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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CLARENCE H. ELLIOT,

Petitioner,

vs.

BRIAN WILLIAMS, *et al.*,

Respondents.

2: 08-cv-00829-GMN-RJJ

ORDER

Petitioner is a state prisoner proceeding with counsel in this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondents' motion to dismiss. (Docket #37.)

PROCEDURAL HISTORY

Following a jury trial in the Eighth Judicial District Court, petitioner was found guilty on August 26, 1998, of murder in the first degree with use of a deadly weapon. Exh. 13. On October 20, 1998, petitioner filed a memo with the trial court, claiming trial counsel was ineffective and requesting new counsel. Exh. 14. On December 14, 1998, the trial court sentenced petitioner to consecutive terms of life with the possibility of parole after 20 years for murder and the deadly weapon enhancement. Exh. 16.

Petitioner filed a direct appeal to the Nevada Supreme Court. Exh. 17. Petitioner's appellate counsel raised the following two claims: 1) the jury verdict should be reversed because the state did not prove every element of the crime beyond a reasonable doubt; and 2) the failure of law enforcement to preserve potentially useful evidence deprived petitioner from receiving a fair trial. Petitioner's original appellate counsel withdrew and new counsel was appointed. Exhs. 56, 57, 58. Counsel filed a supplemental brief raising the following four additional claims: 1) the trial court

1 erred in admitting hearsay statements of the victim; 2) the state violated petitioner's right to remain
2 silent; 3) the state's improper closing argument denied petitioner due process and the right to a fair
3 trial; and 4) the jury instructions failed to define "deliberate" as a separate element of first degree
4 murder. Exh. 20. On February 28, 2002, the Nevada Supreme Court issued its opinion affirming
5 petitioner's conviction. Exh. 22.

6 On June 7, 2002, petitioner filed a state postconviction petition for writ of habeas
7 corpus. Exh. 24. In his petition, petitioner raised four grounds for relief. In ground one, petitioner
8 alleged that trial counsel was ineffective for failing to perform any pretrial investigation; for failing
9 to contact and interview and identified defense witnesses; for failing to locate, contact and interview
10 any of the state's witnesses; and for failing to locate, contact and interview alibi witnesses. In
11 ground two, petitioner alleged that trial counsel was ineffective for failing to file any pretrial motions
12 including suppression of evidence and "alibi witness motion." In ground three, petitioner alleged
13 that trial counsel failed to raise any meaningful defense at trial and failed to make any meaningful
14 objections at trial. In ground four petitioner alleged that he was prejudiced by cumulative error of
15 trial counsel. Exh. 24. The trial court appointed counsel to represent petitioner. Exh. 66. The trial
16 court held evidentiary hearings on October 19, 2005, and March 22, 2006. Exh. 30 and 31. The
17 trial court issued an order on March 6, 2007, granting petitioner's state habeas petition, finding that
18 trial counsel was ineffective for not calling character witnesses or investigating the alibi witness.
19 Exh. 34, p. 4.

20 The state filed a notice of appeal on April 25, 2007. Exh. 36. On March 6, 2008, the
21 Nevada Supreme Court issued an order reversing the trial court. Exh. 45. Remittitur issued on
22 April 1, 2008. Exh. 47.

23 This court received petitioner's federal petition on June 25, 2008. With counsel,
24 petitioner filed a first amended petition on February 13, 2009, and a supplemental amended petition
25 on March 31, 2009. (Docket #14, 24.) Respondents filed the present motion to dismiss on October
26 27, 2009. (Docket #37.) Petitioner opposes the motion. (Docket #38.)

1 **LEGAL STANDARDS**

2 Respondents move to dismiss this petition on the ground that it is barred by the
3 statute of limitations. Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
4 dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it
5 that the Petitioner is not entitled to relief in the district court” The Advisory Committee Notes
6 to Rule 5 of the Rules Governing § 2254 Cases state that “an alleged failure to exhaust state
7 remedies may be raised by the Attorney General, thus avoiding the necessity of a formal answer as to
8 that ground.” The Ninth Circuit has referred to a respondent’s motion to dismiss as a request for the
9 Court to dismiss under Rule 4 of the Rules Governing § 2254 Cases. *See, e.g., O’Bremski v. Maass*,
10 915 F.2d 418, 420 (1991); *White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989); *Hillery v. Pulley*,
11 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Based on the Rules Governing Section 2254
12 Cases and case law, the court will review respondents’ motion to dismiss pursuant to its authority
13 under Rule 4.

14 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty
15 Act of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
16 enactment. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S.
17 1008, 118 S.Ct. 586 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting *Drinkard*
18 *v. Johnson*, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997),
19 *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding
20 AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after
21 the enactment of the AEDPA, thus it is governed by its provisions.

22 This court may entertain a petition for writ of habeas corpus “in behalf of a person in
23 custody pursuant to the judgment of a State court only on the ground that he is in custody in violation
24 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

25 The AEDPA altered the standard of review that a federal habeas court must apply
26 with respect to a state prisoner's claim that was adjudicated on the merits in state court. *Williams v.*

1 A petitioner who is in state custody and wishes to collaterally challenge his
2 conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. §
3 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court
4 the initial opportunity to correct the state's alleged constitutional deprivations. *Coleman v.*
5 *Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); *Rose v. Lundy*, 455 U.S. 509, 518,
6 102 S.Ct. 1198, 1203 (1982); *Buffalo v. Sunn*, 854 F.2d 1158, 1163 (9th Cir. 1988).

7 A petitioner can satisfy the exhaustion requirement by providing the highest state
8 court with “a full and fair opportunity to consider and resolve the federal claims.” *Sandgathe v.*
9 *Maass*, 314 F.3d 371, 371 (9th Cir. 2002), *citing Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887,
10 888 (1995) A federal court will find that the highest state court was given a full and fair opportunity
11 to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal
12 basis. *Duncan v. Henry*, 513 U.S. at 365, 115 S.Ct. at 888 (legal basis); *Kenney v. Tamayo-Reyes*,
13 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis). Additionally, the petitioner must have
14 specifically told the state court that he was raising a federal constitutional claim. *Duncan*, 513 U.S.
15 at 365-66, 115 S.Ct. at 888; *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir.1998). A petitioner can
16 accomplish this by explicitly citing federal law or the decisions of the federal courts. *Sandgathe*, 314
17 F.3d at 376. “General appeals to broad constitutional principles, such as due process, equal
18 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195
19 F.3d 1098, 1106 (9th Cir. 1999); *see, Anderson v. Harless*, 459 U.S. 4, 7, 103 S.Ct. 276 (1982)
20 (Exhaustion requirement not satisfied circumstance that the "due process ramifications" of an
21 argument might be "self-evident."). However, the Ninth Circuit has held that “for purposes of
22 exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same purpose
23 as a citation to a federal case analyzing such an issue.” *Peterson v. Lampert*, 319 F.3d 1153, 1158
24 (9th Cir. 2003). Further, the Ninth Circuit has held that even if a petitioner did not raise a
25 constitutional issue in a manner which would otherwise be deemed sufficient, the claim is exhausted
26 if the state court actually considered and decided the issue. *Sandgathe* , 314 F.3d at 376-77.

1 In ground two, petitioner contends that he was denied his right to effective assistance
2 of counsel because counsel failed to file a motion to suppress evidence obtained by law enforcement
3 officers who grossly exceeded the scope of the search warrant. (Docket #24.) This claim was
4 presented to the Eight Judicial District Court as ground two of petitioner’s postconviction petition
5 for writ of habeas corpus. Exh. 24. As respondents state, the state district court granted petitioner
6 habeas relief on different grounds, expressly finding that counsel was ineffective for failing to call
7 any witnesses or conduct any investigation. Exh. 34, p. 4. The state appealed the district court’s
8 order and raised one issue: “Whether the district court erred when it granted Defendant’s post-
9 conviction petition on the basis of ineffective assistance of counsel.” Exh. 42, p. 1. Respondents
10 contend that petitioner’s answer brief did not raise the legal or factual basis for his present ground
11 two claim. They argue that petitioner did not file a cross appeal pursuant to NRAP (3)(4), presenting
12 the claims the district court denied relief on, including trial counsel’s failure to file a motion to
13 suppress. Respondents thus argue that ground two is unexhausted.

14 Petitioner argues in response that ground two is exhausted. He contends that the
15 claim was before the Nevada Supreme Court because of the briefing provided by the parties on
16 appeal. First, in discussing petitioner’s several claims of ineffective assistance, the state argued that
17 trial counsel was not ineffective for failing to file a motion to suppress, stating as follows:

18 Similarly, Mr. Kennedy did not feel that filing frivolous motions or
19 motions with no chance of success would benefit defendant. While
20 defendant contends, for example, that the keys retrieved from his
21 residence were illegally seized, he conceded on cross-examination
 that on two separate occasions in February of 1996, he had consented
 to search of his home and had also provided the police a set of his car
 keys.

22 Exh. 42, p. 24. Next, petitioner responded to respondents’ argument in his answering brief,
23 contending that counsel should have filed a motion to suppress, arguing:

24 Mr. Elliot testified that he had no knowledge of a police detective
25 taking car keys and photographing them until he, Mr. Elliot, was in
26 court. Elliot argues the keys were taken during a search of other parts
 of the house, and not covered by the existing search warrant, the state
 argues that the keys were taken during a consent search; Mr. Kennedy
 might at least have tested the issue on a Motion to Suppress.

1 Exh. 43, p. 28. Finally, respondents argued in their reply brief that petitioner had failed to show that
2 a motion to suppress would have been successful, arguing as follows:

3 Defendant further contends that trial counsel should have tested the
4 issue of an alleged illegal search in a Motion to Suppress. However, as
5 stated in the State's Opening Brief, Defendant conceded on cross-
6 examination that on two separate occasions in February 1996, he
consented to the search of his home and had also provided the police
with a set of car keys. Defendant has failed to show that a Motion to
Suppress would have been successful.

7 Exh. 44, p. 3. Petitioner concludes that although the Nevada Supreme Court did not rule directly on
8 the Fourth Amendment dimension to the ineffective assistance of counsel claim, the issue was
9 clearly before the court.


10 The court agrees. Although this case presents an unusual factual scenario of the
11 underlying case being presented to the Nevada Supreme Court on an appeal by the respondents, the
12 court finds that the factual and legal basis of petitioner's claim was placed before the court by the
13 briefing provided to that court by both parties. Accordingly, this court concludes that the concern of
14 comity to the state court which underlies the exhaustion doctrine has been satisfied.

15 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss is **DENIED**.
16 (Docket #37.)

17 **IT IS FURTHER ORDERED** that respondents shall **FILE** an answer to this petition
18 for writ of habeas corpus within thirty (30) days of the date of service of this order. Petitioner is
19 granted thirty (30) days thereafter to file a reply.

20 DATED this 1st day of October, 2010.

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Gloria M. Navarro
United States District Judge