UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LILLIAN RIVERA,

Petitioner,

v.

SABINA KAPLAN,

Respondent.

17-CV-2257 (RA)

MEMORANDUM OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Lillian Rivera filed this petition for habeas corpus, dated March 20, 2017, as a "protective petition[]" pursuant to *Pace v. DiGuglielmo*, 544 U.S. 408, 416–17 (2005). Pet. at 9, Dkt. 2.[1] Rivera lists four grounds on which she claims that she is being held unlawfully in state custody, and asserts these grounds were not "presented to the state court due to Petitioner recently finishing her CPL [§] 440.10 motion[,] therefore [she] is requesting a 'stay and abeyance' so that she may have the matter determined on the merits." Pet. at 5, Dkt. 2. Rivera explains that she "[d]id not want to run out of time." *Id.* According to Respondent, Rivera filed a CPL § 440.10 motion on April 5, 2017, which remains pending. Resp.'s Ltr. Mot. at 2, Dkt. 7. Respondent opposes Rivera's request for a stay and abeyance and moves to dismiss the petition without prejudice based on lack of exhaustion. *Id.* at 1. Rivera's stay application is granted.[2]

[1] Because not all of Petitioner's submissions are paginated, the page numbers cited refer to the ECF page numbers.

[2] On July 10, 2017, the Court received a letter from Petitioner dated July 3, 2017, which requests additional time to reply to Respondent's motion that her petition should be dismissed, and reasserts her request for a stay and abeyance of her petition. She also contends that she "submitted *both* exhausted and unexhausted claims." Petitioner, however, has not identified any exhausted claims, and thus, for the purpose of this application, the Court assumes without deciding that all of her claims are unexhausted. Because the Court grants Petitioner's request for a stay and abeyance, her request for additional time to oppose Respondent's pending motion is denied as moot.

Respondent argues that there is no basis to retain jurisdiction over a petition that contains only unexhausted claims. *Id.* at 2. That argument ignores the Supreme Court's guidance in *Pace* that a petitioner should take the very action Rivera does here. In *Pace*, the Court held that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) statute of limitations period is not tolled when a postconviction petition is rejected by the state court as untimely, because such petition is not deemed to have been "properly filed," within the meaning of AEDPA's statutory tolling provision. 544 U.S. at 410. Responding to the argument that a "petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that [it] was never 'properly filed,'" and that his federal habeas petition is thus time barred, the Supreme Court noted in dicta that:

> A prisoner seeking state postconviction relief might avoid this predicament . . . by filing a "protective" petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted. A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute "good cause" for him to file in federal court.

Pace, 544 U.S. at 416–17 (citing *Rhines v. Weber*, 544 U.S. 269, 278 (2005)). The majority included this language despite the dissent's warning that:

> The inevitable result of today's decision will be a flood of protective filings in the federal district courts. As the history of this case demonstrates, litigants, especially those proceeding *pro se,* cannot predict accurately whether a state court will find their application timely filed. Because a state court's timeliness ruling cannot be predicted with certainty, prisoners who would otherwise run the risk of having the federal statute of limitations expire while they are exhausting their state remedies will have no choice but to file premature federal petitions accompanied by a request to stay federal proceedings pending the exhaustion of their state remedies. The Court admits that this type of protective filing will result from its holding.

Id. at 429 (Stevens, *J.*, dissenting) (internal citation omitted). "While . . . dictum is not binding upon us, it must be given considerable weight and cannot be ignored." *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (footnote omitted); *see also Sierra Club v. E.P.A.*, 322 F.3d 718, 724 (D.C. Cir. 2003) ("For this 'inferior Court [ ],' U.S. Const. art. III, § 1, cl. 1, . . . 'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997))); *Bangor Hydro-Elec. Co. v. F.E.R.C.*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be *dicta,* but Supreme Court *dicta* tends to have somewhat greater force—particularly when expressed so unequivocally."); *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007) ("But if dicta this be, it is of the most persuasive kind."), *aff'd*, 571 F.3d 185 (2d Cir. 2009).

Pace suggests that whether a stay and abeyance is appropriate in a particular case is governed by the three-part test articulated by the Supreme Court in *Rhines*: that a petitioner show good cause, that the unexhausted claims are not "plainly meritless," and that there are a lack of intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. at 277–78. In *Rhines*, the Court was confronted with "the problem of a 'mixed' petition for habeas corpus relief in which a state prisoner present[ed] a federal court with a single petition containing some claims that have been exhausted in the state courts and some that have not." *Id.* at 271.

Although the Second Circuit does not appear to have addressed the question of whether such a stay and abeyance procedure is available when a petition is fully unexhausted, rather than mixed, the circuit courts that have done so—the Third, Seventh, Ninth, and Tenth—have all held that *Rhines* applies to a petition that includes solely unexhausted claims. *See Mena v. Long*, 813 F.3d 907, 910–11 (9th Cir. 2016); *Doe v. Jones*, 762 F.3d 1174, 1179–82 (10th Cir. 2014); *Heleva v. Brooks,* 581 F.3d 187, 191–92 (3d Cir. 2009); *Dolis v. Chambers,* 454 F.3d 721, 725 (7th Cir.

2006) ("We have gone so far as to suggest that it would be wise for a petitioner to file in both state and federal court simultaneously, particularly where there is some procedural uncertainty about the state court post-conviction proceeding, and then ask the district court to stay the federal case until the state case concludes to ensure that she does not miss the one-year deadline."). And as these courts have observed, "the petition in *Pace* was *not* mixed," *Doe*, 762 F.3d at 1179, and the Supreme Court "recommended this course of action without any mention that it could apply only to a mixed petition," *Heleva*, 581 F.3d at 191. Consistent with the logic articulated by the Supreme Court in *Pace*, the Court grants Petitioner's application for a stay.

First, Petitioner has shown good cause. As the Supreme Court stated in *Pace*, "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." 544 U.S. at 416; *see also Haynes v. Ercole*, No. 08-CV-3643, 2009 WL 580435, at *1 (E.D.N.Y. Mar. 6, 2009) ("[B]ecause petitioner filed this 'protective habeas' to ensure its timeliness, the Court finds 'good cause' for the stay."); *Whitley v. Ercole*, 509 F. Supp. 2d 410, 419 (S.D.N.Y. 2007) ("[A] petitioner's showing of his confusion, if reasonable, concerning the delay in his state filing would satisfy the *Rhines* requirement of 'good cause.'"); *Fernandez v. Artuz,* No. 00-CV-7601, 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)).

Here, Petitioner asserts that she is "reasonabl[y] confus[ed] about whether a state filing would be timely, therefore constituting 'good cause' for her to file her claim in federal court." Pet. at 8, Dkt. 2. In particular, she states that the "[i]nstant petition is being submitted as a 'protective petition' in order to preclude Petitioner from having the statute of limitations on her petition run

out." *Id.* at 8–9 (citing *Pace*, 455 U.S. at 408). Respondent does not contest that Rivera's confusion is genuine or reasonable. Respondent represents that the limitations period was tolled on April 5, 2017, and thus "once [Rivera] completes the 440.10 proceeding, she will have approximately three months remaining in the limitations period in which to re-file a habeas petition." Resp.'s Ltr. Mot. at 3, Dkt. 7. The record, however, has not been filed on the docket, and the Court cannot independently confirm Respondent's calculation. Moreover, Respondent's position assumes that Petitioner's 440.10 petition was properly filed, a determination that, as far as this Court is aware, has not yet been made by the state court. The "predicament" that Rivera is seeking to avoid by filing a "protective petition," is the precise situation addressed by the Supreme Court in *Pace*, namely, when "a Petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that [it] was never properly filed, and thus that [her] federal habeas petition is time barred." *Pace*, 544 U.S. at 416 (internal quotation marks omitted). For the foregoing reasons, Rivera has shown good cause to file a protective petition in federal court and for a stay.

The second *Rhines* factor requires a petitioner to show that the unexhausted claims are not "plainly meritless." *Rhines,* 544 U.S. at 277. Petitioner argues *inter alia* that her constitutional rights were violated because the "trial included an ample amount of hearsay," including statements of non-testifying co-defendants, "thereby denying Petitioner her 6th Amendment right to confrontation" under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Bruton v. United States*, 391 U.S. 123 (1968), Pet. at 4, 16–36, Dkt. 2, and that the trial was fundamentally unfair because she had an antagonistic defense with the co-defendant with whom she was tried jointly, Pet. at 4, 11–13. Respondent has not responded to the merits of Petitioner's claims. Without opining as to whether Petitioner's claims warrant habeas relief under AEDPA, the Court cannot say, at this point

in time, that they are "plainly meritless." *See Nickels v. Conway*, No. 10-CV-0413, 2013 WL 4403922, at *6 (W.D.N.Y. Aug. 15, 2013); *see also Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008) ("[F]or nearly a decade, we have informed the district courts that whenever good cause is shown and the claims are not plainly meritless, stay and abeyance is the preferred course of action.").

As to the third *Rhines* factor, there is no indication that Petitioner has "engaged in intentionally dilatory litigation tactics." *Rhines,* 544 U.S. at 278. Petitioner sought a stay simultaneously with filing her petition. *See Whitley*, 509 F. Supp. 2d at 421.

Accordingly, the motion to stay the petition is granted. Petitioner must, however, advise this Court in writing within 30 days after state court exhaustion is complete. If she fails to do so "the stay may later be vacated *nunc pro tunc*"—meaning retroactively—"as of the date the stay was entered, and the petition may be dismissed" in certain circumstances. *See Zarvela v. Artuz,* 254 F.3d 374, 381–82 (2d Cir. 2001).

SO ORDERED.

Dated: July 13, 2017
New York, New York

Ronnie Abrams
United States District Judge