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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARTIN SALAZAR CASTRO,

Petitioner,

v.

DWIGHT NEVEN, et al.,

Respondents.

Case No. 2:16-cv-01237-MMD-GWF

ORDER

This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Nevada state prisoner Martin Salazar Castro is before the Court on respondents' motion to dismiss part of Ground 2. (ECF No. 12.)

I. PROCEDURAL HISTORY AND BACKGROUND

On March 22, 2010, a jury convicted Castro of count 1: conspiracy to commit robbery; count 2: burglary while in possession of a deadly weapon; counts 3-6: first-degree kidnapping with use of a deadly weapon; counts 7-8: robbery with use of a deadly weapon; count 9: conspiracy to commit sexual assault; counts 10, 12, 13: sexual assault with use of a deadly weapon; count 11: attempted sexual assault with use of a deadly weapon; counts 14-15: battery with intent to commit sexual assault with use of a deadly weapon; counts 16-19: battery with use of a deadly weapon; and counts 20-23: open or gross lewdness with use of a deadly weapon (Exh. 46).¹ The state district court sentenced Castro to terms that amount to about twenty-five years to life, with 908

¹Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 12, and are found at ECF Nos. 13-17.

1 days' credit for time served (ECF No. 7 at; Exh. 51). Judgment of conviction was filed on
2 August 9, 2010. (Exh. 51.)

3 The Nevada Supreme Court affirmed the convictions on March 30, 2012. (Exh.
4 56.) Remittitur issued on May 1, 2012. (Exh. 57.)

5 Castro filed a proper person state postconviction petition for writ of habeas
6 corpus. (Exh. 58.) The state district court appointed counsel, who filed a supplemental
7 petition, and the court held an evidentiary hearing. (Exhs. 65, 67, 68.) The state district
8 court denied Castro's postconviction petition on April 28, 2014. (Exh. 69.) The Nevada
9 Supreme Court affirmed the denial of the petition on December 18, 2015, and remittitur
10 issued on January 15, 2016. (Exhs. 74, 75.)

11 Castro dispatched his federal habeas petition for filing on or about May 25, 2016
12 (ECF No. 7). Respondents now argue that Grounds 2(B) and 2(C) are subject to
13 dismissal as unexhausted (ECF No. 12).

14 **II. LEGAL STANDARDS & ANALYSIS**

15 **A. Exhaustion**

16 A federal court will not grant a state prisoner's petition for habeas relief until the
17 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*
18 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
19 courts a fair opportunity to act on each of his claims before he presents those claims in
20 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*
21 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
22 petitioner has given the highest available state court the opportunity to consider the
23 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
24 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.
25 1981).

26 A habeas petitioner must "present the state courts with the same claim he urges
27 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
28 constitutional implications of a claim, not just issues of state law, must have been raised

1 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.
2 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court
3 must be “alerted to the fact that the prisoner [is] asserting claims under the United
4 States Constitution” and given the opportunity to correct alleged violations of the
5 prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v.*
6 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)
7 “provides a simple and clear instruction to potential litigants: before you bring any claims
8 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*
9 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520
10 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process,
11 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”
12 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However,
13 citation to state caselaw that applies federal constitutional principles will suffice.
14 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

15 A claim is not exhausted unless the petitioner has presented to the state court
16 the same operative facts and legal theory upon which his federal habeas claim is based.
17 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
18 exhaustion requirement is not met when the petitioner presents to the federal court facts
19 or evidence which place the claim in a significantly different posture than it was in the
20 state courts, or where different facts are presented at the federal level to support the
21 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
22 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,
23 458 (D. Nev. 1984).

24 B. Ground 2

25 Castro sets forth three claims in Ground 2. In Ground 2(A) he alleges that trial
26 counsel rendered ineffective assistance by failing to investigate the criminal histories of
27 state witnesses Wyzga, Marquez and Tigrett (ECF No. 7 at 14-16). In Ground 2(C) he
28 argues that counsel was ineffective for failing to file motions to admit prior bad acts of

1 the victims. (*Id.* at 18-19.) In Ground 2(B) Castro appears to claim that, due to the trial
2 court or the state’s error, exculpatory photographs were missing at trial. (*Id.* at 16-17.)
3 Ground 2(B) also appears to set forth a claim that trial counsel was ineffective for failing
4 to locate and/or use the photos at trial. (*Id.*)

5 Respondents argue that Grounds 2(B) and 2(C) are unexhausted (ECF No. 12 at
6 12).² This Court has reviewed the state-court record and agrees with respondents that
7 Castro did not present the claims in federal Grounds 2(B) and 2(C) to the highest state
8 court. (See Exhs. 53, 71.) Accordingly, Grounds 2(B) and 2(C) are unexhausted.

9 **III. PETITIONER’S OPTIONS REGARDING UNEXHAUSTED CLAIMS**

10 A federal court may not entertain a habeas petition unless the petitioner has
11 exhausted available and adequate state court remedies with respect to all claims in the
12 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both
13 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the
14 Court finds that grounds 2(B) and 2(C) are unexhausted. Because the Court finds that
15 the petition contains unexhausted claims, petitioner has these options:

- 16 1. He may submit a sworn declaration voluntarily abandoning
17 the unexhausted claims in his federal habeas petition, and proceed only
18 on the exhausted claims;
- 19 2. He may return to state court to exhaust his unexhausted
20 claims, in which case his federal habeas petition will be denied without
21 prejudice; or
- 22 3. He may file a motion asking this Court to stay and abey his
23 exhausted federal habeas claims while he returns to state court to exhaust
24 his unexhausted claims.

25 With respect to the third option, a district court has discretion to stay a petition that it
26 may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005). The
27 *Rhines* Court stated:

28 [S]tay and abeyance should be available only in limited circumstances.
Because granting a stay effectively excuses a petitioner’s failure to
present his claims first to the state courts, stay and abeyance is only
appropriate when the district court determines there was good cause for

²The Court follows respondents’ labeling of the subparts of Ground 2.

1 the petitioner's failure to exhaust his claims first in state court. Moreover,
2 even if a petitioner had good cause for that failure, the district court would
3 abuse its discretion if it were to grant him a stay when his unexhausted
4 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for
a writ of habeas corpus may be denied on the merits, notwithstanding the
failure of the applicant to exhaust the remedies available in the courts of
the State").

5 *Rhines*, 544 U.S. at 277.

6 In response to respondents' motion to dismiss, petitioner filed a motion for stay
7 and abeyance (ECF No. 18). Respondents opposed the motion (ECF No. 19),
8 contending in part that the motion was premature. This Court agrees. Castro's motion
9 for stay and abeyance will be denied without prejudice. Castro may file a renewed
10 motion for stay and abeyance, if any, in accordance with this order.

11 If petitioner wishes to ask for a stay, he must file a new motion for stay and
12 abeyance in which he demonstrates good cause for his failure to exhaust his
13 unexhausted claims in state court, and presents argument regarding the question of
14 whether or not his unexhausted claims are plainly meritless. Respondent would then be
15 granted an opportunity to respond, and petitioner to reply. Or petitioner may file a
16 declaration voluntarily abandoning his unexhausted claims, as described above.

17 Petitioner's failure to choose any of the three options listed above, or seek other
18 appropriate relief from this Court, will result in his federal habeas petition being
19 dismissed. Petitioner is advised to familiarize himself with the limitations periods for
20 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations
21 periods may have a direct and substantial effect on whatever choice he makes
22 regarding his petition.

23 **IV. CONCLUSION**

24 It is therefore ordered that respondents' motion to dismiss (ECF No. 12) is
25 granted as follows: Grounds 2(B) and 2(C) are unexhausted.

26 It is further ordered that petitioner will have thirty (30) days to either: (1) inform
27 this Court in a sworn declaration that he wishes to formally and forever abandon the
28 unexhausted grounds for relief in his federal habeas petition and proceed on the

1 exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes to
2 dismiss this petition without prejudice in order to return to state court to exhaust his
3 unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to
4 hold his exhausted claims in abeyance while he returns to state court to exhaust his
5 unexhausted claims.

6 It is further ordered that if petitioner elects to abandon his unexhausted grounds,
7 respondents will have thirty (30) days from the date petitioner serves his declaration of
8 abandonment in which to file an answer to petitioner's remaining grounds for relief. The
9 answer must contain all substantive and procedural arguments as to all surviving
10 grounds of the petition, and comply with Rule 5 of the Rules Governing Proceedings in
11 the United States District Courts under 28 U.S.C. §2254.

12 It is further ordered that petitioner will have thirty (30) days following service of
13 respondents' answer in which to file a reply.

14 It is further ordered that petitioner's motion for production of transcripts and
15 documents (ECF No. 10) is denied.


16 It is further ordered that petitioner's motion for stay and abeyance (ECF No. 18)
17 is denied without prejudice as set forth in this order.

18 It is further ordered that petitioner's motion for judicial notice (ECF No. 20) is
19 denied as moot.

20 It is further ordered that if petitioner fails to respond to this order within the time
21 permitted, this case may be dismissed.

22 It is further ordered that the Clerk send to petitioner one copy of his motion to
23 stay (ECF No. 18).

24 DATED THIS 7th day of August 2017.

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27 _____
28 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE