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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JOHN TOLE MOXLEY,

*Petitioner,*

vs.

DWIGHT NEVEN, *et al.*,

*Respondents.*

2:07-cv-01123-RLH-GWF

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court for consideration of the exhaustion issue briefed in the answer (#51) and reply (#52) as to Ground 2. In an effort to expedite a final resolution of the case, the Court directed respondents to present any remaining procedural defenses in the answer together with their response on the merits. #50.

***Background***

Petitioner John Tole Moxley seeks to set aside his 2004 Nevada state conviction, pursuant to a jury verdict, of possession of a stolen vehicle and his adjudication as a habitual criminal.

In Ground 2, petitioner alleges that he was denied a right to due process of law under the Fifth and Fourteenth Amendments when the State allegedly breached a promise to accept a plea to voluntary manslaughter in a murder case pending against him at the same time and a plea to possession of a stolen vehicle in the present case after petitioner detrimentally relied upon the promise by releasing his bail bond in the murder case. Petitioner alleges in

1 particular: (a) that a deputy district attorney “promised Moxley that he could plead guilty to  
2 voluntary manslaughter in case C-14152 (1-10 year sentence stipulation) and to the  
3 possession of the stolen vehicle charges in case C-189183, where he faced a 1-5 year  
4 sentence;” and (b) that “Moxley also believed that the deal included a provision that would  
5 preclude the District Attorney from pursuing habitual criminal enhancement against him in the  
6 PSV [possession of a stolen vehicle] case.” He seeks “in this PSV case, specific performance  
7 of the promises respecting the PSV plea, including the absence of any habitual criminal  
8 charges . . . , resulting in vacation of Moxley’s conviction and sentence.”<sup>1</sup>

9         Petitioner presented a claim corresponding at least in part to federal Ground 2 in an  
10 original mandamus petition filed in the state supreme court. On a prior *sua sponte* show  
11 cause inquiry, the Court held that the mandamus petition exhausted the claims presented  
12 therein in the state courts pursuant to the Ninth Circuit’s decision in *Chambers v. McDaniel*,  
13 549 F.3d 1191 (9<sup>th</sup> Cir. 2008).<sup>2</sup> The Court directed respondents to file an answer to the  
14 remaining claims in the petition with the proviso that they include any additional procedural  
15 defenses within the answer.<sup>3</sup>

16         In the answer, respondents contend that Ground 2 is not fully exhausted to the extent  
17 that petitioner alleges that the proposed agreement included a plea to the stolen vehicle  
18 charge with a 1 to 5 year sentence on that charge and with no possible habitual criminal  
19 exposure. Respondents contend that the mandamus petition filed in the Supreme Court of  
20 Nevada alleged only that the State backed out of an agreement under which Moxley would  
21 enter an *Alford* plea to voluntary manslaughter as to the murder charge with a stipulated 1 to  
22 10 year sentence.

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26         <sup>1</sup>#33, at 11 & 13.

27         <sup>2</sup>#42, at 5-6.

28         <sup>3</sup>#50, at 1.

1 **Governing Law**

2 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court  
3 remedies on a claim before presenting that claim to the federal courts. To satisfy this  
4 requirement, the claim must have been fairly presented to the state courts completely through  
5 to the highest court available, in this case the Supreme Court of Nevada. *E.g., Peterson v.*  
6 *Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075  
7 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the specific federal  
8 constitutional guarantee and also must state the facts that entitle the petitioner to relief on the  
9 federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir. 2000). That  
10 is, fair presentation requires that the petitioner present the state courts with both the operative  
11 facts and the federal legal theory upon which his claim is based. *E.g., Castillo v. McFadden*,  
12 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the state courts,  
13 as a matter of federal-state comity, will have the first opportunity to pass upon and correct  
14 alleged violations of federal constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501  
15 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

16 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed  
17 petition presenting both exhausted and unexhausted claims must be dismissed without  
18 prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate  
19 relief.

20 **Discussion**

21 Petitioner urges that law of the case bars respondents from raising this exhaustion  
22 issue because the Court previously considered exhaustion as to Ground 2 in its prior order.  
23 It is established law that the law of the case doctrine is “wholly inapposite to circumstances  
24 where a district court seeks to reconsider an order over which it has not been divested of  
25 jurisdiction . . . [as] [a]ll rulings of a trial court are subject to revision at any time before the  
26 entry of judgment.” *E.g., United States v. Smith*, 389 F.3d 944, 949 (9<sup>th</sup> Cir.2004)(quoting  
27 prior authority). “[A]s long as a district court has jurisdiction over the case, then it possesses  
28 the inherent procedural power to reconsider, rescind, or modify an interlocutory order for

1 cause seen by it to be sufficient.” *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d  
2 882, 889 (9th Cir.2001)(quotations omitted).<sup>4</sup>

3 In the present case, the exhaustion issue previously was addressed on a *sua sponte*  
4 inquiry initiated by the Court. While the show cause order provided for briefing by  
5 respondents, the Court’s orders assuredly did not foreclose respondents from thereafter  
6 raising any procedural defenses, including exhaustion. Under the scheduling orders in this  
7 case, the answer provided the first opportunity for respondents to independently raise and  
8 pursue procedural defenses. The only limitation interposed by the Court has been that any  
9 procedural defenses raised at this juncture in the case be raised together with a response on  
10 the merits. Moreover, Congress has expressly declared that “[a] State shall not be deemed  
11 to have waived the exhaustion requirement or be estopped from reliance upon the  
12 requirement unless the State, through counsel, expressly waives the requirement.” 28 U.S.C.  
13 § 2254(b)(3). The Court thus is not persuaded that it should reject respondents’ exhaustion  
14 argument out of hand on the basis that it previously has considered other exhaustion issues  
15 as to Ground 2.

16 Petitioner next urges that the mandamus petition did in fact claim that the State also  
17 agreed to a plea in the stolen vehicle case as part of the proposed plea deal upon which he  
18 detrimentally relied.

19 This assertion is directly belied by the record.

20 As backdrop, the State filed a motion to revoke petitioner’s in the murder case in  
21 November 2002. Petitioner maintains that at a Wednesday, March 12, 2003, hearing on the  
22 State’s motion he stipulated to the revocation of his bail and the release of the bond in  
23 reliance upon a firm plea offer made by the State that date. He maintains that the written plea  
24 agreement that the State presented to him at the calendar call on the following Tuesday,  
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27 <sup>4</sup>This is settled law requiring only minimal research to locate. Counsel would do well to consider  
28 whether citation to an unpublished district court decision satisfies counsel’s signing obligations under Rule 11  
when controlling Ninth Circuit precedent is directly contrary to the position argued. It is highly doubtful that  
reliance upon a doctrine that Ninth Circuit case law establishes is “wholly inapposite” complies with Rule 11.

1 March 18, 2003, did not reflect the prior agreement, as to which the deputy district attorney  
2 allegedly told Moxley that she had changed her mind.<sup>5</sup>

3 In the mandamus petition, Moxley alleged that on March 12, 2003, the proposed  
4 agreement “was going to be a voluntary manslaughter/Alford decision” and that “the only  
5 *question was whether or not . . . to add the P.S.V. Case to the already agreement [sic]*” in the  
6 murder case.<sup>6</sup> While he sought dismissal of both cases, he sought specific performance only  
7 of the only firm agreement that he alleged had occurred, the alleged agreement as to “(1-10  
8 voluntary manslaughter . . . under Alford . . . w/ time served credited) in Case C-141521.”<sup>7</sup>  
9 He did not seek specific performance as to the stolen vehicle case, as he had not alleged a  
10 finalized agreement as to that case.

11 Similarly, the evidence that Moxley presented to the state courts clearly did not reflect  
12 that any agreement had been reached on March 12, 2003, as to the stolen vehicle case. The  
13 November 25, 2003, affidavit of standby counsel, Paul Wommer, stated: (a) that on March  
14 12, 2003, he suggested to the prosecution that any deal should include the stolen vehicle  
15 case; and (b) that a deputy district attorney responded: “I’ll think about that and get back to  
16 you.”<sup>8</sup> At a July 31, 2003, evidentiary hearing, Wommer testified similarly that “Miss Goettsch  
17 was hesitant about that . . . but said she would consider it.”<sup>9</sup>

18 Petitioner thus neither alleged nor tendered evidence tending to establish that a deal  
19 was reached on March 12, 2003, as to the stolen vehicle case before he stipulated to  
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21 <sup>5</sup>See #33, at 11-12; #37, Ex. 84 (partial transcript); #51, Ex. 2.

22 <sup>6</sup>#37, Ex. 75 at 16 (emphasis added); see also *id.*, at 15 (“Moxley’s reasonable understanding of the  
23 plea agreement was: (1-10 year sentence of voluntary manslaughter . . . )”; *id.*, at 30 (“plea agreement of 1-  
24 10 vol. manslaughter/Alford decision”); *id.*, at 47 (“the plea agreement . . . of “1-10 voluntary manslaughter . . .  
25 Alford with six days to think about it”).

26 <sup>7</sup>#37, Ex. 75, at 53.

27 <sup>8</sup>#37, Ex. 80, ¶ 7.

28 <sup>9</sup>#37, Ex. 61, at 65. See also *id.*, at 67 (Moxley’s question reflects that “the only question was  
whether or not they were going to throw in the possession of stolen vehicle case and that they would call  
[Wommer] on it”); *id.*, at 77 (Moxley makes an unsworn statement to the court that “the only question is  
whether or not we’re going to throw in the PSV”).

1 revocation of bail and exoneration of the bond. Petitioner never presented the state courts  
2 with any claim in the mandamus petition that he released the bond on March 12, 2003, in  
3 reliance on a State offer as to the stolen vehicle case.

4 Federal habeas counsel nonetheless seeks to establish that petitioner exhausted a  
5 claim of detrimental reliance on an offer in the stolen vehicle case based upon the fact that  
6 a proposed written plea agreement presented by the prosecution *on March 18, 2003*, would  
7 have included an agreement as to the stolen vehicle case.<sup>10</sup> This is the proposed written plea  
8 agreement that Moxley alleges that he rejected because it provided for a plea to second  
9 degree murder with a longer sentence rather than voluntary manslaughter.<sup>11</sup> Obviously,  
10 petitioner could not have relied on March 12, 2003, on a provision in a proposed written plea  
11 agreement presented to him on March 18, 2003, that he claims was his first notice that the  
12 alleged plea deal had fallen through. Counsel's reference to the March 18, 2003, proposed  
13 written plea agreement to establish exhaustion of a claim of detrimental reliance on March 12,  
14 2003, on a firm plea offer in the stolen vehicle case is at best unpersuasive and at worst  
15 disingenuous.

16 In the state supreme court, petitioner neither alleged nor presented evidence that a  
17 plea deal had been reached in the stolen vehicle case when he stipulated to the exoneration  
18 of his bail bond. To now seek specific performance of a plea deal that he did not even allege  
19 existed at the time of his alleged detrimental reliance fundamentally alters the claim presented  
20 in state court. Petitioner alleged in state court that a question remained on March 12, 2003,  
21 as to whether to add the stolen vehicle case to the alleged agreement. The exhaustion  
22 doctrine does not permit him to now allege for the first time in federal court that he instead  
23 had an enforceable promise to include the stolen vehicle case that he detrimentally relied  
24 upon by stipulating to the exoneration of the bail bond. Such a claim clearly was not fairly  
25 presented to the state court.

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27 <sup>10</sup>#52, at 6-7.

28 <sup>11</sup>#37, Ex. 77.

1 Ground 2 therefore is not exhausted to the extent that: (a) petitioner claims that he  
2 detrimentally relied upon a promise by the State that he could plead guilty in the stolen vehicle  
3 case, (b) petitioner claims that he had a deal that precluded habitual criminal enhancement  
4 in the stolen vehicle case; and (c) petitioner seeks specific performance of an alleged promise  
5 or plea deal in the stolen vehicle case.

6 The entire action must be dismissed without prejudice unless these fundamental  
7 alterations to the claim presented in state court are dismissed or petitioner seeks other  
8 appropriate relief.

### 9 ***Remaining Matters***

10 The state court record exhibits filed by petitioner's counsel are deficient in a number  
11 of material respects.

12 First, what are presented as state court record exhibits in many instances in this case  
13 in truth are copies of materials obtained from petitioner, not the state court clerk. The  
14 handwritten page numbers from the attachment of the materials to petitioner's state court  
15 filings are evident on the exhibits filed by counsel. An inmate seeking to overturn his  
16 conviction is not a reliable source of state court record exhibits. While the Court does not  
17 require the filing of certified copies of state court record exhibits, counsel must file copies of  
18 state court record materials that have been obtained directly from an official source. It came  
19 to the Court's attention that the materials filed were obtained from petitioner rather than the  
20 state court clerk because it encountered material gaps in the papers that were filed.

21 Second, the exhibits are not organized in the index in any discernible consistent  
22 fashion. The Court understands that the issues in this case involve proceedings in both the  
23 murder case and the stolen vehicle case. However, the exhibits neither are filed consistently  
24 in a chronological order nor consistently broken down by the individual case. The only  
25 conclusion that the Court can reach is that exhibits were added to the index as they were  
26 received by counsel's staff. There is no other readily apparent explanation for the haphazard  
27 presentation of the exhibits in the index.

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1           The Court does not and cannot rely exclusively upon the answer and reply to direct the  
2 Court's attention to the relevant portions of the exhibits. For example, petitioner's counsel has  
3 made factual assertions in this case without supporting record citation and/or without citation  
4 to any relevant factual findings made by the state courts on the issue. The Court  
5 independently reviews the record. To undertake such review, it must be able to use the index  
6 of exhibits to follow the progress of an issue in the state court proceedings. Chronological  
7 organization of the exhibits usually is the best and easiest manner of organization.

8           Third, certain exhibits are incomplete, such as, for example, the transcript of the March  
9 12, 2003, proceeding in which petitioner stipulated to the revocation of his bail and the  
10 exoneration of the bond.

11           Counsel has a nondelegable duty to ensure that the state court record exhibits that he  
12 files are both reliable and presented in a readily usable manner. If counsel again files  
13 purported state court record exhibits in a habeas matter in this Court that are obtained from  
14 the interested petitioner rather than a state court clerk, that are presented in the haphazard  
15 manner in this case, and that are missing key materials, the Court will direct counsel to refile  
16 the full set of exhibits along with a certification that he has individually reviewed each exhibit  
17 to assure compliance with the Court's directives.

18           In the present case, given the late juncture in these proceedings, the Court will direct  
19 only that a limited number of key designated materials be filed or re-filed, either because they  
20 are missing, incomplete and/or because they were not obtained from an official source.

21           IT THEREFORE IS ORDERED that the Court holds that Ground 2 is not exhausted  
22 to the extent that: (a) petitioner claims that he detrimentally relied upon a promise by the State  
23 that he could plead guilty in the stolen vehicle case, (b) petitioner claims that he had a deal  
24 that precluded habitual criminal enhancement in the stolen vehicle case; and (c) petitioner  
25 seeks specific performance of an alleged promise or plea deal in the stolen vehicle case.

26           IT FURTHER IS ORDERED that petitioner shall have **twenty-one (21) days** from entry  
27 of this order within which to file a motion for dismissal without prejudice of the entire petition,  
28 for partial dismissal only of the unexhausted claims, and/or for other appropriate relief.



1 IT FURTHER IS ORDERED that any motion filed must contain or be accompanied by,  
2 either contemporaneously or via a document filed within **ten (10) days** thereafter, a signed  
3 declaration by petitioner under penalty of perjury pursuant to 28 U.S.C. § 1746 that he has  
4 conferred with his counsel in this matter regarding his options, that he has read the motion,  
5 and that he has authorized that the relief sought therein be requested from the Court.

6 IT FURTHER IS ORDERED that respondents shall have **fourteen (14) days** to file a  
7 response to any such motion filed, running from the filing of the declaration, and petitioner  
8 shall have **seven (7) calendar days** to file a reply, including any intermediate weekends or  
9 holidays except for the last such day.

10 IT FURTHER IS ORDERED that, within **twenty-eight 28 days** of this order, petitioner  
11 shall file supplemental exhibits with copies obtained from the respective state court clerk of  
12 the following:

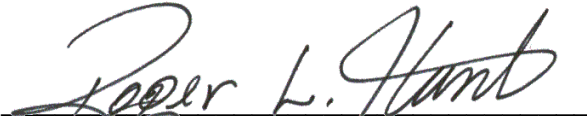
- 13 (a) the State's November 22, 2002, motion for remand  
14 and revocation of bail in No. C141521, *including all*  
15 *of the attachments filed with the motion* (currently  
16 Exhibit 79);
- 17 (b) petitioner's written opposition to the motion;
- 18 (c) the transcripts of hearings prior to March 12, 2003,  
19 pertaining to the motion;
- 20 (c) the *entire* transcript of the March 12, 2003, hearing  
21 on the motion to revoke bail (currently Exhibit 84);  
22 and
- 23 (d) the *entire* August 26, 2004, original mandamus  
24 petition filed in the state supreme court, *including*  
25 *from page 56 on, the appendix and exhibits*  
26 *reflecting the supporting factual record actually*  
27 *presented by petitioner to the state supreme court*  
28 (currently Exhibit 75).

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**Given the anticipated volume and nature of the exhibits, there is no need to send a hard copy of the supplemental exhibits to the Court via the staff attorney.**

**Extension of the deadlines established herein will be considered in only the most extraordinary of circumstances.**

DATED: June 27, 2011.

  
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ROGER L HUNT  
United States District Judge