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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DALE EDWARD FLANAGAN,)
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 Petitioner,)
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 vs.)
)
 RENEE BAKER, *et al.*,)
)
 Respondents.)
)
 _____/

2:09-cv-00085-KJD-GWF

ORDER

This is an action for habeas relief under 28 U.S.C. § 2254 brought by Dale Edward Flanagan, a Nevada prisoner sentenced to death. On September 2, 2011, the respondents filed, in relation to Flanagan’s first amended petition, a motion to dismiss or, in the alternative, for a more definite statement. ECF Nos. 55/56. In response, Flanagan filed, on January 30, 2012, an opposition to the motion (ECF No. 83) and a motion for stay and abeyance (ECF No. 84). On March 30, 2012, respondents’ filed an opposition to the motion for stay and abeyance. ECF No. 90. They also filed, on April 6, 2012, a motion to dismiss the conflict of interest claim contained within Claim Five of Flanagan’s petition. ECF No. 94. For reasons that follow, the court will grant the motion for stay, and stay this action pending the conclusion of Flanagan’s state-court habeas corpus proceedings. The court will deny the motions to dismiss as moot.

A federal court may not grant habeas corpus relief on a claim not exhausted in state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is

1 intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*
2 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the
3 claim to the highest state court, and must give that court the opportunity to address and resolve it.
4 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
5 10 (1992).

6 Flanagan concedes that Claim One of his first amended petition is unexhausted. Thus, his
7 petition is a mixed petition – i.e., it contains both exhausted and unexhausted claims. In *Rose v.*
8 *Lundy*, 455 U.S. 509 (1982), the Supreme Court held that federal district courts may not adjudicate
9 mixed petitions for habeas corpus. 455 U.S. at 518-19. The Antiterrorism and Effective Death
10 Penalty Act of 1996 (AEDPA) preserved *Lundy's* total exhaustion requirement (see 28 U.S.C. §
11 2254(b)(1)(A)), but it also imposed a 1-year statute of limitations on the filing of federal petitions
12 (see § 2244(d)).

13 Because of the interplay between AEDPA's 1-year statute of limitations and *Lundy's*
14 dismissal requirement, petitioners who come to federal court with “mixed” petitions run the risk of
15 forever losing their opportunity for any federal review of their unexhausted claims. *See Rhines v.*
16 *Weber*, 544 U.S. 269, 275 (2005) (“If a petitioner files a timely but mixed petition in federal district
17 court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will
18 likely mean the termination of any federal review.”). To solve the problem, the Court in *Rhines*
19 condoned the “stay-and-abeyance” procedure, whereby the district court, rather than dismiss the
20 mixed petition under *Lundy*, stays the petition and holds it in abeyance while the petitioner returns to
21 state court to exhaust his previously unexhausted claims. *Id.* at 276.

22 The Court cautioned, however, that stay and abeyance, if too frequently used, would
23 undermine AEDPA’s goals of prompt resolution of claims and deference to state court rulings. *Id.*
24 Thus, the Court held that, in order to obtain “stay and abeyance,” a petitioner must show: 1) good
25 cause for the failure to exhaust claims in state court; 2) that unexhausted claims are potentially
26 meritorious; and 3) the absence of abusive tactics or intentional delay. *Id.*; *Jackson v. Roe*, 425 F.3d

1 654, 662 (9th Cir. 2005).

2 Relying on *Rhines*, Flanagan requests that this action be stayed while he completes the
3 exhaustion of Claim One. Claim One is based on allegations that the State committed numerous acts
4 of misconduct in obtaining and presenting the testimony of one of its witnesses, Angela Saldana.
5 Flanagan argues that there is good cause for his failure to exhaust Claim One because evidence of the
6 misconduct was withheld by the State and only unearthed recently when Flanagan located and
7 interviewed Saldana's aunt, Wendy Peoples, and Peoples' daughter, Amy Hanley-Peoples.¹

8 *Rhines* does not go into detail as to what constitutes good cause for failure to exhaust; and,
9 the Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an
10 "extraordinary circumstances" standard. *See Jackson*, 425 F.3d at 661-62 (citing *NLRB v. Zeno*
11 *Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979)). Many district courts have concluded that the standard
12 is more generous than the showing needed for "cause" to excuse a procedural default. *See, e.g.,*
13 *Rhines v. Weber*, 408 F.Supp.2d 844, 849 (D. S.D. 2005) (applying the Supreme Court's mandate on
14 remand). This view finds support in *Pace*, where the Supreme Court acknowledged that a
15 petitioner's "reasonable confusion" about the timeliness of his federal petition would generally
16 constitute good cause for his failure to exhaust state remedies before filing his federal petition. 544
17 U.S. at 416-17. On other hand, interpreting "good cause" too broadly militates against the Supreme
18 Court's admonition that stay and abeyance should only be available in "limited circumstances." *See*
19 *Wooten v. Kirkland* 540 F.3d 1019, 1024 (9th Cir. 2008) (quoting *Rhines*, 544 U.S. at 277).

20 Here, the respondents dispute that the State withheld evidence from Flanagan and question
21 the credibility of the declarations of Wendy Peoples and her daughter, including Peoples' claim that
22 she has made herself difficult to find for the last decade. Even so, Flanagan has demonstrated that he
23 made a good faith effort to develop this specific claim in state court by directing his investigator to
24 locate Peoples and by seeking leave to conduct discovery related to Angela Saldana. See ECF No.

25
26 ¹ The declarations of these two witnesses and the investigator for Flanagan who located them are at ECF No. 47-7, p. 27-36.

1 47-7, p. 36; ECF No. 74-1, p. 74-75. This is sufficient to meet the “good cause” standard under
2 *Rhines*.

3 With respect to the “potentially meritorious” inquiry, the standard should approximate the
4 standard that applies when the court decides whether to deny an unexhausted claim under 28 U.S.C.
5 § 2254(b)(2). *See Rhines*, 544 U.S. at 277. In both instances, the objective is to preserve the
6 principle of comity while preventing the waste of state and federal resources that occurs when a
7 petitioner is sent back to state court to litigate a clearly hopeless claim. *Cf. Cassett v. Stewart*, 406
8 F.3d 614, 624 (9th Cir. 2005). Thus, Flanagan should not be prevented from returning to state court
9 unless “it is perfectly clear that [he] does not raise even a colorable federal claim.” *Id.*

10 The allegations supporting Claim One, if taken as true, arguably present a meritorious
11 challenge to his conviction or sentence. As noted, Flanagan contends, among other things, that the
12 State failed to disclose material evidence that would have undermined the credibility of a witness
13 that testified against him and that the State knowingly offered false or misleading testimony and
14 evidence. Claim One contains factual allegations sufficient to raise colorable grounds for relief
15 under *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959).
16 Because the claim provides Flanagan with at least some chance of habeas relief, Claim One satisfies
17 the “potentially meritorious” standard in *Rhines*.

18 Lastly, in opposing the motion for stay and abeyance, the respondents make no argument that
19 Flanagan has intentionally engaged in dilatory litigation tactics. And, the court sees no indication of
20 such tactics in the record herein

21 Having met the requirements under *Rhines*, Flanagan has shown that a stay is warranted to
22 allow him to complete state court proceedings before moving forward with this federal habeas
23 action. The court will stay this case. This will be the last time that the court imposes a stay to
24 facilitate Flanagan’s exhaustion of claims in state court. Flanagan must exhaust all of his
25 unexhausted claims in state court during the stay of this action imposed pursuant to this order.

26 Respondents’ motions to dismiss (ECF Nos. 55/94) are grounded, in part, on Flanagan’s

1 alleged failure to exhaust in state court all the claims in his first amended habeas petition. As the
2 court is staying this action to allow exhaustion of Flanagan's claims in state court, and as Flanagan
3 will be allowed, following the stay, to file a second amended petition, the stay of this action renders
4 those motions to dismiss moot, and they will be denied on that basis.

5 **IT IS THEREFORE ORDERED** that petitioner's Motion for Stay and Abeyance (ECF No.
6 84) is GRANTED. This action is STAYED to allow petitioner to exhaust, in state court, all his
7 unexhausted claims for habeas corpus relief.

8 **IT IS FURTHER ORDERED** that, on or before December 15, 2012, petitioner shall file
9 and serve a status report, describing the status of his state-court proceedings. Thereafter, during the
10 stay of this action, petitioner shall file such a status report every 6 months (on or before June 15,
11 2013; December 15, 2013; June 15, 2014; etc.). Respondents may, if necessary, file and serve a
12 response to any such status report within 15 days after its service. If necessary, petitioner may reply
13 within 15 days of service of the response.

14 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** from the date this order is
15 entered to initiate the appropriate state court proceeding, if he has not yet done so. Following the
16 conclusion of state court proceedings, petitioner shall, within **30 days**, make a motion to lift the stay.

17 **IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a motion by
18 respondents if petitioner does not comply with the time limits in this order, or if he otherwise fails to
19 proceed with diligence during the stay imposed pursuant to this order.

20 **IT IS FURTHER ORDERED** that respondents' motion to dismiss the first amended
21 petition (ECF No. 55) and motion to dismiss conflict of interest claim (ECF No. 94) are DENIED as
22 moot. Respondents' motion for a more definite statement (ECF No. 56) is DENIED without
23 prejudice

24 DATED: 8/23/12

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UNITED STATES DISTRICT JUDGE