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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JONATHAN MONTANA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

) Case No. _____

) **NOTICE OF MOTION AND**
) **MOTION FOR STAY AND**
) **ABEYANCE UNDER RHINES v.**
) **WEBER; MEMORANDUM OF**
) **POINTS AND AUTHORITIES**

) **Date: TBD**
) **Time: TBD**

TO THE HONORABLE COURT:

PLEASE TAKE NOTICE that on a date and time as set by the Court, or as soon thereafter as counsel may be heard, Petitioner Jonathan Montana will move this Court for an order staying and holding this § 2254 petition in abeyance pending exhaustion of unexhausted ineffective assistance of trial counsel claims in California state court.

¹ Motion for Admission to the Northern District of California Pending

1 This Motion is made pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005),
2 and is based upon this Notice of Motion, the accompanying Memorandum of
3 Points and Authorities, the Petition for Writ of Habeas Corpus filed concurrently
4 herewith, the declarations and exhibits filed in support thereof, and upon such
5 other matters as may be presented to the Court at the hearing on this Motion.
6

7
8 Respectfully submitted,

9 Dated: 11/10/2025

/s/ Gail Shifman
Gail Shifman, Esq.
Attorney for Petitioner
Jonathon Montana

14 Dated: 11/10/2025

s/JOHN D. KIRBY
John D. Kirby, Esq.
Attorney for petitioner
Jonathon Montana

MOTION FOR STAY AND ABEYANCE

Petitioner Jonathan Montana respectfully moves this Court for an order:

1. Staying and holding this § 2254 petition in abeyance pending exhaustion of unexhausted ineffective assistance of trial counsel claims in California state court;
2. Establishing the following deadlines:
 - Petitioner shall file a state habeas corpus petition in the Santa Clara County Superior Court within 30 days of the stay order;
 - Petitioner shall file status reports with this Court every 90 days and within 30 days of each state court disposition;
 - Petitioner shall move to lift the stay and lodge a proposed amended federal petition within 30 days of final state court disposition; and
3. Granting such other and further relief as the Court deems just and proper.

This Motion is made on the grounds that: (1) good cause exists for Petitioner's failure to exhaust state remedies due to abandonment and ineffective assistance by prior post-conviction counsel; (2) the unexhausted claims are potentially meritorious; and (3) Petitioner has not engaged in intentionally dilatory litigation tactics.

Dated: 11/07/2025

Respectfully submitted,

s/JOHN D. KIRBY

John D. Kirby, Esq.

Attorney for petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

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I.

INTRODUCTION

1. Petitioner Jonathan Montana ("Petitioner") files this Motion concurrently with a protective Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. The Petition is timely filed before the Antiterrorism and Effective Death Penalty Act ("AEDPA") limitations deadline of November 11, 2025.
2. All ineffective assistance of trial counsel ("IATC") claims articulated in the Petition (Grounds 1–7) remain unexhausted because Petitioner's previously retained habeas counsel, Benjamin P. Lechman, abandoned the matter and performed no investigation or filings for over 10-months. See Retainer Agreement (Exhibit A); Communications Chronology (Exhibit C).

3. Upon realizing counsel's abandonment, Petitioner acted diligently. He retained new counsel, John D. Kirby, on August 5, 2025 (Exhibit B), and caused this protective petition and motion to be prepared and filed to preserve federal review while pursuing state court exhaustion.
4. This Motion seeks a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), to permit Petitioner to exhaust his unexhausted claims in California state court while preserving his federal habeas corpus rights.

II.

LEGAL STANDARD

5. District courts have discretion to stay a habeas corpus petition to allow a petitioner to exhaust unexhausted claims in state court where three conditions are met:

- a. The petitioner shows good cause for failure to exhaust the claims in state court;
- b. The unexhausted claims are potentially meritorious; and
- c. There is no indication the petitioner has engaged in intentionally dilatory litigation tactics.

Rhines v. Weber, 544 U.S. 269, 277–78 (2005).

6. The Supreme Court has recognized that stay-and-abeyance is available only "in limited circumstances" and emphasized that district courts should place reasonable time limits on a petitioner's trip to state court and back. *Id.* at 277–78.
7. The Ninth Circuit interprets the "good cause" requirement flexibly and has recognized that ineffective assistance or abandonment by post-conviction counsel and failures to conduct extra-record investigation can constitute good cause. See *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014) (reversing denial of *Rhines* stay; recognizing good cause where post-

conviction counsel failed to investigate and present substantial extra-record evidence).

8. To demonstrate potential merit under *Rhines*, a petitioner need only show that the unexhausted claims are not "plainly meritless." *Rhines*, 544 U.S. at 277.
9. The Petitioner exercised due diligence in seeking counsel to discuss the issues in his case. At no time did the Petitioner engage in dilatory litigation tactics.

III.

ARGUMENT

A. Good Cause Exists: Prior Post-Conviction Counsel's Abandonment and Nonperformance

10. Petitioner retained attorney Benjamin P. Lechman on October 23, 2024, specifically to pursue state and federal habeas corpus relief. See Retainer Agreement (Exhibit A).
11. Over the ensuing months—from October 2024 through August 2025—Petitioner repeatedly attempted to facilitate investigation by providing potential grounds for relief, relevant records, and additional funds, and by pressing counsel to take action. See Communications Chronology (Exhibit C), detailing text messages and emails from October 3, 2024, through August 1, 2025. All text messages and emails regarding the Petitioner's due diligence are submitted as Exhibit D (text messages); Exhibit E (emails).
12. Despite receiving payment, Mr. Lechman performed no investigation, made serial excuses, failed to schedule and/or conduct any telephone conferences, and did not file any habeas petitions in state or federal court.

1 13. As the AEDPA deadline approached, Mr. Lechman admitted on August 1,
2 2025, that he was too busy to work on Petitioner's case. He offered to
3 refund unused fees and suggested that Petitioner retain substitute counsel.
4 See Communications Chronology and text messages. (Exhibits C & D).

5 14. This abandonment by prior post-conviction counsel constitutes good
6 cause under *Rhines* as construed by the Ninth Circuit. In *Blake v. Baker*,
7 the Ninth Circuit recognized good cause where post-conviction counsel
8 failed to develop claims through extra-record investigation. 745 F.3d at
9 983–85. The court held that the district court abused its discretion in
10 denying a *Rhines* stay under such circumstances. *Id.*

11 15. Similarly, the Supreme Court in *Rhines* held that it is an abuse of
12 discretion to deny a stay where good cause exists, the claims are
13 potentially meritorious, and there is no indication of intentional delay. 544
14 U.S. at 278.

15 16. Here, Mr. Lechman's failure to perform any work over 10-month period,
16 despite repeated requests and payment, effectively deprived Petitioner of
17 the opportunity to exhaust his state court remedies in a timely manner.

18 17. Petitioner retained new counsel, John D. Kirby, on August 5, 2025. See
19 Retainer Agreement (Exhibit B). New counsel immediately began
20 reviewing the case file, discovery materials, pleadings, and court rulings
21 to prepare this protective petition and motion.

22 18. The diligent transition from abandoned counsel to new counsel, and the
23 prompt filing of this protective petition, corroborate the existence of good
24 cause and demonstrate the absence of any delay attributable to Petitioner
25 himself.

B. The Unexhausted Claims Are Potentially Meritorious

19. The ineffective assistance claims (Grounds One–Eight) are not plainly meritless under *Strickland v. Washington*, 466 U.S. 668 (1984). Each raises substantial deficiencies and resulting prejudice that, individually and cumulatively, undermined confidence in the verdict.

20. **Ground One:** Failure to retain and present SART/forensic medical expert; inadequate cross-examination of SART nurse. Trial counsel retained no defense SART expert and failed to impeach the State’s nurse on core issues: injury interpretation, positioning, and protocol. The nurse’s “consistent with” force testimony and opinion that Doe was “on her back” during anal intercourse supplied ostensible scientific corroboration to a credibility-based case. A defense expert would have explained that the findings are equally consistent with consensual intercourse (especially given delayed exam), that positioning cannot be reliably inferred from injury patterns, that applying toluidine blue dye before baseline documentation risks artifacts, and that force indicators were not definitive. Given the centrality of this evidence, there is a reasonable probability expert testimony would have altered credibility assessments and the outcome. See *People v. Montana*, 2024 Cal. App. Unpub. LEXIS 3591, at *8, *14–15, *38–39. (See Exhibit F)

21. **Ground Two:** Failure to investigate and present evidence of prior false accusation. Counsel ignored available impeachment showing Doe previously made a false rape accusation during her relationship—mirroring the alleged motive here. The boyfriend’s mother reportedly had personal knowledge and was willing to testify, yet counsel conducted no investigation, obtained no records, and filed no motion. In a pure credibility contest—where the jury acquitted on Count 6—this evidence

1 of motive, pattern, and direct impeachment had substantial probative
2 value. There is a reasonable probability it would have led to acquittals on
3 additional counts or a hung jury.

4 **22. Ground Three:** Failure to impeach with available evidence. Counsel did
5 not use: (1) preliminary hearing positioning testimony/demonstrations; (2)
6 full surveillance footage contradicting claims of profound incapacity; (3)
7 Doe's "low key kidnapped" text juxtaposed with the prosecution's later
8 removal of kidnapping charges; (4) Doe's conditional text—"Even if I
9 were to have said yes..."—suggesting uncertainty about consent; or (5)
10 Doe's desire to "forget" rather than promptly report. Effective
11 impeachment—"the principal means" to test credibility—was essential.
12 The omitted lines of impeachment, considered together, create a
13 reasonable probability of a different result. See *Montana*, at *6–14, *23,
14 *38–39; *Davis v. Alaska*, 415 U.S. 308, 316 (1974).
15

16 **23. Ground Four:** Failure to secure/authenticate complete surveillance video
17 and challenge alteration. Counsel neither subpoenaed original files with
18 metadata nor retained a video forensics expert, and did not challenge the
19 prosecution's selective clips. Complete authenticated footage would have
20 documented Doe's functional abilities and voluntary conduct (e.g.,
21 walking hand-in-hand), directly undercutting the incapacitation theory.
22 Given the Count 6 acquittal and the case's reliance on capacity, there is a
23 reasonable probability that full video context would have produced
24 acquittals, a hung jury, or fewer convictions.
25

26 **24. Ground Five:** Failure to present admissible lay/expert capacity evidence.
27 The court excluded L.A.'s legal-conclusion opinion on consent.
28 Competent counsel would have elicited admissible factual observations
29 (gait, coherence, recognition, affect), comparative familiarity with Doe's
30

intoxication, and narrowed lay opinions on capabilities—then integrated those facts into a robust hypothetical for toxicology expert Halla Weingarten. Properly framed, this evidence would have undermined the State’s incapacity theory and supported the defense account. There is a reasonable probability of a different outcome had counsel presented the evidence in admissible form. See *Montana*, at *21–22, *40–44.

25. Ground Six: Failure to forensically analyze and present phone/text evidence. Counsel obtained no forensic extraction or expert analysis, despite central phone evidence: garbled “help” texts followed by a successful text, multiple answered calls, location sharing, and timestamps. Expert analysis could show preserved cognitive function (decision-making, phone operation) and correlate activity with claimed blackout periods. Proper analysis would materially undercut incapacitation and support the defense timeline. There is a reasonable probability of acquittals or a hung jury. See *Montana*, at *10–12.

26. Ground Seven: Failure to investigate and remedy detective–juror contact. Counsel ignored credible allegations that Detective Alfaro made case-implicating comments in proximity to jurors and that his cousin in the venire stated she could not acquit. Counsel neither alerted the court, requested a *Remmer* hearing, sought removal for cause, moved for mistrial, nor built a record. This forfeited the *Remmer* presumption and hearing, leaving potential juror bias unremedied. Given the seriousness and source of the contact, there is at least a reasonable probability of juror removal, mistrial, or curatives had counsel acted. (See Exhibit G, Appellant’s Opening Brief, H049456, at pp. 56-57; submitted as Exhibit H, 3CT 822-823); *Remmer v. United States*, 347 U.S. 227, 229 (1954).

1 **27. Ground Eight:** Cumulative error. The combined effect of counsel's
2 failures—no SART expert, no prior-accusation impeachment, minimal
3 impeachment generally, no complete video, no admissible capacity
4 presentation, no phone forensics, and no action on juror contact—
5 rendered the trial fundamentally unfair. Each omission amplified the
6 others, leaving the State's forensic and credibility case largely un rebutted
7 in a matter decided on credibility, with the jury already evidencing doubt
8 on Count 6. There is a reasonable probability that effective representation
9 would have produced acquittals, additional not-guilty verdicts, or a hung
10 jury. See *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007); *Chambers*
11 *v. Mississippi*, 410 U.S. 284, 298, 302–03 (1973).

12 Each claim requires extra-record development (expert declarations, investigator
13 reports, original media, forensic analyses, and witness statements) available in
14 state habeas and, as appropriate, federal proceedings. Collectively and
15 individually, these claims clear *Rhines*'s "not plainly meritless" threshold. 544
16 U.S. at 277.

17 **C. No Intentionally Dilatory Litigation Tactics**

18 28. The record demonstrates Petitioner's diligence and the absence of any
19 gamesmanship or intentional delay:

- 20 a. Petitioner made persistent efforts to spur his prior counsel to action, as
21 evidenced by continuous text messages and emails from October 3, 2024,
22 through August 1, 2025, multiple payments, and proof of delivery via USPS and
23 FedEx. See Communications Chronology (Exhibits C, D, E).
- 24 b. Immediately upon prior counsel's admission that he could not handle the case,
25 Petitioner retained new counsel on August 5, 2025. See Retainer Agreement
26 (Exhibit B).

1 c. New counsel, reviewed the extensive, pre-trial, trial and appellate discovery,
2 pleadings, court rulings, and numerous communications Petitioner had with
3 Benjamin Lechman to prepare and file this protective petition before the
4 November 11, 2025, AEDPA deadline.

5 d. See Declarations of Petitioner's attorney, John D. Kirby, Esq., and Petitioner,
6 Jonthan Montana.

7 29. There is no indication whatsoever of intentionally dilatory tactics on
8 Petitioner's part. See *Rhines*, 544 U.S. at 278 (third prong of stay analysis
9 requires absence of intentional delay).
10

11 **D. Narrowly Tailored Stay Terms**

12 30. To ensure the efficient administration of justice and compliance with
13 *Rhines'* admonition that stays include reasonable time limits, Petitioner
14 proposes the following narrowly tailored terms:
15

16 a. Petitioner shall file a state habeas corpus petition in the Santa Clara County
17 Superior Court within 30 days of the date of the stay order;

18 b. Petitioner shall file status reports with this Court every 90 days, and within 30
19 days of each state court disposition (whether by the superior court, court of
20 appeal, or California Supreme Court);

21 c. Petitioner shall move to lift the stay and lodge a proposed amended federal
22 petition within 30 days of final disposition by the California state courts.
23

24 31. These proposed deadlines ensure that the stay will be of limited duration
25 and subject to continuing oversight by this Court, consistent with the
26 requirements of *Rhines*. 544 U.S. at 277–78.

27 //

28 //

IV.

CONCLUSION

32. Petitioner has demonstrated good cause for his failure to exhaust state court remedies, arising from abandonment and nonperformance by prior post-conviction counsel. The unexhausted IATC claims set forth in Grounds 1–8 of the Petition are potentially meritorious and require extra-record development available only in state habeas corpus proceedings. Petitioner has acted diligently and there is no indication of intentionally dilatory tactics.

33. All three criteria set forth in *Rhines v. Weber* are satisfied.

34. Petitioner respectfully requests that this Court grant a stay-and-abeyance order on the terms proposed herein, allowing Petitioner to exhaust his state court remedies while preserving his federal habeas corpus rights.

Respectfully Submitted,

Dated: 11/10/2025

/s/ Gail Shifman
Gail Shifman, Esq.
Attorney for Petitioner
Jonathon Montana

Dated: 11/10/2025

/s/ John D. Kirby
John D. Kirby, Esq.
Attorney for Petitioner
Jonathon Montana