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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

TRACY PETROCELLI,  
Petitioner,  
vs.  
E.K. McDANIEL, *et al.*,  
Respondents.

3:94-cv-0459-RCJ-VPC

**ORDER**

Introduction and Background

This action is a petition for writ of habeas corpus by Tracy Petrocelli, a Nevada prisoner under sentence of death. It is before the court on Petrocelli's Motion to Stay Proceedings and Hold Litigation in Abeyance (docket #203), filed April 21, 2010. In that motion, Petrocelli argues that this action should be stayed so that he may return once again to state court to exhaust his unexhausted claims. The court will deny the motion, will require Petrocelli to abandon his unexhausted claims or face dismissal of his entire petition, and will move this case toward resolution of Petrocelli's remaining claims, on their merits.

In its January 4, 1985 decision on Petrocelli's direct appeal, the Nevada Supreme Court described, as follows, the facts of the case as revealed by the evidence at trial:

Tracy Petrocelli's journey to Reno began in Washington where he killed his fiancée. He fled Washington and apparently drove to Colorado in a Corvette, to Oklahoma in a van and to Reno in a Datsun which he stole while "test driving" the

1 vehicle. Upon arriving in Reno, Petrocelli decided he needed a four-wheel drive truck  
2 to get around in the snow. The next day, his search for a vehicle ultimately led to a  
3 local used car dealer. The dealer, James Wilson, acceded to Petrocelli's request for a  
4 test drive of a Volkswagen (VW) pickup, and the two drove off with the dealer at the  
5 wheel. At about 1:30 p.m., a Dodge dealer saw them driving north on Kietzke Lane.  
6 Approximately forty-five minutes later, a Reno patrolman saw one person driving a  
7 truck matching the description of the VW speeding toward Pyramid Lake.

8 That evening, Petrocelli was picked up on the Pyramid Highway and given a  
9 ride to Sutcliffe. He told the driver that his motorcycle had broken down. In Sutcliffe,  
10 Petrocelli got a ride to Sparks with a local game warden. Petrocelli then took a cab to  
11 Reno and apparently paid his fare from a two-inch roll of bills.

12 The next day, the game warden and his partner looked for Petrocelli's  
13 motorcycle. Instead, they found the VW truck with bloodstains and bullet holes on  
14 the passenger side. The car dealer's body was found later that day in a crevice,  
15 covered with rocks, sagebrush and shrubbery. His back pockets were turned slightly  
16 inside out and empty; his wallet was missing. The victim, who usually carried large  
17 amounts of cash with him, had been shot three times with a .22 caliber weapon. One  
18 shot was to the neck; another shot was to the heart. The third shot was to the back of  
19 the head from a distance of two to three inches.

20 In the abandoned truck, .22 caliber bullet casings were found. When he was  
21 arrested, Petrocelli was carrying a .22 caliber semi-automatic pistol which he testified  
22 he always carried loaded and ready to fire. Ballistics tests on the casings found in the  
23 abandoned VW revealed that they had been fired from Petrocelli's pistol. Tests on the  
24 bullet found in Wilson's chest and a test bullet fired from Petrocelli's pistol also  
25 revealed similar markings.

26 At trial, Petrocelli provided his own account of the killing. After driving off  
the car lot, the car dealer stopped at a gas station and filled the truck. From the  
station, Petrocelli drove the truck. He and Wilson proceeded to argue about the price  
of the truck. Petrocelli laid \$3,500.00 on the dashboard and offered a total of  
\$5,000.00 cash. The car dealer was insulted and called him a "punk." Later, on the  
way back, Wilson twice grabbed for the steering wheel. Petrocelli then pulled out his  
pistol and said: "Now who is the punk." The victim laughed and said he had a gun  
also, although Petrocelli never saw one. The car dealer tried to take the pistol from  
Petrocelli as he continued to drive. As they struggled, the gun went off two or three  
times. Petrocelli testified, "I knew it was shooting, and I was just trying to pull it  
away from him.... It was an accident. It was an accident. I didn't do anything. I just  
tried to keep him from getting the gun." Petrocelli drove to a nearby doctor's office,  
went up to the door, but did not go in because he "didn't know how to tell him  
[doctor] there was someone hurt, shot in the car." Thereafter, Petrocelli went to a  
bowling alley and called the hospital, but "didn't know what to say." He then returned  
to the truck, drove to Pyramid Lake and hid the car dealer's body under some rocks.  
Petrocelli began walking after his truck bogged down, but then returned to the vehicle  
to retrieve his gloves and the gun. He also picked up the car dealer's wallet, took his  
money, threw the business and credit cards into the wind, and discarded the wallet.  
Petrocelli then walked to the highway where he obtained rides back to Reno.

1 Petrocelli was convicted by a jury of first degree murder and robbery with the  
2 use of a deadly weapon. The sentence for the murder conviction was set at death.

3 *Petrocelli v. State*, 101 Nev. 46, 48-49, 692 P.2d 503, 505-06 (1985).

4 On September 8, 1982, the trial court imposed the sentence of death on the murder conviction,  
5 and a sentence of imprisonment for 15 years on the robbery conviction, plus an additional 15 years in  
6 prison for the use of a deadly weapon. Exhibit 5.<sup>1</sup>

7 Petrocelli appealed. See Exhibit Z (opening brief); Exhibit AA (answering brief); Exhibit BB  
8 (reply brief). The Nevada Supreme Court affirmed on January 4, 1985. *Petrocelli v. State*, 101 Nev.  
9 46, 692 P.2d 503 (1985); see also Exhibit 9, Exhibit FF.

10 On August 12, 1985, Petrocelli filed a petition for post-conviction relief in the state district court.  
11 Exhibit H. On March 20, 1985, the state district court held an evidentiary hearing. Exhibit Y  
12 (transcript). On December 31, 1986, the state district court denied the petition. Exhibit I. Petrocelli  
13 appealed. Exhibit JJ (opening brief); Exhibit KK (answering brief); Exhibit LL (reply brief). The  
14 Nevada Supreme Court dismissed the appeal on June 23, 1988. Exhibit NN.<sup>2</sup>

15 On August 24, 1988, Petrocelli filed a petition for writ of habeas corpus in this court, initiating  
16 the case of *Petrocelli v. Whitley*, CV-N-88-0446-HDM.<sup>3</sup> Exhibit 16. Counsel was appointed to  
17 represent Petrocelli. See Exhibits 2 and 5 to Respondents' February 7, 1997 Filing.<sup>4</sup> On May 31, 1989,  
18

19  
20 <sup>1</sup> Unless otherwise noted, the exhibits identified by numbers in this order were filed by  
21 Petrocelli and are located in the record at docket #163 through #169. Unless otherwise noted, the  
22 exhibits identified by letters in this order were filed by respondents and are located in the record at  
23 docket #36, and docket #70 through #76.

24 <sup>2</sup> The court refers to this state-court proceeding as Petrocelli's "first state habeas action."

25 <sup>3</sup> The court here uses its older system of file numbers to identify Petrocelli's first federal habeas  
26 action. Using the court's current file number system, that case would be identified as *Petrocelli v.*  
*Whitley*, 3:88-cv-0446-HDM.

<sup>4</sup> In this action, on February 7, 1997, respondents filed a document entitled: "Response to  
Petitioner's Explanation Why Grounds 26, 27, 28, 6 and 9 Should Not Be Barred As An Abuse of the  
Writ" (docket #55) ("Respondents' February 7, 1997 Filing"). Attached to that document are 11  
exhibits, which are copies of documents filed in *Petrocelli v. Whitley*, CV-N-88-0446-HDM.

1 upon a motion by Petrocelli, the court ordered his first federal habeas action, case number CV-N-88-  
2 0446-HDM, dismissed without prejudice, to allow him to return to further exhaust his claims in state  
3 court. See Exhibits 6, 7, 8, 9, 10, and 11 to Respondents' February 7, 1997 Filing.

4 On March 10, 1989, Petrocelli filed a petition for writ of habeas corpus in state district court.  
5 Exhibit PP. The state district court dismissed that petition on January 22, 1992. Exhibit UU. Petrocelli  
6 appealed. See Exhibit WW (opening brief); Exhibit XX (answering brief); Exhibit YY (reply brief).  
7 The Nevada Supreme Court dismissed the appeal on December 22, 1993. Exhibit ZZ.<sup>5</sup>

8 Petrocelli then initiated this, his second, federal habeas corpus action, on July 13, 1994. He filed  
9 the original habeas petition in the action on October 28, 1994 (docket #4). Counsel was appointed for  
10 Petrocelli (docket #7, #8, #24). On February 9, 1996, Petrocelli filed a first amended habeas petition  
11 (docket #28).

12 Respondents then filed a motion to dismiss, arguing that certain claims in the first amended  
13 petition were unexhausted, procedurally barred, and constituted an abuse of the writ (docket #36). The  
14 court granted that motion on abuse of the writ grounds, and dismissed five claims from the first amended  
15 petition (docket #46, #56).

16 In an order entered September 30, 1997, this court denied the first amended habeas petition,  
17 ruling that certain claims in it were an abuse of the writ and that certain claims were procedurally  
18 defaulted, and denying the remainder of the claims on their merits (docket #78). Judgment was entered  
19 (docket #79).

20 Petrocelli appealed (docket #80). In a published opinion filed on March 8, 2001, the court of  
21 appeals affirmed in part, reversed in part, and remanded. *Petrocelli v. Angelone*, 248 F.3d 877 (9th  
22 Cir.2001) (copy in record at docket #88). The court of appeals affirmed the district court's denial, on  
23 the merits, of certain of Petrocelli's claims; the court reversed the district court's determinations that  
24 certain claims were an abuse of the writ and that certain claims were procedurally defaulted. *Id.* The  
25 court of appeals remanded for further proceedings. *Id.*

26 \_\_\_\_\_  
<sup>5</sup> The court refers to this state-court proceeding as Petrocelli's "second state habeas action."

1           After receiving the remand, the district court heard from the parties regarding the status of the  
2 remanded claims, with respect to the exhaustion of those claims in state court (*see* docket #92, #93, #94,  
3 #97, #98, #99, #101). In an order entered February 7, 2003 (docket #100), the court ruled that the  
4 remanded claims were “mixed,” meaning that some of them had been exhausted in state court and some  
5 had not. The court extended to Petrocelli the opportunity to amend his petition to remove the  
6 unexhausted claims, and then, during a stay of this case, to return to state court to exhaust those claims.  
7 Petrocelli then filed a second amended petition (docket #104), and then, to correct typographical errors,  
8 a third amended petition (docket #108), purportedly including in it only claims exhausted in state court.  
9 On May 28, 2003, the court ordered this action stayed pending Petrocelli’s exhaustion of claims in state  
10 court (docket #109).

11           On August 11, 2003, Petrocelli filed a petition for writ of habeas corpus in the state district court.  
12 Exhibit 26. Petrocelli later filed a supplement to that petition. Exhibit 32. The state district court held  
13 evidentiary hearings. Exhibits 29, 30, 31 (transcripts). The petition was dismissed by the state district  
14 court on April 14, 2006. Exhibit 36. Petrocelli appealed. *See* Exhibit 38 (opening brief); Exhibit 39  
15 (answering brief); Exhibit 40 (reply brief). The Nevada Supreme Court affirmed on July 26, 2007.  
16 Exhibit 41.<sup>6</sup>

17           On November 16, 2007, upon a motion by Petrocelli, the stay of this action was lifted (docket  
18 #147). On January 11, 2009, Petrocelli filed his fourth amended petition for writ of habeas corpus  
19 (docket #162). The fourth amended petition includes 31 claims for habeas corpus relief, including  
20 several with subparts.

21           On May 26, 2009, respondents filed a motion to dismiss, asserting that certain of Petrocelli’s  
22 claims have already been adjudicated; that certain of Petrocelli’s claims are unexhausted in state court;  
23 and that certain of Petrocelli’s claims are procedurally barred. On March 23, 2010, the court granted  
24 the motion to dismiss in part and denied it in part (docket #200). The court denied the motion to dismiss  
25 with respect to Grounds 6(c), 6(d), 7(b), 7(f), 10, 12, and 13 of the fourth amended petition. The court

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26           <sup>6</sup> The court refers to this state-court proceeding as Petrocelli’s “third state habeas action.”

1 dismissed Grounds 1, 2, 3, 4, 5, 6(a), 6(b), 7(a), 7(c), 7(d), 8(a), and 8(c). The court ruled Grounds 7(e),  
2 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h),  
3 16(i), 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 to be unexhausted, and, with respect  
4 to those unexhausted claims, the court granted Petrocelli time to file a notice of abandonment of  
5 unexhausted claims, indicating his election to abandon the unexhausted claims and proceed with the  
6 litigation of his remaining exhausted claims, or, in the alternative, to file a motion for stay, requesting  
7 a stay of these proceedings to allow him to return to state court to exhaust the unexhausted claims. The  
8 court ordered that, if Petrocelli did not, within the time allowed, file a notice of abandonment of  
9 unexhausted claims, abandoning all of his unexhausted claims, or a motion for a stay to allow  
10 exhaustion of his unexhausted claims in state court, his fourth amended petition would be dismissed,  
11 in its entirety, pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

12 Petrocelli then filed his motion for stay (docket #203), respondents filed their opposition to the  
13 motion (docket #212), and Petrocelli replied (docket #217).

#### 14 Rhines

15 Under 28 U.S.C. § 2254(b)(1)(A), this federal court cannot grant a writ of habeas corpus unless  
16 “the applicant has exhausted the remedies available in the courts of the State.” This exhaustion  
17 requirement is “grounded in principles of comity” as it gives states “the first opportunity to address and  
18 correct alleged violations of state prisoner’s federal rights.” *Coleman v. Thompson*, 501 U.S. 722, 731  
19 (1991).

20 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court held that a district court may stay  
21 a mixed petition – a petition containing both exhausted and unexhausted claims – in “limited  
22 circumstances,” so that a petitioner may present his unexhausted claims to the state courts without losing  
23 his right to federal habeas review to the one-year statute of limitations. *Rhines*, 544 U.S. at 273-75  
24 (explaining how the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),  
25 which imposed a one-year statute of limitations on the filing of federal petitions, affected the treatment  
26 of mixed petitions). In *Rhines*, the Court ruled that a district court may stay a mixed petition only if:

1 (1) the petitioner has “good cause” for his failure to exhaust his claims in state court; (2) the  
2 unexhausted claims are potentially meritorious; and (3) there is no indication that the petitioner  
3 intentionally engaged in dilatory litigation tactics. *Id.* at 278. “[A] *Rhines* stay must be assessed “in  
4 light of the Supreme Court’s instruction that the district court should only stay mixed petitions in  
5 ‘limited circumstances.’” *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir.2008), citing *Rhines*, 544  
6 U.S. at 273-75. Moreover, the court must keep in mind that AEDPA aims to encourage the finality of  
7 sentences and to encourage petitioners to exhaust their claims in state court before seeking habeas relief  
8 in federal court. *Rhines*, 544 U.S. at 276-77; *see also Wooten*, 540 F.3d at 1024.

9 For the reasons stated below with respect to each of Petrocelli’s unexhausted claims, the court  
10 will deny Petrocelli’s request for a *Rhines* stay.

11 Ground 7(e)

12 In Ground 7(e), Petrocelli claims that his trial counsel was ineffective, at the penalty phase of  
13 his trial, “for failing to object to instructions and final argument regarding the possibility of parole or  
14 clemency.” Fourth Amended Petition, p. 185; *see also id.* at pp. 185-86.

15 Petrocelli argues that there is good cause for his failure to exhaust this claim, because of  
16 “supervening authority” and “change in law.” Motion for Stay, pp. 4-7. Petrocelli argues that the court  
17 should grant a stay to allow him to return to state court to present the claim in Ground 7(e), because the  
18 Ninth Circuit, in 2008, decided *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir.2008), a case involving a  
19 claim that a capital defendant’s constitutional rights were violated by the prosecutor’s argument that he  
20 could receive clemency and parole if sentenced to death. Petrocelli appears to contend that he could not  
21 have exhausted in state court the claim asserted in Ground 7(e) before *Sechrest* was decided. The court  
22 finds this argument to be without merit.

23 The claim in Ground 7(e) is a claim of ineffective assistance of Petrocelli’s trial counsel. To  
24 establish an ineffective assistance of counsel claim, the petitioner must show: (1) the representation was  
25 deficient, falling “below an objective standard of reasonableness”; and (2) the deficient performance  
26 prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong of

1 that analysis, the petitioner must show that “counsel made errors so serious that counsel was not  
2 functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S.  
3 at 687. “A convicted defendant making a claim of ineffective assistance must identify the acts or  
4 omissions of counsel that are alleged not to have been the result of reasonable professional judgment.”  
5 *Id.* at 690. “A fair assessment of attorney performance requires that every effort be made to eliminate  
6 the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and  
7 to evaluate the conduct of counsel’s performance at the time.” *Id.* at 689. Ineffective assistance of  
8 counsel in violation of the Sixth Amendment is representation that falls “below an objective standard  
9 of reasonableness” in light of “prevailing professional norms” at the time of the representation. *Id.* at  
10 688-89; *see also Bobby v. Van Hook*, --- U.S. ---, 130 S.Ct. 13, 16-17, 175 L.Ed.2d 255 (2009).

11 Therefore, because the *Strickland* analysis looks to the professional norms prevailing at the time  
12 of the representation, the decision in *Sechrest*, more than 25 years after Petrocelli’s trial, has no impact  
13 on the question whether Petrocelli received ineffective assistance of counsel as a result of his attorney’s  
14 failure to object to jury instructions and argument regarding the possibility of parole or clemency.

15 Furthermore, it is plain from the record that the claim in Ground 7(e) could have been  
16 articulated, and exhausted in state court, before *Sechrest* was decided. In fact, Petrocelli made a closely  
17 related argument – the substantive claim, that his constitutional rights were violated by the argument  
18 regarding the availability of clemency and parole – in his first amended petition in this federal habeas  
19 action, well before *Sechrest* was decided. There appears, therefore, to be no reason why Petrocelli could  
20 not have exhausted in state court, in one of his three state-court habeas petitions, the claim that his  
21 counsel was ineffective for failing to object to jury instructions and argument regarding the possibility  
22 of parole or clemency. The 2008 *Sechrest* decision does not constitute good cause for Petrocelli’s  
23 failure to exhaust the claim in Ground 7(e).

24 Ground 8(b)

25 In Ground 8(b), Petrocelli claims that his appellate counsel was ineffective “for failure to argue  
26 that there was insufficient evidence to support the robbery conviction and robbery as the underlying



1 felony for the felony-murder rule, and robbery as an aggravating circumstance.” Fourth Amended  
2 Petition, p. 188; *see also id.* at pp. 188-89.

3       Regarding his failure to exhaust this claim in state court, Petrocelli argues that there is good  
4 cause for his failure because the attorneys who litigated his three state-court habeas proceedings were  
5 ineffective for failing to raise it. *See Reply in Support of Motion for Stay*, p. 25.

6       *Rhines* does not go into detail as to what constitutes “good cause” for a failure to exhaust; and,  
7 the Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an  
8 “extraordinary circumstances” standard. *See Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir.2005)  
9 (citing *NLRB v. Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir.1979)).

10       Some district courts have concluded that the standard is more generous than the showing needed  
11 for “cause” to excuse a procedural default. *See, e.g., Rhines v. Weber*, 408 F.Supp.2d 844, 849  
12 (D.S.D.2005) (applying the Supreme Court’s mandate on remand). This view finds support in *Pace v.*  
13 *DiGuglielmo*, 544 U.S. 408 (2005), where the Supreme Court acknowledged that a petitioner’s  
14 “reasonable confusion” about the timeliness of his federal petition would generally constitute good  
15 cause for his failure to exhaust state remedies before filing his federal petition. *Pace*, 544 U.S. at 416-  
16 17.

17       On the other hand, a request for a *Rhines* stay must be assessed “in light of the Supreme Court’s  
18 instruction that the district court should only stay mixed petitions in ‘limited circumstances.’” *Wooten*  
19 *v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir.2008) (citing *Rhines*, 544 U.S. at 273-75). In *Wooten*, the  
20 petitioner attempted to show good cause under *Rhines* “by stating that he was ‘under the impression’ that  
21 his counsel included all of the issues raised before the California Court of Appeal in his petition before  
22 the California Supreme Court.” *Wooten*, 540 F.3d at 1024. Finding that justification inadequate, the  
23 Ninth Circuit explained as follows:

24       . . . To accept that a petitioner’s “impression” that a claim had been included in  
25 an appellate brief constitutes “good cause” would render stay-and-obey orders routine.  
26 Indeed, if the court was willing to stay mixed petitions based on a petitioner’s lack of  
knowledge that a claim was not exhausted, virtually every habeas petitioner, at least  
those represented by counsel, could argue that he *thought* his counsel had raised an

1 unexhausted claim and secure a stay. Such a scheme would run afoul of *Rhines* and its  
2 instruction that district courts should only stay mixed petitions in “limited  
circumstances.”

3 *Id.* (emphasis in original, citation omitted).

4 In *Riner v. Crawford*, 415 F.Supp.2d 1207 (D.Nev.2006), this court only required a petitioner  
5 to show “that he was prevented from raising the claim, either by his own ignorance or confusion about  
6 the law or the status of his case, or by circumstances over which he had little or no control, such as the  
7 actions of counsel either in contravention of the petitioner’s clearly expressed desire to raise the claim  
8 or when petitioner had no knowledge of the claim’s existence.” *Riner*, 415 F.Supp. at 1211. The  
9 decision in *Wooten*, however, undermines any reliance on *Riner*. Like the petitioner’s claim in *Wooten*  
10 that he was under the impression that counsel had raised unexhausted claims, Petrocelli’s justification,  
11 that his post-conviction counsel performed ineffectively in failing to raise the claim, is one that could  
12 be raised in virtually every case. Acceptance of such a good-cause theory would conflict with the  
13 Supreme Court’s guidance, in *Rhines*, that mixed petitions should only be stayed in limited  
14 circumstances, and it would run contrary to the goals of AEDPA.

15 The United States District Court for the Southern District of California, in a recent order,  
16 rejected a claim of ineffective assistance of post-conviction counsel as good cause under *Rhines*, stating:

17 There appears to be a measure of agreement that some factor either external to  
18 or outside the control of Petitioner may be sufficient to demonstrate good cause for  
19 failure to exhaust claims in state court. As the Ninth Circuit has indicated that the  
20 good cause standard does not require a showing as high as extraordinary  
21 circumstances, and the Supreme Court has held that reasonable confusion over  
22 timeliness may also provide a sufficient showing of good cause, this Court is  
23 persuaded that a standard of “excusable neglect” is an appropriate and reasonable  
24 standard to apply to an analysis of good cause under *Rhines*.

25 Here, Petitioner asserts that the failure to raise the unexhausted claims earlier  
26 can be attributed to the fact that “state habeas counsel conducted a wide-ranging  
investigation, raised an extensive array of claims, and may be faulted only in failing  
to formulate and organize the claims in a manner that comports with the technical  
requirements of section 2254 exhaustion.” (Pet. Opp. and Mot. at 11.) Petitioner’s  
proffered reason does not constitute good cause for failing to exhaust Claim 14 in  
state court. Under an application of the “excusable neglect” standard, “counsel’s  
oversight ... do[es] not constitute good cause” for failing to exhaust claims in state  
court. [*Corjasso v. Ayers*, 2006 WL 618380 (E.D.Cal. March 9, 2006)] at \*3.

1           The *Corjasso* court was careful to distinguish between “excusable neglect,”  
2 which could constitute good cause, and simple negligence, reasoning that “[t]he point  
3 is whether some outside, uncontrollable event precluded the bringing of the [ ] issue.”  
4 *Id.* at \*2. In that case, the district court was not persuaded that counsel’s work load  
5 and oversight of the unexhausted claim failed to constitute good cause, reasoning that  
6 “[i]f the court found these circumstances to justify the delay, then good cause could  
7 be found in virtually every case, which the Supreme Court clearly did not intend in  
8 Rhines.” *Id.* at \*3.

9           The situation presented here is analogous to that in *Corjasso*, as Petitioner’s  
10 failure to raise the claim in state court was not the result of any external event outside  
11 his control, but was due to deliberate decisions made by counsel in “formulating and  
12 organizing the claims” for presentation to the state supreme court. As such, “[s]imply  
13 saying that the issue was overlooked by counsel is not outside the control of  
14 petitioner since he is held bound by the acts of his counsel.” *Id.* at \*2.

15           In sum, Petitioner is unable to demonstrate good cause for failing to exhaust  
16 Claim 14 in state court. Accordingly, the Court declines to stay the federal  
17 proceedings and hold the mixed federal petition in abeyance under *Rhines v. Weber*.

18 *Hoyos v. Cullen*, 2011 WL 11425 (S.D.Cal.2011) at \*9-10.

19           While this court might hesitate to place an “excusable neglect” label on the *Rhines* good cause  
20 standard, this court agrees with the court in *Hoyos*, and the court in *Corjasso*, that a simple statement  
21 that state post-conviction counsel was ineffective for overlooking the issue is not enough to show good  
22 cause under *Rhines*, and that some factor either external to, or outside the control of, the petitioner and  
23 his counsel is required.

24           In this court’s view, under the circumstances in this case, to conclude that Petrocelli had good  
25 cause for his failure to exhaust, based simply upon his conclusory and unsupported assertion of  
26 ineffective assistance of counsel, without more, would conflict with the Supreme Court’s instruction in  
*Rhines* that mixed petitions should be stayed in only limited circumstances, and it would disregard and  
undermine the goals of the AEDPA, to encourage the finality of sentences, and to encourage petitioners  
to exhaust their claims in state court before filing in federal court. *See Rhines*, 544 U.S. at 273-77; *see*  
*also Wooten*, 540 F.3d at 1024. This court finds that Petrocelli has not shown good-cause, under *Rhines*,  
for his failure to previously exhaust, in state court, the claim in Ground 8(b).

1           Ground 9

2           In Ground 9, Petrocelli claims that he received ineffective assistance of counsel in his state post-  
3 conviction proceedings. Fourth Amended Petition, pp. 195-96. Ground 9, for the most part, sets forth  
4 only general and unspecified claims of attorney error. The only somewhat specific assertion of attorney  
5 error in Ground 9 is the claim that counsel failed to investigate and discover available mitigating  
6 evidence. *Id* at 195.

7           One of the showings that must be made, under *Rhines*, to establish that a stay is warranted, is  
8 that the unexhausted claim is “potentially meritorious.” *Rhines*, 544 U.S. at 278. There is no federal  
9 constitutional right to counsel in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S.  
10 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989) (applying the rule to capital cases). Consequently,  
11 there is no viable claim of constitutionally ineffective assistance of counsel in state post proceedings.  
12 See *Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there  
13 can be no deprivation of effective assistance). In veiw of these well-established principles, Petrocelli  
14 has made no showing that the claim in Ground 9 has potential merit.

15           Ground 11

16           In Ground 11, Petrocelli claims that his constitutional rights were violated “because the  
17 statutorily-mandated definition of ‘premeditation and deliberation’ given to his jury deprived him of due  
18 process and equal protection.” Fourth Amended Petition, p. 200; *see also id.* at pp. 200-19. Petrocelli  
19 argues that there is good cause for his failure to exhaust this claim, because of “intervening changes in  
20 the law.” Motion for Stay, p. 10; *see also id.* at pp. 9-18. More specifically, Petrocelli argues that his  
21 claim in Ground 11 is based upon the Ninth Circuit Court of Appeals’ decision in *Polk v. Sandoval*, 503  
22 F.3d 903 (9th Cir.20007), and *Polk* was not decided until after his appeal in his third state habeas action.  
23 Petrocelli’s argument is not compelling.

24           Petrocelli could have raised this claim in state court before *Polk* was decided. Petrocelli  
25 demonstrated this himself. In the state district court, in his third petition for writ of habeas corpus, filed  
26 August 11, 2003 – about four years before *Polk* was decided – Petrocelli made this claim. Exhibit 26,

1 pp. 21-25. Had Petrocelli asserted the claim on the appeal in that action, it would now be exhausted.  
2 However, Petrocelli did not do that. The claim was abandoned and not asserted on appeal before the  
3 Nevada Supreme Court. *See* Exhibit 38, pp. 18-20 (statement of issues presented on appeal in third state  
4 habeas action). Petrocelli has provided no explanation – much less “good cause” – for his abandonment  
5 of this claim on the appeal in his third state habeas action.

6 So, while the decision in *Polk* may have added some weight to Petrocelli’s claim, Petrocelli’s  
7 ability to exhaust the claim was not dependent on the *Polk* decision, and Petrocelli has not shown good  
8 cause for his failure to exhaust the claim.

9 Ground 14

10 In Ground 14, Petrocelli claims that his constitutional rights were violated “because the Nevada  
11 capital punishment system operates in an arbitrary and capricious manner.” Fourth Amended Petition,  
12 p. 252; *see also id.* at pp. 252-55.

13 With respect to this claim, Petrocelli appears to argue that a stay should be granted because “[t]o  
14 Petitioner’s counsel’s knowledge, this issue has not been previously ruled on by the Nevada Supreme  
15 Court, despite the obvious deficiencies of the state’s death penalty system.” Motion for Stay, p. 18.  
16 This, however, is not a showing of good cause for Petrocelli’s failure to exhaust this claim. *See Rhines*,  
17 544 U.S. at 278. In fact, if Petrocelli had not abandoned this claim on the appeal in his third state habeas  
18 action, it is possible that the Nevada Supreme Court might have ruled on this claim. Petrocelli raised  
19 this claim in his state habeas petition, in the state district court, in his third state habeas action, but he  
20 did not assert the claim in his appeal. *See* Exhibit 26, pp. 30-33; Exhibit 38, pp. 18-20. Petrocelli offers  
21 no explanation for the abandonment of the claim on the appeal in his third state habeas action, and he  
22 has, therefore, failed to show good cause for his failure to exhaust the claim.

23 Grounds 15(a), 15(b), 15(c), 15(d), 15(e)

24 In Ground 15, Petrocelli claims that his constitutional rights were violated “due to the substantial  
25 and injurious effect of a consistent pattern of prosecutorial misconduct and overreaching which distorted  
26 the fact finding process and rendered both the trial and sentencing hearing fundamentally unfair.”

1 Fourth Amended Petition, p. 256; *see also id.* at pp. 256-62. Ground 15 includes five subparts,  
2 designated Grounds 15(a), 15(b), 15(c), 15(d), and 15(e). *See id.* at 256-62. In Ground 15(a), Petrocelli  
3 claims that the prosecution committed misconduct “by giving inadequate notice of intent to seek the  
4 death penalty.” *Id.* at 258; *see also id.* at pp. 258-60. In Ground 15(b), Petrocelli claims that the  
5 prosecution “improperly disparaged Mr. Petrocelli by using pejorative terminology.” *Id.* at p. 260; *see*  
6 *also id.* at pp. 260-61. In Ground 15(c), Petrocelli claims that the prosecution “improperly instructed  
7 the jurors to send a message to the community.” *Id.* at p. 261; *see also id.* at pp. 261-62. In Ground  
8 15(d), Petrocelli claims that the prosecution committed misconduct “in failing to turn over the letter  
9 from Dr. Gerow to the prosecutor.” *Id.* at p. 262. In Ground 15(e), Petrocelli claims that “[t]rial,  
10 appellate and post-conviction counsel were ineffective for failing to challenge the extensive  
11 prosecutorial misconduct which occurred in Mr. Petrocelli’s trial.” *Id.* at p. 262.

12 With respect to all of his Ground 15 claims, Petrocelli argues that there is good cause for his  
13 failure to exhaust because of ineffective assistance of his counsel, in failing to assert these claims on his  
14 direct appeal and in his three state habeas actions. *See Motion for Stay*, p. 19.

15 This court finds that Petrocelli has not made a showing of good cause for his failure to exhaust  
16 the claims asserted in Grounds 15(a), 15(b), 15(c), 15(d), and 15(e). *See discussion of Ground 8(b)*,  
17 *supra*.

18 Grounds 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i)

19 In Ground 16, Petrocelli claims that his constitutional rights were violated “due to trial court  
20 errors at voir dire and the failure of counsel to object to the jury selection process.” Fourth Amended  
21 Petition, p. 263; *see also id.* at pp. 263-83. Ground 16 includes nine somewhat overlapping subparts,  
22 which are designated Grounds 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), and 16(i). *See id.*  
23 at 256-62. In Ground 16(a), Petrocelli claims that “[t]he trial court improperly death-qualified the jury,  
24 failed to life-qualify the jury, and prevented the defense from individually questioning potential jurors  
25 concerning their views on the death penalty.” *Id.* at 266; *see also id.* at 266-68. In Ground 16(b),  
26 Petrocelli claims that “[t]he trial court failed to adequately inquire as to bias.” *Id.* at 268; *see also id.*

1 at 268-70. In Ground 16(c), Petrocelli claims that “[t]he trial court failed to life-qualify prospective  
2 jurors.” *Id.* at 270; *see also id.* at 270-73. In Ground 16(d), Petrocelli claims that “[t]he trial court  
3 improperly imposed overly-restrictive voir dire standards.” *Id.* at 273; *see also id.* at 273-77. In Ground  
4 16(e), Petrocelli claims that “[d]efense counsel were ineffective for failing to rehabilitate death reticent  
5 jurors.” *Id.* at 277; *see also id.* at 277-78. In Ground 16(f), Petrocelli claims that “[t]he trial court erred  
6 by failing to provide individual sequestered voir dire.” *Id.* at 278; *see also id.* at 278-79. In Ground  
7 16(g), Petrocelli claims that “[t]he trial court ... erroneously failed to closely examine the beliefs of the  
8 prospective jurors and examined them in a hurried, incomplete and inconsistent manner.” *Id.* at 279-80.  
9 In Ground 16(h), Petrocelli claims that “[t]rial counsel failed to provide constitutionally effective  
10 representation during the entire jury selection process.” *Id.* at 281; *see also id.* at 281-82. In Ground  
11 16(i), Petrocelli claims that “[a]ppellate and post-conviction counsel were ineffective in failing to raise  
12 this claim.” *Id.* at 282; *see also id.* at 282-83.

13 Petrocelli argues that there is good cause for his failure to exhaust all of these claims because  
14 of “subsequent legal developments that were not in existence at the time of Mr. Petrocelli’s appeal.”  
15 Motion for Stay, p. 19. The only “subsequent legal development” cited by Petrocelli, however, is the  
16 United States Supreme Court’s decision in *Morgan v. Illinois*, 504 U.S. 719 (1992), issued June 15,  
17 1992. *See id.* The *Morgan* decision predated by more than a decade Petrocelli’s third state-court  
18 petition for writ of habeas corpus. The timing of the decision in *Morgan* does not explain why the  
19 claims in Ground 16 were not raised in Petrocelli’s third state habeas action.

20 Petrocelli also argues that his appellate counsel was ineffective for failing to raise this issue on  
21 his appeal, apparently referring to his direct appeal to the Nevada Supreme Court. *See* Motion for Stay,  
22 pp. 19-20. Here again, however, the court does not accept such a claim of ineffective assistance of  
23 counsel, without more, as satisfaction of the good-cause requirement imposed by *Rhines*. *See* discussion  
24 of Ground 8(b), *supra*. And, moreover, this ineffective assistance of appellate counsel does not appear  
25 to speak to Petrocelli’s failure to raise these claims in his third state habeas action.

26 Petrocelli has not shown good cause for his failure to exhaust the claims set forth in Ground 16.

1           Ground 17

2           In Ground 17, Petrocelli claims that his constitutional rights were violated “by the introduction  
3 of inaccurate, prejudicial and fundamentally flawed evidence of ‘future dangerousness’ at the penalty  
4 phase.” Fourth Amended Petition, p. 284; *see also id.* at pp. 284-302.

5           Petrocelli argues that, in view of developments in the law “since the time of Mr. Petrocelli’s  
6 appeal and initial habeas applications,” there is good cause for his failure to exhaust this claim. Motion  
7 for Stay, p. 20; *see also* Reply in Support of Motion for Stay (docket #217), p. 30. Petrocelli cites the  
8 Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as  
9 the critical subsequent legal development. *See* Motion for Stay, p. 20.

10           However, the *Daubert* case was decided in 1993, more than ten years before Petrocelli filed his  
11 third state-court petition for writ of habeas corpus. *See* Exhibit 26. *Daubert* was on the books when  
12 that third round of state post-conviction litigation was conducted, and there is no reason presented by  
13 Petrocelli to explain why the claim in Ground 17 were not raised in that petition. Petrocelli has not  
14 shown good cause for his failure to exhaust the claim in Ground 17.

15           Ground 18

16           In Ground 18, Petrocelli claims that his constitutional rights were violated “due to the failure of  
17 the trial court to provide his jury with a Unanimity Instruction.” Fourth Amended Petition, p. 303; *see also id.*  
18 *at pp.* 303-06.

19           As the court understands Petrocelli’s argument, his only theory that there was good cause for  
20 his failure to exhaust this claim in state court is that the claim “is based on fundamental due process  
21 concerns that should have been raised by trial and appellate counsel but, through no fault of Petitioner,  
22 were not.” Motion for Stay, p. 21; *see also* Reply in Support of Motion for Stay, pp. 30-31. This is not  
23 a showing of good cause. *See* discussion of Ground 8(b), *supra*.

24           Ground 19

25           In Ground 19, Petrocelli claims that his constitutional rights were violated “because the jury  
26 instructions did not properly instruct the jury on the limited use of prior bad act evidence in the penalty



1 phase and did not protect against the arbitrary and capricious infliction of the death penalty.” Fourth  
2 Amended Petition, p. 307; *see also id.* at pp. 307-11.

3 Pointing to *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998), *Hollaway v. State*, 116 Nev.  
4 732, 6 P.3d 987 (2000), and *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), Petrocelli argues that this  
5 claim is “largely based on law that has changed since the direct appeal and may well apply retroactively  
6 to Mr. Petrocelli’s case.” Motion for Stay, p. 22. *Middleton*, *Hollaway*, and *Evans*, however, were all  
7 decided well before Petrocelli litigated his third state habeas action. The petition in Petrocelli’s third  
8 state habeas action was filed August 11, 2003. *See* Exhibit 26. Petrocelli makes no showing of good  
9 cause for his failure to raise this claim in that proceeding.

#### 10 Ground 20

11 In Ground 20, Petrocelli claims that his constitutional rights were violated “due to the admission  
12 of cumulative and prejudicial victim impact testimony at the guilt and penalty phases of his trial.”  
13 Fourth Amended Petition, p. 312; *see also id.* at pp. 312-14.

14 Petrocelli argues that “[t]here is good cause to allow this claim to be exhausted as it is largely  
15 based on *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991), which the state courts did not have  
16 an opportunity to rule on at the time of Petitioner’s appeal.” Motion for Stay, p. 23; *see also* Reply in  
17 Support of Motion for Stay, p. 32. *Payne*, though, was decided some 12 years before Petrocelli initiated  
18 his third state habeas action. *See* Exhibit 26. In addition, *Payne* was decided while Petrocelli’s second  
19 state habeas action was still pending in the state district court. *See* Exhibits PP and UU. The timing  
20 of the *Payne* decision does not establish good cause for Petrocelli’s failure to exhaust the claim in  
21 Ground 20. Petrocelli also argues that his counsel were ineffective for failing to raise this claim on  
22 appeal or in his state habeas actions. However, as is discussed above, in this court’s view, such an  
23 assertion of attorney incompetence in failing to raise the claim in state court, without more, does not  
24 show good cause under *Rhines*. *See* discussion of Ground 8(b), *supra*.

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1           Ground 21

2           In Ground 21, Petrocelli claims that his constitutional rights were violated “because he was  
3 deprived of the adequate assistance of an institutionalization expert.” Fourth Amended Petition, p. 315;  
4 *see also id.* at pp. 315-18. Petrocelli claims that his trial counsel were ineffective, in violation of his  
5 constitutional rights, for failing to obtain the services of, and present the testimony of, such an expert.  
6 *See id.* at 315-18.

7           Petrocelli argues, in his Motion for Stay, that there is good cause for his failure to exhaust this  
8 claim in state court, because “[t]he main body of research upon which it is based is of relatively recent  
9 origin.” Motion for Stay, p. 24. Petrocelli lists the following literature as representing that “body of  
10 research” upon which the claim in Ground 21 is based: DeLisi and Conis (eds.), *Violent Offenders:*  
11 *Theory, Research, Public Policy, and Practice* (Boston, 2008) at 237-53; Goldstein, (ed.), *Forensic*  
12 *Psychology* (vol. 11 of 12); Weiner (ed.), *Handbook of Psychology* (New York, 2003); Cunningham,  
13 Reidy and Sorensen, “Assertions of ‘Future Dangerousness’ at Federal Capital Sentencing: Rates and  
14 Correlates of Subsequent Prison Misconduct and Violence, *Law and Human Behavior* (Sept. 2007); and  
15 Cunningham and Sorensen, Predictive Factors for Violent Misconduct in Close Custody, *Prison Journal*  
16 87, 241-53 (2007). *Id.* at 24. Petrocelli states: “While effective counsel would have presented expert  
17 testimony from an institutionalization expert to rebut the State’s evidentiary presentation of future  
18 dangerousness in the penalty phase, there have been many advances in the literature since then.” *Id.* at  
19 24-25.

20           The claim in Ground 21 is a claim of ineffective assistance of trial counsel. As is discussed,  
21 above, with regard to Ground 7(e), the analysis of a claim of ineffective assistance of counsel looks at  
22 whether counsel’s performance was reasonably competent in light of prevailing professional norms *at*  
23 *the time.* *See Strickland*, 466 U.S. at 688-89; *see also Bobby v. Van Hook*, --- U.S. ----, 130 S.Ct. 13,  
24 16-17, 175 L.Ed.2d 255 (2009). Because, under *Strickland*, the analysis of counsel’s performance is  
25 conducted from the perspective of the time of the trial, subsequent advances in the literature have no  
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1 bearing on the issue of ineffective assistance of counsel, and certainly do not show good cause for  
2 Petrocelli's failure to exhaust this claim.

3 Petrocelli also argues, in the same generic manner found throughout his motion for stay, that his  
4 counsel were ineffective for failing to exhaust this claim. This bald assertion, however, does not  
5 establish good cause, within the meaning of the *Rhines* decision. See discussion of Ground 8(b), *supra*.

6 Ground 22

7 In Ground 22, Petrocelli claims that his constitutional rights were violated "because Mr.  
8 Petrocelli's capital trial, sentencing, and review on direct appeal were conducted before state judicial  
9 officers whose tenure in office was not during good behavior but whose tenure was dependent on  
10 popular election." Fourth Amended Petition, p. 319; *see also id.* at pp. 319-21.

11 Petrocelli argues that his appellate and state post-conviction counsel were ineffective for failing  
12 to exhaust this issue in the state courts. See Motion for Stay, p. 25. The court does not accept such a  
13 bald claim of ineffective assistance of counsel, without more, as satisfaction of the good-cause  
14 requirement imposed by *Rhines*. See discussion of Ground 8(b), *supra*.

15 Ground 23

16 In Ground 23, Petrocelli claims that his constitutional rights were violated "because execution  
17 by lethal injection violates the constitutional prohibition against cruel and unusual punishments."  
18 Fourth Amended Petition, p. 322; *see also id.* at pp. 322-30.

19 With respect to this claim, Petrocelli's entire argument, in his motion for stay, is as follows:

20 The court has ruled that this claim is unexhausted. However, good cause  
21 exists to allow Petitioner to return to state courts to exhaust this claim. Much of the  
22 information upon which this claim is based is quite new. See Exhibits 142-146. At  
23 the time of Petitioner's appeal or state habeas actions, much of the background on the  
24 Nevada lethal injection protocol was still not public knowledge, so there would have  
25 been no feasible way for it to have been successfully raised previously. This  
26 probably accounts for the fact that the claim was not presented to the Nevada  
Supreme Court in the last round of state habeas proceedings. Petitioner should be  
allowed to exhaust this claim in the state courts.

Motion for Stay, pp. 25-26 (citation to order entered March 23, 2010 (docket #200) omitted).

1 Exhibit 142 is a copy of the Nevada Department of Corrections' "Confidential Execution  
2 Manual," as revised in February 2004. Exhibit 143 is a copy of an amicus brief filed in the United  
3 States Supreme Court in a case out of the Eleventh Circuit Court of Appeals entitled *Nelson v.*  
4 *Campbell*. Exhibit 144 is a copy of a Las Vegas Sun article, from March 18, 2004, entitled "Killer  
5 Makes Final Requests," regarding the then-imminent execution of Lawrence Colwell. Exhibit 145 is  
6 a copy of an article from a medical journal, *The Lancet*, entitled "Inadequate Anaesthesia in Lethal  
7 Injection for Execution," dated April 16, 2005. And, Exhibit 146 is a declaration of Mark J. S. Heath,  
8 M.D., apparently produced for use in the case of *Beets v. McDaniel*, 2:04-cv-0085-KJD-GWF, and  
9 signed by Dr. Heath on May 16, 2006.

10 Petrocelli does not describe what efforts he made, while in state court, to obtain the Nevada  
11 Department of Corrections' execution manual, in order to support his state court litigation of the claim  
12 in Ground 23; nor does Petrocelli explain why that document could not have been obtained by means  
13 of a subpoena or other legal process in state court. Petrocelli does not explain the significance of the  
14 amicus brief from the *Nelson* case, with respect to his claimed ability to exhaust the claim he sets forth  
15 in Ground 23. Similarly, with respect to the March 18, 2004, Las Vegas Sun article and the April 16,  
16 2005, *Lancet* article, Petrocelli does not identify what information in those articles he claims was  
17 necessary to his ability to exhaust his claim. Finally, Petrocelli does not describe the circumstances of  
18 the production of the Heath declaration, he does not explain why that declaration, or one similar to it,  
19 could not have been obtained earlier, and he does not provide any explanation why the information in  
20 that declaration was necessary to his exhaustion of his claim.

21 The record shows that Petrocelli was able to, and in fact did, articulate his Ground 23 claim in  
22 state court in 2003 when he initiated his third state habeas action. *See* Exhibit 26, pp. 34-38. However,  
23 Petrocelli abandoned that claim on appeal, and, therefore, did not exhaust it. *See* Exhibits 38 and 40.  
24 Petrocelli has made no showing of good cause for his abandonment of the claim on the appeal in his  
25 third state habeas action, or for his failure to exhaust the claim in general.

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Ground 24

In Ground 24, Petrocelli claims that his constitutional rights were violated “due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review.” Fourth Amended Petition, p. 331; *see also id.* at pp. 331-33.

In his motion for stay, Petrocelli argues that there is good cause for his failure to exhaust this claim in state court, on his direct appeal, “as it could not have been brought earlier on appeal, as it is based on the deficiencies of the direct appeal opinion.” Motion for Stay, p. 26. This argument, of course, does not address the real question, which is: why was this claim not raised in any of Petrocelli’s three state habeas actions? After respondents posed that question in their response to the motion for stay (*see* Opposition to Motion for Stay, p. 60), Petrocelli argued, in his reply: “As to why it was not presented in state post-conviction proceedings, Petitioner has claimed that it is due to ineffective post-conviction counsel.” Reply in Support of Motion for Stay, p. 35. Petrocelli provides no further argument about, or any substantiation of, such a claim of ineffective assistance of post-conviction counsel. Such a bald claim of ineffective assistance of counsel, without more, does not satisfy the good-cause prong of the *Rhines* standards. *See* discussion of Ground 8(b), *supra*.

Ground 25

In Ground 25, Petrocelli claims that his constitutional rights were violated “by the failure to submit all of the elements of capital eligibility to the grand jury or to the court for a probable cause determination.” Fourth Amended Petition, p. 334; *see also id.* at pp. 334-35.

In his motion for stay, Petrocelli asserts that this claim has merit (albeit without any citation to any controlling legal authority), and then Petrocelli goes to state, without explanation: “The failure to raise this claim earlier was not Petitioner’s fault.” Motion for Stay, p. 27. In his reply, Petrocelli asserts that ineffective assistance of his post-conviction counsel is good cause for his failure to exhaust the claim. *See* Reply in Support of Motion for Stay, pp. 35-36.

1 As is discussed above, the court does not accept such a claim of ineffective assistance of counsel,  
2 without more, as satisfaction of the good-cause requirement imposed by *Rhines*. See discussion of  
3 Ground 8(b), *supra*.

4 Ground 26

5 In Ground 26, Petrocelli claims that his constitutional rights were violated “because the death  
6 penalty is cruel and unusual punishment in all circumstances.” Fourth Amended Petition, p. 336; see  
7 *also id.* at pp. 336-37.

8 This general challenge to the death penalty conflicts with the holding of the United States  
9 Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). In that case, the Court ruled that execution by  
10 lethal injection, as carried out in Kentucky, was constitutional. It appears the *Baze* holding forecloses  
11 Petrocelli’s argument that the death penalty, no matter how administered, is necessarily unconstitutional.  
12 Petrocelli does not explain how his claim in Ground 26 could have any possible merit in light of *Baze*.

13 Furthermore, Petrocelli does not show good cause for his failure to exhaust this claim in state  
14 court. Petrocelli actually asserted this claim in the state district court in his third state habeas action (*see*  
15 Exhibit 26, pp. 28-29), but he did not raise the issue before the Nevada Supreme Court on the appeal  
16 in that action. See Exhibits 38 and 40.

17 Petrocelli argues:

18 Petitioner requests that he be allowed to exhaust this claim in the state courts. There  
19 is “good cause” for this request because Mr. Petrocelli asserts that under modern,  
20 evolving standards of decency, it is cruel and unusual punishment for the government  
to kill its own citizens. As these standards have evolved since Petitioner was last in  
state court, those courts should be afforded an opportunity to rule on this claim.

21 Motion for Stay, p. 27. Petrocelli offers no explanation how “standards of decency” have evolved since  
22 he litigated his third state habeas action.

23 Petrocelli also asserts, with respect to this claim, his generic argument that there is good cause  
24 for his failure to exhaust this claim because of ineffectiveness of his counsel in failing to raise it on  
25 direct appeal or on the appeal in any of his three state habeas actions. See Motion for Stay, pp. 27-28.

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1 Petrocelli's bald claim of ineffective assistance of counsel, without more, does not establish good cause  
2 for his failure to exhaust this claim. See discussion of Ground 8(b), *supra*.

3 Ground 27

4 In Ground 27, Petrocelli claims that his "conviction and sentence are invalid pursuant to the  
5 rights and protections afforded him under the International Covenant on Civil and Political Rights."  
6 Fourth Amended Petition, p. 338; *see also id.* at pp. 338-39.

7 Here again, Petrocelli made the claim in Ground 27 before the state district court in his third  
8 state habeas action (*see* Exhibit 26, pp. 40-41), but he did not raise the issue before the Nevada Supreme  
9 Court on the appeal in that action. *See* Exhibits 38 and 40.

10 Petrocelli argues that there is good cause for his failure to exhaust this claim "because  
11 international law is increasingly being considered by various courts in their rulings." Motion for Stay,  
12 p. 28. Petrocelli offers no further explanation or support for that argument. It is not a showing of good  
13 cause for his failure to exhaust the claim.

14 Furthermore, Petrocelli's claim of ineffective assistance of counsel, for not raising this claim on  
15 direct appeal or on the appeal in any of his state habeas actions, without more, does not establish good  
16 cause for his failure to exhaust this claim. *See* discussion of Ground 8(b), *supra*.

17 Ground 28

18 In Ground 28, Petrocelli claims that his death sentence is unconstitutional "because of the risk  
19 that the irreparable punishment of execution will be applied to innocent persons." Fourth Amended  
20 Petition, p. 340; *see also id.* at pp. 340-42.

21 Petrocelli argues that there is good cause for his failure to exhaust this claim, as follows:

22 There is "good cause" for this request [to be allowed to exhaust this claim in the state  
23 courts] as through no fault of Petitioner this claim was never previously presented in  
24 state court. Additionally, since his last round of state habeas proceedings, the factual  
25 basis of the claim has shifted in Petitioner's favor due to widespread publicity  
26 regarding the possible execution of innocent persons. An example would be the  
widespread controversy regarding the Todd Willingham case in Texas.

1 Motion for Stay, pp. 28-29. There is no further explanation or support for this argument. The allegation  
2 that there was not as much “publicity regarding the possible execution of innocent persons” when  
3 Petrocelli litigated his direct appeal and his three state habeas actions, as there is now, does not amount  
4 to a showing of good cause for Petrocelli’s failure to exhaust.

5 Furthermore, Petrocelli’s claim of ineffective assistance of counsel, for not raising this claim on  
6 direct appeal or on the appeal in any of his state habeas actions, without more, does not establish good  
7 cause for his failure to exhaust this claim. *See* discussion of Ground 8(b), *supra*.

8 Ground 29

9 In Ground 29, Petrocelli claims that his constitutional rights have been violated because “[t]he  
10 execution of a death sentence after keeping the condemned on death row for an inordinate amount of  
11 time constitutes cruel and unusual punishment.” Fourth Amended Petition, p. 343; *see also id.* at pp.  
12 343-53.

13 With respect to the question of good cause for his failure to exhaust this claim, Petrocelli argues:

14 There is “good cause” for this request [to be allowed to exhaust this claim in the state  
15 courts] as through no fault of Petitioner, the state courts have never had the  
16 opportunity to rule on it. The circumstances of the claim have changed since Mr.  
17 Petrocelli was last in state court, as several additional years have been added to his  
18 confinement, through no choice of his own. Additionally, to the extent that appellate  
19 counsel and state post-conviction counsel failed to raise this issue on direct appeal,  
20 their defective assistance deprived Mr. Petrocelli of his state and federal due process  
21 and equal protection right to effective assistance of counsel on appeal and in post-  
22 conviction, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to  
23 the Constitution.

24 Motion for Stay, p. 29.

25 The fact that Petrocelli has been confined for “several additional years” – about four years,  
26 actually – since he litigated his last state habeas action, does not establish good cause for his failure to  
27 exhaust this claim in that state habeas action.

28 Moreover, Petrocelli’s claim of ineffective assistance of counsel, for not raising this claim in any  
29 of his state habeas actions, without more, does not establish good cause for his failure to exhaust this  
30 claim. *See* discussion of Ground 8(b), *supra*.



1           Ground 30

2           In Ground 30, Petrocelli claims that his constitutional rights have been violated “due to the  
3 cumulative errors in the admission of evidence and instructions, gross misconduct by State officials and  
4 witnesses, and the systematic deprivation of Mr. Petrocelli’s right to the effective assistance of counsel.”  
5 Fourth Amended Petition, p. 354; *see also id.* at pp. 354-56.

6           Petrocelli’s only argument that there is good cause for his failure to exhaust this claim is his  
7 blanket ineffective assistance of counsel argument. As is discussed above, the court does not accept as  
8 good cause, under *Rhines*, Petrocelli’s bald statement that his counsel were ineffective for not  
9 exhausting the claim. *See* discussion of Ground 8(b), *supra*.

10           Ground 31

11           Finally, in Ground 31 Petrocelli claims that his conviction and sentence are unconstitutional  
12 “because he may become incompetent to be executed.” Fourth Amended Petition, p. 357.

13           It appears that Ground 31 does not, at least at this time, state a potentially meritorious claim.  
14 *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 632-35 (9th Cir.1997), *affirmed sub nom. Stewart v.*  
15 *Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). Moreover, in *Panetti v. Quarterman*, 551  
16 U.S. 930 (2007), the Supreme Court held that it is unnecessary to raise an unripe claim of incompetency  
17 in an initial habeas petition in order to preserve the claim.

18           Regarding the question of good cause for his failure to exhaust this claim in state court,  
19 Petrocelli argues:

20           There is “good cause” for this request [to be allowed to exhaust this claim in the state  
21 courts] as it appears that a claim anticipating incompetence to be executed should be  
22 raised in an initial petition for writ of habeas corpus. *Martinez-Villareal v. Stewart*,  
23 118 F.3d 628 (9th Cir.1997), *affirmed sub nom. Stewart v. Martinez-Villareal*, 523  
U.S. 637, 118 S.Ct. 1618 (1998). Mr. Petrocelli therefore requests that the state  
courts have an opportunity to first rule on this claim so that it may be preserved for  
federal habeas review.

24           Motion for Stay, pp. 30-31. But the *Martinez-Villareal* argument does not establish good cause for  
25 Petrocelli’s failure to exhaust this claim in state court. Petrocelli could have exhausted this claim just

26

1 as well in his third state habeas action as he could now. To the extent such a claim would have been  
2 held to be premature in Petrocelli's third state habeas action, it would be now as well.

3 Kelly

4 Petrocelli requests a *Kelly* stay, in the alternative, in case a *Rhines* stay is not granted. See  
5 Motion for Stay, pp. 33-47. The court will deny that request.

6 In *King v. Ryan*, 564 F.3d 1133 (9th Cir.2009), the court of appeals held that, in addition to the  
7 stay procedure authorized in *Rhines*, district courts retain discretion to permit petitioners to follow the  
8 three-step stay-and-abeyance procedure approved in *Calderon v. U.S. Dist. Ct. (Taylor)*, 134 F.3d 981,  
9 986 (9th Cir.1998), and *Kelly v. Small*, 315 F.3d 1063 (9th Cir.2003). Following that procedure  
10 (sometimes referred to as the "*Kelly* procedure" or a "*Kelly* stay"): (1) a petitioner amends his petition  
11 to delete any unexhausted claims; (2) the district court stays and holds in abeyance the amended, fully  
12 exhausted petition, allowing the petitioner the opportunity to proceed to state court to exhaust the  
13 deleted claims; and (3) the petitioner later amends his petition again incorporating the newly-exhausted  
14 claims. *Kelly*, 315 F.3d at 1070-71. The *Kelly* procedure has no requirement of a showing of good  
15 cause for the petitioner's failure to exhaust.

16 However, compared to the *Rhines* procedure, the *Kelly* procedure has a significant drawback for  
17 petitioners. "Unlike the *Rhines* procedure, the *Kelly* procedure does nothing to protect a petitioner's  
18 unexhausted claims from untimeliness in the interim." *King*, 564 F.3d at 1141.

19 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect.  
20 Pub.L. No. 104-132, 110 Stat. 1214-1226 (1996). The AEDPA made various amendments to the  
21 statutes controlling federal habeas corpus practice. One of the amendments imposed a one-year statute  
22 of limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations,  
23 the habeas corpus statute provides:

24 (d)(1) A 1-year period of limitation shall apply to an application for a  
25 writ of habeas corpus by a person in custody pursuant to the judgment  
26 of a State court. The limitation period shall run from the latest of -

1 (A) the date on which the judgment became final by the  
2 conclusion of direct review or the expiration of the time for  
seeking such review;

3 (B) the date on which the impediment to filing an application  
4 created by State action in violation of the Constitution or laws  
of the United States is removed, if the applicant was prevented  
5 from filing by such State action;

6 (C) the date on which the constitutional right asserted was  
initially recognized by the Supreme Court, if the right has  
7 been newly recognized by the Supreme Court and made  
retroactively applicable to cases on collateral review; or

8 (D) the date on which the factual predicate of the claim or  
9 claims presented could have been discovered through the  
exercise of due diligence.

10 28 U.S.C. § 2244(d)(1). The AEDPA limitations period is tolled while a “properly filed application”  
11 for post conviction or other collateral relief is pending before a state court. 28 U.S.C. § 2244(d)(2). The  
12 limitations period is not tolled, however, during the pendency of a federal habeas petition. *See Duncan*  
13 *v. Walker*, 533 U.S. 167 (2001).

14 Therefore, if the *Kelly* procedure is followed, in order to avoid a statute of limitations bar, the  
15 newly-exhausted claims, which are to be set forth in an amended petition after the stay is lifted, must  
16 relate back to claims in the fully-exhausted stayed petition. *See King*, 564 F.3d at 1142.

17 “An amendment of a pleading relates back to the date of the original pleading when ... the claim  
18 ... asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or  
19 attempted to be set forth in the original pleading.” Fed.R.Civ.Pro. 15(c)(2). In *Mayle v. Felix*, 545 U.S.  
20 644 (2005), the Supreme Court held that a petitioner may amend to add a new claim into a pending  
21 federal habeas petition after the expiration of the limitations period only if the new claim shares a  
22 “common core of operative facts” with the claims in the pending petition. *Mayle*, 545 U.S. at 659. An  
23 amended habeas petition, “does not relate back when it asserts a new ground for relief supported by facts  
24 that differ in both time and type from those the original pleading set forth.” *Id.* at 649.

25 A district court exercises discretion in determining whether or not to grant a *Kelly* stay. *Kelly*,  
26 315 F.3d at 1070. The court may properly refuse to stay an exhausted habeas petition when the statute

1 of limitations would prevent the petitioner from ever successfully amending to re-assert his claim. See  
2 *King*, 564 F.3d. at 1141-42.

3 In this case, the one-year AEDPA limitations period ran out long ago. The record indicates that  
4 there has been no post-conviction litigation, and, therefore, no statutory tolling of the limitations period,  
5 since 2007, when the dismissal of Petrocelli's third state habeas action was affirmed on appeal. See  
6 Exhibit 41. Therefore, a *Kelly* stay would benefit Petrocelli only to the extent that his newly-exhausted  
7 claims – those to be added back into the federal petition following the requested stay – would relate back  
8 to exhausted claims to be included in the stayed petition.

9 Petrocelli makes general arguments that the newly-exhausted claims would not be time-barred,  
10 but he does not provide any specific analysis, in this regard, with respect to any particular claim. The  
11 court, however, has examined the unexhausted claims in the fourth amended petition, which Petrocelli  
12 would exhaust during a stay (Grounds 7(e), 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b),  
13 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and  
14 31), and has compared those claims to the exhausted claims in the fourth amended petition, which would  
15 be pled in a stayed fifth amended petition, following the *Kelly* procedure (Grounds 6(c), 6(d), 7(b), 7(f),  
16 10, 12, and 13). See *King*, 564 F.3d at 1142 (“[W]e hold that *Mayle* requires a comparison of a  
17 petitioner’s new claims to the properly exhausted claims left pending in federal court, not to any earlier  
18 version of the complaint containing claims subsequently dismissed for failure to exhaust.”). It appears  
19 to the court that, of all Petrocelli’s unexhausted claims, there may be colorable arguments that three of  
20 those claims might relate back, under *Mayle*, to exhausted claims in Petrocelli’s fourth amended petition.  
21 Grounds 15(d) and 17 might arguably relate back to Ground 12, and Ground 19 might arguably relate  
22 back to Ground 7(b). The court assumes, for purposes of this analysis only, and without finally deciding  
23 the relation-back issue, that Grounds 15(d), 17, and 19 would relate back to exhausted claims, and could  
24 therefore survive a statute of limitations challenge following a *Kelly* stay. There appears to be no  
25 colorable argument that any of Grounds 7(e), 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(e), 16(a), 16(b),  
26

1 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 would  
2 relate back to exhausted claims in the fourth amended petition.

3 Implementation of the *Kelly* procedure is a matter of this court's discretion. *See King*, 564 F.3d  
4 at 1143. The court will exercise its discretion to deny Petrocelli a *Kelly* stay. The killing of James  
5 Wilson, underlying this case, occurred on March 29, 1982, and Petrocelli was convicted in September  
6 of that year – nearly three decades ago. In the time since his conviction, Petrocelli has litigated, in state  
7 court, a direct appeal and three state habeas actions. The last of those state habeas actions was litigated  
8 during a stay of this federal habeas case, between August 2003 and July 2007. In exercising its  
9 discretion, the court is mindful of the important principles of comity and federalism. The State has a  
10 strong interest in the finality of its criminal judgments, and execution of its capital sentences without  
11 undue delay. The court is also mindful of the congressional intent behind AEDPA, the most recent  
12 wide-ranging federal legislation in the habeas area, to “reduce delays in the execution of state and  
13 federal criminal sentences, particularly in capital cases.” *See Rhines*, 544 U.S. at 276. The court is also  
14 cognizant, however, that, facing the ultimate punishment, capital habeas petitioners must be provided  
15 reasonable opportunity to exhaust potentially meritorious habeas claims in state court, to avoid  
16 unnecessary forfeiture of such claims. With these considerations in mind, and well-informed of the  
17 procedural history of this case, this court cannot countenance another stay of this action to provide time  
18 for yet another – it would be Petrocelli's fourth – state habeas action.<sup>7</sup> The court will deny Petrocelli's  
19 motion for a stay, will require Petrocelli to abandon his unexhausted claims or face dismissal of his  
20 entire fourth amended petition, and will move this action toward resolution of Petrocelli's viable claims,  
21 on their merits.

22  
23  
24  
25 <sup>7</sup> Respondents have made no showing that Petrocelli has ever engaged in dilatory litigation  
26 tactics, or that he has otherwise acted in bad faith in any manner in the state courts or in this court. And,  
certainly, the court does not mean to suggest that any improper delay has been the fault of Petrocelli's  
current counsel, who became Petrocelli's counsel on September 27, 2007 (docket #140), after the  
conclusion of Petrocelli's last state habeas action.

1           **IT IS THEREFORE ORDERED** that petitioner's Motion for Leave to File Reply Brief Over  
2 Twenty Pages in Length (docket #216) is **GRANTED**. The reply in support of the motion for stay has  
3 already been filed, and has been considered in this order; therefore, no further action on the part of the  
4 Clerk is necessary in this regard.

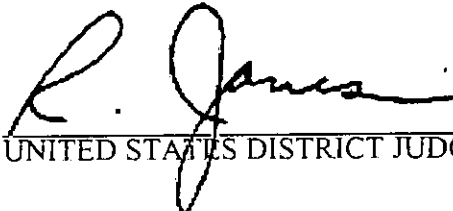
5           **IT IS FURTHER ORDERED** that petitioner's Motion to Stay Proceedings and Hold Litigation  
6 in Abeyance (docket #203) is **DENIED**.

7           **IT IS FURTHER ORDERED** that petitioner shall have **30 days** from the date of entry of this  
8 order to file a notice of abandonment of unexhausted claims, abandoning the claims in his fourth  
9 amended petition that have been held to be unexhausted in state court (Grounds 7(e), 8(b), 9, 11, 14,  
10 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 17, 18, 19,  
11 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31). If petitioner does not, within the time allowed, file  
12 a notice of abandonment of unexhausted claims, abandoning all of his unexhausted claims, petitioner's  
13 Fourth Amended Petition (docket #162) will be dismissed, in its entirety, pursuant to *Rose v. Lundy*, 455  
14 U.S. 509 (1982).

15           **IT IS FURTHER ORDERED** that, if petitioner files a notice of abandonment of unexhausted  
16 claims, abandoning all of his unexhausted claims, within the time allowed, respondent shall thereafter  
17 have **90 days** to file an answer, responding to the exhausted claims remaining in petitioner's fourth  
18 amended petition (Grounds 6(c), 6(d), 7(b), 7(f), 10, 12, and 13).

19           **IT IS FURTHER ORDERED** that, in all other respects, the schedule for further proceedings  
20 set forth in the order entered November 16, 2007 (docket #147) shall remain in force.

21  
22           Dated this 10th day of March, 2011.

23  
24             
25           UNITED STATES DISTRICT JUDGE  
26