

1 The Court went on to state that, “[I]t likely would be an abuse of discretion for a
2 district court to deny a stay and to dismiss a mixed petition if the petitioner had good
3 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and
4 there is no indication that the petitioner engaged in intentionally dilatory litigation
5 tactics.” *Id.* at 278.

6 Thus, this court may stay a petition containing both exhausted and unexhausted
7 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are
8 potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics.
9 *Rhines*, 544 U.S. at 277; *Gonzalez v. Wong*, 667 F.3d 965, 977–80 (9th Cir. 2011).
10 “[G]ood cause turns on whether the petitioner can set forth a reasonable excuse,
11 supported by sufficient evidence, to justify [the failure to exhaust a claim in state court].”
12 *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014). “While a bald assertion cannot
13 amount to a showing of good cause, a reasonable excuse, supported by evidence to
14 justify a petitioner’s failure to exhaust, will.” *Id.* An indication that the standard is not
15 particularly stringent can be found in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), where
16 the Supreme Court stated that: “[a] petitioner’s reasonable confusion about whether a
17 state filing would be timely will ordinarily constitute ‘good cause’ to excuse his failure to
18 exhaust.” *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). *See also Jackson v.*
19 *Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005) (the application of an “extraordinary
20 circumstances” standard does not comport with the “good cause” standard prescribed
21 by *Rhines*).

22 In its order dated March 4, 2016, this court granted respondents’ motion to
23 dismiss in part, concluding that ground 2 was unexhausted (ECF No. 25). In ground 2,
24 Villatoro argues that insufficient evidence was presented at trial to convict him of sexual
25 assault in violation of his Fourteenth Amendment due process rights (ECF No. 9, pp.
26 13-14). He argues that he can demonstrate good cause because his state
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1 postconviction counsel rendered ineffective assistance by failing to present federal
2 ground 2 to the Nevada Supreme Court (ECF No. 28, pp. 9-10).

3 In *Martinez v. Ryan*, the United States Supreme Court held that the failure to
4 appoint counsel or the ineffective assistance of counsel in a state postconviction
5 proceeding may establish cause to overcome procedural default of a claim of ineffective
6 assistance of trial counsel. 132 S.Ct. 1309, 1315, 1318 (2012). The Ninth Circuit then
7 held in *Blake* that a valid claim of ineffective assistance of state postconviction counsel
8 under *Martinez v. Ryan* (which would also encompass the absence of counsel) that
9 would establish “cause” for overcoming a default would also be sufficient to justify a stay
10 for purposes of exhausting the petitioner’s claims. *Blake v. Baker*, 745 F.3d at 983-84
11 (holding that “cause” under *Rhines* “cannot be any more demanding” than the *Martinez*
12 standard); *Id.* at 984, fn. 7 (noting that Supreme Court has suggested the *Rhines*
13 standard is more liberal).

14 Here, Villatoro argues that ineffective assistance of state postconviction counsel
15 provides good cause for his failure to exhaust federal ground 2 (ECF No. 28, pp. 9-10).
16 This argument is unavailing, however, because *Blake* relies on *Martinez* which is limited
17 to addressing claims of ineffective assistance of trial counsel only. *See also Ha Van*
18 *Nguyen v. Curry*, 736 F.3d 1287, 1295 (9th Cir. 2013) (holding that the *Martinez*
19 standard for cause applies to both trial and appellate ineffective assistance of counsel
20 claims). That is, the underlying unexhausted claim must be a claim of ineffective
21 assistance of counsel. Federal ground 2, however, is not an IAC claim, it is a
22 substantive challenge to the sufficiency of the evidence to convict Villatoro of one of the
23 sexual assault counts. Accordingly, Villatoro has not demonstrated good cause for
24 failing to exhaust federal ground 2. The court also notes that a sufficiency of the
25 evidence claim generally must be raised on direct appeal. Thus it is unclear how state
26 postconviction counsel’s failure to raise the claim in a state postconviction petition would
27 constitute ineffective assistance or provide a reasonable excuse here. *Blake*, 745 F.3d
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1 at 982; *see also Jones v. Barnes*, 463 U.S. 745 (1983) (counsel does not have a duty
2 even to raise every non-frivolous claim on appeal).

3 Accordingly, petitioner's motion for a stay and abeyance of this federal habeas
4 corpus proceeding is denied. Villatoro, through counsel, will need to either (1) inform
5 this court in a sworn declaration that he wishes to formally and forever abandon the
6 unexhausted ground for relief in his federal habeas petition and proceed on the
7 exhausted grounds; OR (2) inform this court in a sworn declaration that he wishes to
8 dismiss this petition without prejudice in order to return to state court to exhaust his
9 unexhausted claim.

10 **IT IS THEREFORE ORDERED** that petitioner's motion for stay and abeyance
11 (ECF No. 28) is **DENIED**.

12 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** to either:
13 (1) inform this court in a sworn declaration that he wishes to formally and forever
14 abandon the unexhausted grounds for relief in his federal habeas petition and proceed
15 on the exhausted grounds; OR (2) inform this court in a sworn declaration that he
16 wishes to dismiss this petition without prejudice in order to return to state court to
17 exhaust his unexhausted claims.

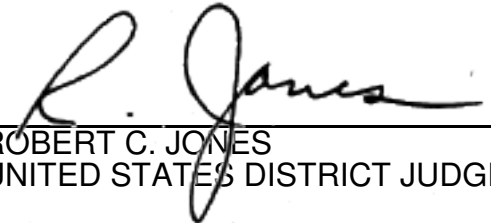
18 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted
19 ground, respondents shall have **thirty (30) days** from the date petitioner serves his
20 declaration of abandonment in which to file an answer to petitioner's remaining grounds
21 for relief. The answer shall contain all substantive and procedural arguments as to all
22 surviving grounds of the petition, and shall comply with Rule 5 of the Rules Governing
23 Proceedings in the United States District Courts under 28 U.S.C. §2254.
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IT IS FURTHER ORDERED that petitioner shall have **thirty (30) days** following service of respondents' answer in which to file a reply.

IT IS FURTHER ORDERED that if petitioner fails to respond to this order within the time permitted, this case may be dismissed.

Dated: This 16th day of February, 2017.


ROBERT C. JONES
UNITED STATES DISTRICT JUDGE