

1 In Rhines v. Weber 544 U.S. 269, 125 S.Ct. 1528 (2005) the Supreme Court held that
2 District Courts have limited discretion to hold in abeyance a mixed habeas petition, that is, one
3 containing both exhausted and unexhausted claims, in order to permit a petitioner to return to
4 state court to exhaust additional claims while the federal proceedings are stayed. Rhines, 125
5 S.Ct. at 1534-35. The Rhines Court held that “a stay and abeyance ‘should be available only in
6 limited circumstances,’ and is appropriate only when the district court determines that there was
7 ‘good cause’ for the failure to exhaust.” Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005)
8 (quoting Rhines, 125 S.Ct. at 1535). The Court in Jackson noted that the Rhines holding applies
9 to stays of mixed petitions, but that Rhines did not comment on the validity of the withdraw and
10 and abeyance procedure approved of in Calderon v. United States District Court (Taylor), 134
11 F.3d 981 (9th Cir. 1998) and Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), where unexhausted
12 claims are withdrawn from a mixed petition and the resultant fully-exhausted petition is held in
13 abeyance while petitioner returns to state court to exhaust the unexhausted claims. Jackson, 425
14 F.3d at 661. Because Jackson involved a mixed petition, the Court held that Rhines directly
15 controlled, and “left for another day the question of whether the stay standard announced by the
16 Supreme Court in Rhines applies to our three-step stay-and-abeyance procedure.” Id.

17 Irrespective of whether Petitioner’s motion for stay is subject to the restrictions placed
18 on this Court’s discretion to issue a stay as set forth in Rhines, or is subject to the Ninth Circuit’s
19 withdraw and abeyance procedure, Petitioner must satisfy the criteria for issuance of a stay.
20 Under either procedure **he must demonstrate there are arguably meritorious claims which**
21 **he wishes to return to state court to exhaust and that he is diligently pursuing his state**
22 **court remedies with respect to those claims.** Jackson, 425 F.3d at 661; Anthony v. Cambra,
23 236 F.3d 568, 575 (9th Cir. 2000); Taylor, 134 F.3d at 987; see also Kelly, 315 F.3d at 1070.
24 Petitioner shall address these concerns in his brief in support of his Motion. In addition,
25 Petitioner should set forth facts in an attempt to demonstrate good cause for his failure to timely
26 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 **December 6, 2010**, Respondent shall file a response to the Motion for stay and abeyance no later than **December 27, 2010**, and Petitioner shall file his reply, if any, to the Respondent’s brief no later than **January 10, 2011**.

IT IS SO ORDERED.

DATED: November 2, 2010



CATHY ANN BENCIVENGO
United States Magistrate Judge