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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 CHRISTOPHER O'NEILL,

Case No. 3:11-cv-00901-MMD-VPC

10 Petitioner,

ORDER

11 v.

12 RENEE BAKER, et al.,

13 Respondents.

14 This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.  
15 Petitioner filed a counseled first amended petition (dkt. no. 13). Before the Court is  
16 respondents' motion to dismiss (dkt. no. 44). Petitioner has opposed the motion (dkt. no.  
17 50), and respondents replied (dkt. no. 54).

18 **I. PROCEDURAL HISTORY AND BACKGROUND**

19 On June 7, 2005, petitioner Christopher O'Neill ("petitioner") was convicted  
20 pursuant to jury verdicts of three counts of possession of a forged instrument, felonies in  
21 violation of NRS § 205.110 (exhibits to first amended petition (dkt. no. 13, Exhs. 24, 25,  
22 26, 30)).<sup>1</sup> On August 25, 2005, petitioner was adjudicated a habitual criminal, sentenced  
23 to life with the possibility of parole, with a minimum parole eligibility of ten years on all  
24 three counts, to be served concurrently, and the judgment of conviction was entered.  
25 (Exhs. 29, 30.) Petitioner was not given credit for time served. (Exh. 30.) An amended  
26 judgment of conviction was filed on April 5, 2007. (Exh. 52.)

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28 <sup>1</sup>All exhibits referenced in this order are exhibits to the amended petition (dkt. no. 13) and are found at dkt. nos. 14-23.

1           Petitioner appealed, and the Nevada Supreme Court affirmed his conviction and  
2 sentence on March 8, 2007. (Exh. 50; *O'Neill v. State*, 153 P.3d 38, 45 (Nev. 2007).)  
3 Remittitur issued on April 3, 2007. (Exh. 51.)

4           On April 30, 2007, petitioner filed his first state postconviction petition for writ of  
5 habeas corpus. (Exh. 53.) Following an evidentiary hearing, the state district court  
6 denied the petition on July 21, 2010. (Exhs. 74, 82, 94, 102, 104, 108.) The Nevada  
7 Supreme Court affirmed the denial of the petition on November 17, 2011, and remittitur  
8 issued on December 13, 2011. (Exhs. 179, 181.)

9           On June 6, 2007, petitioner filed a motion for a new trial, which the state district  
10 court denied on July 24, 2007. (Exhs. 57, 60.) On November 19, 2008, the Nevada  
11 Supreme Court affirmed the denial of the motion for new trial, and remittitur issued on  
12 December 16, 2008. (Exhs. 215, 216.)

13           On July 25, 2010, petitioner filed a motion to correct or modify his sentence,  
14 which the state district court denied on September 1, 2010. (Exhs. 105, 123.) The  
15 Nevada Supreme Court affirmed the denial of the motion on February 9, 2011, and  
16 remittitur issued on March 7, 2011. (Exhs. 154, 159.)

17           On August 24, 2010, petitioner filed his second state postconviction habeas  
18 petition. (Exh. 119.) The state district court dismissed the petition on October 19, 2011.  
19 (Exh. 173.) The Nevada Supreme Court affirmed the dismissal of the petition on June  
20 13, 2012, and remittitur issued on July 10, 2012. (Exhs. 210, 211.)

21           Petitioner dispatched this federal petition for writ of habeas corpus on December  
22 8, 2011 (dkt. no. 4). Through counsel, petitioner filed an amended petition on November  
23 21, 2012 (dkt. no. 13). Respondents argue that the petition should be dismissed  
24 because several grounds are unexhausted and/or are procedurally barred.

## 25       **II.       LEGAL STANDARD FOR EXHAUSTION**

26           A federal court will not grant a state prisoner's petition for habeas relief until the  
27 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*  
28 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state

1 courts a fair opportunity to act on each of his claims before he presents those claims in  
2 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*  
3 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
4 petitioner has given the highest available state court the opportunity to consider the  
5 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,  
6 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.  
7 1981).

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

25 A claim is not exhausted unless the petitioner has presented to the state court  
26 the same operative facts and legal theory upon which his federal habeas claim is based.  
27 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
28 exhaustion requirement is not met when the petitioner presents to the federal court facts

1 or evidence which place the claim in a significantly different posture than it was in the  
2 state courts, or where different facts are presented at the federal level to support the  
3 same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
4 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,  
5 458 (D. Nev. 1984).

### 6 **III. RELEVANT GROUNDS IN INSTANT PETITION**

7 Petitioner sets forth six grounds for relief in his amended petition (dkt. no. 13, pp.  
8 19-50). Respondents argue that grounds 1(A), 1(B), 3, and 5 are unexhausted (dkt. no.  
9 44, pp. 20-21).<sup>2</sup>

#### 10 **A. Ground 1(A)**

11 In ground 1(A) of the federal petition, petitioner alleges that his trial counsel  
12 rendered ineffective assistance in violation of his Sixth and Fourteenth Amendment  
13 rights when he failed to communicate with petitioner prior to trial resulting in a failure to  
14 present a full defense at trial (dkt. no. 13, pp. 19-26).

15 The Court agrees with petitioner that respondents' arguments regarding ground  
16 1(A) are indecipherable. Respondents contend that petitioner's claim in ground 1(A) is  
17 that his counsel was ineffective for failing to challenge the admissibility of the  
18 handwriting expert's testimony on the basis that the prosecution did not authenticate the  
19 handwriting exemplar and that that claim is unexhausted (dkt. no. 44, p. 20). However,  
20 that claim is not presented as part of ground 1(A). The Court has examined ground 1(A)  
21 in the instant petition, compared it to the grounds raised in petitioner's appeal of the  
22 denial of his first state postconviction petition to the Nevada Supreme Court (Exh. 134,  
23 pp. 24-35), and finds that ground 1(A) is exhausted.

#### 24 **B. Ground 1(B)**

25 In ground 1(B) of the federal petition, petitioner alleges that his trial counsel  
26 rendered ineffective assistance of counsel in violation of his Sixth and Fourteenth

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27 <sup>2</sup>As will be discussed below, respondents claim in a heading only that ground  
28 1(C) is also unexhausted, but fail to include any supporting argument.

1 Amendment rights when he failed to object to the state's handwriting expert's testimony  
2 on authentication grounds (dkt. no. 13, pp. 26-29). Petitioner explains that the state's  
3 expert testified that he compared the handwriting on one of the forged checks to a  
4 "known" handwriting sample from petitioner, namely a letter and an envelope. (*Id.* at  
5 26.) Petitioner's trial counsel failed to object to the fact that the "known" handwriting  
6 sample was never authenticated. (*Id.* at 27.) The state relied heavily on the expert's  
7 testimony. (*Id.* at 28.) Petitioner states that he presented this claim to the Nevada  
8 Supreme Court when he appealed the denial of his first state postconviction petition  
9 (dkt. no. 13, p. 19). He also argues, in his opposition to the motion to dismiss, that in  
10 affirming the denial of his second state postconviction petition, the Nevada Supreme  
11 Court stated that it had already considered and rejected this claim (dkt. no. 50, p. 13).

12 Having carefully reviewed the record, including petitioner's briefs to the Nevada  
13 Supreme Court in his appeals of the denial of his first state postconviction petition and  
14 the dismissal of his second state postconviction petition, as well as the Nevada  
15 Supreme Court's orders affirming the state district court in both instances, this Court  
16 agrees with respondents that petitioner did not raise this claim in his appeal of his first  
17 state postconviction petition. The Court notes in particular that in its order affirming the  
18 dismissal of the second state postconviction petition, the Nevada Supreme Court stated  
19 that it had already "considered and rejected [petitioner's] claim that counsel was  
20 ineffective for failing to present a handwriting expert at trial" when it affirmed the denial  
21 of petitioner's ineffective assistance claims in his first state postconviction petition. (Exh.  
22 210, p. 3.) That is not the claim that petitioner now seeks to raise as ground 1(B) of his  
23 federal petition. Accordingly, ground 1(B) is unexhausted.

### 24 **C. Ground 1(C)**

25 In ground 1(C) of the federal petition, petitioner claims that his Sixth and  
26 Fourteenth Amendment rights to effective assistance of counsel were violated when trial  
27 counsel failed to timely move to suppress or otherwise object to the evidence seized by  
28 the parole officers during their searches of petitioner's person and vehicle, the

admission of which was essential to convict petitioner of the crimes charged (dkt. no. 13, p. 29). In a heading in the motion to dismiss, respondents included ground 1(C) as a ground that they contended was unexhausted (dkt. no. 44, p. 14). Respondents provide no argument, however, in support of this general contention that ground 1(C) is unexhausted. Further, the Court concludes that petitioner raised this claim in his appeal of the denial of his first state postconviction petition to the Nevada Supreme Court. (Exh. 134, pp. 14-20.) Accordingly, ground 1(C) is exhausted.

#### **D. Ground 3**

In ground 3 of his federal petition, petitioner contends that he was denied his Sixth and Fourteenth Amendment right to effective assistance of counsel when the court failed to conduct an appropriate inquiry into his motion to replace existing appointed counsel with new appointed counsel (dkt. no. 13, pp. 36-39). The claim that petitioner presented to the Nevada Supreme Court in his appeal of the denial of his first state postconviction petition as ground 4 was under the following heading:

The district court abused its discretion when finding that [trial counsel] was effective when he failed to communicate with [petitioner] before jury trial in order to prepare his defense, advising [petitioner] to wait until the motion to confirm hearing to present his motion for new counsel, knowing that they had irreconcilable differences under *Garcia* and *Young*, and knowing that it would be too late to receive new counsel because of the late date.

(Exh. 134, p. 25.)

Respondents argue that petitioner's substantive claim that the court erred in failing to properly inquire into petitioner's motion to replace counsel is unexhausted (dkt. no. 44, pp. 20-21). However, in petitioner's brief appealing the denial of his first state postconviction petition, under ground 4, he further argued that he "should have received new counsel or represented himself" and that "[w]hen this Court reviews the transcript of the Motion to Confirm Trial, from the Friday before the Monday trial, it is clear that the district court erred when not fully canvassing [petitioner] regarding the extent of the conflict with [trial counsel]." (Exh. 134, pp. 25-26.) He also included the brief colloquy between the court and petitioner regarding a potential conflict and also set forth many

1 areas of conflict that he maintained existed between himself and counsel. (*Id.* at 26-29.)  
2 Petitioner further argued that: “Because of the extent of the conflict, new counsel should  
3 have been appointed. However, the district court made no inquiry about the extent of  
4 the conflict.” (*Id.* at 29.) Particularly in light of the inherent difficulty in separating a claim  
5 of conflict with counsel with a claim of ineffective assistance of counsel, this Court finds  
6 that ground 3 is exhausted.

7 **E. Ground 5(A)**

8 In ground 5(A) of the federal petition, petitioner claims that he was denied his  
9 right to the effective assistance of appellate counsel under the Fifth, Sixth, and  
10 Fourteenth Amendments when counsel failed to raise on appeal that the trial court erred  
11 in denying the mistrial application after an officer mentioned the parole violation report  
12 prepared in his case (dkt. no. 13, p. 43). Petitioner now concedes that ground 5(A) is  
13 unexhausted (dkt. no. 50, pp. 15-16).

14 **F. Ground 5(B)**

15 In ground 5(B) of the federal petition, petitioner claims that he was denied his  
16 right to the effective assistance of appellate counsel under the Fifth, Sixth, and  
17 Fourteenth Amendments when counsel failed to raise on direct appeal that the  
18 handwriting expert’s testimony was inadmissible because the exemplar was not  
19 authenticated (dkt. no. 13, p. 43). Respondents argue that this claim is unexhausted  
20 (dkt. no. 44, p. 21).

21 Petitioner acknowledges that this claim has not been presented to the Nevada  
22 Supreme Court (dkt. no. 50, p. 16). He argues that the claim is “technically” exhausted  
23 because if he were to attempt to return to state court and raise this claim, the Nevada  
24 Supreme Court would conclude that it is procedurally defaulted. (*Id.*) This argument is  
25 unavailing. Ineffective assistance of trial or appellate counsel may satisfy the cause  
26 requirement to overcome a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488-489  
27 (1986). However, for a claim of ineffective assistance of counsel to satisfy the cause  
28 requirement, the independent claim of ineffective assistance of counsel, itself, must first

1 be presented to the state courts. *Murray*, 477 U.S. at 488-489. *Tacho v. Martinez*, 862  
2 F.2d 1376, 1381 (9<sup>th</sup> Cir. 1988). Accordingly, ground 5(B) is unexhausted.

#### 3 **IV. PETITIONER'S OPTIONS REGARDING UNEXHAUSTED CLAIMS**

4 A federal court may not entertain a habeas petition unless the petitioner has  
5 exhausted available and adequate state court remedies with respect to all claims in the  
6 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both  
7 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the  
8 Court finds that grounds 1(B), 5(A) and 5(B) are unexhausted. The petition is thus a  
9 “mixed petition,” containing both exhausted and unexhausted claims, and therefore,  
10 petitioner, through counsel, has these options:

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

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

19 The *Rhines* Court stated:

20 [S]tay and abeyance should be available only in limited circumstances.  
21 Because granting a stay effectively excuses a petitioner's failure to  
22 present his claims first to the state courts, stay and abeyance is only  
appropriate when the district court determines there was good cause for  
23 the petitioner's failure to exhaust his claims first in state court. Moreover,  
even if a petitioner had good cause for that failure, the district court  
24 would abuse its discretion if it were to grant him a stay when his  
unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2)  
25 (“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”).

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

27 Accordingly, if petitioner files a motion for stay and abeyance, he would be  
28 required to show good cause for his failure to exhaust his unexhausted claims in state



1 court, and to present argument regarding the question whether or not his unexhausted  
2 claims are plainly meritless. Respondent would then be granted an opportunity to  
3 respond, and petitioner to reply.

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

#### 10 **V. CONCLUSION**

11 It is therefore ordered that respondents' motion to dismiss (dkt. no. 44) is granted  
12 in part and denied in part as follows:

- 13 1. Grounds 1(B), 5(A) and 5(B) are unexhausted.
- 14 2. Grounds 1(A), 1(C), and 3 are exhausted.

15 It is further ordered that petitioner shall have thirty (30) days to either: (1) inform  
16 this Court in a sworn declaration that he wishes to formally and forever abandon the  
17 unexhausted grounds for relief in his federal habeas petition and proceed on the  
18 exhausted ground; or (2) inform this Court in a sworn declaration that he wishes to  
19 dismiss this petition without prejudice in order to return to state court to exhaust his  
20 unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to  
21 hold his exhausted claim in abeyance while he returns to state court to exhaust his  
22 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or  
23 seek other appropriate relief, respondents may respond to such motion as provided in  
24 Local Rule 7-2.

25 It is further ordered that if petitioner elects to abandon his unexhausted grounds,  
26 respondents shall have thirty (30) days from the date petitioner serves his declaration of  
27 abandonment in which to file an answer to petitioner's remaining grounds for relief. The  
28 answer shall contain all substantive and procedural arguments as to all surviving


1 grounds of the petition, and shall comply with Rule 5 of the Rules Governing  
2 Proceedings in the United States District Courts under 28 U.S.C. §2254.

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

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

7 It is further ordered that any additional state court record exhibits filed herein by  
8 either petitioner or respondents shall be filed with a separate index of exhibits identifying  
9 the exhibits by number. The CM/ECF attachments that are filed further shall be  
10 identified by the number or numbers of the exhibits in the attachment. The hard copy of  
11 any additional state court record exhibits shall be forwarded — for this case — to the  
12 staff attorneys in Reno.

13 DATED THIS 12<sup>th</sup> day of January 2015.

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16 MIRANDA M. DU  
17 UNITED STATES DISTRICT JUDGE  
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