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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Melvin Dosdos Dulcero,  
Petitioner  
v.  
D.W. Neven, et al.,  
Respondents

2:14-cv-01259-JAD-VCF

**Order Granting Respondents' Motion  
to Dismiss and Staying Case for 30  
Days**

**[ECF 17]**

10 Nevada state prisoner Melvin Dosdos Dulcero brings this habeas action to challenge his state  
11 court conviction and sentence for attempted murder with a deadly weapon. Respondents move to  
12 dismiss Dulcero's petition, arguing that Dulcero failed to exhaust his state court remedies.<sup>1</sup> Because  
13 Dulcero failed to exhaust his state court remedies before filing his § 2254 petition, I grant  
14 respondents' motion and stay this case for 30 days so that Dulcero can inform the court whether he  
15 wishes to abandon his unexhausted claims or return to state court to exhaust them.

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**Background**

In May 2007, Dulcero pleaded guilty to attempted murder with a deadly weapon in Nevada's  
Second Judicial District Court.<sup>2</sup> At sentencing, the state district judge declined Dulcero's request to  
apply a change in the law for a deadly weapon sentencing enhancement that became effective after  
Dulcero's offense date.<sup>3</sup> On October 12, 2007, the state district court entered a judgment of  
conviction for attempted murder with the use of a deadly weapon<sup>4</sup> and sentenced Dulcero to 60–180  
months imprisonment, followed by a 60–180 month consecutive term for the weapon enhancement,

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<sup>1</sup> ECF 17.

<sup>2</sup> ECF 18-19, 18–20.

<sup>3</sup> ECF 19-1 at 16.

<sup>4</sup> ECF 19-2.

1 and gave Dulcero credit for the 262 days he already served.<sup>5</sup>

2 Dulcero appealed, arguing that the state district court should have applied the ameliorative  
3 amendments to the deadly weapon enhancement statute;<sup>6</sup> the Nevada Supreme Court affirmed.<sup>7</sup> On  
4 January 13, 2009, Dulcero filed a state habeas petition.<sup>8</sup> The state district court appointed counsel,<sup>9</sup>  
5 who filed an amended petition on Dulcero's behalf three months later.<sup>10</sup> After an evidentiary  
6 hearing,<sup>11</sup> the state district court initially granted the petition in part on a restitution issue, but later  
7 reconsidered that ruling and denied the petition in its entirety.<sup>12</sup> Dulcero appealed;<sup>13</sup> the Nevada  
8 Supreme Court affirmed.<sup>14</sup> Remittitur issued on May 8, 2014.<sup>15</sup>

9 Dulcero timely filed this federal habeas petition two months later.<sup>16</sup> Respondents move to  
10 dismiss Dulcero's petition as a mixed petition, arguing that it contains unexhausted claims.<sup>17</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> ECF 19-15.

<sup>7</sup> ECF 19-21.

<sup>8</sup> ECF 20-1, 20-2.

<sup>9</sup> ECF 20-4.

<sup>10</sup> ECF 20-5.

<sup>11</sup> ECF 20-8, 21-6.

<sup>12</sup> ECF 21-7, 21-11.

<sup>13</sup> ECF 21-15.

<sup>14</sup> Ex. 98.

<sup>15</sup> Ex. 99.

<sup>16</sup> ECF 6.

<sup>17</sup> ECF 17.

1 **Discussion**

2 **A. Exhaustion under 28 USC § 2254**

3 A federal habeas petitioner first must exhaust state court remedies on a claim before  
4 presenting that claim to the federal court.<sup>18</sup> The exhaustion requirement ensures that the state courts  
5 will have the first opportunity to pass upon and correct alleged violations of federal constitutional  
6 guarantees.<sup>19</sup> To satisfy the exhaustion requirement, a petitioner must fairly present his claims to the  
7 state’s highest court.<sup>20</sup> Fair presentation requires that a petitioner (1) identify the federal legal basis  
8 for his claims and (2) state the facts entitling him to relief on those claims.<sup>21</sup> A petitioner must alert  
9 the state court to the fact that he is asserting a federal claim;<sup>22</sup> mere similarity between a state-law  
10 claim and a federal-law claim is insufficient.<sup>23</sup>

11 **B. Ground 1 of Dulcero’s petition is unexhausted.**

12 In ground 1, Dulcero alleges that the state courts violated his Eighth and Fourteenth  
13 Amendment rights by declining to retroactively apply a change in Nevada sentencing law that  
14 occurred after Dulcero’s offense was committed but before he was sentenced.<sup>24</sup> On direct appeal,  
15 Dulcero presented a similar issue to the Nevada Supreme Court, arguing that the state district court  
16 erred in refusing to apply the amendments to the deadly weapon enhancement statute. But in his  
17 opening brief to the Nevada Supreme Court, Dulcero did not cite any federal authority or indicate  
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20 <sup>18</sup> 28 U.S.C. § 2254(b)(1)(A).

21 <sup>19</sup> See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

22 <sup>20</sup> See, e.g., *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Yang v. Nevada*,  
23 329 F.3d 1069, 1075 (9th Cir. 2003).

24 <sup>21</sup> See *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000); *Castillo v. McFadden*, 399 F.3d 993,  
25 999 (9th Cir. 2005).

26 <sup>22</sup> *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995).

27 <sup>23</sup> See *Henry*, 513 U.S. at 366; see also *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

28 <sup>24</sup> ECF 6 at 3–5.

1 that he was invoking a federal right.<sup>25</sup> In his response, Dulcero concedes that ground 1 is  
2 unexhausted, and states that he wishes to abandon that claim in its entirety.<sup>26</sup> Because Dulcero did  
3 not alert the Nevada Supreme Court that he was asserting a federal claim on this basis and concedes  
4 as much, I find that ground 1 of Dulcero’s petition is unexhausted.

5 **C. Ground 2(A) of Dulcero’s petition is also unexhausted.**

6 In ground 2(A), Dulcero argues that his guilty plea was involuntary because: (1) his native  
7 language is Visayan, but the court reporter spoke Tagalog; (2) he was not advised that the state  
8 district court may impose the sentence he received; (3) he entered his plea with the understanding  
9 that he would be eligible for parole after serving two years on each count; and (4) he was not  
10 provided with an explanation regarding the terms of the presentence investigation report, which  
11 included a recommendation of two terms of fifteen years with parole eligibility beginning after  
12 serving five years, and up to \$961,000.00 in restitution.<sup>27</sup>

13 Dulcero alleged in his brief to the Nevada Supreme Court that he spoke Tagalog,<sup>28</sup> and that  
14 he was not advised of the amount of restitution before pleading guilty.<sup>29</sup> But Dulcero did not present  
15 any of the other facts that he now offers in support of his voluntariness claim to the Nevada  
16 Supreme Court.<sup>30</sup> Dulcero also concedes that ground 2(A) is unexhausted. I agree. Because Dulcero  
17 did not present the operative facts supporting his voluntariness claim to the Nevada Supreme Court,  
18 ground 2(A) is unexhausted.<sup>31</sup>

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21 <sup>25</sup> ECF 19-15.

22 <sup>26</sup> ECF 28 at 3.

23 <sup>27</sup> ECF 6 at 10–12.

24 <sup>28</sup> 21-20 at 8.

25 <sup>29</sup> *Id.*

26 <sup>30</sup> *Id.*

27 <sup>31</sup> *See Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005).

1 **D. Because this is a mixed petition, Dulcero must advise the court how he wants to**  
2 **proceed.**

3 A federal court may not entertain a habeas petition unless the petitioner has exhausted all  
4 available and adequate state court remedies for all claims in the petition.<sup>32</sup> A “mixed” petition  
5 containing both exhausted and unexhausted claims is subject to dismissal.<sup>33</sup> Because Dulcero’s  
6 petition is mixed, he has three options:

- 7 1. Submit a sworn declaration advising the court he is voluntarily abandoning his  
8 unexhausted claims and will proceed on the exhausted claims only;
- 9 2. Submit a sworn declaration advising the court he will return to state court to  
10 exhaust his unexhausted claims, in which case his federal habeas petition will  
11 be denied without prejudice; or
- 12 3. He may file a motion asking the court to hold his exhausted federal habeas  
13 claims in abeyance while he returns to state court to exhaust his unexhausted  
14 claims.<sup>34</sup>

15 Dulcero must take one of these steps. If Dulcero fails to inform the court which option he  
16 wishes to pursue by **April 22, 2016**, his petition will be dismissed in its entirety. Dulcero is advised  
17 to familiarize himself with the limitations periods for filing federal habeas petitions found in 28  
18 U.S.C. § 2244(d), as those limitations periods may have a direct and substantial effect on how he  
19 wishes to proceed with this action.

20 **Conclusion**

21 Accordingly, IT IS HEREBY ORDERED that respondents’ motion to dismiss [ECF 17] is  
22 **GRANTED.**

23 IT IS FURTHER ORDERED that Dulcero has until **April 22, 2016**, to either: (1) inform this  
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25 <sup>32</sup> *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

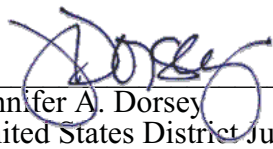
26 <sup>33</sup> *Id.*

27 <sup>34</sup> *See Lundy*, 455 U.S. at 510; *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*, 315 F.3d 1063  
28 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).

1 court in a sworn declaration that he wishes to formally and forever abandon the unexhausted grounds  
2 for relief in his federal habeas petition and proceed on the exhausted grounds; (2) inform this court in  
3 a sworn declaration that he wishes to dismiss this petition without prejudice in order to return to state  
4 court to exhaust his unexhausted claims; or (3) file a motion for a stay and abeyance, asking this  
5 court to hold his exhausted claims in abeyance while he returns to state court to exhaust his  
6 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance or seek other  
7 appropriate relief, respondents may respond as provided in Local Rule 7-2. If petitioner fails to  
8 respond to this order by **April 22, 2016**, his petition will be dismissed in its entirety without further  
9 warning.

10 IT IS FURTHER ORDERED that, if petitioner elects to abandon his unexhausted grounds,  
11 respondents will have **30 days** from the date petitioner serves his declaration of abandonment to file  
12 an answer to petitioner's remaining grounds for relief. The answer must contain all substantive and  
13 procedural arguments for all surviving grounds of the petition and must comply with Rule 5 of the  
14 Rules Governing Proceedings in the United States District Courts under 28 U.S.C. §2254. Petitioner  
15 will then have **30 days** after being served with respondents' answer to file a reply.

16 Dated March 22, 2016

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19 Jennifer A. Dorsey  
20 United States District Judge  
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