IN THE SUPREME COURT OF THE STATE OF UTAH

Troy Michael Kell, Petitioner-Appellant, v. LARRY BENZON, Warden of the Utah State Prison, Respondent-Appellee.	PUBLIC Case No. 20180788 District Court Case. No. 180600004 Death Penalty Case

APPELLANT'S REPLY BRIEF

Appeal from the Sixth Judicial District Court,
In and For Sanpete County, Honorable Wallace Lee

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INTRODUCTION

During the jurors' deliberations on whether or not to sentence Mr. Kell to death, the trial judge entered the jury room and gave a supplemental instruction to the jurors, without any notice to Mr. Kell or his counsel. That instruction unconstitutionally shifted the burden to Mr. Kell to prove that his life should be spared. Three jurors signed declarations regarding this event. One juror in particular stated that she was having a difficult time voting for the death penalty but "felt more comfortable voting for death" after the judge spoke with jurors. (Appellant's Br. Addendum 6, ¶ 2.) This claim was not raised in Mr. Kell's initial petition for post-conviction review (PCR) because counsel in Mr. Kell's initial PCR proceedings failed to conduct virtually any investigation of the case and therefore failed to uncover this claim. At the time, Mr. Kell had a statutory right to the effective assistance of counsel in PCR proceedings.

Both the lower court and Respondent agree that Mr. Kell had a right to the effective assistance of PCR counsel at the time of his initial proceedings, but Respondent contends that that right only applied in cases of complete default and was only enforceable through a rule 60(b) motion in a petitioner's original case. This argument is unsupported by both this Court's jurisprudence and the basic constitutional requirements of due process. Respondent's argument that a new PCR petition alleging ineffective assistance of initial PCR counsel must be subject to the amended version of the PCRA would similarly leave petitioners with no viable means to enforce their statutory right to effective assistance because it prohibits a court from granting relief on any ground that "could have been, but

was not, raised in a previous request for post-conviction relief[.]" Utah Code Ann. § 78B-9-106(1)(d). If a claim was never investigated or presented due to the ineffective assistance of post-conviction counsel, it inherently could have been, but was not, presented in a previous PCR petition. Thus, Mr. Kell would again be left with no avenue for relief. If Mr. Kell had a right to the effective assistance of counsel in his initial PCR proceedings, which all parties agree he did, there must be a mechanism, which comports with federal constitutional requirements of due process, for him to enforce that right.

Respondent also repeatedly asserts, without factual support, that Mr. Kell made a tactical decision to withhold this claim. However, in determining whether to grant a stay of Mr. Kell's federal proceedings, the United States District Court in this case had to determine whether Mr. Kell had engaged in "abusive litigation tactics or intentional delay." *Rhines v. Weber*, 544 U.S. 269, 278 (2005). The federal district court found "no indication that Kell has engaged in intentional or abusive dilatory litigation tactics" with respect to this claim. Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-cv-359 (D. Utah, November 16, 2017), ECF No. 258 at 11 (Addendum 1). Furthermore, the underlying claim could have been discovered in the exercise of reasonable diligence in Mr. Kell's initial PCR proceedings in 2005. *See* Utah Code Ann. § 78-35a-107(2) (1996). Thus, the claim accrued in 2005 but was not raised at the time as a result of the ineffective assistance of Mr. Kell's counsel in his in initial PCR proceedings.

Alternatively, Mr. Kell maintains that the egregious injustice exception articulated by this Court in *Winward v. State*, 2012 UT 85, should apply here. This Court has

repeatedly applied common law exceptions to procedural bars in cases falling under the PCRA in the exercise of its constitutional authority over post-conviction review and it should again do so here. In the event that the Court finds that the 2008 amendments to the PCRA prevent the Court from exercising its constitutional authority over the writ of habeas corpus, the amendments are unconstitutional.

ARGUMENT

I. This Court Should Find that Mr. Kell's Claim Is Not Subject to the Current PCRA and Is Not Procedurally Barred

Mr. Kell was denied his right to the effective assistance of PCR counsel when his counsel failed to conduct a reasonable investigation, including failing to interview even a single juror in Mr. Kell's case. The decision below would leave Mr. Kell without any mechanism to enforce his statutory right, as recognized by this Court in *Menzies v. Galetka*, 2006 UT 81, to the effective assistance of post-conviction counsel. This would violate Mr. Kell's federal constitutional rights to due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (where the state creates a right, the Fourteenth Amendment protects against the arbitrary deprivation of that right by the state). To avoid this constitutional infirmity, this Court should find that the PCRA that was in effect at the time that Mr. Kell's claim was defaulted applies here and that the ineffective assistance of PCR counsel excuses any procedural default.

A. Mr. Kell's Claim was Defaulted as a Result of the Ineffective Assistance of Counsel in His Initial PCR Proceedings when Mr. Kell Had a Statutory Right to the Effective Assistance of Counsel

The court below agreed that at the time of his initial PCR proceedings, when the underlying claim at issue in this appeal could have been presented, Mr. Kell had a statutory right to the effective assistance of counsel and that "[n]othing in the amendments to the PCRA indicates that the removal of the right to the effective assistance of counsel should apply retroactively." (PCR II ROA at 909.[1]) The district court, however, left Mr. Kell with no mechanism to enforce that right. The court found that "although Mr. Kell had the right to the effective assistance of counsel in his initial petition, the proper procedure is to raise his argument in a rule 60(b) motion in his initial case and not in a subsequent petition." *Id.* Respondent similarly argues that under this Court's decision in *Menzies*, in order to obtain relief Mr. Kell must file a rule 60(b) motion in his original PCR case and "would have to show that PCI counsel completely defaulted his case." (Appellee's Br. at 25.) However, in cases following *Menzies*, this Court found that "short of a complete default in representation, a rule 60(b)(6) motion is an inappropriate vehicle for bringing a claim of ineffective assistance of postconviction counsel."[2] *Honie v. State*, 2014 UT 19, ¶ 92.

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[1] References to the record on appeal in the current proceedings will be designated as "PCR II ROA at ___."

[2] Although counsel in this case failed to conduct even a cursory investigation of the case and filed a petition that was just 21 pages in length, most of which repeated claims from Mr. Kell's direct appeal, contained just one case citation, and appended no declarations or other new evidence (*see* Appellant's Br. Addendum 3), the petition and appeal did comply with filing deadlines and therefore was not considered a complete default, as was the case

Although this Court has limited the application of rule 60(b), Respondent's argument that the finding of ineffective assistance of PCR counsel in *Menzies* was limited to the complete default of the case is not supported by *Menzies* itself. In *Menzies*, this Court held that Mr. Menzies was entitled to relief under rule 60(b) because "egregious lawyer misconduct constitutes an exceptional circumstance that may allow a litigant relief from a default judgment under rule 60(b)(6)." 2006 UT 81, ¶ 78. In addition, the Court concluded that there was "a statutory right to the effective assistance of counsel under section 78-35a-202(2)(a)." *Id*. ¶ 84. At no point did this Court tie the enforcement of that statutory right to the filing of a rule 60(b) motion. In fact, this Court's language in *Menzies* and subsequent cases suggests the opposite – that rule 60(b) is the appropriate remedy *only* when counsel has defaulted PCR proceedings and that short of that, petitioners must pursue some other remedy.

Respondent relies on *Honie,* 2014 UT 19, to support his assertion that the holding of *Menzies* is limited to its facts and that rule 60(b) is the only remedy available to a petitioner to enforce his statutory right to the effective assistance of counsel in post-conviction. (*See* Appellee's Br. at 26-27.) But in *Honie* this Court stated that it was the use of rule 60(b)(6) that was limited to the circumstances presented in *Menzies*, not the enforcement of the right to the effective assistance of counsel in PCR proceedings. The Court explicitly held that "a rule 60(b)(6) motion is not an appropriate vehicle for bringing

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when Mr. Menzies's counsel failed to comply with filing deadlines.

a claim of ineffective assistance of postconviction counsel under the facts of this case." *Honie*, 2014 UT 19, ¶ 90. The Court further explained that "in *Kell v. State,* we discussed the limited scope of our holding in *Menzies* and concluded that *rule 60(b)(6) relief* is most common when a deficiency in either representation or notice precluded appellate review." *Id*. (emphasis added); *see also id.* ¶ 92 ("We thus reiterate that, short of a complete default in representation, a rule 60(b)(6) motion is an inappropriate vehicle for bringing a claim of ineffective assistance of postconviction counsel.").

Respondent further argues that although Mr. Kell had a right to the effective assistance of PCR counsel, "that right was not violated as this Court already concluded and he never had a right to *repeated* attempts to set aside the PCI judgment on an ineffective assistance claim he previously lost." (Appellee's Br. at 26 (emphasis in original).) This argument misconstrues several aspects of Mr. Kell's argument. First, in denying Mr. Kell's rule 60(b) motion, this Court found only that because Mr. Kell's counsel did not default his entire proceeding, he was not entitled to relief under rule 60(b). *Kell v. State*, 2012 UT 25, ¶¶ 19-20. The Court did not find that counsel in Mr. Kell's initial PCR proceedings rendered effective assistance of counsel in any aspect of Mr. Kell's case. In fact, the Court never addressed counsel's performance at all. Second, even if the Court had addressed counsel's performance, the Court did not address whether counsel provided ineffective assistance in failing to investigate and present the claim at issue here because that claim was not before the court. Even if the court had found counsel did not render ineffective assistance with respect to previously presented claims, such a finding would not preclude

a finding that counsel were ineffective in failing to investigate *this* claim. Supreme Court precedent makes clear that counsel may be for the most part effective, but nonetheless render ineffective assistance as to a particular issue. *See Rompilla v. Beard*, 545 U.S. 374, 381, 383 (2005) (finding that although it was "not a case in which defense counsel simply ignored their obligation to find mitigating evidence," the lawyers were nonetheless "deficient in failing to examine the court file on Rompilla's prior conviction").

Respondent further argues that "a mere *Strickland* showing is not enough for relief under *Menzies*." (Appellee's Br. at 25.) However, in *Menzies* itself this Court stated that the *Strickland* standard should apply in determining whether a petitioner's statutory right to the effective assistance of counsel had been violated. As this Court explained:

> We can discern no reason why a statutory right to effective assistance of counsel should be premised on something different from that of the constitutional right: ensuring that the proceeding is reliable and fair by requiring a properly functioning adversarial process. Menzies is no less entitled to a proceeding that meets these standards when counsel is required by statute than he would be if counsel were required by the Constitution. The underlying concern is the same in each instance: when an indigent litigant has a legal right to counsel, counsel must render effective assistance in order to give effect to the litigant's right. We therefore use *Strickland* to evaluate Menzies' claim.

Menzies, 2006 UT 81, ¶ 86 (internal citations omitted).

This Court was clear in *Menzies* that, at that time, there was a statutory right to the effective assistance of counsel in PCR proceedings, and that the question of whether that right had been violated was governed by the *Strickland* standard. *See also id*. ¶¶ 90-93 (looking to the ABA Guidelines to determine the relevant professional norms that should apply). Under the *Strickland* standard, counsel need not, as Respondent suggests,

completely default a proceeding in order to have rendered ineffective assistance. *See id.* ¶ 87 (noting that under *Strickland*, an attorney's performance is deficient if it "fell below an objective standard of reasonableness" (quoting *Strickland v. Washington,* 466 U.S. 668, 688-89 (1984))).

Respondent's argument that the only way to enforce the right to the effective assistance of counsel in PCR proceedings is through a rule 60(b) motion, and the only circumstance in which a rule 60(b) motion is available is in the case of complete default, thus cannot be true. Furthermore, following Respondent's argument that, short of a complete default, a petitioner's only option to enforce his right to the effective assistance of counsel is to file a petition that is subject to the *current* version of the PCRA would still leave petitioners with no viable means to enforce their statutory right to effective assistance. This is so because the current version of the PCRA prohibits a court from granting relief on any ground that "could have been, but was not, raised in a previous request for post-conviction relief[.]" Utah Code Ann. § 78B-9-106(1)(d). If a claim was never investigated or presented due to the ineffective assistance of post-conviction counsel, it inherently could have been, but was not, presented in a previous PCR petition. In addition, the 2008 amendments to the PCRA added language stating that an allegation that PCR counsel was ineffective "cannot be the basis for relief in any subsequent post-conviction petition." Utah Code Ann. § 78B-9-109(3). Thus, under the state's argument, unless a petitioner in Mr. Kell's position brought his claim between December 12, 2006, when *Menzies* was decided, and May 5, 2008, when the amendments to the PCRA took

effect, although he had a right to the effective assistance of PCR counsel, he had no mechanism available to enforce that right. This position is not constitutionally tenable. *Evitts*, 469 U.S. at 401 ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); *see also Hicks*, 447 U.S. at 346 (where the state creates a right, the Fourteenth Amendment protects against the arbitrary deprivation of that right by the state); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring) ("[I]f a State establishes postconviction proceedings, [then] these proceedings must comport with due process."); *Yates v. Aiken*, 484 U.S. 211, 217-18 (1988) (per curiam) (unanimous court making clear that state post-conviction proceedings are subject to due process protections); *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992) ("*Hicks* recognized that state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves constitutionally required, may give rise to liberty interests protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause[.]").

B. This Court Should Find that This Claim is Not Time Barred

Respondent repeatedly refers to Mr. Kell's "dilatory tactics" and his "tactical" delay in filing this PCR petition.[3] (*See, e.g.,* Appellee's Br. at 8, 9, 10, 11, 13, 21, 22, 30, 33, 35,

[3] In his brief, Respondent repeats a previously-corrected assertion that the Arizona Federal Defender was appointed to this case in 2007. (Appellee's Br. at 6.) In fact it was the *Utah* Federal Defender that was appointed to represent Mr. Kell, not the Arizona Office, which currently represents him. *See* Sealed Order Appointing the Utah Federal Defender Office [unsealed], *Kell v. Crowther*, No. 2:07-cv-359-CW (D. Utah May 31, 2007), ECF No. 3.

36, 41, 46.) Respondent also argues that courts have found delay in other cases in which the Federal Public Defender for the District of Arizona has acted as counsel, implying that the same must be true in this case. (Appellee's Br. at 29-30.) Respondent ignores that the United States District Court *in this case* specifically found "no indication that Kell has engaged in intentional or abusive dilatory litigation tactics" with respect to this claim. Addendum 1 at 11. As Mr. Kell explained in his motion for a stay of his federal habeas proceedings, "[t]he factual support for these claims was uncovered at approximately the same time that the Utah Supreme Court denied Mr. Kell's rule 60(b) motion. Thus, there was not an appropriate opportunity to present new claims and new evidence to the state court prior to the filing of Mr. Kell's Amended Petition in [the federal district court]."[4] Petr's Mot. to Stay Federal Habeas Proc., *Kell v. Crowther*, No. 2:07-cv-359-CW-PMW (D. Utah Aug. 28, 2017), ECF No. 245 at 16 (Addendum 3); *see also* Reply in Supp. of Petr's Mot. to Stay Federal Habeas Proc., *Kell v. Crowther*, No. 2:007-cv-359-CW-PMW (D. Utah Sept. 25, 2017), ECF No. 254 at 9 (Addendum 4). In its ruling, the federal court

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At that time, Mr. Kell's proceedings in his initial PCR case had not yet concluded. In 2009, the Utah Federal Defender Office determined that it could not represent Mr. Kell because it had a conflict of interest, and the Office of the Federal Public Defender for the District of Arizona was substituted as counsel. *Id.*, ECF No. 29 (April 23, 2009). Mr. Kell filed an initial petition for writ of habeas corpus in the federal district court on May 27, 2009, and a motion to stay federal proceedings to allow state court litigation to resolve was filed approximately two weeks later, on June 12, 2009. *Id.*, ECF Nos. 36, 40, 41. The federal case was stayed less than 60 days after the Arizona Federal Defender Office was appointed and remained stayed until late 2012.

[4] This was true due to the statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2244(d).

noted that shortly after the conclusion of state court proceedings in 2012, Mr. Kell filed his Amended Petition for Writ of Habeas Corpus, wherein he presented the claim in question for the first time.[5] *Id*. As the federal district court explained:

> Two months later the parties entered into the stipulated Case Management Schedule, in which they agreed to address discovery and an evidentiary hearing prior to addressing other issues. ECF No. 97 [Addendum 2]. Motions related to discovery and evidentiary hearing were resolved on June 23, 2017 (ECF No. 238), and counsel filed this motion on August 27, 2017. The court does not find Kell to have engaged in intentional or abusive dilatory litigation tactics.

(Addendum 1 at 11.)[6]

[5] Respondent claims that Mr. Kell "merely noted the declarations in a habeas petition to a court that, under federal law could not even consider them." (Appellee's Br. at 12 (citing 28 U.S.C. § 2254(b)(1)(A) and *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)).) This is an overly simplistic characterization of the ability of a federal court to grant relief when presented with a claim that the respondent argues is unexhausted and/or procedurally defaulted. First, *Pinholster*, cited by Respondent, applies only to claims that have been adjudicated on the merits by the state court, and is therefore not applicable to a claim that has truly been defaulted. *See* 28 U.S.C. 2254(d) (noting that the limitations on relief apply "with respect to any claim that was adjudicated on the merits in state court proceedings"). Second, under federal law there are several exceptions to procedural default rules that may apply in any given case and have not yet been litigated in the instant case. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 755 (1991); *Martinez v. Ryan*, 566 U.S. 1 (2012); *Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Lee v. Kemna*, 534 U.S. 362, 375 (2002).

[6] Respondent also repeatedly contends that Mr. Kell waited to initiate proceedings in state court "until filing it provided optimal potential to stall final judgment in his federal habeas case." (Appellee's Br. at 21; *see also id*. at 12, 35.) This argument is a red herring. The length of time necessary to complete state court litigation is independent of when in the course of Mr. Kell's federal proceedings the stay occurs. The amount of delay in Mr. Kell's federal habeas case is dependent on the course of the state court proceedings and presumably would be the same regardless of when during the pendency of his federal proceedings the stay was granted.

Respondent argues that "[u]nder the plain terms of the PCRA, [Mr. Kell] could have presented those declarations in a post-conviction petition within one year of *when reasonable diligence would have led him to them*. Had he done so, he would have received merits review." (Appellee's Br. at 11 (emphasis added).) But reasonable diligence would have led counsel to the underlying claim in this case in 2005. Indeed, the PCRA in effect at that time contained the same statute of limitations as the one in the current PCRA. *Compare* Utah Code Ann. § 78-35a-107(2) (1996) *with* § 78B-9-107(2) (2017).

Respondent takes issue with Mr. Kell's statement that, had he filed his petition in 2013 it already would have been barred as a result of the ineffective assistance of PCR counsel, (Appellee's Br. at 17-18), but nowhere in his brief does Respondent point to any authority to support his contention that the statute of limitations starts over when new counsel is appointed. Furthermore, Respondent's contention that "both the post-conviction court and the State" were willing to waive PCR counsel's failure to comply with the statute of limitations, (Appellee's Br. at 23 n.4), is untrue. In the lower court, Respondent argued, "Of course, the burden rests on Kell to show that 'the exercise of reasonable diligence' would not have led to the discovery and filing of his claim even earlier. Utah Code Ann. § 78B-9-107(2)(e); *see also id.* § 78B-9-105(2). . . . Kell has given no explanation why he could not have obtained the juror declarations even earlier than 2013. Kell's legal team could have approached the declarant jurors as early as 1996, immediately after the jury convicted and sentenced him." (PCR II ROA at 729 n.3.)

Respondent contends that "PCI counsel's involvement is entirely beside the point"

for purposes of determining when the claim accrued under § 78B-9-107(2)(e). *Id*. at 15-18. Simultaneously, Respondent argues that Mr. Kell defaulted his claim under § 78B-9-106(1)(d) because it could have been discovered and presented in his initial PCR proceedings. (Appellee's Br. at 18-19.) But the claim cannot be defaulted under § 78B-9-106 based on one date of availability, and barred under § 78B-9-107 based on a different date. If the claim "could have been, but was not" raised in Mr. Kell's initial 2005 PCR petition, Utah Code Ann. § 78B-9-106(1)(c), then counsel in Mr. Kell's 2005 proceedings also "knew *or should have known*, in the exercise of reasonable diligence," about the evidentiary basis of the claim, Utah Code Ann. § 78B-9-107 (emphasis added). Respondent cannot have it both ways.

C. This Court Should Find that the PCRA in Effect at the Time of Mr. Kell's Initial PCR Proceedings Applies

Respondent argues that the current version of the PCRA should apply to Mr. Kell's case because "the right *Menzies* read into the statute could only permit bypassing a procedural impediment to considering the merits of a separate claim that may justify post-conviction relief. It could not get Menzies substantive relief from his conviction." (Appellee's Br. at 32.) Respondent cites no language in *Menzies* or any other case to support this conclusion.

This Court's decision in *Menzies* does not support Respondent's argument. Before addressing the issues in Menzies's case, the Court noted the constitutional significance both of its own role and of the fundamental rights at issue in a capital post-conviction proceeding:

> While the issues before us deal only with Menzies' 60(b) motion, we must not lose sight of the fact that the case before us is a post-conviction petition seeking habeas corpus relief from a death penalty sentence. A post-conviction proceeding is a proceeding of constitutional importance, over which the judiciary has supervisory responsibilities due to our constitutional role. In discharging this role, we must recognize the stakes involved in post-conviction proceedings, take appropriate steps to satisfy ourselves of the reliability of convictions and death sentences, and ensure that a petitioner's fundamental rights are adequately protected. As this court has previously noted, "[T]he law should not be so blind and unreasoning that where an injustice has resulted the [plaintiff] should be without remedy."

Menzies, 2006 UT 81, ¶ 62 (quoting *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979)) (alterations in *Menzies*). In announcing its ruling, the Court never mentioned that the right was limited to a particular procedural context but stated only, "we conclude that Menzies has a statutory right to the effective assistance of counsel under section 78-35a-202(2)(a)." *Id*. ¶ 84. Furthermore, the Court premised the statutory right on the same basis as the constitutional right to the effective assistance of counsel. *See id.* ¶ 86 ("Menzies is no less entitled to a proceeding that meets these standards when counsel is required by statute than he would be if counsel were required by the Constitution.").

The language of the 2008 PCRA amendment also supports the reading of *Menzies* as establishing a substantive right. The statute states, "An allegation that counsel appointed under this section was ineffective *cannot be the basis for relief* in any subsequent post-conviction petition." Utah Code Ann. § 78B-9-109(3) (emphasis added). It is unlikely the legislature would have felt the need to remove the ineffective assistance of PCR counsel as a substantive basis for relief had it not understood this Court to be granting a substantive right in *Menzies*.

Respondent's reliance on *State v. Clark*, 2011 UT 23, is misplaced. In *Clark*, the question before the Court was whether the appellants, who were the victims of a crime, had standing to appeal a lower court's order in the criminal case. The Court first acknowledged that "[t]here is no inherent right to appellate review. Such a right must be positively recognized by statute or a constitutional provision." *Id*. ¶ 6 (citations omitted). The statute in question had been amended twice, leaving an approximately one-year gap during which crime victims did not have a right to appeal. *Id*. ¶¶ 7-8. It was during this gap that appellants filed their appeal. *Id*. ¶ 9.

In addressing the appellant's argument, the Court noted that in Utah there is a "statutory bar against the retroactive application of newly codified laws," with the only exception being when "the provision is expressly declared to be retroactive." *Id*. ¶ 11. In distinguishing between substantive and procedural rights, the court noted, "With respect to 'procedural statutes enacted subsequent to the initiation of a suit,' . . . we have held that the new law applies 'not only to future actions, but also to accrued and pending actions,' and that 'further proceedings in a pending case are governed by the new procedural law.'" *Id*. ¶ 12 (quoting *Dep't of Soc. Servs. v. Higgs*, 656 P.2d 998, 1000-01 (Utah 1982)). Thus, if Respondent's interpretation were correct, Mr. Kell's right to the effective assistance of post-conviction counsel would have been extinguished before he even filed his rule 60(b) motion in his original proceeding. *See Kell v. State*, 2012 UT 25, ¶ 3 (noting that Mr. Kell filed his rule 60(b) motion in January 2009); *see also Honie*, 2014 UT 19, ¶ 92 (discussing right to effective representation by PCR counsel where PCR case spanned time before and

after 2008 amendments to the PCRA were enacted); *Archuleta v. Galetka*, 2011 UT 73, ¶ 17 (rule 60(b) motion regarding ineffective assistance of PCR counsel filed in July 2009). The fact that this Court never found that the right established in *Menzies* was extinguished at the time the 2008 amendments to the PCRA became effective indicates that the right is substantive, not procedural.

II. The Judicial Exceptions to the PCRA Remain in Effect and Should Be Applied to This Case

Even if this Court finds that the current version of the PCRA applies to Mr. Kell's claim, the claim can still be reviewed on the merits under the judicial exceptions to the PCRA. Respondent argues, "The [2008 amendments to the] PCRA and rule 65C abolished the common law exceptions." (Appellee's Br. at 33.) However, this Court has never held that to be the case and in *Winward v. State*, 2012 UT 85, the most recent opinion on the matter, suggested that judicial exceptions to the PCRA remain valid.

Respondent first argues that the pre-*Winward* cases cited by Mr. Kell are no longer valid because they pre-date the 2008 amendments to the PCRA, but he has not articulated where in the amendments the legislature directly repudiated the concepts established by this Court's decisions. (*See* Appellee's Br. at 33.) The 2008 amendments included language stating that the PCRA was the "sole remedy" to obtain post-conviction relief, but Respondent has not established how that language directly altered the system that was in place prior to the 2008 amendments. In the cases relied upon by Mr. Kell, this Court applied the PCRA in effect at the time to each of the petitions in question. *See Tilman v. State*, 2005 UT 56, ¶ 22 (noting that although the PCRA codified only the first two "good cause"

factors identified by the Court, "because the power to review post-conviction petitions quintessentially belongs to the judicial branch of government, and not the legislature, all five common law exceptions retain their independent constitutional significance and may be examined by this court in our review of post-conviction petitions" (internal citations and quotation marks omitted)); *Gardner v. Galetka*, 2004 UT 42, ¶ 17; *Gardner v. State*, 2010 UT 46, ¶¶ 93-94 (noting that "[t]he State acknowledges that this court retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would result in an egregious injustice," but declining to determine the extent of that authority because "Mr. Gardner has failed to persuade us that we ought to invoke it in this case"). The Court did not provide a remedy that was outside the PCRA in these instances but rather acknowledged its inherent constitutional authority to apply the common law in its review of post-conviction petitions.

Furthermore, this Court has referred to the PCRA as being the "equivalent" of the AEDPA in the federal context. *Kell*, 2012 UT 25, ¶ 25. The AEDPA similarly occupies the field of federal habeas corpus jurisprudence. There is no avenue for an inmate to obtain habeas relief in the federal courts that does not go through the AEDPA, including provisions such as the statute of limitations applicable to petitions, limitations on a federal court's ability to grant relief, and restrictions on second or successive petitions. *See, e.g.*, 28 U.S.C. §§ 2244, 2254, 2255. The common law, including judicial exceptions to procedural bars, nonetheless continue to play an important role in habeas jurisprudence following the 1996 enactment of the AEDPA. *See, e.g.*, *Dretke v. Haley*, 541 U.S. 386,

393, 394 (2004) ("The cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" (alteration in *Haley*)); *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

Respondent also argues that in order to qualify for relief under *Winward*, Mr. Kell would have to establish that both PCR and current counsel provided ineffective assistance. (Appellee's Br. at 35.) *Winward*, however, requires a petitioner to provide a "reasonable justification" for missing the deadline. *Winward*, 2012 UT 85 ¶ 18. Although Winward himself alleged ineffective assistance of counsel as his justification, nothing in the language of the case suggests that this is the only permissible justification. Rather, the Court stated, "To prove that his case meets the threshold test, 'a petitioner must persuade the court that, given the combined weight of the meritoriousness of the petitioner's claim and the justifications for raising it late,' the court should consider recognizing an exception to the PCRA's procedural rules." *Id.* ¶ 20 (quoting *Gardner*, 2010 UT 46, ¶ 94). As Mr. Kell argued in his opening brief and in the court below, and as was found by the federal district court in this case, Mr. Kell filed his petition at the earliest opportunity, given the course of litigation in his federal habeas case and the limitations placed on his counsel's ability to represent him in state court proceedings. (*See* Addendum 1 at 11 (finding that Mr. Kell had not engaged in any intentional delay); Appellant's Br. at 25 and n.2; PCR II ROA at 821-24.) Had current counsel filed the petition earlier, it would have had no impact on the applicability of the time bar in either the current or prior version of the PCRA because the

claim was available "in the exercise of reasonable diligence" at the time of Mr. Kell's initial PCR proceedings. Utah Code Ann. § 78-35a-107(2)(e) (2004); § 78B-9-107(2)(e) (2017). Furthermore, Mr. Kell has presented a meritorious claim supported by declarations from three separate jurors. The weight of Mr. Kell's claim, combined with the reasonable justifications he has provided, satisfy the requirements of *Winward*.

Respondent also asserts that Mr. Kell has not briefed the particulars of the *Winward* exception (Appellee's Br. at 37), but then proceeds to take issue with the particulars of the exceptions suggested by Mr. Kell, (Appellee's Br. at 37-41). For example, Respondent argues that the Court cannot create a *Martinez*-like standard because *Martinez* applies only to claims of trial counsel ineffectiveness and because "*Martinez* is unique to the demands of federal habeas procedure and can do no work in Utah." (Appellee's Br. at 38.) First, Mr. Kell's suggestion that this Court could articulate a standard that is similar to or based upon the exceptions articulated by the Supreme Court in *Coleman* and *Martinez, i.e.* based upon the ineffective assistance of counsel in an initial post-conviction proceeding, or more broadly on a cause and prejudice standard, does not require this Court to adopt a standard that is *identical* to *Martinez*. The fact that the federal standard is limited to claims of trial counsel ineffectiveness does not require this Court to do the same.[7]

[7] In his dissenting opinion Justice Scalia forcefully pointed out that there was no principled basis on which to limit the *Martinez* ruling to ineffective-assistance-of-counsel claims: "There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised[.]" *Martinez*, 566 U.S. at 19 (Scalia, J., dissenting).

Second, Respondent's contention that *Martinez* itself does not apply in Utah is both irrelevant and inaccurate. The only federal court to address the issue has found that *Martinez* does apply in Utah. *See* Memorandum Decision and Order on Petitioner's Motion for Consideration of the Application of *Martinez v. Ryan, Lafferty v. Crowther*, No. 2:07-CV-322 (D. Utah Dec. 14, 2015), ECF No. 400 at 3-5 ("[T]he court finds that *Martinez* applies in Utah pursuant to *Trevino* where Utah's procedural rules 'make it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.'" (quoting *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013)). Even if Respondent were correct that *Martinez* does not apply in *federal* proceedings in Utah, such a rule would have no bearing on the state court's ability to implement a similarly-framed exception to procedural default rules in state post-conviction proceedings. It is not uncommon for states to have more expansive protections than required under federal law. This is precisely what this Court did in *Menzies*. *See Menzies*, 2006 UT 81, ¶ 84 (recognizing that the Supreme Court had held there was no right to the effective assistance of counsel in state post-conviction proceedings).

As a more limited alternative, Mr. Kell suggested that the Court could limit the *Winward* exception to cases where, "after meeting the threshold requirements of *Winward*, a petitioner under sentence of death identifies a clear constitutional violation that occurred during either phase of trial which, absent application of the egregious injustice exception, would never be reviewed on the merits." (Appellant's Br. at 30.) Respondent contends this would provide "immunity for condemned prisoners to bring claims whenever they want

without regard to their diligence or timeliness, so long as merits review can delay conclusion of their cases." (Appellee's Br. at 41.) Respondent ignores the procedural limitations that prevent this from being true. First, the procedural limitations of the PCRA would continue to apply in most instances. Second, *Winward* itself requires that as a threshold matter a petitioner "must demonstrate that he has a reasonable justification for missing the deadline" and that the underlying claim has "an arguable basis in fact, which would support a claim for relief as a matter of law." *Winward*, 2012 UT 85, ¶¶ 18, 20 (internal citations and quotation marks omitted). In *Winward*, it was these threshold requirements that prevented Mr. Winward from having his claim heard. *Id*. ¶¶ 21, 22-27. Thus, Respondent's contention that a petitioner could "bring claims whenever they want" is unfounded.

III. If Mr. Kell is Without a Remedy, then the 2008 Amendments to the PCRA are Unconstitutional

Respondent contends that Mr. Kell's argument that if the 2008 amendments to the PCRA restricted the authority of this Court over the writ of habeas corpus, they are unconstitutional, is "inadequately briefed." (Appellee's Br. at 42.) Respondent fails to articulate how Mr. Kell's briefing is inadequate, except to argue that it is "doubtful" the issue could be adequately briefed in the number of pages Mr. Kell devoted to the issue in his Opening Brief. *Id*.

Respondent then takes issue with Mr. Kell's characterization of this Court's decision in *Julian v. State*, 966 P.2d 249 (Utah 1998), arguing that the Court "did not hold that the PCRA's one-year limitations period was unconstitutional." (Appellee's Br. at 43.)

Mr. Kell never so stated. (*See* Appellant's Br. at 34 (arguing that this Court held in *Julian* that "such restrictions on the Great Writ," i.e. those that "purport to restrict the authority of the Utah courts over the writ of habeas corpus," "are impermissible"); *see also id.* at 35 (describing the Court's discussion of the one-year statute of limitations in *Julian* as "the court *noted*" (emphasis added)); *Julian*, 966 P.2d at 253 ("We therefore hold that section 78-12-25(3), the four-year statute of limitations provision, may not be constitutionally applied to bar a habeas corpus petition. . . . Applying the catchall statute to bar habeas petitions not only violates the Utah Constitution's open courts provision in article I, section 11, but also violates the separation of powers provision in article V, section 1."). Beyond this, Respondent has not identified any deficiencies in Mr. Kell's constitutional argument.

Respondent again argues that even under the common law, Mr. Kell's claim fails because he has not shown that "he did not withhold his claim for tactical reasons or that reasonable diligence would not have led him to raise the claim in his PCI proceedings." (Appellee's Br. at 45.) Mr. Kell addressed this issue extensively in his Opening Brief and throughout this Reply. (*See* Appellant's Br. at 19-23, 28-29; *see also* PCR II ROA at 31-34, 817-18, 821-24.) Respondent's assertion he "never attempted to meet his burdens under the common law to show that he did not withhold his claim for tactical reasons" is therefore unfounded.

CONCLUSION

For the foregoing reasons, as well as those stated in his Opening Brief, Mr. Kell respectfully requests that this Court reverse the district court's order granting summary

judgment and remand this case with instructions to address Mr. Kell's claim on the merits.

Respectfully submitted this 28th day of August, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(g)(1). It contains 6,007 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font of size 13 points.

By s/ Lindsey Layer
Dated: August 28,2019

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2019, the original of the foregoing Appellant's Reply Brief was filed through electronic mail with the Clerk's Office and one copy was mailed via First Class Mail, postage prepaid, to the following:

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Troy Michael Kell v. State of Utah
Utah Supreme Court Case No. 20180788
Addenda Index

Addendum 1

Kell v. State
20180788

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

TROY MICHAEL KELL, Plaintiff, v. SCOTT CROWTHER, WARDEN, UTAH STATE PRISON; Defendant.	**MEMORANDUM** **DECISION AND ORDER** 2:07-CV-00359-CW Judge Clark Waddoups

Before the court is Petitioner Troy Michael Kell's Motion to Stay Federal Habeas Proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269, 276 (2005). (ECF No. 245.) Respondent (the State) filed its opposition. (ECF No. 247.) Kell addressed the State's objections in his reply. (ECF. 254.) Kell moves this court to stay his federal habeas proceedings while he returns to state court to attempt to exhaust previously unexhausted claims, specifically Claims 3(D) and 3(F) from his amended petition. The State opposes Kell's motion, arguing that he has not shown good cause for failing to exhaust his claims, the claims lack any potential merit, and the motion is dilatory.

I. PROCEDURAL BACKGROUND

Kell was serving a life-without-parole sentence for murder when he stabbed fellow inmate Lonnie Blackmon to death. On August 1, 1996, a jury convicted Kell and sentenced him to death. *See generally State v. Kell*, 61 P.3d 1019 (Utah 2002). On November 1, 2002, the Utah Supreme Court affirmed Kell's conviction and sentence. (*Id.*) On August 1, 2005, Kell's post-conviction counsel filed a 21-page Amended Petition for Post-Conviction Relief that contained

only one case citation, and appended no declarations or other new evidence. (PCR 252-72.)[1] The state moved to dismiss, (PCR 290-93), and the court granted the motion. The Utah Supreme Court affirmed. *Kell v. State*, 194 P.3d 913 (Utah 2008).

On January 13, 2009, Mr. Kell filed a *pro se* motion for relief pursuant to Utah Rule 60(b) in the state court, alleging that he had received ineffective assistance of counsel in his post-conviction proceedings because counsel had failed to investigate and failed to raise many meritorious claims. (PCR 684-51.) Four months later federal habeas counsel filed an Initial Petition in Kell's federal habeas case. (ECF No. 36.) On June 12, 2009, counsel filed a motion to stay federal habeas proceedings, so that he could resolve previously-pending state court litigation. (ECF Nos. 40, 41.) In its order on the motion to stay, the court noted that Kell had filed a "protective federal habeas petition," despite still-pending state court litigation, in order to ensure compliance with the AEDPA statute of limitations. (ECF No. 51.)

The Utah Supreme Court denied the Rule 60(b) appeal. Rehearing was denied and the case was remitted on September 24, 2012. Kell filed his amended petition in this court on January 14, 2013. (ECF No. 94.) His Amended Petition included, for the first time, Claims 3(D) and 3(F), both of which allege extraneous influence on jurors. (ECF No. 94 at 33-40.) These claims were supported by declarations from jurors that were signed in May 2012, after the Utah Supreme Court had issued its opinion denying Mr. Kell's Rule 60(b) motion. (*See* ECF No. 94, exhibits 1, 3, 4, 5, 10, and 11.) Kell asserts that his Amended Petition in this court was his first available opportunity to raise these claims after the denial of his Rule 60(b) motion in state court.

[1] The court will cite to the record of Kell's state post-conviction proceedings, Utah Sixth Judicial District, Sanpete County Case No. 030600171, as "PCR" and the Bates-stamped page numbers, for example PCR 431. A copy of this record is filed with the clerk's office in conjunction with ECF No. 118.

II. ANALYSIS

District courts have inherent authority to issue stays, and AEDPA does not deprive courts of that authority. But it does limit their discretion to exercise that authority because a stay pursuant to *Rhines* creates tension between AEDPA's goals of federalism and comity and its goal of streamlining the federal habeas process. As a result any stay under *Rhines* cannot be indefinite and must meet certain criteria. The petitioner must show that (1) good cause exists for his failure to exhaust, (2) his unexhausted claims are potentially meritorious, and (3) he has not engaged in abusive litigation tactics or intentional delay. *Rhines*, 544 U.S. at 276-78. "Petitioner, as movant, has the burden to show he is entitled to a stay under the *Rhines* factors." *Carter v. Friel*, 415 F.Supp.2d 1314, 1317 (D. Utah 2006).

A. Good Cause

The United States Supreme Court in *Rhines* did not define with any precision what constitutes "good cause." One month after the *Rhines* decision, however, the Court stated that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' to excuse his failure to exhaust." *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005).

Since the *Pace* decision, district courts have reached different conclusions about whether good cause in the *Rhines* context is akin to good cause to excuse procedural default in federal court (which is a high standard because it allows the district court to consider the merits of a defaulted claim) or a more expansive and equitable reading of good cause (which is a lower standard that allows the claim to return to the state court for merits review). *Compare Hernandez v. Sullivan*, 397 F. Supp.2d 1205, 1207 (C.D. Cal. 2005) (courts should look to procedural default law to determine cause), with *Rhines v. Weber*, 408 F.Supp.2d 844, 848-49

(D.S.D. 2005) (*Rhines II*) (rejecting procedural default analysis for cause in exhaustion context). Based in part on those different standards, some district courts have found that ineffective assistance of post-conviction counsel constitutes good cause for failure to exhaust. *See, e.g.*, *Vasquez v. Parrott*, 397 F.Supp.2d 452, 464-65 (S.D.N.Y. 2005); *See also Rhines II.*

There is no Tenth Circuit Court of Appeals decision that explains what constitutes "good cause" in the context of a *Rhines* motion. The only circuit court to directly address whether the good cause standard should be high or low is the Ninth Circuit. In *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014), the court followed *Pace* and *Rhines II* to find that good cause for a *Rhines* stay cannot be any more demanding than a showing of cause for procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), and, in fact, may be less demanding.

In two recent cases in the United States District Court for the District of Utah, two district court judges clarified "good cause" in the context of a *Rhines* motion. *Lafferty v. Crowther*, No. 2:07-CV-322, ECF No. 379 (D. Utah Oct. 30, 2015); *Archuleta v. Crowther*, No. 2:07-CV-630, ECF No. 107 (D. Utah Nov. 12, 2014). Both courts found the analysis of *Blake* and *Rhines II* persuasive because in the *Rhines* context a petitioner is returning to state court to allow the state court to consider his claims. The *Lafferty* and *Archuleta* courts' reasoning reflects the important distinction between the "good cause" necessary to excuse the default of state claims, allowing for *federal* review of a claim, and the "good cause" necessary to excuse the default of state claims, allowing a petitioner *to return to state court* in order to afford the state court the first opportunity to consider the claim. "Good cause" in the context of a stay and abeyance procedure is distinct in that the federal court is not preventing the state court from reviewing a claim, rather it is deciding whether a stay is permissible so that the state court can first review the claims before it is presented in federal court.

The *Blake* court held that ineffective assistance of state post-conviction counsel can establish good cause for failure to exhaust. "While a bald assertion [of ineffective assistance of post-conviction counsel] cannot amount to a showing of good cause, a reasonable excuse, supported by the evidence to justify a petitioner's failure to exhaust, will." *Blake*, 745 F.3d at 982. The judges in *Archuleta* and *Lafferty* agreed with the Blake court that "ineffective assistance of post-conviction counsel may constitute good cause for failure to exhaust claims in state court. *Archuleta v. Crowther*, No. 2:07-CV-630, ECF No. 107 at 9-10; *Lafferty v. Crowther*, No. 2:07-CV-322, ECF No. 379 at 8.

The State argues that unless post-conviction counsel had some reason to believe that the jury deliberations had been extraneously influenced, counsel's performance could not have been deficient for not interviewing the jurors. However, the only way that counsel could have established reason to believe jurors' deliberations had been extraneously influenced would be by speaking with the jurors. The Supreme Court has held that a decision to cease investigation must itself be based on a reasonable investigation. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Williams v. Taylor*, 529 U.S. 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003). Post-conviction counsel could not have made a reasonable strategic decision to limit investigation of jurors because counsel had not conducted any investigation at all. Counsel filed a perfunctory petition, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic. *See* ECF No. 94 at 150-51, 156-60; ECF No. 94-1 Ex. 15; ECF No. 115 at 180-85; ECF No. 115-1 Ex. 1 at ¶ 6; ECF No. 245 at 12, 15. State post-conviction counsel's deficient performance constitutes cause under *Rhines*.

B. Potentially Meritorious

For a federal case to be stayed, the unexhausted claims must be "potentially meritorious" and not "plainly meritless." *Rhines*, 544 U.S. at 277-78.

Kell argues that his claims are "potentially meritorious" because *Rhines* requires nothing more than a showing that he raised a "colorable federal claim." ECF No. 245 at 8. He argues that the substance of his claims is not plainly meritless, and that state procedural rules are irrelevant to the inquiry.

The State argues that this hurdle is less about the substance of a claim and more about the procedural way that it would be presented to, and treated by, the state courts. The State argues that Kell's claims are plainly meritless within the meaning of *Rhines* because time and procedural bars would prevent Kell from exhausting the merits of his claims in state court. ECF No. 247 at 20.

The court in *Lafferty*, when addressing the identical argument—that Mr. Lafferty's claims were not potentially meritorious because they would be barred in state court—held the following: "The Utah Supreme Court may agree with the state. It may not. But it is the state court, not the federal court, that should determine the procedural posture of a claim." Order, *Lafferty*, 2:07-cv-322-DB, ECF No. 379 at 9. "Whether a state remedy is presently available is a question of state law as to which only the state courts may speak with final authority." *Simpson v. Camper*, 927 F.2d 392, 393 (8th Cir. 1991). "[A] federal court always must be chary about reaching a conclusion, based upon a speculative analysis of what a state court might do, that a particular claim is procedurally foreclosed." *Pike v. Guarino*, 492 F.3d 61, 74 (1st Cir. 2007). "If the state court resolves the unexhausted claim on a procedural ground, such as a procedural bar under state law, [then] the federal court will review that disposition, applying the standard of

review that is appropriate under the circumstances." *Fairchild v. Workman,* 579 F.3d 1134, 1153 (10th Cir. 2009). Federalism and comity require that the state courts have the opportunity to make those procedural decisions. Thus, in considering whether Kell's claims are potentially meritorious, this court will not address possible state court time and procedural bars, but will leave the determination of the procedural posture of the claims to the state court.

1. Claim 3(D) is not potentially meritorious and therefore fails to meet the Rhines requirement

Kell argues in claim 3(D) that his right to a fair and impartial jury was violated when the jurors considered extraneous information and failed to adhere to the court's instructions regarding their discussion of matters presented at trial. The sources of the alleged extraneous information were (1) "discussions between jurors regarding the content of the trial while the trial was still in process," and (2) "communications to the jurors from the CUCF [Central Utah Correction Facility] staff regarding their opinions on the appropriate outcome for the trial and dangerousness of Mr. Kell." ECF No. 245 at 10. The court finds that claim 3(D) does not satisfy the potentially meritorious prong of the *Rhines* analysis, because even if factually true, it does not show that jurors were exposed to any improper extraneous information.

The court notes that under both the Utah Rules of Evidence and the Federal Rules of Evidence, a juror "may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Utah R. Evid. 606(b)(1); Fed. R. Evid. 606(b)(1). "The court may not receive a juror's affidavit or evidence of a juror's statement on these matters." *Id.* There is, however, an exception to this rule: a court may consider a juror's testimony about whether "extraneous prejudicial information was improperly brought to the jury's attention," or whether "an outside influence was improperly brought to bear on any juror."

Fed. R. Evid. 606(b)(2). The "extraneous influences exception covers only "misconduct such as jurors reading news reports about the case, jurors communicating with third parties, bribes and jury tampering." *United States v. Benally*, 546 F.3d 1230, 1236 (10th Cir. 2008).

In Kell's case, two of the jurors carpooled to and from the trial each day and sometimes discussed the fact that the trial was giving them nightmares. ECF No. 94-1, Exhibits 5 and 11. However, neither juror attests to discussing "the content of the trial." They merely state that they discussed how the content of the trial was giving them nightmares. Their nightmares, which preceded their discussion, were mental impressions concerning the case. And the discussion itself, between two jurors, was not an external influence; it was intrinsic. *See U.S. v. Bassler*, 651 F.2d 600, 601-2 (8th Cir. 1981) (holding that "[i]ntrinsic influences on a jury's verdict," such as notes shared among jurors, "are not competent to impeach a verdict"). The jurors do not attest that they had any pre-deliberation discussion about the trial evidence, but even if they did discuss some of the content of the case, there is no indication of extrinsic influence being brought to bear on any juror.

The second aspect of claim 3(D) is that there were communications to the jurors from the CUCF staff regarding their opinions on the appropriate outcome for the trial. The source of this claim was the declaration of one juror, who stated that "there was also community pressure to sentence Kell to death. I knew people who worked at the prison. When I would enter the prison, I understood the sentiment for a death sentence was strong among the prison guards that I passed. All of the prison guards wanted the death sentence. All of them. A lot of people looked at is [sic] as, 'He killed somebody and he ought to be killed.'" ECF No. 94, Exhibit 10. The juror does not say how he arrived at his conclusion. He attests only to his impression about the

sentiment among the security guards. As such, his testimony does not fall under any recognized exception to Rule 606(b). Thus, the evidence supporting claim 3(D) is inadmissible.

A second juror stated: "Deputies escorted us to our vehicles because they were afraid somebody might retaliate against us. I guess they thought we might be sniped or something." ECF No. 94, Exhibit 4. Neither of these jurors' statements support the claim that prison staff told or overtly communicated to the jurors their opinions about the proper outcome. Phrases like "I understood," "people looked at [us] as," and "I guess they thought" make it clear that both of these jurors were simply attesting to their impressions, which are speculative and inadmissible. Neither of them attests to any actual communication by any prison staff member. As a result, claim 3(D) fails to show error, much less a constitutional violation.

2. Claim 3(F) is potentially meritorious and therefore meets the second prong of the *Rhines* analysis

In claim 3(F) Kell argues that a supplemental instruction to the jury by the trial court judge unconstitutionally shifted the burden to him to prove that the jury should not impose death. ECF No. 94 at 39. Three jurors recall the judge providing clarification for them on a point of law during their sentencing deliberations. ECF No. 94, Exhibits 2, 5, 6. Specifically, one juror stated:

> I had a difficult time voting for the death penalty but I agreed to do so after Judge Mower came and spoke to the jurors as we deliberated. He told us that Kell's attorneys had to show us that Kell's life should be spared. The jury had bogged down over a definition but the judge's statement helped because we wanted to be sure that we were doing the right thing. I remember that the judge was asked a question while he was speaking to us, and he kidded around and said he couldn't address that question, and said that it was up to us. After the judge came and spoke to us, I felt more comfortable voting for death.

ECF No. 94, Exhibit 5 at ¶ 2. That same juror also recalled that "[t]here was no defense attorney present when the judge spoke to us during deliberations, though there was somebody with him."

Id. at ¶ 3. There is no indication from the trial transcript of a question from the jury after the beginning of the guilt or penalty deliberations. ROA at 5464-67, 5735-37, 5742.

Kell argues that the trial judge's alleged instruction to the jury tainted the deliberation process and unconstitutionally shifted the burden to him to prove that his life should be spared. He also asserts that the judge's alleged actions violated the Utah Rules of Criminal Procedure, which state that if the jury "desire[s] to be informed on any point of law arising in the cause," the jury should "be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given," or the court may "respond to the inquiry in writing, . . . and the response thereto shall be entered in the record." Utah R. Crim. P. 17(n). Kell argues that this was a prejudicial error of constitutional magnitude, and that therefore, he has a colorable claim for state-court relief.

Counsel in Kell's state habeas proceedings admitted that he was unaware of this issue because he failed to speak with any of the jurors, and that there was no strategic reason for his failure to do so. ECF No. 94, Exhibit 15 at ¶¶ 3, 4, 12, 14. Because counsel was unaware of the issue, he failed to raise this claim to the state court, meaning that Kell has been denied the opportunity to have this potentially significant claim reviewed by the state court. Counsel's failure to raise this potentially meritorious claim constitutes good cause under *Rhines*.

C. Intentionally Dilatory Litigation Tactics

The final *Rhines* requirement is that the petitioner show that he has not engaged in "abusive litigation tactics or intentional delay." *Rhines*, 544 U.S. at 277-78. This requirement recognizes that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review." *Id.*

The State argues that Kell's *Rhines* motion is dilatory, because it comes ten years into this federal case and after his federal habeas petition has been submitted for decision on oral argument. Although Kell notes that he has complied with the requirements of the Case Management Schedule as agreed to by the parties and ordered by the court, the State argues that the case management schedule did not prohibit Kell from asking for a *Rhines* stay earlier.

The court finds no indication that Kell has engaged in intentional or abusive dilatory litigation tactics. Although federal habeas counsel was initially appointed in this case in 2007, the federal proceedings were stayed and could not move forward because state proceedings were still ongoing from that time until late 2012. In its order staying the federal proceedings, this court found that Kell had filed a "protective federal habeas petition," despite the pendency of litigation in state court, in order to ensure compliance with the AEDPA statute of limitations. ECF No. 51. Shortly after the state court proceedings concluded, Kell filed in this court his Amended Petition for Writ of Habeas Corpus, which included for the first time claims 3(D) and 3(F). Kell noted in his Amended Petition that he would be filing a motion for a stay pursuant to *Rhines* at the appropriate time. Two months later the parties entered into the stipulated Case Management Schedule, in which they agreed to address discovery and an evidentiary hearing prior to addressing other issues. ECF No. 97. Motions related to discovery and evidentiary hearing were resolved on June 23, 2017 (ECF No. 238), and counsel filed this motion on August 28, 2017. The court does not find Kell to have engaged in intentional or abusive dilatory litigation tactics.

III. CONCLUSION

After carefully considering the arguments and claims before the court in Kell's Motion to Stay (ECF No. 245.), this court hereby grants a limited stay and abeyance *only* with respect to

Claim 3(F) of his Amended Petition so that he may properly exhaust that claim in the state court. The court denies the motion with respect to Claim 3(D). Mr. Kell must commence his proceedings in state court within thirty days of this order, and he shall provide the court with status updates every three months. Mr. Kell must notify the court immediately upon the resolution of the state court proceedings.

Also, the court authorizes the Public Defender of the District of Arizona to represent Kell in state court proceedings pursuant to 18 U.S.C. § 3599, so that he may attempt to properly exhaust Claim 3(F).

IT IS SO ORDERED.

DATED this 16th day of November, 2017.

BY THE COURT:

CLARK WADDOUPS
United States District Court Judge

Addendum 2

Kell v. State
20180788

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

TROY MICHAEL KELL, Petitioner, v. STEVEN TURLEY, Warden, Utah State Prison, Respondent.	ORDER GRANTING MOTION FOR CASE MANAGEMENT SCHEDULE Case No. 2:07-CV-359 Judge Paul M. Warner

The parties agreed to a case management schedule and filed a motion asking the Court to accept it. (See Dkt. No. 96.)

The Court grants the motion and accepts the following case management schedule:

ANSWERING OF THE AMENDED PETITION:

1. By July 15, 2013, Respondent will file his response to the amended petition. The parties will work together to lodge the state court record with the Court by that date.

2. If Respondent files a dispositive motion in addition to his response, Petitioner will respond pursuant to the applicable rules and any orders of the Court.

3. Within 45 days of the filing of Respondent's response, Petitioner will file a reply.

DISCOVERY:

4. Within 90 days of the filing of the reply, the parties will file their respective motions for discovery, including their proposed schedules.

5. Within 180 days of the Court's discovery order resolving any disputes and/or adopting a discovery schedule, the parties will complete discovery.

EVIDENTIARY HEARING:

6. Within 60 days of the close of discovery, either party may file a motion for an evidentiary hearing.

7. A party's response will be filed within 60 days of the filed motion for an evidentiary hearing.

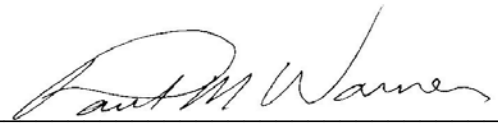
8. A party's reply will be due within 30 days after the response is filed.

9. If the Court holds an evidentiary hearing, the parties will seek post-hearing briefing on the issues addressed at the hearing and work together to create a briefing schedule.

10. After a final Court ruling on the evidentiary hearing issues, the parties will seek briefing on any remaining non-hearing issues and work together to create a briefing schedule.

SO ORDERED this 6th day of March, 2013.

BY THE COURT:



Paul M. Warner
United States Magistrate Judge

Addendum 3

Kell v. State
20180788

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

TROY MICHAEL KELL, Petitioner, v. SCOTT CROWTHER, Warden of the Utah State Prison, Respondent.	Case No. 2:07-cv-359-CW-PMW **Petitioner's Motion to Stay Federal Habeas Proceedings** **Death Penalty Case** Honorable Judge Clark Waddoups

Petitioner Troy Michael Kell, through counsel, respectfully moves this Court to stay his federal habeas proceedings and to authorize the Federal Public Defender of the District of Arizona to represent Mr. Kell in state-court post-conviction proceedings. *See* 18 U.S.C. § 3599(e) (directing that appointed counsel "shall" provide representation in ancillary matters and subsequent stages of available judicial proceedings). Mr. Kell previously sought permission to file a motion to

stay prior to the Court holding oral argument on August 11, 2017. (*See* ECF No. 241.) At the oral argument on his Amended Petition for Writ of Habeas Corpus (*see* ECF No. 243), counsel provided further information as to why a stay was necessary and appropriate to allow Mr. Kell to exhaust previously unexhausted claims, specifically Claims 3(D) and 3(F) from his Amended Petition, pursuant to *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Mr. Kell now files his formal motion to stay his federal habeas proceedings to allow Mr. Kell to return to state court to properly exhaust these claims.

MEMORANDUM

Petitioner Troy Michael Kell initiated these federal habeas proceedings pursuant to 28 U.S.C. § 2241, *et seq.*, to seek relief from his state-court convictions and death sentence. This Court appointed the Federal Public Defender of the District of Arizona to represent Mr. Kell in these proceedings, pursuant to 18 U.S.C. § 3599 and other applicable authority. (ECF No. 33.) Mr. Kell's habeas petition is pending before this Court and briefing on his Motion for Discovery has concluded. Pursuant to the Order entered in this Court on May 26, 2015 detailing the schedule for litigation of non-hearing issues (ECF No. 97), Mr. Kell now requests the Federal Public Defender be authorized to represent him in related state-court post-conviction proceedings.

In such proceedings, Mr. Kell will first assert that his right to a fair and impartial jury were violated as a result of extraneous influences on the jurors in his case, specifically, when two jurors ignored the trial court's instructions not to discuss the case outside of deliberations and engaged in conversations about the case during their carpool to and from the trial and because the Central Utah Correctional Facility ("CUCF") staff conveyed their desire for Mr. Kell to receive a death sentence to the jurors. Second, Mr. Kell will argue that his constitutional rights were violated during his state court sentencing proceeding when the trial court gave an unconstitutional jury instruction that impermissibly shifted the burden of proof with regard to sentencing outside of the presence of Mr. Kell and his counsel and without a court reporter present. Mr. Kell further requests a stay and abeyance of his federal proceedings for the duration of the state-court proceedings.

I. BACKGROUND

On August 1, 1996, Mr. Kell was sentenced to death in the Sixth District Court of Sanpete County, Utah. Mr. Kell's direct appeal was denied on November 1, 2002. *State v. Kell*, 61 P.3d 1019 (Utah 2002). Attorney Michael Esplin was initially appointed to represent Mr. Kell in his state post-conviction proceedings and filed a Preliminary Petition for Post-Conviction Relief in the state district court on May 16, 2003. (PCR ROA 1-5a.) Subsequently, Mr. Esplin withdrew and

attorneys Aric Cramer and William Morrison were appointed (PCR ROA 42-43, 54-55.) Cramer and Morrison filed an Amended Petition for Post-Conviction Relief on August 1, 2005. (PCR ROA 0252-0272.) The petition was only 21 pages in length, contained only one case citation, and appended no declarations or other new evidence. The state moved to dismiss on December 2, 2012. (PCR ROA 0290-0293.) The state court granted the motion to dismiss on January 23, 2007 and the Utah Supreme Court affirmed on September 5, 2008. *Kell v. State*, 194 P.3d 913 (Utah 2008).

On January 13, 2009, Mr. Kell filed a pro se Motion for Relief Pursuant to Utah Rule 60(b) in the state court. (PCR ROA 0684-0851.) In his Rule 60(b) motion, Mr. Kell alleged that he had received ineffective assistance of counsel in his post-conviction proceedings because counsel had failed to investigate and failed to raise many meritorious claims. Four months later, on May 27, 2009, federal habeas counsel filed an Initial Petition in Mr. Kell's federal habeas case. (ECF No. 36.) On June 12, 2009, counsel filed a Motion to Stay Federal Habeas Proceedings and asked that a stay be granted in Mr. Kell's federal case to resolve previously-pending state-court litigation. (ECF Nos. 40, 41.) In its order on Mr. Kell's Motion to Stay, this Court noted that Mr. Kell had filed a "protective federal habeas petition," despite still-pending state court litigation, in order to ensure compliance with the AEDPA statute of limitations. (ECF No. 51.)

The Utah Supreme Court issued its opinion on the Rule 60(b) appeal on May 4, 2012. Rehearing was denied on August 29, 2012 and the case was remitted on September 24, 2012. Mr. Kell filed his Amended Petition for Writ of Habeas Corpus in this Court on January 14, 2013. (ECF No. 94.) In his Amended Petition, Mr. Kell included for the first time Claims 3(D) and 3(F), both of which allege extraneous influence on jurors. (ECF No. 94 at 33-35, 36-40.) These claims were supported by declarations from jurors that were signed in May 2012, after the Utah Supreme Court had issued its opinion denying Mr. Kell's Rule 60(b) motion. (*See* ECF No. 94 Exs. 1, 3, 4, 5, 10, and 11.) Mr. Kell raised these claims in his Amended Petition in this Court, the next available opportunity after the denial of his Rule 60(b) motion in the state court.

II. ARGUMENT

Mr. Kell requests a temporary stay and abeyance while he pursues his claims under Rule 32 in state court. *See Fairchild v. Workman*, 579 F.3d 1134, 1156 (10th Cir. 2009) (a district court may stay a mixed petition and hold it in abeyance while the petitioner returns to state court); *see also Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (a federal court can "deny relief on the merits of an unexhausted claim only when it is perfectly clear that the petitioner has no chance of obtaining relief"). This Court retains the discretion to stay federal proceedings, even in cases affected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Rhines v. Weber, 544 U.S. at 276. In *Rhines*, the United States Supreme Court held that a federal district court should stay a "mixed" federal habeas petition, that is one containing both exhausted and unexhausted claims, if the petitioner has good cause for his failure to exhaust all claims, his unexhausted claims are potentially meritorious, and there is no indication that petitioner engaged in intentionally dilatory litigation tactics. *See id.* at 271-72, 278. To this end, the Court stated that it would be an "abuse of discretion" to deny a stay and dismiss a mixed petition.

A. The *Rhines* "Good Cause" Standard

Although the United States Supreme Court has not clearly defined the "good cause" standard under *Rhines*, their cases indicate that the good cause standard is less stringent than the cause required to excuse procedural default. This conclusion is supported by the Supreme Court's holding in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), in which the Court stated that a petitioner's "reasonable confusion" about the timeliness of his state habeas petition would satisfy "good cause" under *Rhines*. *Id*. at 416. Because the United States Supreme Court affirmed that good cause under *Rhines* could be satisfied by a petitioner's "reasonable confusion" about timeliness, which would not constitute cause to excuse procedural default, the good cause standard in *Rhines* cannot be equivalent to the procedural default rules.

Moreover, nothing in the Supreme Court's decision indicates that the Court intended for good cause under *Rhines* to be equivalent to the cause required to

excuse procedural default. When the Court decided *Rhines*, the procedural default doctrine was well established, and the Court had defined "cause" in the context of procedural default doctrine. *See Coleman v. Thompson*, 501 U.S. 722, 744-51 (1991) (discussing the development of the cause and prejudice standard, confirming that the cause and prejudice standard governs, and abrogating the deliberate bypass standard applied in previous cases). Notably, the Court in *Rhines* did not once cite to any of its longstanding precedent regarding the cause required to excuse procedural default.

Here, the ineffective assistance of Mr. Kell's state post-conviction counsel can satisfy the "good cause" requirement under *Rhines*. District courts have long held that ineffective assistance of appellate and state habeas counsel can satisfy the good cause standard under *Rhines*. *See, e.g.*, *Abel v. Chavez*, No. 2:11-cv-00721-GEB-GGH, 2011 WL 4928689 (E.D. Cal. Oct. 17, 2011) (ineffective assistance of appellate counsel satisfies good cause); *Rankin v. Norris*, No. 5:06-cv-00228-JM, 2009 WL 1973475 (E.D. Ark. July 8, 2009) (ineffective assistance of post-conviction counsel provides good cause); *Rhines v. Weber*, 408 F. Supp. 2d 844, 848 (D. S.D. 2005) (same); *Martin v. Warren*, No. 2:05-cv-71849-VAR-WC, 2005 WL 2173365, at *2 (E.D. Mich. Sept. 2, 2005) (ineffective assistance of appellate counsel satisfies good cause standard); *Brown v. Neven*, No. 2:11-cv-00790-KJD-NJK, 2013 WL 321691, at *5 (D. Nev. Jan. 25, 2013) (finding good cause where

claims were unexhausted because post-conviction counsel failed to include claims in initial state post-conviction pleading); *see also Blake v. Baker*, 745 F.3d 977, 983-84 (9th Cir. 2014) (holding that "good cause under *Rhines*, when based on [ineffective assistance of counsel], cannot be any more demanding than a showing of cause under *Martinez* to excuse procedural fault" and noting that there is a lesser burden on the petitioner because a "showing of good cause under *Rhines* only permits a petitioner to return to state court—not bypass the state court" entirely); *Byford v. Baker*, No. 3:11-cv-00112-JCM-WGC, 2013 WL 431340, at *4-5 (D. Nev. Feb. 1, 2013) (in light of Martinez, finding that ineffective assistance of post-conviction counsel constitutes good cause for a stay under *Rhines*); *Hreniuk v. Balicki*, No. 3:11-cv-00052-MLC, 2013 WL 1187107, at *2 (D. N.J. Mar. 21, 2013) (in light of *Martinez*, finding good cause for a stay where deficient post-conviction attorney failed to develop state evidentiary record); *Brown*, 2013 WL 321691, at *4 (*Martinez* supported finding of good cause for a stay).

B. The *Rhines* "Potentially Meritorious" Standard Requires only that Mr. Kell Present a Colorable Federal Claim

The "potentially meritorious" inquiry set forth in *Rhines* requires nothing more than a showing that the petitioner has stated a colorable federal claim. In *Rhines*, the Court referred to a potentially meritorious claim as one that is not "plainly meritless." *See Rhines*, 544 U.S. at 277. The *Rhines* court also compared the "potentially meritorious" standard to the inquiry under 28 U.S.C. § 2254(b)(2).

See id.; *see also Allen v. Zavaras*, 568 F.3d 1197, 1201 n.7 (10th Cir. 2009) (noting that under *Rhines* a stay may be granted "where the unexhausted claims are not 'plainly meritless'" (quoting *Rhines*, 544 U.S. at 277)).

C. Mr. Kell's Claims are Potentially Meritorious and there is Good Cause for a Stay

Mr. Kell requests that this Court authorize the Federal Public Defender to represent him in state-court proceedings regarding the impact of several juror misconduct issues on his case, pursuant to Utah Code Ann. § 78B-9-104. § 78B-9-104(1)(e) provides relief when "newly discovered material evidence exists that requires the court to vacate the conviction or sentence." Several issues reported by the jurors in their declarations rise to the level of such material evidence and Mr. Kell can state a colorable claim for relief. These issues are raised in Mr. Kell's amended habeas petition as Claims 3(D) and 3(F), but Mr. Kell concedes they were not raised in state court as a result of the ineffectiveness of Mr. Kell's post-conviction counsel. (ECF No. 94 at 33-35 and 36-40); *see also Martinez v. Ryan*, 566 U.S. 1 (2012). Furthermore, Mr. Kell may show good cause for failing to raise these claims in state court on the basis that these claims were based on new facts not known at the time of his post-conviction petition and that these claims have not been withheld for tactical reasons. *See, e.g.*, *United States v. Silva-Arzeta*, 602 F.3d 1208, 1218-19 (2010); *Taylor v. State*, 270 P.3d 471 (Utah 2012).

1. Jurors Violated the Instructions of the Court and Participated in Conversations about the Trial Outside of Deliberations (Claim 3(D))

Mr. Kell's rights to a fair and impartial jury were violated when the jurors considered extraneous information and failed to adhere to the court's instructions regarding their discussion of matters presented at trial. *See generally Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). Nonetheless, investigations into this claim revealed that the jury deliberations were impacted by two sources of extraneous information: discussions between two jurors regarding the content of the trial while the trial was still in progress, and communications to the jurors from CUCF staff regarding their opinions on the appropriate outcome for the trial and dangerousness of Mr. Kell. (*See* ECF No. 94 Exs. 1, 2, 3, 4.)

The jurors swore an oath to follow the instructions of the court. "We presume jurors will remain true to their oath and conscientiously follow the trial court's instructions. The entire weight of our legal system rests upon the shoulders of the jurors." *United States v. Carter*, 973 F.2d 1509, 1513-14 (10th Cir. 1992) (internal quotations and citations omitted). Jurors who disregard their oaths and disobey the instructions of the court threaten the integrity of both the verdict they return and the legitimacy of the justice system as a whole.

In Mr. Kell's case, Jury Instruction 5 specifically prohibited jurors from speaking about the case during any recess, even with each other. (ROA 2234.) Nevertheless, two jurors carpooled together to and from the trial and acknowledged that, during their drives, they discussed the content of the trial and how it was giving them nightmares. (*See* Exhibits 1 and 2.) These discussions took place prior to deliberations and outside of the presence of the other jurors. As a result, these conversations were in violation of the instructions the jurors were given repeatedly throughout the trial that prohibited them from discussing any aspect of the case with anyone, including each other, prior to deliberations.

Additionally, staff members at CUCF, a significant employer in the small community of Sanpete County, communicated to the jurors their opinions regarding the appropriate outcome and sentence for the trial. One juror stated that "there was also community pressure to sentence Kell to death. I knew people who worked at the prison. When I would enter the prison, I understood the sentiment for a death sentence was strong among the prison guards that I passed. All of the prison guards wanted the death sentence. All of them." (ECF No. 94 Ex. 3.) This message regarding the staff sentiment on Mr. Kell's sentencing and dangerousness was also communicated to the jurors overtly. Specifically, "Deputies escorted us to our vehicles because they were afraid somebody might retaliate against us. I guess they thought we might be sniped or something." (ECF No. 94 Ex. 4.) This

messaging, coming from agents of the prison, had a tremendous potential to prejudice the jury against Mr. Kell and to influence their determination of the appropriate sentence in his case. As a result, Mr. Kell was denied due process at his capital-sentencing proceeding and he has a colorable claim for state-court relief.

During state post-conviction proceedings, counsel failed to conduct any investigation, including speaking with jurors, and thus were not aware of this claim and failed to present it to the state court. (ECF No. 94 Ex. 15 at ¶¶ 3, 4, 12, 14.) This failure on the part of post-conviction counsel was unreasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 688. State post-conviction counsel's deficient performance constitutes cause under *Rhines*.

2. The Trial Court Committed Prejudicial Error when it gave an Unconstitutional Supplemental Jury Instruction and, thereby, Shifted the Burden of Proof (Claim 3(F))

Mr. Kell's rights to due process were violated when the trial court gave the jurors an unconstitutional jury instruction, outside of the presence of Mr. Kell and his counsel, which shifted the burden of proof in the sentencing determination. In a death penalty case, each phase of the proceedings must "satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). One of those requirements is that the jury make each determination at each phase based on the evidence presented. *See Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *see*

also Beck v. Alabama, 447 U.S. 625, 638 (1980). An erroneous jury instruction infringes upon this right if "the jury was misled on the applicable law." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1250 (10th Cir. 2000). When there exists a reasonable likelihood that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside. *See Boyde v. California*, 494 U.S. 370, 379-80 (1990).

In order for a jury to impose a capital sentence, it is incumbent on the State to prove the existence of any fact which they have alleged in justification of increasing the presumed punishment from life in prison to that of death. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002). Thus, the burden is on the prosecution to prove that death is the appropriate punishment and a jury must be properly instructed where that burden lies. *Id.*

The judge is "the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 (1933). "[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and … his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). "The judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). Given "the place of importance that trial by jury has in our Bill of Rights," it is incumbent upon our courts to protect

"ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Id*. at 615. This is one of those "basic principles of justice" that requires "strict adherence." *State v. Wood*, 648 P.2d 71, 80 (Utah 1982). It is a principle that must be adhered to in order to "satisfy the requirements of the Due Process Clause." *Gardner*, 430 U.S. at 358.

In Mr. Kell's case, the trial judge violated these principles and Mr. Kell's due process rights by giving the jury an unconstitutional instruction, outside of the presence of Mr. Kell and his counsel and off the record. Three jurors specifically recall the judge providing clarification for them on a point of law during their sentencing deliberations. (*See* ECF No. 94 Ex. 2, 5, 6.) Specifically, one juror recalled that

> I had a difficult time voting for the death penalty but I agreed to do so after Judge Mower came and spoke to the jurors as we deliberated. He told us that Kell's attorneys had to show us that Kell's life should be spared. The jury had bogged down over a definition but the judge's statement helped because we wanted to be sure that we were doing the right thing. I remember that the judge was asked a question while he was speaking to us, and he kidded around and said he couldn't address that question, and said that it was up to us. After the judge came and spoke to us, I felt more comfortable voting for death.

(ECF No. 94 at Ex. 2 at ¶ 2.) That same juror also recalled that "[t]here was no defense attorney present when the judge spoke to us during deliberations, though there was somebody with him." *Id*. at ¶ 3. There is no indication from the trial

transcript of a question from the jury after the beginning of the guilt or penalty deliberations. (ROA at 5464-5467, 5735-5737, 5742.)

The trial judge's instruction to the jury tainted the deliberation process and unconstitutionally shifted the burden to Mr. Kell to prove that his life should be spared. The judge's actions also violated the Utah Rules of Criminal Procedure. This error was a prejudicial error of constitutional magnitude, requiring reversal. As a result, this unconstitutional jury instruction violated Mr. Kell's constitutional rights and he has a colorable claim for state-court relief.

Counsel in state habeas proceedings failed to raise these claims to the state court. As a result, Mr. Kell has been denied the opportunity to have these significant claims reviewed by the state court. *See Martinez*, 566 U.S. at 10 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."). Furthermore, counsel in state post-conviction proceedings admitted that he was unaware of this issue because he failed to speak with any of the jurors, and there was no strategic reason for his failure. (ECF No. 94 Ex. 15 at ¶¶ 3, 4, 12, 14.) Counsel's failure to raise these potentially meritorious claims constitutes good cause under *Rhines*. This Court should grant Mr. Kell a stay to return to state court to exhaust these claims.

D. Mr. Kell has not Engaged in Intentionally Dilatory Litigation Tactics

Mr. Kell satisfies the *Rhines* requirement that he has not engaged in intentionally dilatory litigation tactics. Mr. Kell discovered the factual basis of these claims in May 2012, and included the claims in his Amended Petition for a Writ of Habeas Corpus, which was filed on January 14, 2013. (ECF No. 94.) The factual support for these claims was uncovered at approximately the same time that the Utah Supreme Court denied Mr. Kell's rule 60(b) motion. Thus, there was not an appropriate opportunity to present new claims and new evidence to the state court prior to the filing of Mr. Kell's Amended Petition in this Court. In his Amended Petition, Mr. Kell noted that he would be filing a motion for a stay pursuant to *Rhines* at the appropriate time. (*See* ECF No. 94 at 11; ECF No. 115 at 44, 50, 201.) As discussed above, Mr. Kell has complied with the requirements of the Case Management Schedule (ECF No. 97) as agreed to by the parties and ordered by the Court. As contemplated by the Case Management Schedule, litigation over discovery and an evidentiary hearing began in early 2014 and continued until June 2017. Thus, as agreed by the parties, now is the appropriate time to address a motion for a stay. (*See* ECF No. 97.)

III. Appointment of the Federal Public Defender

This Court should allow the Federal Public Defender of the District of Arizona to represent Mr. Kell in the ancillary state-court litigation described above.

This Court has the authority to permit the Federal Public Defender to represent Mr. Kell as he litigates his successive petition for post-conviction relief in state court. In addition, a number of considerations warrant the exercise of such authority.

A. This Court may authorize the Federal Public Defender to represent Mr. Kell in state court

The Criminal Justice Act provides for appointed federal counsel to represent a party in "ancillary matters appropriate to the proceedings." 18 U.S.C. § 3006A(c). In addition, 18 U.S.C. § 3599(a)(2) states as follows:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

18 U.S.C. § 3599(a)(2). Subsection (e), which governs the scope of federally appointed counsel's duties, provides in turn that federally appointed counsel

> shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599(e).

In *Harbison v. Bell*, the Supreme Court held that 18 U.S.C. § 3599 vests district courts with discretion to permit federally appointed counsel to represent their clients in state clemency proceedings, as well as "other appropriate motions and procedures." 556 U.S. 180, 190 n.7 (2009). *Harbison* involved a "straightforward reading" of § 3599(e). *Id*. at 185. The Court found that the broad language in § 3599(e) "hardly suggests a limitation on the scope of representation." *Id*. at 188. Any limitation on federally appointed counsel "follows from the word 'subsequent' and the organization of subsection (e)," which mirrors "the ordinary course of proceedings for capital defendants." *Id*. Therefore, once federally funded counsel is appointed to represent a state prisoner in 28 U.S.C. § 2254 proceedings, the duties enumerated in § 3599(e) authorize that same counsel to represent the prisoner in all available and subsequent judicial proceedings. It is the term "subsequent" that circumscribes counsel's representation, "not a strict division between federal and state proceedings." *Id*. Accordingly, 18 U.S.C. § 3006A(c) and 18 U.S.C. § 3599(a)(2), along with *Harbison*, authorize this Court to allow Mr. Kell's federal counsel to litigate state-court matters.

Moreover, this Court has often authorized federal habeas counsel to represent clients in state-court post-conviction proceedings, clemency litigation and other ancillary proceedings, including previously in this case. (*See* ECF No.

51; *see also Menzies v. Friel*, 03-CV-00902-JC-KBM (D. Utah Oct. 27, 2004), ECF No. 41 (granting a stay pending conclusion of Rule 60(b) proceedings).)

B. This Court should authorize the Federal Public Defender to represent Mr. Kell in state court for multiple reasons

Several considerations justify allowing the Federal Public Defender—undersigned counsel—to represent Mr. Kell in ancillary state-court litigation. First, allowing counsel to represent Mr. Kell serves the related ends of judicial economy and the avoidance of delay. Counsel have already invested large amounts of time learning the record in Mr. Kell's case and researching the applicable case law. Accordingly, counsel are prepared to initiate state-court proceedings as expeditiously as possible. Were this Court to deny counsel permission to represent Mr. Kell in state court, new counsel would need to be appointed and would be required to expend a tremendous amount of resources, including funding and time, which would lead to a marked delay in state-court litigation.[1]

Second, counsel have the experience necessary to pursue the state-court litigation described above. Such experience is particularly critical in light of the probability that the claims Mr. Kell expects to raise in his successive petition for post-conviction relief will be considered on the merits. Having experienced capital counsel will benefit Mr. Kell in state-court proceedings and will potentially have

[1] Because Mr. Kell has alleged in federal court that his prior state post-conviction counsel provided ineffective assistance, that prior counsel cannot resume representation.

collateral benefits for federal proceedings. Third, undersigned counsel have developed an attorney-client relationship of trust with Mr. Kell, and permitting counsel to represent Mr. Kell in state court continues this relationship and avoids potential interference with it. Finally, such authorization avoids any possibility that newly appointed counsel will adopt strategies that conflict with those of federal habeas counsel, resulting in future problems and potential legal conflicts.

Consequently, this Court can and should allow the Federal Public Defender to represent Mr. Kell in ancillary state-court litigation, as it has done in comparable cases. *See, e.g.*, *Menzies v. Friel*, 03-CV00902-JC-KBM (D. Utah Oct. 27, 2004), ECF No. 41 (granting a stay pending conclusion of Rule 60(b) proceedings).)

IV. A Temporary Stay and Abeyance is in the Interest of Comity and Judicial Economy

A limited stay in this case serves interests advanced by AEDPA—comity and judicial economy—without unduly delaying proceedings. First a stay would allow state courts to decide issues, for example issues based on newly developed evidence. *See, e.g.*, *Rhines*, 544 U.S. at 276-77 (noting that AEDPA "encourages" petitioners to raise claims in state court before raising them in federal court). Second, a stay promotes judicial economy by avoiding parallel proceedings in state and federal court, including litigation of related issues. Certainly the introduction of evidence into the state-court record would affect Mr. Kell's habeas proceedings. Moreover, any state-court relief could moot some of the claims concerning

sentencing that are currently pending before this Court. Consequently, this Court should temporarily stay federal habeas proceedings to allow Mr. Kell to litigate these meritorious claims—claims which he had no opportunity to raise earlier—in state court.

V. Conclusion

For the reasons stated above, Mr. Kell respectfully requests this Court to grant a limited stay and hold his federal habeas proceedings in abeyance while Mr. Kell exhausts claims that were not previously presented to the state court. Further, Mr. Kell asks the Court to authorize the Federal Public Defender of the District of Arizona to represent him in state-court proceedings related to these claims of newly discovered evidence that was not previously raised in his state-court proceedings. In the alternative, Mr. Kell requests this Court stay federal proceedings only with respect to Claims 3(D) and 3(F) of his Amended Petition so that he may properly exhaust those claims in the state court.

Respectfully submitted this 28th day of August, 2017.

Jon M. Sands
Federal Public Defender

/s/ Lindsey Layer
Lindsey Layer
Assistant Federal Public Defender

Attorney for Petitioner Kell

Certificate of Service

I hereby certify that on this 28th day of August, 2017, I electronically filed the foregoing document to the Clerk's Office using the CM/ECF system which sent notification of such filing to the following registrants:

/s/ Daniel Juarez
Assistant Paralegal

Addendum 4

Kell v. State
20180788

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

TROY MICHAEL KELL, Petitioner, v. SCOTT CROWTHER, Warden of the Utah State Prison, Respondent.	Case No. 2:07-cv-359-CW-PMW **Reply in Support of Petitioner's Motion to Stay Federal Habeas Proceedings** **Death Penalty Case** Honorable Judge Clark Waddoups

Petitioner Troy Michael Kell, through counsel, submits his Reply in Support of Motion to Stay Federal Habeas Proceedings. As demonstrated below, Respondent's arguments as to why this Court should not grant a stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), are unavailing.

I. PROCEDURAL HISTORY

Although counsel was appointed on May 31, 2007, *see* ECF No. 3, state post-conviction proceedings were still ongoing at that time, *see* ECF No. 1 at 2. The Utah Supreme Court denied the appeal of Mr. Kell's petition for post-conviction review on September 5, 2008, *Kell v. State*, 194 P.3d 913 (Utah 2003), and Mr. Kell filed a pro se motion for relief pursuant to Utah Rule 60(b) on January 13, 2009, PCR ROA 684-751. Mr. Kell filed an initial petition for writ of habeas corpus in this Court on May 27, 2009, ECF No. 36, and a motion to stay federal proceedings to allow state court litigation to resolve was filed on June 12, 2009, ECF Nos. 40, 41. In its order on Mr. Kell's motion to stay the federal proceedings, this Court noted that Mr. Kell had filed a "protective federal habeas petition," despite the pendency of litigation in state court, in order to ensure compliance with the AEDPA statute of limitations. ECF No. 51 at 3. The case was then stayed for approximately three years while proceedings in state court were ongoing. Although it is true that counsel was initially appointed in 2007, federal proceedings could not go forward because state court proceedings were still ongoing from that time until late 2012. Thus, although perhaps technically correct, it is misleading to assert that Mr. Kell's case has been "pending" in this Court for ten years. *See* ECF No. 247 at 1, 2, 8, 9, 10, 25, 26.

Mr. Kell filed his Amended Petition on January 14, 2013. ECF No. 94. Two months later the stipulated Case Management Schedule was entered in which the parties agreed to address discovery and an evidentiary hearing prior to addressing other issues. ECF No. 97. Motions related to discovery and an evidentiary hearing were resolved on June 23, 2017. ECF No. 238.

II. MR. KELL HAS SATISFIED THE *RHINES* STANDARD

Under *Rhines*, a district court should stay proceedings to allow a petitioner to return to state court when the petitioner has "good cause" for his failure to exhaust a claim, the claim is not "plainly meritless," and the petitioner has not engaged in intentionally dilatory litigation tactics. *Rhines*, 544 U.S. at 277-78. Mr. Kell has satisfied each of these requirements.

A. Mr. Kell has Satisfied the "Good Cause" Requirement under *Rhines*

Respondents contend that in order to satisfy the "good cause" requirement under *Rhines* "[Mr.] Kell must establish 'cause' equivalent to that which would excuse a procedural default." ECF No. 247 at 9 (citing *Carter v. Friel*, 415 F. Supp. 2d 1314, 1319 (D. Utah 2006) and *Hernandez v. Sullivan*, 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005)). As Mr. Kell argued in his motion, the weight of authority is against Respondent's argument. ECF No. 245 at 6-8. Furthermore, two Utah District Court judges have recently followed the Ninth Circuit's reasoning in *Blake v. Baker*, 745 F.3d 977, 983-84 (9th Cir. 2014), and held that the *Rhines* good cause standard is a lesser burden than that required to excuse procedural default. *See* Order, *Lafferty v. Crowther*, 2:07-cv-00322-DB, ECF No. 379 at 7-8 (D. Utah Oct. 30, 2015) ("[T]he court finds the analysis of Blake and Rhines II to be better reasoned than the analysis followed by Hernandez and Carter."); Order, *Archuleta v. Crowther*, 2:07-cv-00630-TC, ECF No. 107 at 9-10 (D. Utah Nov. 12, 2014) (same). These judges also rejected Respondent's contention that ineffective assistance of post-conviction counsel does not constitute "good cause" under *Rhines*. *Id*.; *see also* ECF No. 245 at 6-8.[1]

[1] The cases relied on by Respondent, *Carter* and *Hernandez*, were decided several years before the Supreme Court's decision in *Martinez*, and thus did not have the benefit of the Supreme Court's analysis in that case. *But see Blake v. Baker*, 745 F.3d 977, 983-84 (9th Cir. 2014) (addressing the Supreme Court's decision in *Martinez* and its relation to the *Rhines* "good cause" standard).

Respondent further contends that because Mr. Kell's unexhausted claims are not based on the ineffective assistance of trial counsel, "*Martinez*'s exception is thus unavailable to [Mr.] Kell." ECF No. 247 at 12. This statement misunderstands Mr. Kell's argument and the standard at issue. Under *Martinez*, the ineffective assistance of post-conviction counsel may constitute cause regarding a claim of ineffective assistance of trial counsel in the context of a procedural default. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). Whether there is "good cause" under *Rhines* is a distinct issue from whether there is cause to excuse a procedural default. *Blake*, 745 F.3d at 983-84. There is no indication that any court has ever limited the availability of a *Rhines* stay to a particular type of claim.

Respondent also argues that in order to established good cause based on post-conviction counsel's ineffective assistance, Mr. Kell must "affirmatively prove" that counsel was ineffective under *Strickland v. Washington*. ECF No. 247 at 12. There is no authority that supports Respondent's argument. In *Blake*, the Ninth Circuit stated, "While a bald assertion [of ineffective assistance of post-conviction counsel] cannot amount to a showing of good cause, a reasonable excuse, supported by evidence to justify a petitioner's failure to exhaust, will." *Blake*, 745 F.3d at 982. This is a significantly lesser showing than that required to obtain relief under *Strickland*.

Furthermore, Respondent argues that Mr. Kell cannot establish that post-conviction counsel's performance was deficient unless he can establish that counsel had "reason to think [jurors'] deliberations had been extraneously influenced." ECF No. 247 at 13. This argument ignores the fact that the *only* way counsel could have established reason to believe jurors' deliberations had been extraneously influenced would be by speaking with the jurors. The Supreme Court has repeatedly held that a decision to cease investigation must itself be based on a reasonable investigation. *See Strickland*, 466 U.S. at 690-91; *Williams v. Taylor*, 529 U.S. 362, 396 (2000);

Wiggins v. Smith, 539 U.S. 510, 533-34 (2003); *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(C), (E)(4) and commentary (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation" because "the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case."). Post-conviction counsel cannot have made a reasonable strategic decision to limit investigation of jurors because counsel had not conducted any investigation at all. As argued in Mr. Kell's Amended Petition, Reply, and Motion for a Stay, post-conviction counsel filed a petition that was perfunctory at best, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic. *See* ECF No. 94 at 150-51, 156-60; ECF No. 94-1 Ex. 15; ECF No. 115 at 180-85; ECF No. 115-1 Ex. 1 at ¶6; ECF No. 245 at 12, 15. There is no question that post-conviction counsel's performance was deficient under *Strickland*, and therefore also under the lower *Rhines* standard.

B. Mr. Kell's Claims are Potentially Meritorious

1. The Potential Application of a State Procedural Bar is Not an Appropriate Consideration Under *Rhines*

A petitioner satisfies the *Rhines* standard for a stay if he has good cause for his failure to exhaust, the unexhausted claims are potentially meritorious, and the petitioner did not engage in intentionally dilatory litigation tactics. *Rhines*, 544 U.S. at 271-72, 278. The federal court's determination of whether to grant a stay under *Rhines* is limited to these three factors. *Id.* The possibility of the application of a state procedural bar has no bearing on any of the factors in *Rhines* and is therefore not relevant to this Court's determination whether to grant a stay.

Whether a state procedural rule could potentially bar a claim is clearly not relevant to whether Mr. Kell has established "good cause" or whether he has engaged in "intentionally dilatory

litigation tactics." Both inquiries are based on the actions of the petitioner and the reasons he has not previously exhausted his claims. *See, e.g., Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (a petitioner's "reasonable confusion" about whether a filing would be timely constitutes good cause under *Rhines*).

State procedural rules are similarly irrelevant to the "potentially meritorious" inquiry. The "potentially meritorious" analysis requires only that a petitioner demonstrate that the substance of the claim is not "plainly meritless." *Rhines*, 544 U.S. at 277-78; *see also Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (a federal court may "deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim"). Another court in this district recently agreed that Respondent's argument was misplaced, stating, "The Utah Supreme Court may agree with [Respondent's] position. It may not. But this court finds that the interests in federalism and comity require that the state courts have the opportunity to make that decision." Order, *Archuleta*, 2:07-cv-00630-TC, ECF No. 107 at 15 (D. Utah Nov. 12, 2014); *see also Fairchild v. Workman*, 579 F.3d 1134, 1153 (10th Cir. 2009) (noting that if the state court resolves the claim on the merits, AEDPA deference would then apply in federal court and if the state court resolves the claim on a procedural ground "the federal court will review that disposition, applying the standard of review that is appropriate under the circumstances"). Thus, whether a state procedural bar may or may not be applicable to a state petitioner's claims is not an appropriate element of a district court's determination of whether a stay is appropriate under *Rhines*.[2]

In the alternative, were this Court to hold that Mr. Kell's claims were barred by state

[2] Respondent argues that "[Mr.] Kell 'is not eligible for relief under' the PCRA because the claims are 'barred by the limitation period.'" ECF No. 247 at 16 (citing Utah Code Ann. § 78B-9-106(1)), 17-18. Subsection (3) allows a petitioner to seek relief when the ground for relief could have been raised earlier if the failure to raise that ground was due to ineffective assistance of counsel. Utah Code Ann. § 78B-9-106(3).

procedural rules, Mr. Kell's claims would then be technically exhausted but procedurally defaulted. *See* 28 U.S.C. § 2254(b)(1)(B); *Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006); *Coleman v. Thompson*, 501 U.S. 722, 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him" (citing 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107 125-26, n. 28 (1982))); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) ("The requisite exhaustion may nonetheless exist . . . if it is clear that respondent's claims are now procedurally barred under [state] law." (citations omitted)). Should this Court so decide, Mr. Kell requests the opportunity to brief the adequacy and independence of the state procedural bar and the existence of any excuse to the procedural default.

2. Claims 3(D) and 3(F) are Potentially Meritorious

Respondent contends that Claims 3(D) and 3(F) are meritless because the evidence on which the claims are based is inadmissible under Federal Rule of Evidence 606(b). ECF No. 247 at 18-20. Respondent is incorrect for several reasons. First, by the plain language of Rule 606(b)(1), a juror "may not testify about any statement made or incident that occurred *during the jury's deliberations*[.]" Fed. R. Evid. 606(b)(1) (emphasis added). Claim 3(D) addresses extraneous influences and juror discussions of the case *prior* to deliberations. Second, Rule 606(b)(2) provides exceptions where "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Fed. R. Evid. 606(b)(2). Claims 3(D)—that jurors improperly discussed the case prior to deliberations and were improperly influenced by guards at the prison who were also responsible for jurors' safety during the trial—and 3(F)—that the trial judge gave a supplemental instruction during jurors' penalty phase deliberations outside the presence of the defendant or his attorneys—plainly fall under the

exceptions in subsections (A) and (B). Third, the Supreme Court recently made clear that there may be instances where "the Sixth Amendment requires that the no-impeachment rule give way" when jurors' statements "cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). Although the Court in *Pena-Rodriguez* addressed racial bias in jury deliberations, the Court made clear that its holding was not limited to only that circumstance. *See id.* at 871.

Respondent's argument that Claims 3(D) and 3(F) do not state constitutional violations is also without merit. The Supreme Court has made clear that the Fourteenth Amendment's Due Process Clause requires that defendants be tried by a fair, impartial, and indifferent panel of jurors. *Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992); *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965); *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). With respect to Claim 3(D), Respondent takes issue with the details of Mr. Kell's evidence in support of his claim. *See* ECF No. 247 at 21. Respondent's argument is insufficient to demonstrate the claim is "plainly meritless." *Rhines*, 544 U.S. at 277; *see also Allen v. Zavaras*, 568 F.3d 1197, 1201 n.7 (10th Cir. 2009); *Cassett*, 406 F.3d at 624.

With respect to Claim 3(F), Respondent alleges that Mr. Kell "necessarily had to point to at least some mitigation evidence" in order to convince jurors not to vote for death in the penalty phase, and therefore Mr. Kell's claim must fail. ECF No. 247 at 23-24. This is a misstatement of both constitutional law and the trial court's instructions themselves. The trial court instructed jurors: "It is presumed that a person convicted of aggravated murder will be sentenced to life in prison, unless and until the propriety of the death penalty or life in prison without parol[e] is proved beyond a reasonable doubt. This presumption is not a mere form to be disregarded by the jury at pleasure, but is a substantial essential part of the law and is binding upon the jury." Tr. ROA

6/25/1996 at 5686; *see also id*. at 5686-87 ("The burden of proof necessary for a verdict of death or for a verdict of life in prison without parole over life in prison in this case is upon the State. . . You may return a verdict of death only if . . . you are persuaded beyond a reasonable doubt that the totality of aggravating circumstances outweighs the totality of mitigating circumstances"); *id*. at 5687, 5688. These instructions comport with Supreme Court precedent that the weighing of aggravating and mitigating circumstances is a finding that must be made beyond a reasonable doubt by a jury. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016); *Ring v. Arizona*, 536 U.S. 584, 589 (2002). Respondent's argument that Mr. Kell's claim is not "potentially meritorious" is incorrect.

3. Claim 3(F) is Not Time Barred

Respondents contend that claim 3(F) is "plainly meritless" because it is time-barred in federal court. ECF No. 247 at 14. Respondent is incorrect. In his original Petition, filed in 2009, Mr. Kell raised a claim that he was "Denied his Right to a Fair and Impartial Jury in Violation of the Sixth and Fourteenth Amendments to the United States Constitution." ECF No. 36 at 25. Subclaim D further alleged that jurors "considered extraneous information during deliberations." *Id*. at 29. In order to comply with the one-year time limit under AEDPA, a new claim must "relate back" to a timely filed petition. *Mayle v. Felix*, 545 U.S. 644, 650 (2005). A new claim will not relate back "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id*. Here, Mr. Kell alleged in his initial Petition that jurors considered extraneous information during deliberations. The additional allegation in his Amended Petition that among the extraneous information jurors considered was a supplemental instruction from the trial court given outside the presence of the defendant or counsel does not "differ in both time and type" from the original pleading. Because the claim relates back to the initial Petition, it is not barred by the AEDPA statute of limitations.

C. Mr. Kell has Not Engaged in Intentionally Dilatory Litigation Tactics

Respondent's principal argument that Mr. Kell has been dilatory is that "[Mr.] Kell did not need this Court's permission to file a successive petition in state court" and "could have filed a successive petition in state court concurrent with his amended federal habeas petition . . . or at any time since then." ECF No. 247 at 25. Respondent essentially faults Mr. Kell for adhering to the Case Management Schedule. The Case Management Schedule set out a timeline for responsive pleadings to the Amended Petition, followed by motions for discovery and an evidentiary hearing. ECF No. 97. It specifically contemplated that "briefing on any remaining non-hearing issues" would be addressed *after* evidentiary issues were addressed and the parties would "work together to create a briefing schedule." *Id*. at 2. The whole point of creating a case management schedule is to provide for appropriate and predictable timelines on which the parties and the Court can rely to address relevant motions and other briefing. Respondent now suggests that Mr. Kell was dilatory because he did not disregard the parties' stipulation and the Court's order regarding the briefing schedule. Mr. Kell cannot be dilatory for adhering to the stipulated Case Management Schedule.

Furthermore, Respondent is incorrect that Mr. Kell did not need permission to file in the state court. Mr. Kell is represented by the Federal Public Defender, which is overseen by the Administrative Office of the United State Courts. It has long been the policy that "Defender Services appropriation funds may not be used to represent an individual under a state-imposed death sentence in a state proceeding unless a presiding judicial officer in a federal judicial proceeding involving the individual has determined that such use of Defender Services appropriation funds is authorized by law." Report of the Committee on Defender Services to the Mach 1999 Judicial Conference at 9-10 (March 1999). Thus, Mr. Kell's attorneys are required to have permission in order to represent a petitioner in state-court proceedings. *See, e.g.*, Order, *Archuleta*, 2:07-cv-00630, ECF No. 107 at 20 (D. Utah Nov. 12, 2014).

III. MR. KELL HAS NOT PRESENTED A "MIXED PETITION"

Respondent alleges that Mr. Kell has not moved to exhaust all of the claims in his Amended Petition that are unexhausted and the Court cannot grant a *Rhines* motion "while unexhausted claims remain." Respondent, however, does not cite a single additional claim that Mr. Kell has failed to exhaust. This is because there is none. All other claims in the Amended Petition were raised in state court proceedings and are therefore exhausted.[3]

IV. CONCLUSION

For the reasons stated above, Respondent's arguments as to why Mr. Kell should not be granted a stay are without merit. Mr. Kell respectfully requests this Court to grant a limited stay and hold his federal habeas proceedings in abeyance while Mr. Kell exhausts claims that were not previously presented to the state court. Further, Mr. Kell asks the Court to authorize the Federal Public Defender of the District of Arizona to represent him in state-court proceedings. In the alternative, Mr. Kell requests this Court stay federal proceedings only with respect to Claims 3(D) and 3(F) of his Amended Petition so he may properly exhaust those claims in state court.

Respectfully submitted this 25th day of September, 2017.

[3] In its procedural history section, Respondent states, "[Mr.] Kell moved for discovery to support ten claims in his petition, including four subclaims that he conceded were unexhausted." ECF No. 247 at 4. Respondent cites ECF No. 126 at 28, in which he states Petitioner acknowledged claims 15(E), 15(P), 17(B), and 17(C) "were not adjudicated on the merits in state court." *Id*. Respondent confuses exhaustion with procedural default. They are in fact distinct issues. As Respondent quoted, Mr. Kell conceded the claims "were not adjudicated on the merits in state court." ECF No. 126 at 28. The claims were, however, *presented* to the state court in Mr. Kell's motion pursuant to Rule 60(b). *See* PCR ROA 724, 728, 730. They are therefore exhausted, and were found to be procedurally barred by the state court. *See generally* Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure, Sixth Edition §§ 23, 26 (Matthew Bender) (2006) (discussing doctrines of exhaustion and procedural default, respectively).

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Certificate of Service

I hereby certify that on this 25th day of September, 2017, I electronically filed the foregoing document to the Clerk's Office using the CM/ECF system which sent notification of such filing to the following registrants:

/s/ Daniel Juarez
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