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

Arthur Daniel Mayo,

Petitioner

v.

Brian Williams, et al.,

Respondents

**2:16-cv-00599-JAD-GWF**

**Order Granting in Part and Denying in  
Part Motion to Dismiss**

[ECF No. 16]

10 Nevada state-prison inmate Arthur Daniel Mayo brings this § 2254 petition to challenge his  
11 state-court conviction for possession of a stolen vehicle and resultant habitual-criminal adjudication  
12 and sentence. Respondents move to dismiss Mayo's petition, arguing that his claims are either  
13 procedurally defaulted, unexhausted, or duplicative. Because Mayo's petition is partially  
14 unexhausted, I grant respondents' motion in part and deny it in part and give Mayo until January 22,  
15 2017, to notify the court how he wishes to proceed with this action.

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**Background**

**A. Mayo's state-court conviction and sentence**

In May 2013, Mayo pleaded guilty to possession of a stolen vehicle in Nevada's Eighth  
Judicial District Court.<sup>1</sup> In the plea agreement, the state agreed to dismiss Mayo's controlled-  
substance charge and to dismiss the charges against him in a separate case.<sup>2</sup> The state also agreed  
not to oppose Mayo's release on his own recognizance after entry of the plea, and the parties agreed  
to a maximum sentence of six years.<sup>3</sup> However, the parties also agreed:

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<sup>1</sup> ECF No. 17-5 at 2, 17-7, 17-8.

<sup>2</sup> ECF No. 17-7 at 2.

<sup>3</sup> *See id.*

1 If the Defendant is arrested on new charges or fails to appear for the Pre-Sentence  
2 Investigation Report (PSI) or at rendition of sentence, both parties agree to stipulate to  
3 small habitual criminal treatment and a sentence of five (5) to twelve and one-half  
(12.5) years.<sup>4</sup>

4 When the parties appeared for sentencing on January 16, 2014, the state informed the court  
5 that Mayo had failed to appear for his PSI appointment.<sup>5</sup> Mayo claimed that he obtained a PSI  
6 packet, filled it out, and mailed it in, and, therefore, believed that he was not required to appear for  
7 the appointment.<sup>6</sup> The court continued the sentencing hearing so that the parties could confer.<sup>7</sup>

8 The parties reconvened for Mayo's sentencing a month later.<sup>8</sup> The state informed the court  
9 that the parole and probation department had not received a PSI packet from Mayo and that nobody  
10 had represented to Mayo that he did not need to appear in person for his PSI interview.<sup>9</sup> The parties  
11 also informed the court that Mayo had been arrested on a new petty larceny charge.<sup>10</sup> Based on this  
12 information, the state district-court judge adjudicated Mayo a habitual criminal under Nevada's small  
13 habitual-criminal statute and sentenced him to 5–12.5 years in prison.<sup>11</sup>

14 Mayo appealed his conviction;<sup>12</sup> the Nevada Supreme Court affirmed.<sup>13</sup> Mayo then filed a  
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18 <sup>4</sup> *Id.*

19 <sup>5</sup> *See id.*

20 <sup>6</sup> *See id.*

21 <sup>7</sup> *See id.*

22 <sup>8</sup> ECF No. 17-11.

23 <sup>9</sup> *Id.* at 2–3.

24 <sup>10</sup> *Id.* at 3–4.

25 <sup>11</sup> *Id.* at 11.

26 <sup>12</sup> ECF No. 17-15.

27 <sup>13</sup> ECF No. 17-21.

1 habeas petition in the state district court.<sup>14</sup> The state district court denied the petition,<sup>15</sup> and the  
2 Nevada Court of appeals affirmed.<sup>16</sup> While that appeal was still pending, Mayo filed a second  
3 habeas petition in the state district court, which the state district court denied.<sup>17</sup> Mayo's appeal from  
4 the denial of his second state habeas petition is still pending.<sup>18</sup>

5 **B. Mayo's federal habeas petition**

6 Mayo filed this federal habeas action in March 2016. He asserts three claims for relief: (1)  
7 ineffective assistance of counsel, (2) due-process violations, and (3) equal-protection and due-  
8 process violations.<sup>19</sup> Mayo has also filed a supplemental memorandum in which he asserted four  
9 additional claims for ineffective assistance of counsel and due-process violations.<sup>20</sup>

10 Respondents move to dismiss, arguing that: supplemental ground one is unexhausted in state  
11 court; grounds two and three and supplemental ground four are procedurally defaulted; grounds two  
12 and three and supplemental ground four are redundant; and ground one and supplemental ground two  
13 are redundant.

14 **Discussion**

15 **A. Exhaustion under 28 U.S.C. § 2254**

16 A federal habeas petitioner first must exhaust state-court remedies on a claim before  
17 presenting that claim to the federal court.<sup>21</sup> The exhaustion requirement ensures that the state courts  
18 will have the first opportunity to pass upon and correct alleged violations of federal constitutional

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20 <sup>14</sup> ECF No. 18.

21 <sup>15</sup> ECF No. 18-12, 18-19, 18-14.

22 <sup>16</sup> ECF No. 19-19.

23 <sup>17</sup> ECF No. 19-8, 19-9, 19-12.

24 <sup>18</sup> ECF No. 16 at 3.

25 <sup>19</sup> ECF No. 6.

26 <sup>20</sup> ECF No. 13.

27 <sup>21</sup> 28 U.S.C. § 2254(b)(1)(A).

1 guarantees.<sup>22</sup> To satisfy the exhaustion requirement, a petitioner must fairly present his claims to the  
2 state’s highest court.<sup>23</sup> Fair presentation requires that a petitioner (1) identify the federal legal basis  
3 for his claims and (2) state the facts entitling him to relief on those claims.<sup>24</sup> A petitioner must alert  
4 the state court to the fact that he is asserting a federal claim;<sup>25</sup> mere similarity between a state-law  
5 claim and a federal-law claim is insufficient.<sup>26</sup> “Submitting a new claim to the state’s highest court  
6 in a procedural context in which its merits will not be considered absent special circumstances does  
7 not constitute fair presentation.”<sup>27</sup>

8 **B. Supplemental ground one is unexhausted.**

9 Respondents argue that supplemental ground one is unexhausted. In supplemental ground  
10 one, Mayo alleges that his counsel was constitutionally ineffective because counsel misadvised him  
11 about the consequences of his guilty-plea agreement, which caused him to enter into an agreement he  
12 otherwise would not have entered into.<sup>28</sup>

13 Mayo did not raise this claim on direct appeal.<sup>29</sup> On appeal from the denial of his first state  
14 habeas petition, Mayo asserted IAC claims based on his habitual-criminal adjudication, but he did  
15 not raise an IAC claim based on his decision to plead guilty.<sup>30</sup> Because Mayo did not make any  
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17 <sup>22</sup> See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

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

20 <sup>24</sup> See *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000); *Castillo v. McFadden*, 399 F.3d 993,  
21 999 (9th Cir. 2005).

22 <sup>25</sup> *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995).

23 <sup>26</sup> See *Henry*, 513 U.S. at 366; see also *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

24 <sup>27</sup> *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351  
25 (1989)).

26 <sup>28</sup> ECF No. 13 at 2–3.

27 <sup>29</sup> ECF No. 17-19.

28 <sup>30</sup> ECF No. 18-23, 18-24, 19-1, 19-19.

1 argument that could have reasonably alerted the state courts that he claimed a violation of his  
2 constitutional right to effective assistance of counsel based on his decision to plead guilty,  
3 supplemental ground one is unexhausted.

4 **C. Because this is a mixed petition, Mayo must advise the court how he wants to proceed.**

5 A federal court may not entertain a habeas petition unless the petitioner has exhausted all  
6 available and adequate state-court remedies for *all claims* in the petition.<sup>31</sup> A “mixed” petition  
7 containing both exhausted and unexhausted claims is subject to dismissal.<sup>32</sup> Because Mayo’s  
8 petition is mixed, he has three options:

- 9 1. Submit a sworn declaration advising the court that he is voluntarily abandoning his  
10 unexhausted claims and will proceed on the exhausted claims only;
- 11 2. Submit a sworn declaration advising the court that he will return to state court to  
12 exhaust his unexhausted claims, in which case his federal habeas petition will be  
13 denied without prejudice; or
- 14 3. File a motion asking the court to hold his exhausted claims in abeyance while he  
15 returns to state court to exhaust his unexhausted claims.<sup>33</sup>

16 As to the third option, Mayo is cautioned that a stay and abeyance is available only in limited  
17 circumstances. If Mayo chooses to file a motion for stay and abeyance, he must show that there was  
18 good cause for his failure to first exhaust these claims in state court and that these claims are not  
19 plainly meritless.<sup>34</sup> Respondents would then have a chance to respond to his motion.

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22 <sup>31</sup> *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

23 <sup>32</sup> *Id.*

24 <sup>33</sup> *See Lundy*, 455 U.S. at 510; *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*, 315 F.3d 1063  
25 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).

26 <sup>34</sup> *Rhines*, 544 U.S. at 277 (stating that “stay and abeyance is only appropriate when the district court  
27 determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.  
28 [And] even if a petitioner [shows good cause], the district court would abuse its discretion if it were  
to grant him a stay when his unexhausted claims are plainly meritless.”).

1           **If Mayo fails to choose one of these three options or seek other appropriate relief by**  
2 **January 22, 2017, his federal habeas petition will be dismissed without prejudice as a mixed**  
3 **petition.** Mayo is further cautioned that, if this action is dismissed, he may be barred by the statute  
4 of limitations from ever initiating any subsequent federal habeas corpus action challenging this  
5 conviction and sentence. A federal habeas corpus petition does not toll the statute of limitations  
6 relative to a subsequent federal habeas action.<sup>35</sup>

7 **D. I defer ruling on respondents’ other arguments.**

8           In their dismissal motion, respondents argue that grounds two and three and supplemental  
9 ground four should be dismissed as procedurally defaulted.<sup>36</sup> Mayo responds that good cause for the  
10 default exists because he received ineffective assistance of appellate counsel.<sup>37</sup> In their reply,  
11 respondents acknowledge Mayo’s argument, and, in effect, withdraw this part of their motion to  
12 dismiss.<sup>38</sup> I agree with respondents that, because Mayo’s cause-and-prejudice argument is  
13 intertwined with the merits of his ineffective-assistance-of-appellate-counsel claim (supplemental  
14 ground three), the procedural-default question will be best resolved when the parties address the  
15 merits of supplemental ground three. I therefore deny respondents’ motion to dismiss grounds two  
16 and three and supplemental ground four as procedurally barred without prejudice to respondents’  
17 ability to raise this defense in their answer.

18           I also defer ruling on respondents’ arguments that certain grounds of Mayo’s petition are  
19 redundant. I find that, like the procedural-default question, the question of which claims are

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21 <sup>35</sup> See *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding that “an application for federal  
22 habeas corpus review is not an ‘application for State post-conviction or other collateral review’  
within the meaning of 28 U.S.C. § 2244(d)(2)”).

23 <sup>36</sup> ECF No. 16 at 5–6.

24 <sup>37</sup> ECF No. 23 at 1–7.

25 <sup>38</sup> See ECF No. 24 at 3 (“Because Mayo’s cause and prejudice argument is so intertwined with his  
26 ineffective assistance of appellate counsel claim, Respondents respectfully request this Court defer  
27 ruling on Respondents’ procedural default defense until the parties can properly address the merits of  
28 Mayo’s claim in Supplemental Ground 3.”).

1 redundant will be best addressed in conjunction with the merits of Mayo's claims. I therefore also  
2 deny this portion of respondents motion without prejudice to their ability to re-assert these arguments  
3 in their answer.

4 **Conclusion**

5 Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that respondents'  
6 motion to dismiss [ECF No. 16] is **GRANTED in part and DENIED in part**. I find that Mayo's  
7 supplemental ground one is unexhausted; the motion is denied in all other respects.

8 IT IS FURTHER ORDERED that **Mayo must notify the court how he wishes to proceed**  
9 **with this action by January 22, 2017**. He has three choices: (1) submit a sworn declaration  
10 advising the court that he is voluntarily abandoning his unexhausted claims and will proceed on the  
11 exhausted claims only; (2) submit a sworn declaration advising the court that he will return to state  
12 court to exhaust his unexhausted claims, in which case his federal habeas petition will be denied  
13 without prejudice; or (3) file a motion asking the court to hold his exhausted claims in abeyance  
14 while he returns to state court to exhaust his unexhausted claims.

15 **If Mayo fails to file the required notice by January 22, 2017, or take other appropriate**  
16 **action in this case, this action will be dismissed in its entirety without prejudice and without**  
17 **further warning.**

18 Dated this 22nd day of November, 2016.

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21 Jennifer A. Dorsey  
22 United States District Judge  
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