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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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MARIO HERRADA-GONZALEZ,

Case No. 2:20-cv-01013-GMN-DJA

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Petitioner,

**Order Granting Motion to Stay and
Denying Motion for Leave to File an
Amended Petition without Prejudice**

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v.

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JERRY HOWELL, et al.,

(ECF Nos. 53, 69)

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Respondents.

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28 U.S.C. § 2254 habeas corpus petitioner Mario Herrada-Gonzalez has moved for leave to file a third-amended petition, which respondents oppose. (ECF Nos. 53, 60, 67.) Herrada-Gonzalez has now also moved for a motion for a stay in accordance with *Rhines v. Weber*. (ECF No. 69.) Respondents have filed a non-opposition. (ECF No. 70.) The motion is granted. In light of the stay and abeyance, the motion for leave to amend is denied without prejudice.

In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the discretion of the court to facilitate habeas petitioners' return to state court to exhaust claims. First, "stay and abeyance should be available only in limited circumstances." *Rhines*, 544 U.S. at 277. And the relief is "is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. *Id.* Moreover, "it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and

1 there is no indication that the petitioner engaged in intentionally dilatory litigation
 2 tactics." *Id.* at 278.

3 The Ninth Circuit has held that the application of an "extraordinary
 4 circumstances" standard does not comport with the "good cause" standard prescribed
 5 by *Rhines*. See *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005). The court may
 6 stay a petition containing both exhausted and unexhausted claims if: (1) the habeas
 7 petitioner has good cause; (2) the unexhausted claims are potentially meritorious; and
 8 (3) petitioner has not engaged in dilatory litigation tactics. See *Rhines*, 544 U.S. at 278;
 9 see also *Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir. 2008).

10 Here, Herrada-Gonzalez has returned to state court to present the claim that his
 11 trial counsel was ineffective for failing to ask the district attorney if Herrada-Gonzalez
 12 could plead to second-degree murder, with a sentence of 10 to 25 years, immediately
 13 before trial or on the first day of trial. (See ECF No. 53 at 3.) He ultimately aims to file an
 14 amended federal petition to add this claim. While respondents oppose amendment, they
 15 do not oppose a stay. Herrada-Gonzalez argues that he has good cause for a *Rhines*
 16 stay under *Martinez v. Ryan*¹ because his state postconviction counsel was ineffective
 17 for failing to investigate and raise the claim. (ECF No. 69 at 10-11.) He urges the claim
 18 is not plainly meritless and he is not engaging in intentionally dilatory tactics.
 19 Respondents state that their lack of objection to a stay is not a concession of any kind
 20 regarding the claim's merit or any procedural defenses or arguments. (ECF No. 70 at 1.)
 21 The outcome of the state court proceedings may impact the claims that Herrada-
 22 Gonzalez will be able to pursue in his federal petition. Accordingly, especially in light of
 23 the respondents' non-opposition, petitioner's motion for stay is granted. The motion for
 24 leave to file an amended-petition is denied without prejudice.

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26 ¹*Martinez* held that the ineffective assistance of counsel in an initial-review collateral proceeding
 27 may establish cause excusing the procedural default of a claim of ineffective assistance of trial
 28 counsel. 566 U.S. 1, 9 (2012). With regard to Herrada-Gonzalez' state proceedings, the Nevada
 Supreme Court has expressly declined to follow the *Martinez* exception to excuse state
 procedural bars. *Brown v. McDaniel*, 331 P.3d 867, 871-75 (Nev. 2014) (en banc).

1 **IT IS THEREFORE ORDERED** that petitioner's motion for issuance of stay and
2 abeyance (ECF No. 69) of this federal habeas corpus proceeding is **GRANTED**.

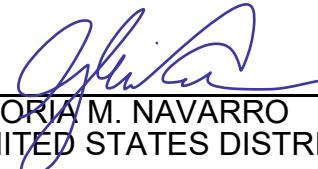
3 **IT IS FURTHER ORDERED** that this action is **STAYED** pending final resolution
4 of petitioner's postconviction habeas petition.

5 **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner
6 returning to federal court with a motion to reopen the case within 45 days of the
7 issuance of the remittitur by the state appellate court at the conclusion of the state court
8 proceedings on the postconviction habeas petition.

9 **IT IS FURTHER ORDERED** that petitioner's motion for leave to file an amended
10 petition (ECF No. 53) is **DENIED** without prejudice.

11 **IT IS FURTHER ORDERED** that the Clerk of Court **ADMINISTRATIVELY**
12 **CLOSE** this action, until such time as the court grants a motion to reopen the matter.

14 DATED: 18 January 2023.

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18 GLORIA M. NAVARRO
19 UNITED STATES DISTRICT JUDGE