-CAB Estrada v. Neotti Doc. 9

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF CALIFORNIA 10 11 JOEY MANUEL ESTRADA, Civil No. 10cv2014-DMS (CAB) 12 Petitioner. ORDER SETTING BRIEFING 13 v. SCHEDULE ON MOTION FOR STAY AND ABEYANCE GEORGE NEOTTI, Warden, 14 Respondent. 15 16 Petitioner is a state prisoner proceeding pro se and in forma pauperis with a Petition for 17 a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. On October 29, 2010, Petitioner 18 filed a Motion for Stay and Abeyance. Petitioner requests this Court to stay his Petition until 19 after the state supreme court has issued a ruling on unexhausted claims presented to that court 20 in a state habeas petition filed on September 28, 2010. Although it appears the claims presented 21 to the state court involve allegations of ineffective assistance of counsel, Petitioner does not 22 articulate the claims with any specificity. 23 The Court will notify Petitioner of the requirements for demonstrating that the stay and 24 abeyance procedure is appropriate in this case. Petitioner shall file a brief in support of the 25 Motion for stay and abeyance addressing these requirements no later than **December 6, 2010**. 26 Respondent shall file a response to the Motion for stay and abeyance no later than **December** 27 27, 2010. Petitioner shall file his reply, if any, to the Respondent's brief no later than January

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District Courts have limited discretion to hold in abeyance a mixed habeas petition, that is, one containing both exhausted and unexhausted claims, in order to permit a petitioner to return to state court to exhaust additional claims while the federal proceedings are stayed. Rhines, 125 S.Ct. at 1534-35. The Rhines Court held that "a stay and abeyance 'should be available only in limited circumstances,' and is appropriate only when the district court determines that there was 'good cause' for the failure to exhaust." Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005) (quoting Rhines, 125 S.Ct. at 1535). The Court in Jackson noted that the Rhines holding applies to stays of mixed petitions, but that Rhines did not comment on the validity of the withdraw and and abeyance procedure approved of in Calderon v. United States District Court (Taylor), 134 F.3d 981 (9th Cir. 1998) and Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), where unexhausted claims are withdrawn from a mixed petition and the resultant fully-exhausted petition is held in abeyance while petitioner returns to state court to exhaust the unexhausted claims. Jackson, 425 F.3d at 661. Because Jackson involved a mixed petition, the Court held that Rhines directly controlled, and "left for another day the question of whether the stay standard announced by the Supreme Court in Rhines applies to our three-step stay-and-abeyance procedure." Id. Irrespective of whether Petitioner's motion for stay is subject to the restrictions placed

In Rhines v. Weber 544 U.S. 269, 125 S.Ct. 1528 (2005) the Supreme Court held that

Irrespective of whether Petitioner's motion for stay is subject to the restrictions placed on this Court's discretion to issue a stay as set forth in Rhines, or is subject to the Ninth Circuit's withdraw and abeyance procedure, Petitioner must satisfy the criteria for issuance of a stay. Under either procedure he must demonstrate there are arguably meritorious claims which he wishes to return to state court to exhaust and that he is diligently pursuing his state court remedies with respect to those claims. Jackson, 425 F.3d at 661; Anthony v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000); Taylor, 134 F.3d at 987; see also Kelly, 315 F.3d at 1070. Petitioner shall address these concerns in his brief in support of his Motion. In addition, Petitioner should set forth facts in an attempt to demonstrate good cause for his failure to timely exhaust the state court remedies with respect to his unexhausted claims.

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CONCLUSION AND ORDER

IT IS ORDERED that Petitioner shall file a brief in support of his Motion for stay and abeyance no later than <u>December 6, 2010</u>, Respondent shall file a response to the Motion for stay and abeyance no later than <u>December 27, 2010</u>, and Petitioner shall file his reply, if any, to the Respondent's brief no later than <u>January 10, 2011</u>.

IT IS SO ORDERED.

DATED: November 2, 2010

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CATHY ANN BENCIVENGO United States Magistrate Judge

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