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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Juan Serna,) Case No. CV 07-2603 DDP (MAN)
)
Petitioner,) **ORDER GRANTING STAY AND ABEYANCE**
)
v.)
)
Lea Ann Chrones, Warden)
)
Respondent.)
)

This matter comes before the Court on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition"). After reviewing the arguments submitted by Petitioner Juan Serna and Respondent Lea Ann Chrones, the Court GRANTS Petitioner's request for a stay and abeyance.

I. BACKGROUND

Petitioner was convicted of two counts of attempted murder, two counts of shooting from a motor vehicle, and one count of illegal possession of a firearm. (P. MPA at 2-3.)¹ Following conviction, Petitioner pursued a direct appeal as well as a state habeas corpus petition; each was denied. He then filed the instant

¹ Refers to Petitioner's Memorandum of Points and Authorities in support of the Petition.

1 Petition alleging five grounds for relief: (1) insufficiency of the
2 evidence to support a conviction; (2) prosecutorial misconduct; (3)
3 violation of due process because the prosecution's expert testified
4 to a fact in issue; (4) violation of due process and a fair trial
5 because of a misleading jury instruction; and (5) ineffective
6 assistance of appellate counsel.² (P. MPA at 11-25.) Respondent
7 moves to dismiss the entire Petition as "mixed," contending
8 Petitioner failed to exhaust his claims for insufficiency of the
9 evidence, prosecutorial misconduct, and improper expert testimony.
10 (MTD.)³ Petitioner responds that he exhausted the challenged
11 claims in his state habeas petition. (P. Opp. at 3-7.)

12 Petitioner's state habeas petition alleged that Direct
13 Appellate Counsel was ineffective because Direct Appellate Counsel
14 failed to raise and exhaust Petitioner's claims for insufficiency
15 of the evidence, prosecutorial misconduct, and improper expert
16 testimony. (SHP at 14.) As such, Petitioner argues that he

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18 ² This case involves two allegations of ineffective
19 assistance of counsel at two different times. In his state habeas
20 petition, Petitioner alleged that his counsel on direct appeal was
21 constitutionally ineffective. (P. Opp. at 13.) The Court refers
22 to Petitioner's counsel on direct appeal as "Direct Appellate
23 Counsel." In the instant Petition, Petitioner alleges his counsel
24 on state habeas review was ineffective. The Court refers to
25 Petitioner's counsel on state habeas review as "State Habeas
26 Counsel".

27 ³ "'Mixed' petitions are those habeas petitions consisting of
28 both exhausted and unexhausted claims." Robbins v. Carey, 481 F.3d
1143, 1147 (9th Cir. 2007). Generally, district courts "must
dismiss such mixed petitions, leaving the prisoner with the choice
of returning to state court to exhaust his claims or of amending or
resubmitting the habeas petition to present only exhausted claims
to the district court." Id. (internal quotations omitted).
Respondent concedes that Petitioner exhausted his claim for
violation of due process and a fair trial because of a misleading
jury instruction. (MTD. at 6.)

1 exhausted his claims for insufficiency of the evidence,
2 prosecutorial misconduct, and improper expert testimony in his
3 state habeas petition because they were the basis of his claim for
4 ineffective assistance of Direct Appellate Counsel. (P. Opp. at 3-
5 7.) In the alternative, Petitioner requests that if the Court
6 finds any of his claims to be unexhausted, the Court grant him a
7 stay and abeyance pursuant to Rhines v. Weber, 544 U.S. 269 (2005).
8 (Id. at 1-2.)⁴

9 **II. EXHAUSTION**

10 A. Legal Standard

11 The Petition is governed by the Anti-Terrorism and Effective
12 Death Penalty Act of 1996 ("AEDPA") because it was filed after
13 AEDPA's effective date, April 24, 1996. See Lindh v. Murphy, 521
14 U.S. 320, 326-27 (1997). Under AEDPA, "[b]efore seeking a federal
15 writ of habeas corpus, a state prisoner must exhaust available
16 state remedies." Baldwin v. Reese, 541 U.S. 27, 29 (2004); see 28
17 U.S.C. § 2254(b)(1). To do so, "a petitioner [must] fairly present
18 his federal claims to the highest state court available." Davis v.
19 Silva, 511 F.3d 1005, 1008 (9th Cir. 2008) (internal quotations
20 omitted). "Fair presentation requires that the petitioner describe
21 in the state court proceedings both the operative facts and the
22 federal legal theory on which his claim is based so that the state
23 courts have a fair opportunity to apply controlling legal
24 principles to the facts bearing upon his constitutional claim."
25 Id. at 1009 (internal quotations omitted). As such, "for purposes

26
27 ⁴ Under Rhines, a district court can stay a "mixed" petition
28 and permit the petitioner to exhaust any unexhausted claims in
state court without dismissing the federal petition. See Rhines,
544 U.S. 269.

1 of exhausting state remedies, a claim for relief in habeas corpus
2 must include reference to a specific federal constitutional
3 guarantee, as well as a statement of the facts that entitle the
4 petitioner to relief." Id. (internal quotations omitted).

5 B. Analysis

6 Petitioner contends that he exhausted his claims for
7 insufficiency of the evidence, prosecutorial misconduct, and
8 improper expert testimony because they formed the basis of his
9 state habeas claim for ineffective assistance of Direct Appellate
10 Counsel. (P. Opp. at 3-7.) Petitioner's argument must fail,
11 however, because the Ninth Circuit has specifically held to the
12 contrary. See Rose v. Palmateer, 395 F.3d 1108 (9th Cir. 2005).
13 In Rose, the Ninth Circuit held that although an underlying claim
14 might be related to an ineffective assistance of counsel claim, the
15 underlying claim is not exhausted when raised only as one of
16 several issues handled ineffectively by counsel. See id. As such,
17 the Court finds that Petitioner has not exhausted his claims for
18 insufficiency of the evidence, prosecutorial misconduct, and
19 improper expert testimony.

20 **III. STAY AND ABEYANCE**

21 Because the Court finds that Petitioner has not exhausted his
22 claims for insufficiency of the evidence, prosecutorial misconduct,
23 and improper expert testimony, the Court considers his request to
24 stay this proceeding and permit him to exhaust his claims in state
25 court pursuant to Rhines. The magistrate judge afforded the
26 parties an opportunity to file supplemental briefing on
27 Petitioner's request for a stay and abeyance. While Petitioner
28 filed a brief, Respondent did not file an opposition. Respondent

1 has therefore failed to oppose Petitioner's request for a stay and
2 abeyance. Regardless of Respondent's failure to oppose
3 Petitioner's request, the Court would grant him a stay and abeyance
4 for the reasons that follow.

5 A. Legal Standard

6 "[A] district court has discretion to stay a mixed petition to
7 allow a petitioner time to return to state court to present
8 unexhausted claims." Jackson v. Roe, 425 F.3d 654, 660 (9th Cir.
9 2005); see Rhines, 544 U.S. at 275. Courts may grant relief when:
10 (1) "good cause" exists for the petitioner's failure to exhaust;
11 (2) the petitioner's unexhausted claims are not "plainly
12 meritless"; and (3) there is no indication that the petitioner
13 engaged in abusive litigation tactics or intentional delay. See
14 Rhines, 544 U.S. at 277-78. When a petitioner satisfies all three
15 elements, "it likely would be an abuse of discretion for a district
16 court to deny a stay and to dismiss a mixed petition." Id. at 278.

17 B. Analysis

18 Here, elements two and three of the Rhines test are not at
19 issue as the Court finds that Petitioner's claims cannot fairly be
20 deemed "plainly meritless," and there is no indication he has
21 engaged in intentionally dilatory litigation tactics. As such, the
22 Court focuses on element one: whether Petitioner had "good cause"
23 for failing to exhaust his claims. The issue before the Court,
24 whether ineffective assistance of post-conviction counsel is
25 sufficient "good cause" to warrant a stay and abeyance, is
26 undecided in the Ninth Circuit. The Court concludes that it is.

27 Some courts have analogized the "good cause" needed for a stay
28 and abeyance to the "cause" necessary to excuse procedural default.

1 See e.g., Hernandez v. Sullivan, 397 F. Supp. 2d 1205 (C.D. Cal.
2 2005). In a procedural default, "[a] habeas petitioner who has
3 failed to meet the State's procedural requirements for presenting
4 his federal claims has deprived the state courts of an opportunity
5 to address those claims in the first instance." Edwards v.
6 Carpenter, 529 U.S. 446, 451 (2000) (internal quotations omitted).
7 As such, the Supreme Court "require[s] a prisoner to demonstrate
8 cause for his state-court default of any federal claim, and
9 prejudice therefrom, before the federal habeas court will consider
10 the merits of that claim." Id. "Although [the Supreme Court]
11 ha[s] not identified with precision exactly what constitutes
12 'cause' to excuse a procedural default, [it] ha[s] acknowledged
13 that in certain circumstances counsel's ineffectiveness in failing
14 properly to preserve the claim for review in state court will
15 suffice." Id. Because "[t]he procedural default doctrine and its
16 attendant cause and prejudice standard are grounded in concerns of
17 comity and federalism" however, not just any deficiency in
18 counsel's performance will excuse a procedural default. See id.
19 Counsel's "assistance must have been so ineffective as to violate
20 the Federal Constitution." Id.

21 The Court finds the stay and abeyance context distinguishable
22 from the procedural default context. The reasoning of the district
23 court on remand from Rhines ("Rhines II") is persuasive:

24 The failure of a habeas petitioner to meet
25 the State's procedural requirements deprives the
26 state courts of an opportunity to reach the
27 issues in the first instance. But unlike the
28 procedural default situation where a petitioner
is barred from presenting his claim to state
courts, [petitioner] is not barred from
presenting his claim to the state court. Thus,
the principles of comity and federalism would be

1 given full recognition if the court allowed
2 [petitioner] to exhaust his unexhausted claims in
3 state court. As a result, the underlying concern
4 of applying the principles of comity and
5 federalism that result in requiring a petitioner
6 to show that the assistance of counsel was so
7 ineffective as to violate the Federal
8 Constitution does not exist, because petitioner
9 can present his claims to state court.

10 Rhines v. Weber, 408 F. Supp 2d 844, 848-49 (D.S.D. 2005) (remand of
11 Rhines, 544 U.S. 269). In other words, granting Petitioner a stay
12 and abeyance would promote the principles of comity and federalism.
13 A stay and abeyance would allow the state courts to hear
14 Petitioner's claims for insufficiency of the evidence,
15 prosecutorial misconduct, and improper expert testimony in the
16 first instance, and correct any constitutional violations therein,
17 rather than precluding the state courts from having an opportunity
18 to review the claims at all.

19 Further, Supreme Court precedent suggests "good cause" should
20 be interpreted broadly in the stay and abeyance context. Just one
21 month after Rhines, the Supreme Court considered whether a state
22 post conviction petition that was untimely filed pursuant to state
23 law was "properly filed" under AEDPA, thus entitling the petitioner
24 to statutory tolling. Pace v. DiGuglielmo, 544 U.S. 408, 410
25 (2005).⁵ The Supreme Court held that if a petitioner fails to
26 comply with state filing requirements, he has not "properly filed"

27 ⁵ AEDPA has a one year statute of limitations for filing
28 federal habeas petitions. See 28 U.S.C. §2244(d)(1). "That
limitation period is tolled, however, while a properly filed
application for State post-conviction or other collateral review
with respect to the pertinent judgment or claim is pending." Pace,
544 U.S. at 410. As such, a petitioner can pursue state post-
conviction remedies without running afoul of AEDPA's limitation
period.

1 under AEDPA and is therefore not entitled to statutory tolling.
2 See id. The petitioner argued that such a result is unfair because
3 a petitioner could make a good faith effort to exhaust his claims
4 only to find out after years of litigation that his state post
5 conviction petition was untimely pursuant to state requirements.
6 Id. at 416. At that point, he contended, his federal petition
7 would be time barred, leaving him no opportunity for federal
8 review. Id. In response, the Supreme Court suggested that "[a]
9 prisoner seeking state postconviction relief might avoid this
10 predicament . . . by filing a 'protective' petition in federal
11 court and asking the federal court to stay and abey the federal
12 habeas proceedings until state remedies are exhausted." Id. The
13 Supreme Court further held that "[a] petitioner's reasonable
14 confusion about whether a state filing would be timely will
15 ordinarily constitute 'good cause' for him to file in federal
16 court." Id. The Supreme Court's use of the liberal "reasonable
17 confusion" language as constituting "good cause" just one month
18 after Rhines suggests the Supreme Court intended a broad definition
19 of "good cause" in the stay and abeyance context.

20 A stay and abeyance is further distinguishable from a
21 procedural default by the respective relief granted in each
22 context. The relief afforded in the procedural default context is
23 greater than in the stay and abeyance context. A petitioner who
24 successfully alleges ineffective assistance of counsel in the
25 procedural default context is afforded the relief due to a
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1 petitioner who has proven his constitutional rights were violated.⁶
2 In contrast, a petitioner who successfully convinces a court to
3 stay and abey federal proceedings by alleging ineffective
4 assistance of counsel is merely given an opportunity to present his
5 claims to the state courts. The burden of showing "good cause" in
6 the stay and abeyance context should therefore be correspondingly
7 less than the burden of showing "cause" in the procedural default
8 context. As such, in order to show "good cause" for a stay and
9 abeyance, Petitioner need not make a showing that his counsel was
10 so ineffective that his constitutional rights were violated.

11 Therefore, the Court must determine whether ineffective
12 assistance of post-conviction counsel is sufficient "good cause" to
13 warrant a stay and abeyance. Once more, the Court finds the
14 reasoning of Rhines II persuasive. The court in Rhines II found
15 that a petitioner's "reasonable confusion" about whether his
16 counsel exhausted his claims in state court constituted "good
17 cause" to warrant a stay and abeyance. See Rhines II, 408 F. Supp.
18 2d at 849. Further, the court found that "because the court
19 believes that [petitioner's] allegations of ineffective assistance
20 of counsel are analogous to the 'reasonable confusion' about
21 timeliness cited in Pace, the court finds good cause exists to
22 excuse [petitioner's] failure to exhaust his claims in state
23 court." Id. This Court agrees with Rhines II that a petitioner's
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27 ⁶ This is because a petitioner attempting to excuse a
28 procedural default by alleging a claim of ineffective assistance of
counsel must prove an underlying constitutional violation. See
Edwards, 529 U.S. at 451.

1 "reasonable confusion" about whether counsel exhausted claims in
2 state court is "good cause" to warrant a stay and abeyance.

3 In the instant case, the Court finds that Petitioner was
4 "reasonably confused" about whether State Habeas Counsel exhausted
5 his claims for insufficiency of the evidence, prosecutorial
6 misconduct, and improper expert testimony. This is evident from
7 Petitioner's state habeas petition which states in pertinent part:

8
9 This [p]etition, which is filed in part, for
10 exhaustion of state remedies on the issues,
11 alleges that petitioner was deprived of his Sixth
12 and Fourteenth Amendment right [sic] to the
13 effective assistance of appellate counsel. In
14 the instant case, appellate counsel failed to
15 properly raise potentially meritorious federal
16 constitutional issues in the [California] Court
17 of Appeal and in [the California Supreme Court]
18 in the [p]etition for [r]eview. Specifically,
19 appellate counsel failed to allege that (1) the
20 evidence was insufficient to support the
21 convictions on all counts; (2) the gang expert
22 testifying to the ultimate issue deprived
23 [Petitioner] of Fifth, Sixth and Fourteenth
24 Amendment Rights to due process and a fair trial;
25 (3) prosecutorial misconduct deprived
26 [P]etitioner of a fair trial; (4) [P]etitioner
27 was deprived of his Sixth Amendment right to the
28 the [sic] effective assistance of trial counsel
for failing to offer contemporaneous objections
to the improper testimony of the gang expert and
the improper questions and argument by the
prosecutor.

Appellate counsel's errors deprived
[P]etitioner of review of the federal
constitutional issues in the [California] Court
of Appeal and [the California Supreme Court] and
possibly from review of these issues in the
federal court. It is firmly established law that
a state prisoner must exhaust his state remedies
before petitioning for a writ of habeas corpus in
federal court.

(SHP. at 13-14.) (emphasis added) (citations omitted). Petitioner's
state habeas petition indicates that State Habeas Counsel was fully
aware of the exhaustion requirement and further, that State Habeas

1 Counsel intended to exhaust all of Petitioner's claims through the
2 claim for ineffective assistance of Direct Appellate Counsel.
3 (Id.) Moreover, in his supplemental briefing, Petitioner makes the
4 very same contention stating that it is "apparent that
5 [P]etitioner's intention in filing a habeas petition in the
6 California Supreme Court was to exhaust the claims he believed
7 [Direct] [A]ppellate [C]ounsel improperly failed to raise and
8 exhaust." (Supp. Br. at 4.) Therefore, it is clear Petitioner
9 expected State Habeas Counsel to exhaust his claims and was
10 surprised to find them unexhausted.⁷

11 The Court finds that Petitioner suffered "reasonable
12 confusion" when, after relying upon trained legal counsel to
13 properly exhaust his claims, Petitioner discovered his claims were
14 unexhausted. Petitioner was reasonable in relying upon counsel to
15 exhaust his claims. To find otherwise suggests that an individual
16 is unreasonable when relying upon counsel to properly perform his
17 duties as counsel. Surely an individual who is not legally trained
18 would suffer "reasonable confusion" when, after reading a document
19 purporting to accomplish a particular legal task, the individual
20 discovers counsel failed to complete the task.⁸ As such, the Court
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22 ⁷ The Court notes that all factual allegations in Petitioner's
23 supplemental briefing were uncontested by Respondent.

24 ⁸ This is not to suggest that Petitioner did not assume the
25 risk of his counsel's failure to exhaust. See Murray v. Carrier,
26 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by
27 counsel whose performance is not constitutionally ineffective under
28 the standard established in Strickland v. Washington [466 U.S. 668
(1984)] . . . we discern no inequity in requiring him to bear the
risk of attorney error . . ."). To the contrary, the Court has
imposed the risk of attorney error upon Petitioner by finding his
claims for insufficiency of the evidence, prosecutorial misconduct,
(continued...)

1 finds that Petitioner's "reasonable confusion" about whether his
2 claims were exhausted through his state habeas petition constitutes
3 sufficient "good cause" to warrant a stay and abeyance.

4 One court has suggested that since many petitioners claim
5 ineffective assistance of post-conviction counsel, "[t]o hold that
6 an allegation of ineffective assistance of post-conviction counsel
7 constitutes 'good cause' for failure to exhaust state remedies . . .

8 . would render such stays of mixed petitions the rule rather than
9 the exception." Carter v. Friel, 415 F. Supp. 2d 1314, 1318-19 (D.
10 Utah 2006). The Carter court however, has concerned itself with
11 only the first element under Rhines. Rhines set forth three
12 requirements that must be satisfied before a court can grant a stay
13 and abeyance. Rhines, 544 U.S. at 277-78. "Good cause" is only
14 the first of those requirements. Id. A petitioner still must
15 bring claims that are not "plainly meritless" and the petitioner
16 must not be engaged in intentionally dilatory litigation tactics.
17 Id.; cf. Avila v. Kirkland, 249 F. App'x 695 (9th Cir. 2007)
18 (affirming the district court's grant of a stay because the
19 unexhausted claim was plainly meritless) (unpublished). The
20 Supreme Court gave the district courts discretion to consider the
21 Rhines elements and determine whether each has been satisfied. See
22 Rhines, 544 U.S. at 277-78. District courts are well equipped to
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24 _____
25 ⁸ (...continued)

26 and improper expert testimony to be unexhausted. The question
27 before the Court, however, is not whether Petitioner assumed the
28 risk of his counsel's error or whether counsel was constitutionally
ineffective. Rather, the question before the Court is whether
Petitioner was "reasonably confused" when he relied upon counsel to
properly exhaust his claims and counsel failed to do so.

1 determine whether a petitioner has satisfied all three elements
2 and, further, are capable of recognizing meritless requests.

3 Moreover, when a petitioner satisfies all three requirements
4 under Rhines, "it likely would be an abuse of discretion for a
5 district court to deny a stay and to dismiss a mixed petition."
6 Id. at 278. The Court declines to preclude relief based upon a
7 speculative fear that a large number of petitioners will claim
8 ineffective assistance of post-conviction counsel. If many
9 petitioners are entitled to a stay and abeyance because they
10 satisfy the Rhines test, then all deserving requests should be
11 granted.

12 **IV. PROCEDURE FOLLOWING THE STAY AND ABEYANCE**

13 "Even where a stay and abeyance is appropriate, the district
14 court's discretion in structuring the stay is limited by the
15 timeliness concerns reflected in AEDPA. A mixed petition should
16 not be stayed indefinitely." Id. "[D]istrict courts should place
17 reasonable time limits on a petitioner's trip to state court and
18 back." Id. As such, the Petition is stayed, and is conditional
19 upon Petitioner's initiation of exhaustion proceedings with the
20 state courts within sixty (60) days of entry of this order. The
21 stay is further conditioned upon Petitioner's return to this Court
22 within sixty (60) days of exhaustion of his claims in the state
23 courts.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Petitioner's
3 request for a stay and abeyance.

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6 IT IS SO ORDERED.

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8 Dated: 6-12-08



DEAN D. PREGERSON

United States District Judge

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