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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WILLIAM BRYON LEONARD,  
  
v.  
  
WILLIAM GITTERE,<sup>1</sup> et al.,  
  
Petitioner,  
  
Respondents.

Case No. 2:99-cv-0360-MMD-CWH

ORDER

**I. SUMMARY**

On March 27, 2019, Petitioner filed a motion for stay and abeyance asking the Court to suspend these federal proceedings while he once again pursues state court relief from his conviction and death sentence. (ECF No. 169.) For the reasons that follow, the motion will be denied.

**II. BACKGROUND**

Nearly two and a half years ago, this Court reopened these proceedings after a ten-year exhaustion stay. At that time, the Court entered a scheduling order that allowed Petitioner 60 days within which to file an amended petition. (ECF No. 120.) Within that 60-day period, Petitioner filed, in succession, a motion for leave to supplement his petition for writ of habeas corpus (ECF No. 121), a motion to re-impose the stay (ECF No. 124), and a motion for extension of time to file a first amended petition pending resolution of his motion to re-impose the stay (ECF No. 127).

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<sup>1</sup>As the current warden at Ely State Prison, William Gittere is automatically substituted as a respondent for former warden, Timothy Filson. See Fed. R. Civ. P. 25(d).

1           When the Court denied Petitioner’s motion to re-impose the stay (ECF No. 129),  
2           Petitioner filed a motion for reconsideration (ECF No. 130) that further delayed the filing  
3           of his first amended petition. And, from the time the motion for reconsideration was  
4           denied, nearly five months passed before Petitioner filed his 400-page amended petition.

5           After receiving four extensions of time, Respondents filed a motion to dismiss the  
6           petition, advancing various procedural defenses including failure to exhaust. Petitioner  
7           then filed the motion for stay and abeyance currently before the Court for decision.

### 8           **III.     LEGAL STANDARDS**

9           In *Rhines v. Weber*, 544 U.S. 269 (2005), the stay and abeyance procedure was  
10          condoned by the Court as a means by which a habeas petitioner with a mixed petition  
11          subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982), could fully exhaust his  
12          petition without the risk of running afoul of the 1-year statutory time limit for filing federal  
13          petitions. See *Rhines*, 544 U.S. at 276. The Court in *Rhines* cautioned, however, that stay  
14          and abeyance, if too frequently used, would undermine AEDPA’s goals of prompt  
15          resolution of claims and deference to state court rulings. See *id.* Thus, the Court held that,  
16          in order to obtain “stay and abeyance,” a petitioner must show: 1) good cause for the  
17          failure to exhaust claims in state court; 2) that unexhausted claims are potentially  
18          meritorious; and 3) the absence of abusive tactics or intentional delay. See *id.*; see also  
19          *Jackson v. Roe*, 425 F.3d 654, 662 (9th Cir. 2005).

### 20          **IV.     DISCUSSION**

21          With his motion for stay and abeyance, Petitioner asks the Court to stay further  
22          proceedings in this case until he completes state court litigation of an amended petition  
23          for writ of habeas corpus he filed in the state district court on June 9, 2017. According to  
24          Petitioner, the amended state petition includes a claim of ineffective assistance of counsel  
25          supported by “newly discovered evidence,” which consists of “a declaration from trial  
26          counsel [James Wessel] acknowledging the harm his gambling addiction caused to  
27          [Petitioner].” (ECF No. 169 at 3.)

1           This Court sees several problems with Petitioner’s request for a stay. First, the  
2 allegation that trial counsel’s gambling problem negatively impacted his performance  
3 while representing the Petitioner is not new. Indeed, the initial petition filed in this case in  
4 1999 alleged that, while he “was preparing and conducting Petitioner’s defense, lead  
5 counsel was trying to deal with unfolding consequences of his **own criminal conduct**  
6 stemming from a gambling addiction” which involved “the **embezzlement of \$150,000 of**  
7 **another client’s funds**, which was discovered several months prior to Petitioner’s capital  
8 murder trial” and shortly after the trial “resulted in lead counsel’s **conviction of three**  
9 **felony counts** of embezzlement, incarceration and disbarment.” (ECF No. 3 at 7-8  
10 (emphasis in original).) See also DePasquale v. McDaniel, Case No. 3:07-cv-00472-ECR,  
11 2011 WL 841419, at \*7 (D. Nev. Mar. 7, 2011) (referencing “Wessel’s gambling problem,  
12 financial problems, and actions which resulted in Wessel’s eventual disbarment and  
13 conviction for the crime of embezzlement”).

14           As noted, a Rhines stay permits a petitioner to present unexhausted claims to the  
15 state court while his federal petition remains pending, thereby allowing him to avoid the  
16 risk of later returning to federal court with a time-barred petition. Here, Petitioner does not  
17 identify a particular unexhausted claim he intends to exhaust during his requested stay.  
18 It appears only that he wishes to supplement long-standing ineffective assistance of  
19 counsel claims with additional evidence; i.e., an acknowledgment from Wessel himself  
20 regarding the harmful impact of his gambling problem. That is not the purpose of a Rhines  
21 stay.

22           On the other hand, if Petitioner is, in fact, presenting an unexhausted claim in his  
23 recently filed state petition, he has not established good cause for failing to exhaust the  
24 claim. Evidence of trial counsel’s gambling, financial, and legal woes has been readily  
25 available for most, if not all, of the 30 years since Petitioner’s conviction. Wessel’s belated  
26 acknowledgment that his gambling problem undermined his performance was not a  
27 prerequisite for bringing a claim challenging his performance nor does the  
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1 acknowledgment give rise to a new claim. As Respondents note, Strickland v.  
2 Washington presents an objective standard for reviewing trial counsel's performance. See  
3 466 U.S. 668, 688 (1984). Wessel's declaration may shed light on the underlying cause  
4 of his alleged errors or omissions, but it does not significantly impact the question whether  
5 his performance fell below the Strickland standard.

6 Petitioner's motion for stay and abeyance does not satisfy the requirements  
7 established in Rhines.

8 It is therefore ordered that Petitioner's motion (ECF No. 169) is denied.

9 It is further ordered that the scheduling order of December 28, 2016 (ECF No. 120)  
10 continues to govern proceedings in this case.

11 DATED THIS 14<sup>th</sup> day of May 2019.



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13 MIRANDA M. DU  
14 UNITED STATES DISTRICT JUDGE  
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