

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William A. Foster,	:	
	:	
Petitioner	:	Civil Action 2:09-cv-00214
	:	
v.	:	Judge Holschuh
	:	
Warden, Lebanon Correctional Institution,	:	Magistrate Judge Abel
	:	
Respondent	:	
	:	

ORDER

Petitioner William Foster brings this action for a writ of habeas corpus under 28 U.S.C. § 2254. This matter is before the Magistrate Judge on petitioner's March 19 and July 7, 2009 motions to stay while he exhausts his Ohio court remedies for Grounds Three and Four (docs. 4 and 13).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") advances the States' significant interest in the finality of criminal convictions. Stays undermine finality and the AEDPA's provisions that encourage prisoners to timely present all of their federal claims to the state court at the earliest opportunity. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Stays should be used sparingly. They should not be granted when the unexhausted grounds are plainly meritless. 544 U.S. at 278. Further, before a court can stay a habeas corpus action, the petitioner must demonstrate good cause for having failed to exhaust his state court remedies. *Id.* Nonetheless,

it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

Id.; see also *Griffin v. Rogers*, 399 F.3d 626, 632-33 (6th Cir. 2005)(citations omitted); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002). A stay must be time limited, and the petitioner has the obligation to promptly present his unexhausted claims to the state courts and to promptly return to federal court once he has exhausted his state court remedies. 544 U.S. at 278; *Palmer v. Carlton*, 276 F.3d at 781.

Here on January 8, 2009 Foster filed a petition to vacate or set aside his judgment and sentence on the basis of new evidence demonstrating prosecutorial misconduct. Foster supported the petition with a copy of a statement of Sonya Frasier indicating she first denied certain knowledge of the crime and misconduct as well with respect to Keith Jones, the jail-house witness. Foster also alleged that his trial counsel was ineffective for failing to call to testify Officer Chamberlain, the officer to whom Sonya Frasier made her initial statement denying knowledge of some details of the crime. (July 7, 2009 Return of Writ, Doc. 14, Exh. 15.) In response, the State argued that the information regarding Frasier came out at trial and, therefore, was neither new nor undiscoverable as required for an exception under Ohio Revised Code § 2953.23 to untimely filing. The State further argued that the petition was barred by *res judicata* because the arguments should have been made at trial. *Id.*, Exh. 16. On February 19, 2009, the trial court

denied the petition as untimely because it was filed more than 180 days after the transcript was filed in the Court of Appeals on direct appeal. Foster filed a timely appeal on March 5, 2009, which has been fully briefed and is awaiting decision.

The Magistrate Judge concludes that Foster has satisfied the *Rhines* criteria for a stay. Petitioner Foster is ORDERED to advise the Court of any decision by the Ohio Court of Appeals within seven days of receiving it. Further, petitioner Foster is ORDERED to advise the Court of the status of his appeal on or before **September 10, 2009**.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge

