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## UNITED STATES DISTRICT COURT

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## DISTRICT OF NEVADA

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DAVID AUGUST KILLE, SR.,

Case No. 2:17-cv-01805-RFB-NJK

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Petitioner,

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v.

**ORDER**

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BRIAN WILLIAMS, et al.,

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Respondents.

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This pro se habeas matter comes before the Court on Petitioner David August Kille, Sr.'s Motion for Stay and Abeyance (ECF No. 27). Respondents do not oppose (ECF No. 28).

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Kille challenges the Nevada Department of Corrections' ("NDOC") refusal to grant him educational time credits for obtaining his G.E.D. and high school diploma while incarcerated. The Amended Petition (ECF No. 7) alleges two claims asserting that NDOC violated Kille's Fifth, Eighth and Fourteenth Amendment rights to due process, against cruel and unusual punishment, and to equal protection. On May 13, 2019, the Court granted in part and denied in part Respondents' motion to dismiss, finding that Kille's petition was unexhausted in its entirety. (ECF No. 23.) The Court ordered that within 30 days, Kille "will either (1) move to dismiss the petition without prejudice or (2) file a motion for other appropriate relief, including potentially a motion to stay and abey." (Id. at 3.) Kille now seeks a stay and abeyance as well as the appointment of counsel.

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**I. KILLE'S MOTION FOR STAY AND ABEYANCE**

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A federal court cannot grant a state prisoner's petition for writ of habeas corpus unless the petitioner has fully exhausted available state court remedies for each of the issues presented, or the State has expressly waived the exhaustion issue. 28 U.S.C. § 2254(b),(c); see also *Rose v. Lundy*, 455 U.S. 509 (1982). In general, a federal district court must dismiss an unexhausted petition without prejudice. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (noting that the Supreme

1 Court “has long held that a state prisoner’s federal habeas petition should be dismissed if the  
2 prisoner has not exhausted available state remedies as to any of his federal claims”).

3 A district court is authorized to stay an unexhausted petition in “limited circumstances” to  
4 allow a petitioner to present unexhausted claims to the state court without losing his right to federal  
5 habeas review due to the relevant one-year statute of limitations. *Rhines v. Weber*, 544 U.S. 269,  
6 273–75 (2005); see also *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016) (holding that district  
7 courts have authority to stay and hold in abeyance both mixed petitions and “fully unexhausted  
8 petitions under the circumstances set forth in *Rhines*”). Under the *Rhines* test, “a district court  
9 must stay a mixed petition only if: (1) the petitioner has ‘good cause’ for his failure to exhaust his  
10 claims in state court; (2) the unexhausted claims are potentially meritorious; and (3) there is no  
11 indication that the petitioner intentionally engaged in dilatory litigation tactics.” *Wooten v.*  
12 *Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008) (citing *Rhines*, 544 U.S. at 278).

13 This Court has declined to prescribe the strictest possible standard for issuance of a stay.  
14 E.g., *Riner v. Crawford*, 415 F. Supp. 2d 1207, 1210 (D. Nev. 2006). “[G]ood cause under *Rhines*,  
15 at least in this Circuit, should not be so strict a standard as to require a showing of some extreme  
16 and unusual event beyond the control of the defendant.” *Id.* Thus, “petitioner’s reasonable  
17 confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ for  
18 him to file in federal court.” *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). Ineffective  
19 assistance of post-conviction counsel or a lack of counsel can also constitute good cause. *Blake v.*  
20 *Baker*, 745 F.3d 977, 982–83 (9th Cir. 2014); *Dixon v. Baker*, 847 F.3d 714, 721 (9th Cir. 2017)  
21 (a “statement that ‘there was no counsel’ in [the petitioner’s] state post-conviction case is sufficient  
22 to establish good cause”) (quoting *Martinez v. Ryan*, 566 U.S. 1, 17 (2012)).

23 The Ninth Circuit has acknowledged that the *Rhines* “good cause” standard does not  
24 require “extraordinary circumstances.” *Wooten*, 540 F.3d at 1024 (citing *Jackson v. Roe*, 425 F.3d  
25 654, 661–62 (9th Cir. 2005)). But courts “must interpret whether a petitioner has ‘good cause’ for  
26 a failure to exhaust in light of the Supreme Court’s instruction in *Rhines* that the district court  
27 should only stay mixed petitions in ‘limited circumstances.’” *Wooten*, 540 F.3d at 1024 (citing  
28 *Jackson*, 425 F.3d at 661). Courts must also “be mindful that AEDPA aims to encourage the

1 finality of sentences and to encourage petitioners to exhaust their claims in state court before filing  
2 in federal court.” Wooten, 540 F.3d at 1024 (citing Rhines, 544 U.S. at 276–77).

3 Here, Kille has failed to provide any justification for a stay and abeyance. He requests the  
4 stay “so that he may attempt to exhaust his due process, equal protection, and his cruel and unusual  
5 punishment claims in the Nevada Supreme Court.” (ECF No. 27 at 2.) This statement merely  
6 reflects the Court’s prior holding that his claims are not exhausted. Kille’s statement does not in  
7 any sense demonstrate good cause for his failure to exhaust the claims. Kille also fails to address  
8 the second and third Rhines factors—he must demonstrate that his unexhausted claims are  
9 potentially meritorious and he has not intentionally engaged in dilatory litigation tactics. If the  
10 Court granted a stay based upon a nonexistent showing, it would be applying the Rhines test in a  
11 manner that rendered stay orders not only routine but automatic, which would undermine the goals  
12 of AEDPA and run afoul of Rhines’ instruction that a stay and abeyance is only appropriate in  
13 limited circumstances. See Wooten, 540 F.3d at 1024. Because Kille did not address the  
14 requirements for a Rhines stay, his motion will be denied without prejudice. He may renew the  
15 motion within 30 days, or his petition will be dismissed without prejudice as wholly unexhausted.

## 16 **II. REQUEST FOR APPOINTMENT OF COUNSEL**

17 A note in Kille’s motion asks this Court to appoint counsel. There is no constitutional right  
18 to appointed counsel in a federal habeas corpus proceeding. *McClasky v. Zant*, 499 U.S. 467, 495  
19 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“[T]he right to appointed counsel  
20 extends to the first appeal of right, and no further.”)). However, an indigent petitioner seeking  
21 relief under 28 U.S.C. § 2254 may move the court for appointment of representation to pursue that  
22 relief. 18 U.S.C. § 3006A(a)(2)(B). Federal courts have discretion to appoint counsel when the  
23 interests of justice so require. 18 U.S.C. § 3006A(a)(2); see also *LaMere v. Risley*, 827 F.2d 622,  
24 626 (9th Cir. 1987). The interests of justice so require “when the complexities of the case are such  
25 that denial of counsel would amount to a denial of due process.” *Brown v. United States*, 623 F.2d  
26 54, 61 (9th Cir. 1980). In the absence of such circumstances, a request for counsel in habeas  
27 proceedings is addressed to the sound discretion of the district court. *Id.* (citing *Dillon v. United*  
28 *States*, 307 F.2d 445, 447 (9th Cir. 1962)). When a habeas corpus petitioner has a good

1 understanding of the issues and the ability to present forcefully and coherently his contentions, no  
2 attorney is required. LaMere, 827 F.2d at 626.

3 In this case, the Court finds that the interests of justice do not require the appointment of  
4 counsel. Kille has demonstrated that he can coherently present his claims without counsel, and his  
5 claims are not particularly complex. Indeed, Kille has managed to file an application to proceed  
6 in forma pauperis, several motions, and an amended habeas petition all without the assistance of  
7 counsel. The Court will therefore deny Kille's request.

8 **IT IS THEREFORE ORDERED:**

- 9 1. Petitioner David August Kille, Sr.'s Motion for Stay and Abeyance (ECF No. 27) and  
10 request for counsel are **DENIED WITHOUT PREJUDICE**.
- 11 2. Petitioner will have 30 days from the date of entry of this order to renew his motion or  
12 seek other appropriate relief in accordance with the Court's May 13, 2019 Order (ECF  
13 No. 23). Failure to do so will result in the dismissal of the unexhausted petition without  
14 prejudice and without further advance notice.

15 DATED this 6th day of September, 2019.

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19 RICHARD F. BOULWARE, II  
20 UNITED STATES DISTRICT JUDGE  
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