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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ROBIN LEE BENJAMIN,

Case No. 3:16-cv-00024-MMD-VPC

Petitioner,

ORDER

v.

STATE OF NEVADA,

Respondent.

I. INTRODUCTION

In this habeas corpus action, brought *pro se* by Robin Lee Benjamin, the respondents filed a motion to dismiss on March 16, 2016 (ECF No. 8). In the motion to dismiss, respondents argue: that the respondent named by Benjamin in her petition — the State of Nevada — is not a proper respondent in this action, and that the Court, therefore, lacks personal jurisdiction; that Benjamin has not exhausted state-court remedies with respect to any of her claims; and that certain of Benjamin's claims are not cognizable in this federal habeas corpus action, because they are based on alleged violations of Benjamin's rights under state law. The parties have fully briefed the motion to dismiss. Additionally, Benjamin has filed an amended petition for writ of habeas corpus (ECF No. 17), naming additional respondents, but otherwise setting forth the same claims as in her original petition, and respondents move to strike the amended petition (ECF No. 18). The Court will deny respondents' motion to strike, and will grant respondents' motion to dismiss in part and deny it in part. The Court will dismiss

1 Benjamin's claims based on alleged state constitutional violations. The Court will grant
2 Benjamin an opportunity to make an election with respect to her unexhausted claims.

3 **II. BACKGROUND**

4 On March 24, 2010, Benjamin was charged in an indictment, in Nevada's Second
5 Judicial District Court, with the crime of exploitation of an older or vulnerable person.
6 See Indictment, Exh. 4 (ECF No. 9-4) (The exhibits cited in this order were filed by
7 respondents and are located in the record at ECF Nos. 9 through 14.). Benjamin was
8 arraigned on April 29, 2010, and she pled not guilty. See Reporter's Transcript, April 29,
9 2010, Exh. 14 (ECF No. 9-14). Benjamin was tried before a jury in December of 2010.
10 See Trial Transcripts, Exhs. 31, 32, 33, 34, 36, 38, 40, 43, 46, 55 (ECF Nos. 10-5, 10-6,
11 10-7, 10-8, 10-10, 10-12, 10-14, 10-17, 10-20, 11-4). The jury rendered its verdict on
12 December 16, 2010, finding Benjamin guilty. See Verdict, Exh. 57 (ECF No. 11-6).
13 Benjamin was sentenced on March 10, 2011. See Transcript of Sentencing, Exh. 63
14 (ECF No. 11-12). She was sentenced to ten years in prison, with parole eligibility after
15 two years. See *id.* at 37 (ECF No. 11-12 at 38); Judgment of Conviction, Exh. 64 (ECF
16 No. 11-13). Her sentence also includes payment of \$675.00 in fees, and \$181,864.00 in
17 restitution, the restitution to be paid jointly and severally by Benjamin and her co-
18 defendant. See Judgment of Conviction, Exh. 64 (ECF No. 11-13).

19 Benjamin appealed. See Notice of Appeal, Exh. 69 (ECF No. 11-18); Fast Track
20 Statement, Exh. 81 (ECF No. 12-5). The Nevada Supreme Court affirmed the judgment
21 of conviction on February 9, 2012. See Order of Affirmance, Exh. 89 (ECF No. 12-13).
22 The Nevada Supreme Court denied rehearing on July 31, 2012. See Order Denying
23 Rehearing, Exh. 96 (ECF No. 12-20).

24 On May 20, 2013, Benjamin filed, in the state district court, a motion for
25 modification of her sentence. See Motion for Modification of Sentence, Exh. 104 (ECF
26 No. 13-3). The state district court denied that motion on July 9, 2013. See Order
27 Denying Motion for Modification of Sentence, Exh. 109 (ECF No. 13-8).

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1 On August 16, 2013, Benjamin filed, in the state district court, a petition for writ of
2 habeas corpus. See Petition for Writ of Habeas Corpus, Exh. 110 (ECF No. 13-9). The
3 state district court appointed counsel to represent Benjamin in that action. See Order
4 Granting Motion, Exh. 116 (ECF No. 13-15); Recommendation and Order for
5 Appointment of Counsel, Exh. 117 (ECF No. 13-16). With counsel, Benjamin elected not
6 to supplement her petition. See Notice to Court of No Supplement, Exh. 119 (ECF No.
7 13-18). The state district court held an evidentiary hearing on May 27, 2015. See
8 Transcript of Proceedings, May 27, 2015, Exh. 133 (ECF No. 14-7). On June 4, 2015,
9 the state district court entered a written order, denying Benjamin's state habeas petition.
10 See Findings of Fact, Conclusions of Law and Judgment Denying Petition, Exh. 135
11 (ECF No. 14-9). Benjamin appealed. See Notice of Appeal, Exh. 136 (ECF No. 14-10);
12 Fast Track Statement, Exh. 141 (ECF No. 14-15). The Nevada Court of Appeals
13 affirmed on November 19, 2015. See Order of Affirmance, Exh. 144 (ECF No. 14-18).

14 This Court received Benjamin's federal habeas petition, initiating this action, on
15 January 21, 2016 (ECF No. 1). Benjamin's petition asserts the following fourteen
16 grounds for relief:

- 17 1. Benjamin's state and federal constitutional rights were violated
18 because she was unable to hear trial proceedings and, therefore, unable
19 to participate in her defense. Petition for Writ of Habeas Corpus (ECF No.
20 1 at 5.)
- 21 2. Benjamin's state and federal constitutional rights were violated, as
22 a result of ineffective assistance of counsel, because her trial counsel
23 failed to ensure that she could adequately hear the trial proceedings. (*Id.*
24 at 6.)
- 25 3. Benjamin's state and federal constitutional rights were violated, as a
26 result of ineffective assistance of counsel, because her trial counsel failed
27 to call available character witnesses on her behalf, and failed to put on a
28 character defense. (*Id.* at 8.)
4. Benjamin's state and federal constitutional rights were violated, as
a result of ineffective assistance of counsel, because her trial counsel
failed to object to or supplement the incomplete jury instructions regarding
conspiracy and/or aiding and abetting. (*Id.* at 10.)
5. Benjamin's state and federal constitutional rights were violated
because the trial court failed to instruct the jury that there was no criminal
aiding and abetting if the actions at issue were not criminal. (*Id.* at 11.)

1 6. Benjamin's state and federal constitutional rights were violated, as
2 a result of ineffective assistance of counsel, because her trial counsel
3 failed to object on relevance grounds to the repeated admission of
evidence related to the victim's state of mind when she executed a power
of attorney. (*Id.* at 12.)

4 7. Benjamin's state and federal constitutional rights were violated
5 because of the State's tampering with and/or coaching of witnesses, and
6 the trial court's failure to adequately investigate or order a remedy. (*Id.* at
14.)

7 8. Benjamin's state and federal constitutional rights were violated, as
8 a result of ineffective assistance of counsel, because her trial counsel
9 failed to properly follow through with a hearing and/or a motion for a
remedy regarding the State's tampering with and/or coaching of
witnesses. (*Id.* at 16.)

10 9. Benjamin's federal constitutional rights were violated because the
11 trial court was biased and/or displayed bias against Benjamin and/or her
counsel. (*Id.* at 18.)

12 10. Benjamin's federal constitutional rights were violated because of
repeated acts of prosecutorial misconduct. (*Id.* at 19.)

13 11. Benjamin's state and federal constitutional rights were violated
14 because of prosecutorial misconduct in misstating the law as to juror
unanimity, and because of ineffective assistance of her counsel in failing
to object. (*Id.* at 21.)

15 12. Benjamin's federal constitutional rights were violated because her
16 sentence was imposed under the influence of passion, prejudice and/or
17 arbitrary factors. (*Id.* at 23.)

18 13. Benjamin's federal constitutional rights were violated because the
19 Nevada Supreme Court failed to conduct a fair and adequate appellate
review. (*Id.* at 24.)

20 14. Benjamin's federal constitutional rights were violated as a result of
the cumulative effect of the errors identified above. (*Id.* at 25.)

21 Respondents filed their motion to dismiss (ECF No. 8) on March 16, 2016.
22 Benjamin filed an opposition to the motion on May 12, 2016 (ECF No. 19). Respondents
23 filed a reply on May 27, 2016 (ECF No. 20).

24 Also, in response to respondents' motion to dismiss, Benjamin filed an amended
25 petition for writ of habeas corpus on May 6, 2016 (ECF No. 17). On May 9, 2016,
26 respondents filed a motion to strike the amended petition (ECF No. 18). Benjamin did
27 not respond to the motion to strike.

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1 **III. DISCUSSION**

2 **A. Benjamin's Claims Based on State Constitutional Violations**

3 Respondents argue in their motion to dismiss that Benjamin's claims in Grounds
4 1-8 and 11, are not cognizable in this federal habeas corpus action to the extent they
5 are based on alleged violations of the Nevada Constitution. See Motion to Dismiss (ECF
6 No. 8), p. 10.

7 Federal habeas corpus relief may be granted “only on the ground that [the
8 petitioner] is in custody in violation of the Constitution or laws or treaties of the United
9 States.” 28 U.S.C. § 2254(a). Claims based on alleged violations of state law are not
10 cognizable on federal habeas review. See *Estelle v. McGuire*, 502 U.S. 62, 67-68
11 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); see also *Hinman v. McCarthy*, 676
12 F.2d 343, 348-50 (9th Cir.), cert. denied, 459 U.S. 1048 (1982) (alleged violation of
13 state constitution not cognizable in federal habeas action).

14 Benjamin's claims, in Grounds 1-8 and 11, of violations of her rights under the
15 Nevada Constitution are not cognizable in this federal habeas corpus action, and will be
16 dismissed.

17 **B. Exhaustion of Claims in State Court**

18 A federal court may not grant habeas corpus relief on a claim not exhausted in
19 state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of
20 federal-state comity, and is intended to allow state courts the initial opportunity to
21 correct constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To
22 exhaust a claim, a petitioner must fairly present the claim to the highest state court, and
23 must give that court the opportunity to address and resolve it. See *Duncan v. Henry*,
24 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10
25 (1992). A claim is fairly presented to the state court if, before that court, the petitioner
26 describes the operative facts and legal theory upon which the claim is based. See
27 *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (*per curiam*); *Picard*, 404 U.S. at 275;
28 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982).

1 Respondents claim in their motion to dismiss that Benjamin has not exhausted
2 any of the grounds in her petition in state court. See Motion to Dismiss at 5-9.

3 The Court has examined the record of Benjamin's state court litigation, and finds
4 that, on her direct appeal and her appeal in her state habeas action she presented only
5 three claims.

6 On her direct appeal to the Nevada Supreme Court, Benjamin claimed that, in
7 violation of both her state-law rights and her federal constitutional rights, the State
8 presented insufficient evidence at trial to prove beyond a reasonable doubt that she
9 either conspired with or aided and abetted her co-defendant. See Fast Track Statement,
10 Exh. 81 at 30-39 (ECF No. 12-5 at 31-40). However, Benjamin does not assert any such
11 claim in this case. See list of claims asserted by Benjamin, above.

12 The one other claim that Benjamin asserted on her direct appeal was that the
13 trial court did not properly instruct the jury regarding the legal concept of "conspiracy."
14 See Fast Track Statement, Exh. 18 at 30, 40-43 (ECF No. 12-5 at 31, 41-44). However,
15 Benjamin did not, in that claim before the Nevada Supreme Court, assert any violation
16 of her federal constitutional rights. To satisfy the exhaustion requirement, a petitioner
17 must fairly present her claim to the state court, and fair presentation requires that the
18 petitioner identify the federal legal basis for her claim. See *Shumway v. Payne*, 223
19 F.3d 982, 987 (9th Cir. 2000); *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005).
20 The petitioner must alert the state court that she is asserting a federal claim; mere
21 similarity between a state-law claim and a federal-law claim is insufficient. See *Duncan*
22 *v. Henry*, 513 U.S. 364, 365-66 (1995). In making this claim regarding the jury
23 instructions, in the state supreme court, Benjamin did not exhaust any federal
24 constitutional claim that would be cognizable in this federal habeas corpus action.

25 Finally, on the appeal in her state habeas action, Benjamin asserted only one
26 claim: that her federal constitutional rights were violated, on account of ineffective
27 assistance of counsel, because her trial counsel did not ensure that she could
28 adequately hear and meaningfully participate in her trial. See Fast Track Statement,

1 Exh. 141 at 7-10 (ECF No. 14-15 at 8-11). This claim by Benjamin, on the appeal in her
2 state habeas action, served to exhaust the claim that she asserts as Ground 2 in this
3 case. See Petition for Writ of Habeas Corpus (ECF No. 1) at 6-8.

4 Other than these three claims — only one of which exhausted a claim made by
5 Benjamin in this case — there is no indication in the record of Benjamin presenting any
6 other claim regarding her conviction or sentence on appeal in state court.

7 The Court, then, determines that only one of Benjamin's claims, Ground 2, is
8 exhausted in state court. Grounds 1 and 3-14 are unexhausted.

9 The Court will require Benjamin to make an election with respect to her
10 unexhausted claims. With respect to the unexhausted claims, Benjamin must elect to do
11 one of the following: (1) file a notice stating that she wishes to abandon her
12 unexhausted claims, and proceed in this action with the litigation of her exhausted
13 claim; or (2) file a motion for a stay, under *Rhines v. Weber*, 544 U.S. 269 (2005),
14 requesting a stay of this action while she exhausts her unexhausted claims in state
15 court.

16 Benjamin is warned that, if she does not make this election, as required, within
17 the time allowed, the Court will dismiss her entire action, “without prejudice,” pursuant to
18 *Rose v. Lundy*, 455 U.S. 509 (1982). Benjamin is further warned that if this action is
19 dismissed in its entirety, nominally “without prejudice,” she may be barred by the statute
20 of limitations from ever initiating any subsequent federal habeas corpus action regarding
21 the conviction and sentence that are the subject of this case. That is because, unless
22 there is some form of tolling available to Benjamin that is not now apparent to the Court,
23 the limitations period imposed by 28 U.S.C. § 2244(d) has either already run out or will
24 likely run out before a new federal habeas action could be initiated. A federal habeas
25 corpus petition does not toll the statute of limitations relative to a subsequent federal
26 habeas action. See *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding that “an
27 application for federal habeas corpus review is not an ‘application for State post-
28 conviction or other collateral review’ within the meaning of 28 U.S.C. § 2244(d)(2)”).

1 If Benjamin elects to file a motion for a stay, she must make a showing that a
2 stay is warranted under *Rhines*. In *Rhines*, the Supreme Court circumscribed the
3 discretion of federal district courts to impose stays to facilitate habeas petitioners'
4 exhaustion of claims in state court. The *Rhines* Court stated:

5 [S]tay and abeyance should be available only in limited circumstances.
6 Because granting a stay effectively excuses a petitioner's failure to
7 present his claims first to the state courts, stay and abeyance is only
8 appropriate when the district court determines there was good cause for
9 the petitioner's failure to exhaust his claims first in state court. Moreover,
10 even if a petitioner had good cause for that failure, the district court would
11 abuse its discretion if it were to grant him a stay when his unexhausted
12 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for
13 a writ of habeas corpus may be denied on the merits, notwithstanding the
14 failure of the applicant to exhaust the remedies available in the courts of
15 the State").

11 * * *

12 [I]t likely would be an abuse of discretion for a district court to deny a stay
13 and to dismiss a mixed petition if the petitioner had good cause for his
14 failure to exhaust, his unexhausted claims are potentially meritorious, and
15 there is no indication that the petitioner engaged in intentionally dilatory
16 litigation tactics. In such circumstances, the district court should stay,
17 rather than dismiss, the mixed petition.

16 *Rhines*, 544 U.S. at 277-78. In short, in a motion for stay, Benjamin would have to show
17 (1) that there was good cause for her failure to exhaust her unexhausted claims, (2) that
18 her unexhausted claims are not plainly meritless, and (3) that she has not engaged in
19 intentionally dilatory litigation tactics.

20 **C. Benjamin's Amended Petition**

21 Respondents argue in their motion to dismiss that, in her original habeas petition
22 (ECF No. 1), Benjamin named an improper respondent, the State of Nevada. See
23 Motion to Dismiss at 5. Respondents argue that, because of this, the Court should
24 dismiss Benjamin's petition for lack of personal jurisdiction, or, in the alternative, allow
25 Benjamin to amend her petition in order to name a proper respondent. *See id.*

26 It appears that Benjamin is currently on parole. Therefore, as respondents point
27 out in their motion to dismiss, the proper respondents include Benjamin's parole officer,
28 the official in charge of the parole agency, and the state correctional agency. *See Ortiz-*

1 *Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996), citing Rule 2, Advisory
2 Committee Notes, Rules Governing Section 2254 Cases in the United States District
3 Courts ("The named respondents shall be the particular probation or parole officer
4 responsible for supervising the applicant, and the official in charge of the parole or
5 probation agency, or the state correctional agency, as appropriate."). The State of
6 Nevada is not a proper respondent.

7 Benjamin filed an amended petition for writ of habeas corpus on May 6, 2016
8 (ECF No. 17). Benjamin's amended petition names as respondents, in addition to the
9 State of Nevada: the Nevada Attorney General; the Department of Parole and
10 Probation; a parole officer; and Natalie Wood, who is the officer in charge of the
11 Department of Parole and Probation. See Amended Petition for Writ of Habeas Corpus
12 (ECF No. 17) at 1. In all other respects, Benjamin's amended petition is identical to her
13 original petition.

14 As the amended petition cures the defect concerning the named respondents,
15 and makes no other changes, the Court will deny respondents' motion to strike the
16 amended petition (ECF No. 18). This action will proceed on the amended petition. As is
17 discussed above, Benjamin's claims based on alleged state constitutional violations will
18 be dismissed, and Benjamin will be directed to make an election with regard to her
19 unexhausted claims.

20 **IV. CONCLUSION**


21 It is therefore ordered that respondents' motion to strike (ECF No. 18) is denied.

22 It is further ordered that respondents' motion to dismiss (ECF No. 8) is granted in
23 part and denied in part. Petitioner's claims, in Grounds 1-8 and 11, to the extent based
24 on alleged violations of her rights under the Nevada Constitution, are dismissed. The
25 Court finds petitioner's remaining claims in Grounds 1 and 3-14 to be unexhausted; the
26 Court will grant petitioner an opportunity to make an election with respect to those
27 claims. In all other respects, respondents' motion to dismiss is denied.

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1 It is further ordered that, with respect to Grounds 1 and 3-14, which are
2 unexhausted in state court, petitioner must, within sixty (60) days from the date of this
3 order, make an election; within that time, petitioner must do one of the following: (1) file
4 a notice stating that she wishes to abandon Grounds 1 and 3-14, and proceed with this
5 action with regard to her remaining claim in Ground 2, or (2) file a motion for a stay,
6 requesting that this case be stayed while she exhausts her unexhausted claims in state
7 court. If petitioner does not make that election within the time allowed, the Court will
8 dismiss this entire action, without prejudice, pursuant to *Rose v. Lundy*, 455 U.S. 509.

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10 DATED THIS 3rd day of October 2016.

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14 MIRANDA M. DU
15 UNITED STATES DISTRICT JUDGE
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