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

10 JONATHAN MONTANA, ) Case No. 25-cv-09717-TLT  
11 Petitioner, )  
12 vs. ) **PETITIONER'S REPLY IN**  
13 ) **SUPPORT OF MOTION FOR**  
14 ) **STAY AND ABEYANCE UNDER**  
15 ) **RHINES V. WEBER**  
16 )  
17 JEFF MACOMBER, Secretary of the )  
18 California Department of Corrections )  
19 and Rehabilitation, )  
20 Respondent, )  
21 \_\_\_\_\_

22 **I. INTRODUCTION**

23 Respondent's Opposition fundamentally misapprehends both the legal  
24 standard governing *Rhines* stays and the factual record before this Court.  
25 Respondent demands a showing of counsel "abandonment" in some formalistic  
26 sense, contends that courtesy equals competence, and faults Petitioner for a two-  
27 month post-filing delay without acknowledging the legitimate investigative  
28 obstacles—Conflict schedules of previous attorneys in order to obtain  
29 investigative reports, declarations, the transcripts of prior proceedings and  
30 particularly the unavailability of a critical SART medical expert located in

1 Africa—that necessitated that brief interval. Dr. Tappan was originally retained  
2 by Petitioner, although prior counsel did not call him to testify at trial, and is  
3 familiar with the facts and circumstances of the case.  
4

5 These facts establish good cause under *Rhines v. Weber*, 544 U.S. 269  
6 (2005), and Ninth Circuit authority construing it:  
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8 **First**, prior habeas counsel Benjamin P. Lechman was retained on October  
9 23, 2024, specifically to pursue state and federal post-conviction relief, yet  
10 performed no investigation, produced no work product, filed no petitions, and  
11 repeatedly postponed substantive case discussions over a ten-month period  
12 before admitting—just three months before the AEDPA deadline—that he could  
13 not handle the matter. See previously filed exhibits: Retainer Agreement  
14 (Exhibit A<sup>1</sup>);  
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16 Communications Chronology (Exhibit C); Text Messages & Email (Exhibits D-  
17 E).  
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22 This constructive failure to perform constitutes good cause under *Blake v.*  
23 *Baker*, 745 F.3d 977 (9th Cir. 2014), and *Doerr v. Shinn*, 127 F.4th 1162 (9th  
24 Cir. 2025).  
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30 <sup>1</sup> The referenced Exhibits and Declarations were previously filed with the Motion to Stay, 11/12/2025, Docket Entry 2.

1           **Second**, Petitioner acted with diligence: he retained substitute counsel  
2 John D. Kirby immediately upon Lechman's withdrawal (August 5, 2025),  
3 caused this protective federal petition to be timely filed (November 12, 2025),  
4 and is filing the corresponding state habeas petition this (January 2026)  
5 following resolution of the SART expert's availability. See Declaration of John  
6 D. Kirby ¶¶ 3, 6 (Exhibit H to Motion to Stay.); Supplemental Declaration of  
7 John D. Kirby ¶¶ 2–4 (filed concurrently herewith) ("Supp. Kirby Decl.").

8           **Third**, Respondent's reliance on *Banks v. Allison*, 140 F.4th 1181 (9th  
9 Cir. 2025), is misplaced. *Banks* involved a petitioner who waited **years** after  
10 filing his federal petition without pursuing state exhaustion and offered only  
11 generalized excuses. Here, the brief post-filing interval is explained by concrete,  
12 documented obstacles, and the state petition is being filed within a week of this  
13 Reply—rendering any prejudice or finality concern moot.

14           The *Rhines* factors are satisfied. Denial of the stay would result in  
15 procedural default of potentially meritorious ineffective assistance of trial  
16 counsel (IATC) claims that require extra-record development available only in  
17 state court, thereby frustrating AEDPA's exhaustion-comity balance without  
18 advancing any legitimate finality interest.

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28 **II. ARGUMENT**

29 **A. Good Cause Exists Under *Rhines* and Ninth Circuit Authority**

30 **1. Good Cause Does Not Require Literal Abandonment**

1 Respondent insists the exhibits "show no abandonment" because Mr.  
2 Lechman "was always courteous and responsive." Gov Opp at 4. This conflates  
3 form with substance. "Good cause" under *Rhines* requires "a reasonable excuse,  
4 supported by sufficient evidence," for failing to exhaust state remedies. *Blake*,  
5 745 F.3d at 982. It does not demand proof that counsel vanished or refused  
6 communication.  
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9  
10 The Ninth Circuit has held that ineffective assistance or constructive  
11 failure by post-conviction counsel satisfies this standard. In *Blake*, the court  
12 reversed denial of a *Rhines* stay where post-conviction counsel failed to conduct  
13 extra-record investigation despite being retained and ostensibly working on the  
14 case. *Id.* at 983–85. The court reasoned that "good cause under *Rhines*, when  
15 based on [ineffective assistance of counsel], cannot be any more demanding than  
16 a showing of cause under *Martinez* [*v. Ryan*, 566 U.S. 1 (2012)] to excuse state  
17 procedural default." *Id.* at 983–84.  
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22 Similarly, in *Doerr*, the Ninth Circuit held that "failure to present his  
23 ineffective assistance at sentencing claim in state court was due to the ignorance  
24 or inadvertence of his original state postconviction counsel. That is sufficient to  
25 constitute good cause under *Rhines*." 127 F.4th at 1174–75. *Doerr* did not  
26 require showing that counsel disappeared—only that counsel's performance fell  
27 below the standard necessary to present the claims.  
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1 The good cause inquiry focuses on whether the petitioner had a  
2 reasonable opportunity to exhaust, not whether counsel answered emails  
3 promptly and was courteous. See *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th  
4 Cir. 2008). Respondent's "courtesy" argument does not support diligent or  
5 competent legal assistance.  
6  
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## 8 **2. The Record Establishes Prior Counsel's Constructive Failure**

9 The undisputed record demonstrates Lechman performed no substantive  
10 work during ten critical months:  
11

- 12 • **Retention and Promises:** Lechman was retained October 23, 2024,  
13 specifically to pursue state and federal habeas relief. Exhibit A. He  
14 repeatedly assured Petitioner work would commence. Exhibits C-E.
- 15 • **Serial Postponements:** From October 2024 through July 2025, Lechman  
16 postponed or missed scheduled conferences, citing trial commitments.  
17 Exhibit. C at 1–3; Exhibit D. On June 12, 2025, he "promise[d] Montana  
18 that he will devote the summer to Montana's case." Exhibit C at 2. That  
19 promise was not kept.
- 20 • **No Work Product:** Respondent identifies no actual work product  
21 produced for Petitioner's benefit—no investigative reports, expert  
22 consultations, draft petitions, or substantive legal memoranda. Montana  
23 Decl., Dkt. 1 ¶ 5 ("No state habeas petition was filed on my behalf, and, to  
24 my knowledge, Mr. Lechman conducted no investigation of my IATC  
25 claims.").
- 26 • **Admission of Inability:** On August 1, 2025—just over three months  
27 before the November 11, 2025 AEDPA deadline—Lechman admitted he  
28 was "too busy" to devote time to Montana's case, suggested refunding the  
29 retainer, and referred Petitioner to substitute counsel. Exhibit C at 3;  
30 Exhibit. 4. This left Petitioner with inadequate time to retain new counsel,  
conduct necessary investigation, and exhaust state remedies.

Respondent's generalized allegations that Lechman "performed work" are  
unsupported by billing records, work product, or specificity. Under *Blake* and

1 *Doerr*, the relevant question is whether counsel presented claims to state court.

2 He did not.

3  
4 Petitioner concluded his communication with Lechman with the  
5 following text message: 8.01.2025 – at 6:19 pm – Montana sends BL a message  
6 stating, it seems like your case loads are too much to handle my case needs. I  
7 retained you almost a year ago and have done nothing – now you're telling me  
8 you won't make the most critical deadline – this is completely unfair.  
9

10 Montana requests a full refund from Bl; Exhibit C at 3; Exhibit D.

11  
12 **3. Post-Filing Delay Is Explained and Resolved**

13 Respondent asserts Petitioner "has still not initiated state habeas  
14 proceedings." Gov Opp at 5. This fails for three reasons.  
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16 First, as of this Reply's filing, the state habeas petition is being filed  
17 within a week in Santa Clara County Superior Court. Supp. Kirby Decl. ¶ 2.  
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19 Respondent's temporal objection is moot.

20  
21 Second, the interval between the November 12, 2025 federal filing and  
22 January 2026 state filing is explained by concrete investigative obstacles: the  
23 unavailability of a critical SART/forensic medical expert traveling in Africa.  
24

25 Supp. Kirby Decl. ¶ 3. Ground One of Petitioner's IATC claims—failure to  
26 retain and present a SART expert—requires an expert declaration addressing  
27 deficiencies in the State's SART nurse testimony. This expert is currently  
28 unavailable for consultation until late January 2026 due to his location and  
29  
30

1 professional commitments. *Id.* His declaration is essential to Ground One's  
2 factual foundation.

3  
4 Prior and current counsel also had obligations in other pending matters  
5 during November–December 2025; January 2026. Supp. Kirby Decl. ¶ 4. These  
6  
7 are ordinary realities of criminal defense practice, not dilatory tactics. Cf.  
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9 *Rhines*, 544 U.S. at 278 (stay inappropriate only where petitioner "engages in  
10 abusive litigation tactics or intentional delay").

11 Third, Respondent identifies no prejudice from this two-month interval.  
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13 The AEDPA limitations period was tolled by the timely federal filing. State  
14 courts retain full jurisdiction. No party's interest in finality or comity is  
15  
16 compromised by ensuring the state petition is supported by necessary expert  
17  
18 declarations. Presenting a fully developed state petition advances comity by  
19  
20 giving state courts a complete record—precisely what *Rhines* and *Rose v. Lundy*,  
21 455 U.S. 509 (1982), contemplate.

22 The good cause showing is threefold: (1) retained post-conviction  
23  
24 counsel's constructive failure over ten months; (2) inadequate time for substitute  
25  
26 counsel to complete investigation before the AEDPA deadline; and (3)  
27  
28 legitimate investigative needs explaining the brief post-filing interval. This  
29  
30 satisfies *Blake* and *Doerr*.

**B. *Banks v. Allison* Is Distinguishable**

1 Respondent invokes “*Banks v. Allison*, 140 F.4th 1181, 1187 (9<sup>th</sup> Cir.  
 2 2025)”, arguing the Court must consider post-filing diligence. Gov Opp at 5.  
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 4 *Banks* is factually distinguishable.

5 In *Banks*, the petitioner filed a federal petition in 2016, obtained a stay in  
 6  
 7 2017, then waited until 2021—nearly four years—to file a state petition,  
 8 offering only vague explanations. 140 F.4th at 1185–86. The Ninth Circuit  
 9  
 10 upheld lifting the stay, emphasizing failure to diligently pursue state court  
 11 remedies over years and absence of concrete explanation. *Id.* at 1187.

12 Here, by contrast:

- 13 • **Duration:** Two months, not four years.
- 14 • **Concrete Explanation:** Documented need to secure a declaration from a
- 15 SART expert in Africa, whose availability was delayed by geography and
- 16 professional commitments. Supp. Kirby Decl. ¶ 3. This is specific,
- 17 evidence-supported, and tied directly to Ground One's merits.
- 18 • **Active Diligence:** Petitioner retained substitute counsel immediately upon
- 19 prior counsel's withdrawal (August 5, 2025), filed a protective federal
- 20 petition before the AEDPA deadline (November 12, 2025), and is filing
- 21 the state petition within a week of this filing, (January 2026). Supp. Kirby
- 22 Decl. ¶¶ 2–4. This demonstrates continuous forward momentum.

23 *Banks* does not hold that a two-month interval explained by expert  
 24 unavailability and resolved by imminent state filing defeats good cause. The  
 25 timeline reflects diligence at every stage:

Date	Event	Showing of Diligence
Aug. 14, 2024	California Supreme Court denies review; AEDPA clock begins	Petitioner already in contact with Lechman regarding post-conviction relief. Ex. 3.

Date	Event	Showing of Diligence
Oct. 23, 2024	Petitioner retains Lechman	Formal retention within two months of finality; 12+ months before AEDPA deadline. Ex. 1.
Oct. 2024– Aug. 2025	Petitioner repeatedly contacts Lechman, provides materials	Documented efforts via texts and emails. Exs. 3–5.
Aug. 1, 2025	Lechman admits inability to proceed	~3 months before AEDPA deadline. Ex. 3.
Aug. 5, 2025	Petitioner retains substitute counsel Kirby	Immediate action upon Lechman's withdrawal. Ex. 2.
Nov. 12, 2025	Federal petition filed	Timely protective filing preserves jurisdiction. Dkt. 1.
Jan. 2026	State habeas petition filed (within a week)	Filed promptly upon resolution of expert availability. Supp. Kirby Decl. ¶ 2.

This demonstrates continuous, reasonable diligence. *Banks* requires reasonableness, not perfection.

**C. The Unexhausted Claims Are Potentially Meritorious**

Respondent does not dispute that Petitioner's unexhausted IATC claims satisfy the "potentially meritorious" prong. The Motion detailed eight grounds requiring extra-record development:

1. Failure to retain SART expert (central forensic evidence);
2. Failure to investigate prior false accusation (direct credibility impeachment);
3. Failure to impeach with available evidence (multiple lines of cross-examination);
4. Failure to secure complete surveillance video (authentication and context);
5. Failure to present admissible capacity evidence (evidentiary rulings);
6. Failure to forensically analyze phone/text evidence (cognitive function);
7. Failure to investigate detective–juror contact (*Remmer v. United States*, 347 U.S. 227 (1954), concerns);

1 8. Cumulative error (fundamental fairness under *Parle v. Runnels*, 505 F.3d  
2 922, 927 (9th Cir. 2007)).

3 Each claim requires extra-record development—expert declarations,  
4 investigative reports, witness statements—available only through state habeas  
5 proceedings. *Blake*, 745 F.3d at 984. Under *Strickland v. Washington*, 466 U.S.  
6 668 (1984), Petitioner must show deficient performance and prejudice. The  
7 factual showing necessary cannot be made on the trial record alone where  
8 deficiencies involve omissions.  
9  
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11 Respondent's silence on this prong is tantamount to concession. The  
12 claims are "not plainly meritless." *Rhines*, 544 U.S. at 277.  
13

14 **D. No Intentional Delay or Dilatory Tactics Exist**

15 Respondent does not argue that Petitioner engaged in "abusive litigation  
16 tactics or intentional delay." *Rhines*, 544 U.S. at 278. The record demonstrates  
17 the opposite: persistent efforts to spur prior counsel over ten months, immediate  
18 retention of substitute counsel, protective federal filing before the deadline, and  
19 resolution of post-filing interval by filing the state petition this week.  
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22 Respondent's argument reduces to: Petitioner should have filed an  
23 incomplete state petition in November 2025 rather than waiting two months to  
24 secure essential expert declarations. But filing a deficient state petition risks  
25 summary denial and procedural default. *Rhines* does not compel petitioners to  
26 choose between haste and competence.  
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1 Petitioner is not a capital defendant seeking to delay execution. Cf.  
2 *Rhines*, 544 U.S. at 277–78. Petitioner seeks only a brief stay to complete  
3 exhaustion that prior counsel's failure made impossible within the AEDPA  
4 window—precisely the scenario *Rhines* contemplated.  
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7 **E. Denial Would Frustrate AEDPA's Purposes**

8 *Rhines* recognized that AEDPA's twin purposes—finality and exhaustion-  
9 comity—must be balanced. 544 U.S. at 277. Denying a stay here frustrates both:  
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11 First, forcing Petitioner to dismiss unexhausted claims or suffer  
12 procedural default undermines exhaustion's rationale: "allowing the State an  
13 initial opportunity to pass upon and correct alleged violations of prisoners'  
14 federal rights." *Id.* at 273. Denying a stay deprives California courts of that  
15 opportunity.  
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18 Second, Respondent identifies no prejudice. The state petition is being  
19 filed within a week. Petitioner proposes narrow time limits ensuring expeditious  
20 resolution. Mot. at 12–13. The stay will not "drag out indefinitely" federal  
21 review. *Rhines*, 544 U.S. at 278.  
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24 Third, the alternative—dismissal without prejudice under *Lundy*—is  
25 impractical. Where the AEDPA limitations period has expired, dismissal  
26 without prejudice is effectively dismissal with prejudice. *Duncan v. Walker*, 533  
27 U.S. 167, 181–84 (2001). Petitioner would be barred from federal review of  
28 substantial constitutional claims through no fault of his own.  
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1 This cannot be reconciled with *Rhines*' instruction that "it likely would be  
2 an abuse of discretion for a district court to deny a stay and to dismiss a mixed  
3 petition if the petitioner had good cause for his failure to exhaust, his  
4 unexhausted claims are potentially meritorious, and there is no indication that  
5 the petitioner engaged in intentionally dilatory litigation tactics." 544 U.S. at  
6 278. All three conditions are met.  
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10 **III. CONCLUSION**

11 The undisputed facts establish: (1) good cause—prior counsel's ten-month  
12 constructive failure, followed by substitute counsel's diligent but necessarily  
13 brief investigation constrained by expert availability; (2) potential merit—eight  
14 detailed IATC claims requiring extra-record development; and (3) no intentional  
15 delay—continuous diligence, timely protective filing, and imminent state filing  
16 following resolution of legitimate investigative obstacles.  
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20 Granting the stay advances AEDPA's exhaustion-comity purposes,  
21 prejudices no party, and avoids unjust procedural default. Denying the stay  
22 would contravene *Rhines* and Ninth Circuit precedent.  
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24 Petitioner respectfully requests that this Court grant the Motion for Stay  
25 and Abeyance.  
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Respectfully Submitted,

Dated: 2/06/2025

/s/ John D. Kirby  
John D. Kirby, Esq.  
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Jonathon Montana