

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

JASON WALLER,

Petitioner,

: Case No. 3:15-cv-310

- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

TERRY TIBBALS, Warden,
London Correctional Institution,

Respondent.

DECISION AND ORDER DENYING SECOND MOTION FOR STAY

This habeas corpus case is before the Court on Petitioner's Motion for Stay and Abeyance (ECF No. 13).

Petitioner previously filed a Motion for Stay (ECF No. 10) which Respondent opposed (ECF No. 11) and which the Court denied because it did not identify the claims intended to be exhausted or the vehicle by which Waller intended to exhaust them (Decision and Order, ECF No. 12). Waller has responded by identifying three unexhausted claims for relief and intends to pursue them by a motion for delayed appeal to the Ohio Supreme Court.

A principal reason for the stay procedure approved by the Supreme Court in *Rhines v. Weber*, 544 U.S. 269, 277-278 (2005), was to allow a habeas petitioner to exhaust state remedies on claims pled in a mixed habeas petition and avoid both dismissal for lack of exhaustion under *Rose v. Lundy*, 455 U.S. 509 (1982), and the bar of the one-year statute of limitations adopted in the Antiterrorism and Effective Death Penalty Act of 1996.

Those reasons do not support a stay here. The three claims Petitioner sets forth in his Motion are not part of the Amended Petition so that, at least with respect to these claims, it is not a “mixed” petition. Furthermore, the remedy Waller intends to use – delayed direct appeal to the Ohio Supreme Court – is not available to him. He has already taken a delayed appeal to the Ohio Supreme Court. *State v. Waller*, 138 Ohio St. 3d 1491 (2014). Ohio practice does not provide for two such delayed appeals.

The Motion for Stay is therefore DENIED.

December 16, 2015.

s/ *Michael R. Merz*
United States Magistrate Judge