



1 exhausted, the motion for stay was denied as moot and petitioner was further advised that if there  
2 were additional claims he was seeking to exhaust in state court, he would need to file another  
3 motion for stay. Id. at 2-3. He was then given an opportunity to file an amended petition and/or a  
4 motion for stay (id. at 3-4), and proceeded to request two extensions of time (ECF Nos. 12, 15),  
5 which were granted (ECF Nos. 14, 16).

6 In requesting his second extension of time, petitioner stated that the extension was sought,  
7 in part, to allow him “to continue to review existing grounds, exhaust them for relief that  
8 petitioner is pursuing.” ECF No. 15 at 2. Petitioner was advised that the court would not extend  
9 his deadline for filing an amended petition to allow him to exhaust additional claims and  
10 construed the motion as a request for additional time to file a motion for stay. ECF No. 16 at 2.  
11 The motion was granted and petitioner was reminded of the criteria for requesting a stay under  
12 both Rhines v. Weber, 544 U.S. 269 (2005), and Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003).  
13 Id. at 2-3. He was also reminded that if he failed to file an amended petition, the case would  
14 proceed on the first amended petition. Id. at 3.

## 15 II. Motion to Stay

16 Petitioner has now filed a motion to stay, requesting that the case be stayed to allow him  
17 to “exhaust” an exhibit. ECF No. 18 at 2. Specifically, petitioner seeks to present the state courts  
18 with a declaration from Jerilyn Lewis in support of his previously-exhausted claim for witness  
19 intimidation. Id. The Lewis declaration has not been submitted in support of petitioner’s motion,  
20 but from petitioner’s description it appears that the declaration is intended to corroborate  
21 allegations that have been previously exhausted in state court. See ECF No. 3 at 61-62, 143.

22 In general, the exhaustion requirement applies to claims, and not to individual items of  
23 evidence. Correll v. Stewart, 137 F.3d 1404, 1414 n.2 (9th Cir.) (rejecting theory that claim  
24 exhaustion requires complete presentation of evidence in state court, and stating that “ ‘claim  
25 exhaustion’ does not equate to ‘evidence exhaustion’ ”), cert. denied, 525 U.S. 996 (1998); see  
26 also Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008) (exhaustion does not require that  
27 petitioner present every piece of evidence to state court) (quoting Chacon v. Wood, 36 F.3d 1459,  
28 1469 (9th Cir. 1994)). The presentation of supplemental evidence does not change the exhaustion

1 status of a claim previously presented to state court unless that evidence “fundamentally alters”  
2 the claim. Vasquez v. Hillery, 474 U.S. 254, 260 (1986). This may be the case where, for  
3 example, new evidence places the case “in a significantly different and stronger evidentiary  
4 posture that it was when the state courts considered it.” Aiken v. Spalding, 841 F.2d 881, 883  
5 (9th Cir. 1988) (quoting Dispensa v. Lynaugh, 826 F.2d 375, 377 (5th Cir. 1987)).

6 Petitioner has not established grounds for a stay. Not only has he failed to establish his  
7 entitlement to a stay under Rhines or Kelly, he has not demonstrated that further exhaustion is  
8 necessary. It will therefore be recommended that the motion to stay be denied. Petitioner is  
9 reminded that he does not require and should not wait for an order from this court to file things in  
10 state court that he believes he must present to the state court.

### 11 III. Motion to Appoint Counsel

12 Petitioner has requested the appointment of counsel. ECF No. 19. There currently exists  
13 no absolute right to appointment of counsel in habeas proceedings. Nevius v. Sumner, 105 F.3d  
14 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A(a)(2) authorizes the appointment of  
15 counsel at any stage of the case if “the interests of justice so require.” In the present case, the  
16 court does not find that the interests of justice would be served by the appointment of counsel at  
17 the present time and the request will be denied.

### 18 IV. First Amended Petition

19 Since petitioner did not file an amended petition by the deadline previously set, the case  
20 will proceed on the first amended petition. The first amended petition challenges petitioner’s  
21 2010 conviction for murder with a firearm enhancement on two grounds. ECF No. 3. In Ground  
22 One, petitioner asserts that he was denied an impartial jury. Id. at 6-7. Ground Two claims that  
23 his due process rights were violated by the prosecutor’s prejudicial misconduct. Id. at 60-62,  
24 108-17. Since petitioner may be entitled to relief if the claimed violation of constitutional rights  
25 is proved, respondent will be directed to file a response to petitioner’s first amended habeas  
26 petition.

27 Accordingly, IT IS HEREBY ORDERED that:

- 28 1. Petitioner’s motion to proceed in forma pauperis (ECF No. 7) is granted;

- 1           2. Petitioner’s motion to appoint counsel (ECF No. 19) is denied;
- 2           3. Respondent is directed to file a response to petitioner’s first amended habeas petition
- 3 (ECF No. 3) within sixty days from the date of this order. See Rule 4, 28 U.S.C. foll. § 2254. An
- 4 answer shall be accompanied by all transcripts and other documents relevant to the issues
- 5 presented in the petition. See Rule 5, 28 U.S.C. foll. § 2254;
- 6           4. If the response to the habeas petition is an answer, petitioner’s reply, if any, shall be
- 7 filed and served within thirty days after service of the answer;
- 8           5. If the response to the habeas petition is a motion, petitioner’s opposition or statement
- 9 of non-opposition to the motion shall be filed and served within thirty days after service of the
- 10 motion, and respondent’s reply, if any, shall be filed and served within fourteen days thereafter;
- 11 and
- 12           6. The Clerk of the Court shall serve a copy of this order, the form Consent to Proceed
- 13 Before a United States Magistrate Judge, and a copy of the first amended petition for writ of
- 14 habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 3) on Tami Krenzin, Supervising Deputy
- 15 Attorney General.

16           IT IS FURTHER RECOMMENDED that petitioner’s motion for stay (ECF No. 18)

17 be denied.

18           These findings and recommendations are submitted to the United States District Judge

19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

20 after being served with these findings and recommendations, petitioner may file written


21 objections with the court. Such a document should be captioned “Objections to Magistrate

22 Judge’s Findings and Recommendations.” Petitioner is advised that failure to file objections

23 within the specified time may waive the right to appeal the District Court’s order. Martinez v.

24 Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 DATED: April 10, 2019

26   
27 ALLISON CLAIRE  
28 UNITED STATES MAGISTRATE JUDGE