

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MICHAEL HAYNES,	:	
	:	
Petitioner,	:	ORDER
	:	08-CV-3643 (JFB)
– against –	:	
	:	
ROBERT ERCOLE,	:	
	:	
Respondent.	:	
	:	
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JOSEPH F. BIANCO, District Judge:

By motion dated August 29, 2008, *pro se* petitioner Michael Haynes seeks an order staying any action on his writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, pending the adjudication of his C.P.L. § 440.20 motion filed in New York state court regarding purported irregularities in his sentencing procedures. In connection with that motion, petitioner submitted a declaration explaining his “good cause.” Respondent submitted a letter stating that, because petitioner has not filed a mixed petition and because his state court motion is plainly without merit, “[t]here does not appear to be a need or basis for staying the habeas petition.” Respondent’s Letter, dated September 25, 2008, at 2.

In an abundance of caution, in its discretion, the Court grants petitioner’s motion under the standard articulated in *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). First, because the habeas petition contains an excessive sentencing claim, it appears that petitioner’s pending state motion regarding purported sentencing irregularities is related to that claim and, thus, may make this a “mixed petition.” Moreover, although respondent briefly argues that the claim is plainly meritless, the Court is unable to make that determination based upon the current submissions.

Furthermore, because petitioner filed this “protective habeas” to ensure its timeliness, the Court finds “good cause” for the stay. *See Fernandez v. Artuz*, No. 00 Civ. 7601 KMW AJP, 2006 WL 121943, at *4 (S.D.N.Y. Jan. 18, 2006) (“District courts have ... [found] good cause where the petitioner filed a ‘protective’ federal habeas petition where the petitioner was confused as to whether his claims were properly exhausted in state court.”) (collecting cases). Finally, there is no evidence that petitioner has engaged in intentionally dilatory litigation tactics.

In his August 29, 2008 motion, and by letter dated September 23, 2008, petitioner also advised the Court that he needs the stay because he intends to file a separate motion in state court regarding certain ineffective assistance of counsel claims. The Court also will allow petitioner an opportunity to attempt to exhaust those claims in state court, for the same reasons articulated above with respect to his sentencing claim.

Accordingly, the motion to stay the petitioner is granted on the condition (1) the prompt filing of any motions in state court (that have not already be filed) within 30 days of this Order; (2) the prompt return to federal court (by advising this Court in writing) within 30 days after state court exhaustion is complete. *See Zarvela v. Artuz*, 254 F.3d 374, 380-82 (2d Cir. 2001).

SO ORDERED.

JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: March 6, 2009
Central Islip, NY