

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. FARLEY,
Petitioner,
v.
RON DAVIS,
Respondent.

Case No. 16-cv-04443-PJH

DEATH PENALTY CASE

ORDER GRANTING MOTION TO STAY

Re: Dkt. No. 61

Farley has filed a motion to stay the current proceeding pursuant to *King v. Ryan*, 564 F.3d 1133, 1141-42 (9th Cir. 2009), and *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), so that he may return to state court to exhaust his unexhausted claims. Davis has filed a statement of non-opposition.

Under the procedure outlined in *Kelly*, “(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted petition, allowing the petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his petition and re-attaches the newly-exhausted claims to the original petition.” *King*, 564 F.3d at 1134 (citing *Kelly*, 315 F.3d at 1070–71). Farley is not required to show good cause as under *Rhines*, but rather must eventually show that the amendment of any newly exhausted claims back into the petition satisfies both *Mayle v. Felix*, 545 U.S. 644, 655 (2005), by sharing a “common core of operative facts” and *Duncan v. Walker*, 533 U.S. 167 (2001), by complying with the statute of limitations. *King*, 564 F.3d at 1141–43.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

As noted by Davis in his statement of non-opposition, the Court's February 5, 2018 Order dismissing the unexhausted claims completed the first step of the process. Accordingly, Farley's motion to stay is GRANTED. The Federal Public Defender of Arizona is hereby appointed to represent Farley in his state exhaustion proceedings.

Within 90 days of the filing date of this Order, Farley shall file an exhaustion petition in state court. To the extent that any claim contains allegations or supporting documentation that were not part of the state court record, pursuant to *Cullen v. Pinholster*, 131 U.S. 1388, 1400 (2011), such materials must be presented to the California Supreme Court before they may be reviewed by this Court under 28 U.S.C § 2254(d)(1). Accordingly, they should be included in the exhaustion petition

One hundred and twenty days after the entry of this Order, and every 90 days thereafter until proceedings in his state exhaustion case are completed, Farley shall serve and file in this Court a brief report containing an update on the status of his pending state habeas action. No later than thirty (30) days after proceedings in his state case are completed, Farley shall serve and file notice that proceedings are completed.

IT IS SO ORDERED.

Dated: May 8, 2018



PHYLLIS J. HAMILTON
United States District Judge