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28UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MICHAEL RAY WHEELER,

Case No. 3:12-cv-00469-MMD-WGC

Petitioner,

ORDER

v.

JAMES COX, et al.,

Respondents.

This *pro se* habeas matter under 28 U.S.C. § 2254 is before the Court on respondents' motion to dismiss several grounds in petitioner Michael Ray Wheeler's first-amended petition (ECF No. 42.) Wheeler did not file an opposition, and respondents filed a notice of failure to respond to motion (ECF No. 52).

**I. PROCEDURAL HISTORY AND BACKGROUND**

On August 16, 2008, a jury convicted Wheeler of one count of domestic battery causing substantial bodily harm (Exh. 33).<sup>1</sup> The state district court adjudicated Wheeler a habitual criminal and sentenced him to a term of five to twenty-five years. (Exh. 54.) Judgment of conviction was entered on February 15, 2007. (Exh. 55.) The Nevada Supreme Court affirmed Wheeler's conviction on April 7, 2008, and remittitur issued on May 2, 2008. (Exhs. 71, 72.)

Wheeler filed a *pro per* state postconviction petition for habeas corpus on June 19, 2008. (Exh. 77.) The state district court appointed counsel; Wheeler filed a

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<sup>1</sup>The exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 42, and are found at ECF Nos. 43-49, 51.

1 counseled, supplemental petition, and the state district court denied the petition on  
2 January 19, 2011. (Exh. 139.) On September 15, 2011, the Nevada Supreme Court  
3 affirmed the denial of the petition, and remittitur issued on October 11, 2011. (Exhs.  
4 158, 159.)

5 Wheeler filed a second state postconviction petition on February 7, 2012. (Exh.  
6 160.) The Nevada Supreme Court affirmed the denial of the second petition on  
7 September 16, 2014, and remittitur issued on October 15, 2014. (Exhs. 194, 195.)

8 While the second state postconviction petition was pending, Wheeler dispatched  
9 his federal habeas petition for mailing on August 27, 2012 (ECF No. 6). This Court  
10 granted petitioner's motion to stay the petition pending the conclusion of his state-court  
11 proceedings (ECF No. 27).<sup>2</sup> The Court granted the motion to reopen this case on April  
12 30, 2015, and petitioner filed an amended petition on June 17, 2015 (ECF Nos. 35, 37).  
13 Respondents now argue that several grounds in the first-amended petition should be  
14 dismissed because they do not relate back to the original petition, are unexhausted, or  
15 noncognizable (ECF No. 42).

## 16 **II. LEGAL STANDARDS & ANALYSIS**

### 17 **A. Relation Back**

18 Respondents first argue that grounds 5(b) and 7 of the amended petition do not  
19 relate back to the original petition and should thus be dismissed as untimely (ECF No.  
20 42 at 6-9). A new claim in an amended petition that is filed after the expiration of the  
21 Antiterrorism and Effective Death Penalty Act's ("AEDPA") one-year limitation period will  
22 be timely only if the new claim relates back to a claim in a timely-filed pleading under  
23 Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out  
24 of "the same conduct, transaction or occurrence" as a claim in the timely pleading.  
25 *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held

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26 <sup>2</sup>It appears that Wheeler was paroled about May 2013 and released from custody  
27 about June 2014 (ECF Nos. 26, 28). In order to obtain § 2254 habeas relief, a prisoner  
28 must be in custody at the time the petition is filed in federal court. *Spencer v. Kemna*,  
523 U.S. 1, 7 (1998). Here, the original petition reflects that Wheeler satisfied the  
custody requirement at the time he filed his petition (ECF No. 6).

1 that habeas claims in an amended petition do not arise out of “the same conduct,  
2 transaction or occurrence” as claims in the original petition merely because the claims  
3 all challenge the same trial, conviction or sentence. 545 U.S. at 655–64. Rather, under  
4 the construction of the rule approved in *Mayle*, Rule 15(c) permits relation back of  
5 habeas claims asserted in an amended petition “only when the claims added by  
6 amendment arise from the same core facts as the timely filed claims, and not when the  
7 new claims depend upon events separate in ‘both time and type’ from the originally  
8 raised episodes.” 545 U.S. at 657. In this regard, the reviewing court looks to “the  
9 existence of a common ‘core of operative facts’ uniting the original and newly asserted  
10 claims.” A claim that merely adds “a new legal theory tied to the same operative facts as  
11 those initially alleged” will relate back and be timely. 545 U.S. at 659 and n.5; *Ha Van*  
12 *Nguyen v. Curry*, 736 F.3d 1287, 1297 (9<sup>th</sup> Cir. 2013).

13 Here, Wheeler filed his first-amended petition on June 17, 2015, nearly three  
14 years after he dispatched his original petition for filing on August 27, 2012 (ECF Nos. 6  
15 and 37). The claims in the first-amended petition must therefore relate back to  
16 Wheeler’s original petition in order to be deemed timely.

17 **1. Ground 5(b)**

18 Wheeler claims that his trial counsel rendered ineffective assistance when he  
19 failed to object to improper opinion testimony by (a) Detective Fiore and (b) Officer Scott  
20 Tracy (ECF No. 37 at 9-10).

21 In his original petition, petitioner argues prosecutorial misconduct based on the  
22 prosecutor’s conspiring with Detective Fiore to “subvert probative evidence to wrongfully  
23 impeach the key percipient witness of the case” (ECF No. 6 at 7-8). Petitioner  
24 incorporated by reference his direct appeal, his first state postconviction petition and  
25 supplement and his second state postconviction petition. There are passing references  
26 in his first state postconviction filings regarding another officer who was interviewing the  
27 victim with Officer Tracy who testified that he could not hear or understand very well  
28 what the victim was saying and arguing that the defense should have explored whether

1 Tracy was able to understand. (*See e.g.*, Exh. 85 at 12.) Nowhere does Wheeler claim,  
2 however, that Officer Tracy testified improperly about his own opinion or that trial  
3 counsel failed to object to any such testimony. Accordingly, ground 5(b) does not relate  
4 back to the original petition, and therefore, it is dismissed as untimely.

## 5                   **2.     Ground 7**

6             Wheeler contends that his trial counsel rendered ineffective assistance because  
7 he failed to investigate any aspect of the case, specifically the defense theory that the  
8 victim’s injuries were the result of an accident and not domestic violence. (ECF No. 37  
9 at 12-13.) He argues that he would have been acquitted or found guilty of a lesser crime  
10 if trial counsel had called Dr. Thomas H. Gill to rebut the State’s three expert physicians.  
11 (*Id.*)

12             In ground 8 of the original petition Wheeler contends that trial counsel was  
13 ineffective for failing to present any forensic expert witnesses regarding the alleged  
14 victim’s injuries. (ECF No. 6 at 6.) In the supplement to his first state postconviction  
15 petition, Wheeler argues ineffective assistance of counsel for failing to investigate that  
16 the victim’s injuries were the result of an accident. (Exh. 85 at 13.) He asserts mainly  
17 that counsel should have recalled the victim to the stand because she would have  
18 testified “as to the facts stated within her memorandum to postconviction counsel,” that  
19 is, she would have testified that her injuries were accidental and not the result of  
20 domestic violence. (Exh. 85 at 13.)

21             The crux of ground 7 in Wheeler’s amended petition is that a report by Dr. Gill  
22 that was procured long after trial indicates that he would have been acquitted had Dr.  
23 Gill testified. Having carefully reviewed the original petition, the amended petition and  
24 Wheeler’s state-court filings that he incorporates by reference, the Court concludes that  
25 ground 7 is different in “time and type” from the “originally raised episodes.” *Mayle*, 545  
26 U.S. at 657. Ground 7, therefore, does not relate back and is dismissed as untimely.

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1           **B.     Claims Cognizable in Federal Habeas Corpus**

2           A state prisoner is entitled to federal habeas relief only if he is being held in  
3 custody in violation of the constitution, laws or treaties of the United States. 28 U.S.C. §  
4 2254(a). Unless an issue of federal constitutional or statutory law is implicated by the  
5 facts presented, the claim is not cognizable under federal habeas corpus. *Estelle v.*  
6 *McGuire*, 502 U.S. 62, 68 (1991). A petitioner may not transform a state-law issue into a  
7 federal one merely by asserting a violation of due process. *Langford v. Day*, 110 F.3d  
8 1380, 1381 (9th Cir. 1996). Alleged errors in the interpretation or application of state law  
9 do not warrant habeas relief. *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir. 2004).  
10 Respondents argue that grounds 2, 3, and 4 do not raise federally cognizable claims.

11                   **1.     Ground 3**

12           Wheeler contends that NRS § 173.095 presumptively disallows the filing of a  
13 post-verdict amended information charging habitual criminal where a defendant has  
14 exercised his Sixth Amendment right to a jury trial, notwithstanding NRS § 207.016(2).  
15 He argues that therefore, the habitual criminal judgment must be stricken in order to  
16 preserve his Sixth Amendment rights (ECF No. 37 at 6-8.)

17           The Court agrees with respondents that it is unclear whether Wheeler intended to  
18 argue a Fourteenth Amendment due process violation here or, as he sets forth, a “Sixth  
19 Amendment due process” violation. In any event, neither is a cognizable claim in federal  
20 habeas corpus. U.S. Const. Amend. VI (setting forth no due process right); *Oyler v.*  
21 *Boles*, 368 U.S. 448, 452 (1962) (no due process interest in receiving advance notice  
22 that trial for substantive offense will be followed by habitual-criminal allegation).  
23 Accordingly, ground 3 is dismissed as noncognizable in federal habeas corpus.

24                   **2.     Ground 4**

25           Wheeler argues that the trial court abused its discretion and violated his  
26 Fourteenth Amendment due process rights by imposing the habitual criminal sentence  
27 (ECF No. 37 at 8-9.) Though Wheeler labels it as a due process violation, this claim  
28 raises issues of state law only. *Langford*, 110 F.3d at 1381. Nevada state law requires

1 only that the “sentencing court . . . exercise its discretion and weigh the appropriate  
2 factors for and against the habitual criminal statute before adjudicating a person as a  
3 habitual criminal.” *Hughes v. State*, 996 P.2d 890, 893 (Nev. 2000) (cited in *Harman v.*  
4 *Schomig*, 2007 WL 529761 \*6 (D. Nev. 2007) (unreported). A constitutional entitlement  
5 cannot be created by a discretionary decision permitted by state law. *Connecticut Bd. of*  
6 *Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). Ground 4 is a state-law claim and is  
7 therefore dismissed as noncognizable in federal habeas corpus.

### 8 **3. Ground 2**

9 Wheeler claims that he was convicted of a statutorily non-existent crime in  
10 violation of his Fourteenth Amendment rights. (ECF No. 37 at 5-6.) He argues that the  
11 charges against him were an unconstitutional “amalgamation” of NRS § 200.485, NRS §  
12 200.481(2)(b) and NRS § 33.018 and that the resulting ambiguity should be resolved in  
13 favor of lenity.

14 The Court disagrees with respondents that ground 2 presents only a question of  
15 state law. *See, e.g., Norris v. Czerniak*, 121 Fed.Appx.198 (9<sup>th</sup> Cir. 2005) (unpublished  
16 disposition). Whether the interplay of the three statutes is ambiguous implicates federal  
17 due process. Accordingly, ground 2 states a federally cognizable claim.

### 18 **C. Exhaustion**

19 Respondents argue, alternatively, that ground 2 is unexhausted. (ECF No. 42 at  
20 12-13.) State prisoners seeking federal habeas relief must comply with the exhaustion  
21 rule codified in § 2254(b)(1):

22 An application for a writ of habeas corpus on behalf of a person in custody  
23 pursuant to the judgment of a State court shall not be granted unless it  
appears that —

24 The applicant has exhausted the remedies available in the courts of  
25 the State; or

- 26 (i) there is an absence of available State corrective process; or  
27 (ii) circumstances exist that render such process ineffective to  
protect the rights of the applicant.

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1 The purpose of the exhaustion rule is to give the state courts a full and fair opportunity  
2 to resolve federal constitutional claims before those claims are presented to the federal  
3 court, and to “protect the state courts’ role in the enforcement of federal law.” *Rose v.*  
4 *Lundy*, 455 U.S. 509, 518 (1982); *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see*  
5 *also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
6 petitioner has given the highest available state court the opportunity to consider the  
7 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,  
8 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.  
9 1981).

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

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

1 exhaustion requirement is not met when the petitioner presents to the federal court facts  
2 or evidence which place the claim in a significantly different posture than it was in the  
3 state courts, or where different facts are presented at the federal level to support the  
4 same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
5 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,  
6 458 (D. Nev. 1984).

7 With respect to ground 2, the record reflects that Wheeler did not present the  
8 corresponding state postconviction claim to the Nevada Supreme Court as a federal  
9 due process violation. (See Exh. 68 at 12-17.) Ground 2 is, therefore, unexhausted.

### 10 **1. Ground 9**

11 Wheeler asserts that the prosecutor “coerce[d] [the victim] to testify in a particular  
12 fashion for favorable treatment” in violation of his Fourteenth Amendment due process  
13 rights. (ECF No. 37 at 15-17.) In his second state postconviction petition, Wheeler  
14 claimed that “[b]ecause the state failed to disclose evidence which would have provided  
15 grounds for the defense to impeach Mrs. Wheeler’s credibility as a state’s witness while  
16 testifying intoxicated at the preliminary hearing, a *Brady* violation has axiomatically  
17 occurred.” (Exh. 160 at 13.) While both the state and federal claims relate to his wife’s  
18 testimony at the preliminary hearing, they argue distinct federal constitutional issues.  
19 The Court determines that federal ground 9 was not fairly presented to the Nevada  
20 Supreme Court. Accordingly, ground 9 is unexhausted.

### 21 **2. Ground 10**

22 Wheeler contends that the prosecutor’s misconduct when she injected her  
23 personal beliefs and opinions into her arguments to the jury violated his Fourteenth  
24 Amendment rights. (ECF No. 37 at 17-18.) Wheeler presented this claim in the appeal  
25 of the denial of his second state postconviction petition. (Exh. 191 at 16-17.)  
26 Respondents are correct that Wheeler did not explicitly state that he was bringing a  
27 federal due process and fair trial claim. Moreover, he cites to only Nevada state cases  
28 and, while some of the cases reference a right to a fair trial, they never invoke the

1 federal constitution nor otherwise make it clear that the decision is based on federal  
2 constitutional principles. Accordingly, ground 10 is unexhausted.

### 3 **D. Procedural Bar**

4 “Procedural default” refers to the situation where a petitioner in fact presented a  
5 claim to the state courts but the state courts disposed of the claim on procedural  
6 grounds, instead of on the merits. A federal court will not review a claim for habeas  
7 corpus relief if the decision of the state court regarding that claim rested on a state law  
8 ground that is independent of the federal question and adequate to support the  
9 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

10 The *Coleman* Court explained the effect of a procedural default:

11 In all cases in which a state prisoner has defaulted his federal  
12 claims in state court pursuant to an independent and adequate state  
13 procedural rule, federal habeas review of the claims is barred unless the  
14 prisoner can demonstrate cause for the default and actual prejudice as a  
result of the alleged violation of federal law, or demonstrate that failure to  
consider the claims will result in a fundamental miscarriage of justice.

15 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The  
16 procedural default doctrine ensures that the state’s interest in correcting its own  
17 mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d  
18 1039, 1046 (9th Cir. 2003).

19 To demonstrate cause for a procedural default, the petitioner must be able to  
20 “show that some objective factor external to the defense impeded” his efforts to comply  
21 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to  
22 exist, the external impediment must have prevented the petitioner from raising the  
23 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

24 Respondents argue that ground 8 is procedurally barred.

#### 25 **1. Ground 8**

26 Wheeler claims that the prosecutor’s misconduct when she commended on his  
27 post-arrest silence at trial for substantive and impeachment purposes violated his Fifth  
28 Amendment right to remain silent. (ECF No. 37 at 14-15.) Wheeler raised this claim for

1 the first time in his second state postconviction petition, and presented it to the Nevada  
2 Supreme Court in his appeal of the denial of the petition. (Exh. 191 at 2-6.) The Nevada  
3 Supreme Court affirmed the dismissal of the second state postconviction petition as  
4 untimely, successive and an abuse of the writ. (Exh. 194.)

5 Under Nevada law, the state district court shall dismiss any postconviction claim  
6 that could have been raised in a direct appeal or a prior postconviction petition or was  
7 not filed within one year of entry of the judgment of conviction or the issuance of  
8 remittitur after the convictions were affirmed on appeal. NRS § 34.810(1)(b); 34.726.  
9 Petitioner bears the burden of proving good cause for his failure to present the claim  
10 and of proving actual prejudice. *Id.* The Nevada Supreme Court explicitly relied on these  
11 procedural bars when it declined to review the claim that corresponds to federal ground  
12 8. (Exh. 194.) The Ninth Circuit Court of Appeals has held that, at least in non-capital  
13 cases, application of the procedural bar of NRS § 34.810 is an independent and  
14 adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see*  
15 *also Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999). The Ninth Circuit Court of  
16 Appeals has also held that the application of the procedural bar of NRS § 34.726 is an  
17 independent and adequate state ground. *Collier v. Bayer*, 408 F.3d 1279, 1285 (9<sup>th</sup> Cir.  
18 2005); *Loveland v. Hatcher*, 231 F.3d 640, 643 (9<sup>th</sup> Cir. 2000).

19 Therefore, this Court finds that the Nevada Supreme Court's determination that  
20 federal ground 8 was procedurally barred under NRS § 34.810(1)(b) was an  
21 independent and adequate ground for the court's affirmance of the dismissal of that  
22 claim in the state petition. Petitioner did not oppose the motion to dismiss and has not  
23 argued that cause and prejudice exists to excuse the default. Federal ground 8 is,  
24 therefore, dismissed as procedurally barred from federal review.

### 25 **III. PETITIONER'S OPTIONS REGARDING UNEXHAUSTED CLAIMS**

26 A federal court may not entertain a habeas petition unless the petitioner has  
27 exhausted available and adequate state court remedies with respect to all claims in the  
28 petition. *Rose v. Lundy*, 455 at 510. A "mixed" petition containing both exhausted and

1 unexhausted claims and a petition containing only unexhausted claims are both subject  
2 to dismissal. *Id.*; *Mena v. Long*, 813 F.3d 907, 912 (9<sup>th</sup> Cir. 2016). In the instant case,  
3 the Court finds that (i) grounds 5(b) and 7 are dismissed as time-barred; (ii) grounds 3  
4 and 4 are dismissed as not cognizable in federal habeas corpus; (iii) ground 8 is  
5 dismissed as procedurally defaulted; and (iv) grounds 3, 9 and 10 are unexhausted.  
6 Because the Court finds that the petition is a “mixed petition,” containing both exhausted  
7 and unexhausted claims, petitioner has these options:

8           1. He may submit a sworn declaration voluntarily abandoning  
9 the unexhausted claims in his federal habeas petition, and proceed only  
10 on the exhausted claims;

11           2. He may return to state court to exhaust his unexhausted  
12 claims, in which case his federal habeas petition will be denied without  
13 prejudice; or

14           3. He may file a motion asking this Court to stay and abey his  
15 exhausted federal habeas claims while he returns to state court to exhaust  
16 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  
23 appropriate when the district court determines there was good cause for  
24 the petitioner’s failure to exhaust his claims first in state court. Moreover,  
25 even if a petitioner had good cause for that failure, the district court would  
26 abuse its discretion if it were to grant him a stay when his unexhausted  
27 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) (“An application for  
28 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”).

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

          Accordingly, if petitioner files a motion for stay and abeyance, he would be  
required to show good cause for his failure to exhaust his unexhausted claims in state  
court, and to present argument regarding whether or not his unexhausted claims are  
plainly meritless. Respondent would then be granted an opportunity to respond and  
petitioner to reply.

1           Petitioner's failure to file a motion for stay or seek other appropriate relief from  
2 this Court will result in his federal habeas petition being dismissed. Petitioner is advised  
3 to familiarize himself with the limitations periods for filing federal habeas petitions  
4 contained in 28 U.S.C. § 2244(d), as those limitations periods may have a direct and  
5 substantial effect on whatever choice he makes regarding his petition.

6 **IV. CONCLUSION**

7           It is therefore ordered that respondents' motion to dismiss (ECF No. 42) is  
8 granted in part as follows:

9           Grounds 5(b) and 7 are dismissed as time-barred,

10          Grounds 3 and 4 are dismissed as noncognizable in federal habeas corpus,

11          Grounds 2, 9 and 10 are unexhausted,

12          Ground 8 is dismissed as procedurally barred.

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

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

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

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

It is further ordered that respondents' motion for leave to file certain exhibits under seal (ECF No. 50) is granted.

DATED THIS 28<sup>th</sup> day of September 2016.



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MIRANDA DU  
UNITED STATES DISTRICT JUDGE