoever within the meaning of Rhines. Even if the delay is measured by the approximately  
8 five months these proceedings have been delayed while the instant Motion has been pending,  
9 or what appears to be a relatively short further delay until the state supreme court rules on the  
10 pending petition for review, such a delay does not appear to be so severe as to outweigh  
11 Petitioner’s right to federal review of his claims. Respondent asserts that the statute of  
12 limitations has not yet expired, and therefore the same result could be obtained by dismissing  
13 the Petition without prejudice to initiate new federal habeas proceedings after exhaustion. If the  
14 Court were to pursue that course, however, there remains the possibility that Petitioner would  
15 not be entitled to statutory tolling due to imposition of state procedural bars, and he would have  
16 lost the opportunity to raise any of his claims in a federal habeas proceeding, including the  
17 claims which are now clearly exhausted. The relatively short delay required for the state court  
18 determination to be made, when balanced against Petitioner’s right to have his federal habeas  
19 claims addressed, counsels in favor of a stay. In any case, Respondent would not be prejudiced  
20 by a stay rather than dismissal because the statute of limitations and procedural default defenses  
21 can be raised after the stay has been lifted.

22         Additionally, the Rhines good cause standard has not yet been fully developed, and  
23 Petitioner sets forth a number of reasons for the failure to raise the claims on direct appeal which  
24 have a potential to satisfy the various manifestations of that standard. (See R&R at 5.) In  
25 addition to those reasons, he argues ineffective assistance of appellate counsel. (Pet.’s Reply at  
26 3-5.) Expansion of the record appears necessary to determine the verity and effect of those  
27 reasons, and Petitioner would almost certainly have exhausted his state court remedies before  
28 the record could be expanded and examined, resulting in a longer and perhaps unnecessary delay.

1 **III. Conclusion**

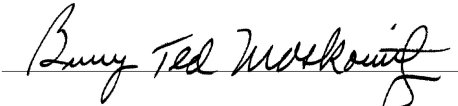
2 The stay and abeyance standard of Rhines requires respect for AEDPA's twin purposes  
3 of preventing delay and respecting the finality of state court judgments, and is relegated to the  
4 discretion of the Court. As noted above, Petitioner began exhausting his state court remedies  
5 with five months left on the statute of limitations. Petitioner has been diligent in proceeding  
6 through his first full round of state post-conviction review, which should soon conclude. It is  
7 not yet clear whether and to what extent the state supreme court will address the merits of the  
8 claims or subject them to procedural bars, and it is not yet clear whether the statute of limitations  
9 has expired. If the statute of limitations has not yet expired, as Respondent admits is possible,  
10 then no delay within the meaning and purpose of AEDPA will result from issuance of a stay, and  
11 Respondent will not be prejudiced in the ability to raise any affirmative defenses. If there is a  
12 delay, it will likely be short, and a longer delay may result from denying a stay. These reasons  
13 all support staying this action until what appears to be an imminent conclusion to Petitioner's  
14 state post-conviction proceedings. The Court notes that once the state supreme court rules on  
15 the pending petition for review, the stay will be lifted and this action will proceed on the claims  
16 presented in the federal Petition. If Petitioner has failed to present any of those claims to the  
17 state supreme court, or if any of those claims were rejected on the basis of procedural bars,  
18 Respondent remains free to argue, once the stay has lifted, that such claims are unexhausted,  
19 untimely and/or procedurally defaulted in this Court.

20 **IV. Order**

21 For the reasons set forth above, the Court **DECLINES TO ADOPT** the findings and  
22 conclusions of the Magistrate Judge, **GRANTS** Petitioner's Motion for Stay and Abeyance, and  
23 **ISSUES** a stay. This action is stayed until thirty (30) days after the state supreme court rules on  
24 the petition for review now pending in that court. Respondent and Petitioner shall immediately  
25 notify this Court upon of the disposition of the petition for review.

26 **IT IS SO ORDERED.**

27 DATED: July 23, 2010

28   
Honorable Barry Ted Moskowitz  
United States District Judge