

1 failure was beyond his control, were insufficient to meet the good cause standard. (See Order 4).
2 The Court rejected this argument because such a claim could be made by virtually every habeas
3 corpus petitioner seeking a stay, which result would clearly conflict with the Supreme Court's
4 guidance in *Rhines* that mixed petitions should only be stayed in limited circumstances. *Wooten v.*
5 *Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008). Thus, the Court denied the motion to stay, not
6 because it categorically rejected the notion that ineffective assistance of post-conviction counsel can
7 serve as good cause for failing to exhaust, but because Petitioner's arguments in support of good
8 cause, as set forth in his initial motion, were too generic.

9 The Court declines to reconsider. Although the Court did not make such a blanket ruling in
10 the original order, on reconsideration the Court finds that as a matter of law a *Strickland*-type¹ claim
11 of ineffective assistance of post-conviction counsel cannot constitute good cause for failing to
12 exhaust a claim in a federal habeas corpus action. See *Martinez v. Schiro*, 623 F.3d 731, 743 (9th Cir.
13 2010) (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)); *Landrum v. Mitchell*, 625 F.3d 905,
14 919 (6th Cir. 2010) (citing *Coleman*, 501 U.S. at 750; *Pennsylvania v. Finley*, 481 U.S. 551, 555
15 (1987)). The law on this point has been clear in this Circuit for over a decade: "[A]ny
16 ineffectiveness of [an] attorney in the post-conviction process is not considered cause for the
17 purposes of excusing [a] procedural default at that stage." *Manning v. Foster*, 224 F.3d 1129, 1133
18 (9th Cir. 2000) (citing *Coleman*, 501 U.S. at 752).

19 This does not mean that post-conviction counsel's actions can never support a showing of
20 good cause. Good cause can exist, for example, based on a claim that post-conviction counsel
21 ignored a petitioner's instructions and thereby obtained a worse outcome than the petitioner would
22 have reached on his own. But such a claim is different from an ineffective assistance claim.
23 Although such a claim involves a petitioner's post-conviction attorney, it is at its core a
24 garden-variety claim of external interference with a petitioner's ability to present a claim. See *id.* at
25 1134 (holding that an attorney's interference with a petition due to a conflict of interest can support

26

¹ See *Strickland v. Washington*, 466 U.S. 688 (1984).

1 cause excusing a procedural default). In other words, "my attorney didn't do a good enough job in
2 post-conviction proceedings" cannot constitute good cause, *see id.* at 1133, but "my attorney
3 interfered with my attempts to present my petition" can, *see id.* at 1134. A contrary conclusion
4 would not only frustrate the purposes of AEDPA, it would erode the Supreme Court's explicit
5 rejection of a putative right to post-conviction counsel in *Finley*, because it would excuse procedural
6 defaults based purely upon the performance of that counsel as measured not by the good cause
7 standard, but by the professional standard of *Strickland*. Petitioner claims only the first kind of error,
8 which cannot support a finding of cause.

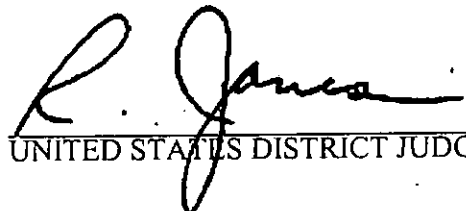
9 **IT IS THEREFORE ORDERED** that "Petitioner's Motion for Reconsideration of Denial
10 of Motion for Stay and Abeyance" (docket #54) is DENIED.

11 **IT IS FURTHER ORDERED** that Petitioner shall have **twenty (20) days** from the date this
12 order is entered within which to file a Notice of Abandonment of Unexhausted Claims, indicating
13 that Claims One through Five, Six(A)(B)and(D), Seven(A-F)(H-J), and Nine through Thirteen are to
14 be deleted from his amended petition (docket #17).

15 **IT IS FURTHER ORDERED** that, if Petitioner does not abandon his unexhausted claims
16 within the time allowed, the amended petition (docket #17) shall be dismissed under *Rose v. Lundy*,
17 455 U.S. 509 (1982).

18 **IT IS FURTHER ORDERED** that, if Petitioner abandons his unexhausted claims within the
19 time allowed, respondents shall have sixty (60) days from the date the Notice of Abandonment is
20 filed within which to file an Answer to the remaining claims in the second revised amended petition
21 (docket #17).

22 DATED: March 14, 2011

23
24 
25 UNITED STATES DISTRICT JUDGE
26