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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MATTHEW ARTHUR FIELDS,)
)
 Petitioner,)
)
 vs.)
)
 ROBERT LEGRAND, *et al.*,)
)
 Respondents.)
 _____)

3:11-cv-00341-LRH-WGC

ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a state prisoner, is proceeding *pro se* (ECF #6). Before the court is respondents’ motion to dismiss (ECF #9). Petitioner has opposed the motion (ECF #17), and respondents have replied (ECF #18).

I. Procedural History and Background

In November 2006, the State of Nevada charged petitioner with one count of causing the death of a person by driving a vehicle while under the influence of alcohol, one count of leaving the scene of an accident involving the death of a person, and one count of conspiring to attempt to suborn perjury (exhibits to motion to dismiss, ECF #9, ex. 2).¹ Petitioner was convicted pursuant to a guilty plea and sentenced to 6 to 18 years on the first count, a consecutive term of 6 to 15 years on the second count, and a concurrent term of one year on the third count (ex. 17). Petitioner did not file a direct appeal.

On April 23, 2008, petitioner filed a state petition for writ of habeas corpus (ex. 18). Following an evidentiary hearing (*see* ex. 28), the state district court denied the petition (ex. 30). Petitioner

¹ All exhibits referenced in this Order are exhibits to respondents’ motion to dismiss (ECF #9), which are located at ECF #s 10, 11 and 12.

1 appealed the denial of his state habeas petition to the Nevada Supreme Court (ex. 33). In his appeal,
2 petitioner argued that his counsel rendered ineffective assistance by (1) failing to fully investigate the
3 “305 program”—an alcohol treatment program—and improperly advising him that he would be eligible
4 for the 305 program and that such participation would reduce his sentence; (2) improperly advising him
5 that his sentences would run concurrently; (3) failing to advise the state district court during sentencing
6 that the 305 program would not apply to the sentence, as imposed; (4) failing to object when the State
7 argued that petitioner would only serve half his sentence under the 305 program; and (5) failing to file
8 a direct appeal (ex. 38). On March 17, 2011, the Nevada Supreme Court affirmed the denial of the state
9 habeas petition (ex. 42).

10 On May 10, 2011, petitioner initiated this federal petition for writ of habeas corpus (ECF #6).
11 In his federal petition, petitioner raises the following grounds for relief:

12 (1) Counsel rendered ineffective assistance under the Sixth and Fourteenth Amendments in
13 failing to adequately defend the case by litigating the charges of leaving the scene of an accident
14 involving the death of a person and conspiring to attempt to suborn perjury.

15 (2) Counsel rendered ineffective assistance under the Sixth and Fourteenth Amendments by
16 failing to investigate petitioner’s eligibility for the 305 program and improperly advising him that his
17 sentence would be reduced by participation in the program, failing to obtain records of petitioner’s 2000
18 conviction prior to sentencing, and failing to cross-examine witness Rowe at sentencing.

19 (3) Counsel rendered ineffective assistance under the Sixth and Fourteenth Amendments by
20 improperly advising petitioner that his prison terms would run concurrently, that he would qualify for
21 the 305 program and that such participation would reduce his sentence.

22 (4) Counsel rendered ineffective assistance under the Sixth and Fourteenth Amendments by
23 failing to present mitigating evidence at sentencing, including family members’ testimony, improperly
24 advising the sentencing court that petitioner was eligible for the 305 program, failing to make corrections
25 to the presentence investigation report, and failing to adequately cross-examine witness Rowe at
26 sentencing regarding petitioner’s 2000 conviction.

27 (5) Counsel rendered ineffective assistance under the Sixth and Fourteenth Amendment by
28 failing to perfect a direct appeal raising several issues.

1 (6) The *Lozada* remedy is inadequate as a matter of law.

2 This court denied petitioner's motion for appointment of counsel on June 21, 2011 (ECF #7).
3 Respondents argue that the petition should be dismissed because it contains several unexhausted claims
4 (ECF #9).

5 **II. Discussion**

6 **A. Exhaustion Standard**

7 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has
8 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28
9 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims
10 before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844
11 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
12 petitioner has given the highest available state court the opportunity to consider the claim through direct
13 appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004);
14 *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

15 A habeas petitioner must "present the state courts with the same claim he urges upon the federal
16 court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications of a claim,
17 not just issues of state law, must have been raised in the state court to achieve exhaustion. *Ybarra v.*
18 *Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve
19 exhaustion, the state court must be "alerted to the fact that the prisoner [is] asserting claims under the
20 United States Constitution" and given the opportunity to correct alleged violations of the prisoner's
21 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106
22 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) "provides a simple and clear instruction to
23 potential litigants: before you bring any claims to federal court, be sure that you first have taken each
24 one to state court." *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S.
25 509, 520 (1982)). "[G]eneral appeals to broad constitutional principles, such as due process, equal
26 protection, and the right to a fair trial, are insufficient to establish exhaustion." *Hiivala v. Wood*, 195
27 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However, citation to state caselaw that applies
28 federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003)

1 (en banc).

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

9 **B. Petition in the Instant Case**

10 1. Grounds 2 and 4: petitioner's claim that counsel was ineffective by failing to cross-
11 examine witness Rowe at sentencing

12 In grounds 2 and 4 of the federal petition, petitioner alleges counsel rendered ineffective
13 assistance under the Sixth and Fourteenth Amendments by failing to cross-examine witness Rowe at
14 sentencing (ECF #6 at 7,13). Respondents correctly argue that petitioner fails to raise this issue in his
15 fast track statement filed on appeal of the denial of his state habeas petition (*see ex. 38*). Accordingly,
16 petitioner's claims in grounds 2 and 4 that his counsel was ineffective because he failed to cross-examine
17 witness Rowe at sentencing are unexhausted.

18 2. Ground 2: petitioner's claim that counsel was ineffective by failing to obtain records
19 from his 2000 misdemeanor conviction

20 In ground 2, petitioner alleges that counsel rendered ineffective assistance under the Sixth and
21 Fourteenth Amendments by failing to obtain records of petitioner's 2000 conviction prior to sentencing
22 (ECF #6 at 7). Respondents point out that petitioner never raised this claim in the fast track statement
23 filed on appeal of the denial of his state habeas petition (*see ex. 38*). In his opposition to the motion to
24 dismiss, petitioner argues that he did in fact exhaust this claim and references the evidentiary hearing
25 before the state district court (ECF #17 at 9-10). However, this argument is of no moment because
26 petitioner did not raise this claim on appeal to the Nevada Supreme Court. Accordingly, petitioner's
27 claim in ground 2 that his counsel was ineffective by failing to obtain records from his 2000
28 misdemeanor conviction is unexhausted.

1 3. Ground 4: petitioner’s claim that counsel was ineffective by failing to present
2 mitigating evidence at sentencing

3 In ground 4, petitioner alleges that counsel rendered ineffective assistance under the Sixth and
4 Fourteenth Amendments by failing to present mitigating evidence at sentencing, including family
5 members’ testimony (ECF #6 at 13). Respondents argue that this claim is unexhausted (ECF #9 at 5).

6 In his opposition to the motion to dismiss, petitioner argues that he did in fact exhaust this claim
7 and again references the evidentiary hearing before the state district court (ECF #17 at 10-11). Petitioner
8 also points out that the fast track statement filed on appeal to the state court references that several
9 family members were available to testify at the sentencing hearing but that his counsel made the decision
10 not to call those witnesses (ex. 38 at 5-6). However, that reference appears in the statement of facts
11 section of the fast track statement only; it is not a claim that is raised and discussed in the issues on
12 appeal section of the fast track statement (*see generally* ex. 38). The mere mention of factual allegations
13 in the statement of facts section of the appellate brief without setting it forth as an issue on appeal did
14 not give the Nevada Supreme Court a fair opportunity to act on the claim before it was presented in the
15 federal habeas petition. *O’Sullivan*, 526 U.S. at 844. Accordingly, petitioner’s claim set forth in ground
16 4 that counsel was ineffective by failing to present mitigating evidence at sentencing, including family
17 members’ testimony, is unexhausted.

18 4. Ground 4: petitioner’s claim that counsel was ineffective by failing to correct the
19 presentence investigation report

20 In ground 4, petitioner alleges that counsel rendered ineffective assistance by failing to make
21 corrections to the presentence investigation report (ECF #6 at 13). Respondents argue that this claim
22 is unexhausted (ECF #9 at 6).

23 In his opposition to the motion to dismiss, petitioner argues that this claim is in fact exhausted;
24 however, he fails to point to anywhere in his appellate brief to the Nevada Supreme Court to support this
25 argument (see ECF #17 at 11-12). Again, there is a reference to the presentence report in the statement
26 of facts of the fast track statement, but the claim that petitioner’s counsel rendered ineffective assistance
27 by failing to correct the presentence report was not fairly presented as an issue on appeal to the Nevada
28 Supreme Court. Accordingly, petitioner’s claim set forth in ground 4 that counsel was ineffective in

1 failing to correct the presentence report is unexhausted.

2 5. Ground 6

3 In ground 6, petitioner alleges that the *Lozada* remedy is inadequate as a matter of law (ECF #6
4 at 18).² While petitioner asserts that this claim is exhausted (ECF #17 at 13), he did not raise it in his
5 appeal of the denial of his state habeas petition (*see ex. 38*). Accordingly, respondents are correct that
6 ground 6 is unexhausted.

7 **III. Petitioner’s Options Regarding Unexhausted Claims**

8 A federal court may not entertain a habeas petition unless the petitioner has exhausted available
9 and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509,
10 510 (1982). A “mixed” petition containing both exhausted and unexhausted claims is subject to
11 dismissal. *Id.* In the instant case, the court finds that the following grounds are unexhausted:
12 petitioner’s claims in grounds 2 and 4 that his counsel was ineffective because he failed to cross-examine
13 witness Rowe at sentencing; petitioner’s claim in ground 2 that his counsel was ineffective because he
14 failed to obtain records from his 2000 misdemeanor conviction; petitioner’s claim in ground 4 that
15 counsel was ineffective because he failed to present mitigating evidence at sentencing, including family
16 members’ testimony; petitioner’s claim in ground 4 that counsel was ineffective because he failed to
17 correct the presentence report; and ground 6. Because the court finds that the petition is a “mixed
18 petition,” containing both exhausted and unexhausted claims, petitioner has these options:

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

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

27 ² This ground references *Lozada v. State*, 871 P.2d 944 (Nev. 1994), which holds that if a
28 petitioner is denied a direct appeal due to ineffective assistance of counsel, that he or she may file a
habeas petition that sets forth the claims he or she would have argued on direct appeal, and that he or
she is entitled to appointed counsel to litigate such habeas petition.

1 The *Rhines* Court stated:

2 [S]tay and abeyance should be available only in limited circumstances.
3 Because granting a stay effectively excuses a petitioner's failure to present his claims
4 first to the state courts, stay and abeyance is only appropriate when the district court
5 determines there was good cause for the petitioner's failure to exhaust his claims first
6 in state court. Moreover, even if a petitioner had good cause for that failure, the district
7 court would abuse its discretion if it were to grant him a stay when his unexhausted
8 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ
9 of habeas corpus may be denied on the merits, notwithstanding the failure of the
10 applicant to exhaust the remedies available in the courts of the State").

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

12 Accordingly, petitioner would be required to show good cause for his failure to exhaust his
13 unexhausted claims in state court, and to present argument as to whether or not his unexhausted claims
14 are plainly meritless. Respondent would then be granted an opportunity to respond, and petitioner to
15 reply.

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

21 **IV. Conclusion**

22 **IT IS THEREFORE ORDERED** that respondents' motion for leave to file Exhibit 14 under
23 seal (ECF #12) is **GRANTED**.

24 **IT IS FURTHER ORDERED** that respondents' motion to dismiss the petition (ECF #9) is
25 **GRANTED in part, and DENIED in part**, as follows:

26 The following grounds set forth in the petition are unexhausted:

27 1. Claims in grounds 2 and 4 that counsel was ineffective because he failed to cross-examine
28 witness Rowe at sentencing;

29 2. Claim in ground 2 that counsel was ineffective because he failed to obtain records from his
30 2000 misdemeanor conviction;

31 3. Claim in ground 4 that counsel was ineffective because he failed to present mitigating
32 evidence at sentencing, including family members' testimony;

1 4. Claim in ground 4 that counsel was ineffective because he failed to correct the presentence
2 report;

3 5. Ground 6.

4 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** to either: **(1)** inform
5 this court in a sworn declaration that he wishes to formally and forever abandon the unexhausted grounds
6 for relief in his federal habeas petition and proceed on the exhausted ground; **OR (2)** inform this court
7 in a sworn declaration that he wishes to dismiss this petition without prejudice in order to return to state
8 court to exhaust his unexhausted claims; **OR (3)** file a motion for a stay and abeyance, asking this court
9 to hold his exhausted claim in abeyance while he returns to state court to exhaust his unexhausted
10 claims. If petitioner chooses to file a motion for a stay and abeyance, or seek other appropriate relief,
11 respondents may respond to such motion as provided in Local Rule 7-2.

12 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted grounds,
13 respondents shall have **thirty (30) days** from the date petitioner serves his declaration of abandonment
14 in which to file an answer to petitioner's remaining grounds for relief. The answer shall contain all
15 substantive and procedural arguments as to all surviving grounds of the petition, and shall comply with
16 Rule 5 of the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. §2254.

17 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following service of
18 respondents' answer in which to file a reply.

19 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within the time
20 permitted, this case may be dismissed.

21 Dated this 16th day of November, 2011.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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