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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BARTLEY DAMIEN LEE,  
Petitioner,  
vs.  
JACK PALMER, et al.,  
Respondents.

Case No. 3:10-CV-00355-ECR-(VPC)

**ORDER**

Before the court are the second amended petition for writ of habeas corpus (#32), respondents' second motion to dismiss (#36), petitioner's opposition (#47), and respondents' reply (#52). The court finds that petitioner has not exhausted his state-court remedies on one ground for relief, and the court grants the motion in part.

Respondents present three arguments. First, respondents argue that most of the exhibits (#33) in support of the second amended petition are unexhausted because petitioner never presented those facts to the Nevada Supreme Court. Second, respondents argue that all of the grounds for relief are unexhausted. The court will discuss first whether the grounds are exhausted before turning to whether the exhibits are exhausted. Third, respondents argue that all of the grounds for relief in the second amended petition are untimely because they do not relate back to grounds that petitioner raised in his first amended petition (#10).

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the operative facts

1 and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan  
2 v. Henry, 513 U.S. 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

3 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state  
4 remedies only if he characterized the claims he raised in state proceedings specifically as federal  
5 claims. In short, the petitioner must have either referenced specific provisions of the federal  
6 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.  
7 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that  
8 applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158  
9 (9th Cir. 2003) (en banc).

10 This is not the first time that respondents have argued that grounds for relief are  
11 unexhausted. Respondents argued in their first motion to dismiss (#12) that grounds in the first  
12 amended petition (#10) were unexhausted. In the case of ground 1 of the second amended petition  
13 (#32), respondents’ argument is almost the same as what they presented earlier. Ground 1 is a claim  
14 that trial counsel provided ineffective assistance because counsel allowed petitioner to plead guilty  
15 without a determination of competence. Respondents argued in their first motion to dismiss (#12),  
16 and they argue now, that the ineffective-assistance claim is unexhausted because petitioner did not  
17 raise it on appeal from the denial of his state post-conviction habeas corpus petition. This court has  
18 ruled that the ineffective-assistance claim was exhausted because the Nevada Supreme Court itself  
19 noted the issue itself. Order, at 2-3 (#22) (citing Sandgathe v. Maass, 314 F.3d 371, 376-77 (9th  
20 Cir. 2002)). The court sees no reason to depart from its earlier holding that the equivalent ground in  
21 the first amended petition (#10) is exhausted. To the extent that petitioner alleges additional facts in  
22 support of the ground, those facts do not fundamentally alter the nature of ground 1. See Vasquez v.  
23 Hillery, 474 U.S. 254, 260 (1986).<sup>1</sup>

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25 <sup>1</sup>A tension exists in the law regarding the presentation of new facts in federal habeas corpus  
26 petitions. Vasquez held that new factual allegations do not make a ground unexhausted if those new  
27 facts do not fundamentally alter the claim considered by the state courts. Recently, the Supreme  
28 Court held that when a federal court reviews a claim, the merits of which have been decided by a  
state court, then pursuant to 28 U.S.C. § 2254(d) the review is restricted to the record that was  
before the state court. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011). In other words, if  
Vasquez is still good law, then it is possible for a ground alleging new facts to survive a challenge to

1 Ground 4 is a claim that petitioner's guilty plea was unknowing and involuntary because  
2 petitioner was incompetent at the time that he entered the plea. Respondents argue that petitioner  
3 did not alert the Nevada Supreme Court of the federal nature of his claim. However, the Nevada  
4 Supreme Court quoted petitioner's first ground in his state habeas corpus petition, and that ground  
5 mentioned the federal constitution. Ex. 79, at 3 n.1 (#17). Petitioner presented the federal issue to  
6 the state courts. In addition, in his supplemental fast track statement, petitioner cited Bryant v.  
7 State, 721 P.2d 364 (Nev. 1986), which notes that Nevada's legislature and courts have adopted the  
8 federal constitutional rule requiring knowing and voluntary guilty pleas. See Ex. 75, at 7 (#17).  
9 Citation to a state case which applies a federal constitutional issue fairly presents that issue to the  
10 Nevada Supreme Court. Peterson, 319 F.3d at 1158. To the extent that petitioner alleges  
11 additional facts in support of the ground, those facts do not fundamentally alter the nature of ground  
12 4. Ground 4 is exhausted.

13 Ground 2 is a claim that the Nevada Supreme Court denied petitioner his right to a direct  
14 appeal, in violation of the Fifth and Fourteenth Amendments. In petitioner's state post-conviction  
15 proceedings, the parties stipulated to the following:

16 On December 16, 2005, this court convicted petitioner, pursuant to his guilty plea, of  
17 attempted murder with the use of a deadly weapon.

18 On December 27, 2005, petitioner sent an "inmate request" form to this court, stating,  
19 among other things, that the form "is also my notice of appeal[.]" No appeal was processed  
20 on behalf of petitioner.

21 On May 8, 2006, petitioner filed a post-conviction petition for writ of habeas corpus. The  
22 State filed an answer and the matter was set for hearing.

23 Based on the inmate request form petitioner sent to this court, the parties stipulate that  
24 petitioner filed a valid notice of appeal after the court filed the judgment of conviction. The  
25 parties stipulate that the notice was timely filed.

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its exhaustion, but the court would be unable to consider those new facts if 28 U.S.C. § 2254(d) is  
27 applicable. The court of appeals has recognized this tension, but has deferred answering the  
28 question. Stokley v. Ryan, 659 F.3d 802, 808 (9th Cir. 2011).

This court will treat Vasquez and Pinholster as separate questions. In most of the grounds  
challenged, the court rules that new factual allegations do not make the ground unexhausted. This  
ruling is consistent with Vasquez. Whether the court can consider the new factual allegations in its  
review of the grounds on their merits is a question that the court will answer when the court turns to  
the merits.

1 Ex. 30 (#15). The Nevada Supreme Court directed counsel to provide more information. Ex. 35  
2 (#15). Based upon counsel's responses, the Nevada Supreme Court determined that the inmate  
3 request form was never submitted to the state district court or to jail officials, and it dismissed the  
4 appeal as untimely. Ex. 45 (#15). The court has already determined that all the litigation before the  
5 Nevada Supreme Court effectively exhausted the issue, and the court sees no reason to depart from  
6 that conclusion. See Order, at 3-4 (#22). Respondents also argue that any claim of ineffective  
7 assistance of appellate counsel is unexhausted, but petitioner states that he presents no such claim.  
8 See Opposition, at 15 (#47).

9 Ground 3 is a claim that trial counsel provided ineffective assistance at sentencing because  
10 counsel did not consult with petitioner about a direct appeal. Petitioner raised this claim in his  
11 supplemental fast track statement, Ex. 75, at 8 (#17). The Nevada Supreme Court denied the claim  
12 on its merits. Ex. 79, at 4-5 (#17). To the extent that petitioner alleges additional facts in support of  
13 the ground, those facts do not fundamentally alter the nature of ground 3. Ground 3 is exhausted.

14 Ground 5 is another claim that trial counsel provided ineffective assistance at sentencing.  
15 Petitioner states that he provided counsel with names of witnesses who could provide evidence that  
16 could have mitigated petitioner's sentence. Petitioner claims that counsel did not confer with  
17 witnesses or call them to testify. The closest that petitioner came to presenting this claim to any  
18 state court was in his supplement to the state habeas corpus petition. There, petitioner stated:

19 In the event this Court does not find that Mr. Lee was denied his right to a direct appeal  
20 through ineffective assistance, his remaining habeas claims must be addressed. They relate  
21 to ineffective assistance of counsel during sentencing. Mr. Lee respectfully requests leave of  
22 court to file a supplement addressing those claims with relevant legal authority after the  
23 Lozada[ v. State, 871 P.2d 944 (Nev. 1994)] hearing.

24 Ex. 28, at 7 (#15). Petitioner does not allege any facts in this statement, he did not file another  
25 supplement, and he never presented the issue to the Nevada Supreme Court on appeal from the  
26 denial of the state habeas corpus petition. Ground 5 is not exhausted.<sup>2</sup>

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26 <sup>2</sup>The court has held that all of ground 1 of the first amended petition (#10) was unexhausted.  
27 Order, at 2-3 (#22). That holding was erroneous. Ground 1 of the first amended petition (#10)  
28 contained two claims of ineffective assistance of counsel. First, petitioner claimed that counsel  
failed to move for a competency hearing. This claim corresponds with ground 1 of the second  
amended petition (#32), and it is exhausted. Second, petitioner claimed that counsel failed to

1 Respondents do not persuade the court that most of the exhibits (#33) in support of the  
2 second amended petition are unexhausted. As the court has already discussed with respect to the  
3 individual grounds, these exhibits present additional facts that do not fundamentally alter the  
4 grounds for relief that the state courts considered.

5 Respondents next argue that grounds 2, 3, 4, and 5 of the second amended petition (#32) are  
6 untimely. Petitioner filed the second amended petition (#32) after the one-year period of limitation  
7 of 28 U.S.C. § 2244(d) expired. The grounds in the second amended petition are timely if they  
8 relate back to the grounds in the first amended petition (#10), which petitioner filed before the  
9 period of limitation expired. Relation back, pursuant to Rule 15(c) of the Federal Rules of Civil  
10 Procedure, is allowed “[s]o long as the original and amended petitions state claims that are tied to a  
11 common core of operative facts . . . .” Mayle v. Felix, 545 U.S. 644, 664 (2005).

12 Respondents challenge two aspects of ground 2. First, they note that petitioner did not allege  
13 in his first amended petition (#10) anything about his counsel’s concessions to the Nevada Supreme  
14 Court, which led to that court dismissing his direct appeal as untimely. As petitioner noted in the  
15 argument regarding the exhaustion of ground 2, he is not attempting to create a claim of ineffective  
16 assistance of counsel. The operative facts of ground 2 are that the Nevada Supreme Court denied  
17 petitioner a direct appeal even though petitioner had submitted a document that qualified as a notice  
18 of appeal. Counsel’s concessions do not change the operative facts.

19 Next, respondents note that petitioner did not mention a theory of equal protection in his first  
20 amended petition (#10). Petitioner claims in ground 2 that the Nevada Supreme Court’s actions in  
21 his belated direct appeal treated him differently from other litigants who stipulate to facts. Even  
22 though petitioner did not raise an equal-protection claim in his first amended petition (#10), that  
23 claim shares the same operative facts with the claim in the first amended petition that he was denied  
24 a direct appeal. Ground 2 relates back to the first amended petition (#10), and it is timely.

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27 prevent at sentencing evidence of his competency at the time of the crime, which could have  
28 mitigated the sentence that the court imposed. This claim corresponds with ground 5 of the second  
amended petition (#32), and it is unexhausted.

1 Ground 3 is a claim that trial counsel provided ineffective assistance because he did not  
2 consult with petitioner about a direct appeal. Petitioner alleges two facts that he did not allege in his  
3 first amended petition. First, petitioner now alleges that the Nevada Supreme Court had barred  
4 counsel from appearing before that court without prior authorization, so that counsel was unable to  
5 file a notice of appeal. Second, petitioner now alleges that the prosecution knew of counsel's legal  
6 disability. Petitioner counters that these are not actual claims, just facts surrounding the claim that  
7 counsel did not consult with petitioner about an appeal and did not file a notice of appeal. The court  
8 agrees. The operative facts are that trial counsel did not consult with petitioner about an appeal and  
9 did not file a direct appeal even after, according to petitioner, he told counsel that he was interested  
10 in an appeal. The disability that the Nevada Supreme Court placed upon counsel and the  
11 prosecution's knowledge of that disability are not operative facts. Ground 3 relates back to the first  
12 amended petition (#10), and it is timely.

13 Ground 4 is a claim that petitioner's guilty plea was unknowing and involuntary because  
14 petitioner was incompetent at the time that he entered the plea. Petitioner did not raise any such  
15 claim in his first amended petition (#10). However, ground 4 shares a common core of operative  
16 facts with ground 1 of the first amended petition. That ground included a claim that petitioner  
17 received ineffective assistance of counsel because counsel let him plead guilty without first  
18 determining whether petitioner was competent to enter a plea. The facts underlying both grounds  
19 are the same. Ground 4 relates back to the first amended petition (#10), and it is timely.

20 Ground 5 is a claim that counsel provided ineffective assistance at sentencing because  
21 counsel did not confer with, or call to testify, witnesses who could have provided mitigating  
22 evidence. Although petitioner has presented more specific facts in ground 5, petitioner presented  
23 essentially the same claim in ground 1 of the first amended petition (#10). Ground 5 relates back to  
24 the first amended petition (#10), and it is timely.

25 The second amended petition (#32) is mixed, containing both claims exhausted in state court  
26 and claims not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S.  
27 509, 521-22 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983).

1 Respondents have submitted a renewed motion for leave to file presentence report under seal  
2 (#37), with a corrected image at #40 of the court's docket. Given that the presentence report is a  
3 confidential document, the court grants respondents' motion.

4 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#36) is **GRANTED** in  
5 part. Ground 5 is unexhausted.


6 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry  
7 of this order to file a motion for dismissal without prejudice of the entire petition, for partial  
8 dismissal of ground 5, or for other appropriate relief. Within ten (10) days of filing such motion,  
9 petitioner must file a signed declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 that  
10 he has conferred with his counsel in this matter regarding his options, that he has read the motion,  
11 and that he has authorized that the relief sought therein be requested. Failure to comply with this  
12 order will result in the dismissal of this action.

13 IT IS FURTHER ORDERED that if petitioner elects to dismiss the aforementioned grounds  
14 of his second amended petition (#32) and proceed on the remaining grounds, respondents shall file  
15 and serve an answer to the remaining grounds within forty-five (45) days after petitioner serves his  
16 declaration dismissing those grounds. The answer shall comply with Rule 5 of the Rules Governing  
17 Section 2254 Cases in the United States District Courts.

18 IT IS FURTHER ORDERED that if respondents file and serve an answer, petitioner shall  
19 have forty-five (45) days from the date on which the answer is served to file and serve a reply.

20 IT IS FURTHER ORDERED that respondents' renewed motion for leave to file presentence  
21 report under seal (#37) is **GRANTED**.

22 DATED: September 4, 2012.

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25 EDWARD C. REED  
26 United States District Judge  
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