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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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8 JUSTIN JAMES EDMISTEN,

9 Petitioner,

10 vs.

11 DWIGHT NEVEN, et al.,

12 Respondents.

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Case No. 2:15-cv-00952-RFB-NJK

ORDER

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Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 4) and respondents' motion to dismiss (ECF No. 14). Petitioner has not responded to the motion to dismiss. The court finds that petitioner has not exhausted ground 1, and the court grants the motion to dismiss in part.

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1 16-28). The state district court denied the motion. Petitioner appealed, and the Nevada Court of
2 Appeals affirmed. Edmiston v. State, 2015 WL 4715297 (Nev. App. Aug. 4, 2015).¹

3 Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must
4 exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a
5 petitioner must fairly present that ground to the state’s highest court, describing the operative facts and
6 legal theory, and give that court the opportunity to address and resolve the ground. See Duncan v.
7 Henry, 513 U.S. 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

8 In ground 1, petitioner alleges that a prior state-court proceeding for the same offense was
9 dismissed because of prosecutorial misconduct. The prosecution then opened a new proceeding in state
10 court. Petitioner alleges that trial counsel provided ineffective assistance because trial counsel did not
11 move to dismiss the second state-court proceeding. The court agrees with respondents that petitioner
12 has not presented this claim to the state courts. In his proper-person motion to withdraw plea, petitioner
13 presented the underlying issue that the second prosecution was improper, but he did not argue in that
14 motion that counsel was ineffective for failing to file a motion to dismiss. Ex. 39 (ECF No. 15-39).
15 Petitioner did not present in his state post-conviction habeas corpus petition the claim that he presents
16 in ground 1. Ex. 49 (ECF No. 16-5). In his motion to correct an illegal sentence, petitioner alleges that
17 if counsel had appealed the judgment of conviction, he could have raised the issue of the improper
18 second prosecution. Ex. 72 (ECF No. 16-28). The issue presented in the illegal-sentence motion does
19 not exhaust ground 1 for two reasons. First, the operative facts are different. In the state-court illegal-
20 sentence motion, petitioner argued that counsel should have filed a direct appeal from the judgment of
21 conviction. In ground 1, petitioner argues that counsel should have filed a motion to dismiss before he
22 pleaded guilty. Second, petitioner was not using the correct procedure. A motion to correct an illegal
23 sentence is used only for claims that the sentence exceeded what the governing statute authorizes, that
24 the court was without jurisdiction, or that the state district court based its sentence upon a mistaken,
25 material assumption of the defendant’s criminal record. Edwards v. State, 918 P.2d 321, 323-25 (Nev.
26 1996). The Nevada Court of Appeals held that petitioner’s claim in the illegal-sentence motion was not

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28 ¹Petitioner’s name is spelled “Edmisten” or “Edmiston” in different documents.

1 within the narrow scope of an illegal-sentence motion. Edmiston v. State, 2015 WL 4715297 (Nev.
2 App. Aug. 4, 2015). “Submitting a new claim to the state’s highest court in a procedural context in
3 which its merits will not be considered absent special circumstances does not constitute fair
4 presentation.” Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994) (citing Castille v. Peoples, 489
5 U.S. 346, 351 (1989)). For these reasons, ground 1 is not exhausted.

6 Respondents next argue that petitioner’s guilty plea bars consideration of grounds 2 and 3.
7 Ground 2 is a claim that trial counsel provided ineffective assistance because counsel did not investigate
8 an alibi defense or potential witnesses. Ground 3 is a claim that trial counsel provided ineffective
9 assistance because trial counsel did not move to suppress petitioner’s confession.

10 [A] guilty plea represents a break in the chain of events which has preceded it in the criminal
11 process. When a criminal defendant has solemnly admitted in open court that he is in fact
12 guilty of the offense with which he is charged, he may not thereafter raise independent
13 claims relating to the deprivation of constitutional rights that occurred prior to the entry of
the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea
by showing that the advice he received from counsel was not within the standards set forth in
[McMann v. Richardson, 397 U.S. 759 (1970)].

14 Tollett v. Henderson, 411 U.S. 258, 267 (1973). The court will not address this argument now.
15 Petitioner first needs to decide what to do with the unexhausted ground 1. If petitioner decides to
16 dismiss ground 1 and proceed with grounds 2 and 3, then respondents may renew the argument in their
17 answer.

18 The petition (ECF No. 4) is mixed, containing both claims exhausted in state court and claims
19 not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 521-22
20 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may a.) voluntarily dismiss
21 the unexhausted ground 1 and proceed with the remaining grounds; b.) voluntarily dismiss this action
22 without prejudice while he returns to state court to exhaust ground 1; or c.) move to stay this action
23 while he returns to state court to exhaust ground 1. If petitioner chooses the second option, the court
24 makes no assurances about any possible state-law procedural bars or the timeliness of a subsequently
25 filed federal habeas corpus petition. If petitioner chooses the last option, he must show that he has
26 “good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is
27 no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines v. Weber,
28 544 U.S. 269, 278 (2005). If petitioner chooses the last option, he also will need to designate an

1 alternative choice in case the court declines to stay the action. Otherwise, the court will dismiss the
2 action.

3 IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 14) is
4 **GRANTED** in part with respect to ground 1.

5 IT IS FURTHER ORDERED that petitioner shall have forty-five (45) days from the date of
6 entry of this order to do one of the following: (1) inform this court in a sworn declaration that he
7 wishes to dismiss ground 1 of his petition (ECF No. 4), and proceed only on the remaining grounds
8 for relief, (2) inform this court in a sworn declaration that he wishes to dismiss his petition (ECF No.
9 4) to return to state court to exhaust his state remedies with respect to the claims set out in ground 1
10 of his petition (ECF No. 4), or (3) move to stay this action while he returns to state court to exhaust
11 his state remedies with respect to the claims set out in ground 1 of his petition (ECF No. 4). Failure
12 to comply will result in the dismissal of this action.

13 IT IS FURTHER ORDERED that the Court for good cause now reconsiders its previous order
14 (ECF No. 3) denying the appointment of counsel and **ORDERS** that counsel shall be appointed for
15 petitioner. **The Clerk of Court shall serve a copy of this Order on the Federal Public Defender's**
16 **Office for Nevada within a week.** Petitioner shall have (45) days from the date of entry of this order
17 to file an amended petition or file a motion to file with a requested amount of time for the filing of the
18 amended petition.

19 IT IS FURTHER ORDERED that if petitioner elects to dismiss the aforementioned grounds of
20 his petition (ECF No. 4) and proceed on the remaining grounds, respondents shall file and serve an
21 answer, which must comply with Rule 5 of the Rules Governing Section 2254 Cases in the United
22 States District Courts, within forty-five (45) days after petitioner serves his declaration dismissing
23 those grounds. Petitioner shall have forty-five (45) days from the date on which the answer is served
24 to file and serve a reply.

25 **DATED:** March 21, 2017.

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RICHARD F. BOULWARE, II
United States District Judge