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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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WILLIAM RONALD CLARK,

Petitioner,

v.

RENEE BAKER, et al.,

Respondents.

Case No. 3:12-cv-00579-MMD-VPC

ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed a counseled first-amended petition. (Dkt. no. 48.) Before the Court is respondents' motion to dismiss. (Dkt. no. 51.) Petitioner opposed the motion (dkt. no. 52), and respondents replied (dkt. no. 53).

I. PROCEDURAL HISTORY AND BACKGROUND

A jury convicted petitioner William Ronald Clark ("Clark" or "petitioner") of count 1: robbery with the use of a deadly weapon; count 3: assault with a deadly weapon; count 4: discharging a firearm out of a motor vehicle; and count 8: assault with a deadly weapon (exhibits to respondents' first motion to dismiss, dkt. no. 22, Exh. 83).¹ The state district court adjudicated Clark a habitual criminal and sentenced him to four concurrent terms of eight to twenty years. (Exh. 44.) The court ordered the sentences to be served consecutive to the term imposed in a separate case. *Id.*

¹All exhibits referenced in this order are exhibits to respondents' first motion to dismiss (dkt. no. 22), which was dismissed without prejudice, and are found at dkt. nos. 23-27.

1 The Nevada Supreme Court affirmed Clark’s convictions on December 3, 2009.
2 (Exh. 55.) Remittitur issued on December 29, 2009. (Exh. 56.)

3 Petitioner filed a state postconviction petition for writ of habeas corpus on
4 November 30, 2010. (Exh. 58.) The state district court conducted an evidentiary hearing
5 and ultimately denied the petition. (Exhs. 68, 69.) Petitioner appealed, the Nevada
6 Supreme Court affirmed the denial of the petition on October 8, 2012, and remittitur
7 issued on November 2, 2012. (Exhs. 98, 105, 106.)

8 Petitioner dispatched his federal habeas corpus petition on October 30, 2012.
9 (Dkt. no. 8.) This Court appointed counsel, and petitioner filed a counseled first-
10 amended petition on October 24, 2014. (Dkt. no. 48.) Respondents have filed a motion
11 to dismiss, arguing that several grounds should be dismissed because they do not
12 relate back to the original petition, are unexhausted, or are noncognizable.

13 **II. LEGAL STANDARDS AND ANALYSIS**

14 **A. Relation Back**

15 Respondents argue that several grounds in the amended petition do not relate
16 back to the original petition and should thus be dismissed as untimely. (Dkt. no. 51 at 7-
17 9.) A new claim in an amended petition that is filed after the expiration of the
18 Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) one-year limitation period will
19 be timely only if the new claim relates back to a claim in a timely-filed pleading under
20 Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out
21 of “the same conduct, transaction or occurrence” as a claim in the timely pleading.
22 *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held
23 that habeas claims in an amended petition do not arise out of “the same conduct,
24 transaction or occurrence” as claims in the original petition merely because the claims
25 all challenge the same trial, conviction or sentence. *Mayle*, 545 U.S. at 655-64. Rather,
26 under the construction of the rule approved in *Mayle*, Rule 15(c) permits relation back of
27 habeas claims asserted in an amended petition “only when the claims added by
28 amendment arise from the same core facts as the timely filed claims, and not when the

1 new claims depend upon events separate in ‘both time and type’ from the originally
2 raised episodes.” *Id.* at 657. In this regard, the reviewing court looks to “the existence
3 of a common core of operative facts uniting the original and newly asserted claims.” *Id.*
4 at 65 (internal quotation marks omitted). A claim that merely adds “a new legal theory
5 tied to the same operative facts as those initially alleged” will relate back and be timely.
6 *Id.* at 659 & n. 5.

7 Here, the parties do not dispute that petitioner’s original federal petition,
8 dispatched on October 30, 2012, was timely. Nor do they dispute that the one-year
9 limitations period expired on February 12, 2013. (Dkt. nos. 50, 52.) Thereafter, on May
10 28, 2013, petitioner submitted what he also styled as a habeas petition. (Dkt. no. 38.) In
11 its order dated March 31, 2014, this Court recounted in detail what led petitioner to take
12 such action. (Dkt. no. 42 at 2-4.) This Court also appointed counsel, observing that “[a]t
13 the very least, amendment to the pleadings — whether as originally or currently
14 presented — is necessary. This action cannot be effectively litigated and adjudicated
15 with the pleadings in their current state, for which the Court accepts responsibility. Such
16 pleading amendment, however, would appear to be more appropriately accomplished
17 through appointed counsel” *Id.* at 3-4. Petitioner filed his counseled, first-amended
18 federal petition on October 24, 2014. (Dkt. no. 48.)

19 Respondents now argue that all claims in the counseled, first-amended petition
20 must relate back to the original petition as set forth at docket number 8 only. (Dkt. no.
21 51 at 8-9.) However, in light of this Court’s order at docket number 42 it is clearly
22 appropriate to consider both docket numbers 8 and 38 as comprising the original
23 petition for the purposes of determining which claims relate back.

24 **1. Ground 2(d)**

25 In ground 2(d) of the first-amended petition, Clark claims that his trial counsel
26 rendered ineffective assistance of counsel in violation of his Sixth and Fourteenth
27 Amendment rights because counsel was unprepared for the state’s expert fingerprint
28 testimony. (Dkt. no. 48 at 19-22.) Counsel allegedly failed to elicit testimony from two

1 witnesses to emphasize that none of the fingerprints were identified as Clark's. (*Id.*) In
2 his original petition, Clark pointed out that an expert testified that none of the fingerprints
3 processed matched his prints. (Dkt. no. 38 at 6.) He further argued that his trial counsel
4 was ineffective because he did not ask the expert if the prints matched those of Joe
5 Buckles — another individual who was present — despite the fact that Clark told his
6 counsel that it was Buckles who fired the shots. (*Id.*)

7 This Court is persuaded that the ineffective assistance claims in ground 2(d)
8 surrounding the fingerprint evidence arise from the same core facts as the timely filed
9 claims and do not differ in time or type from the original claims. *Mayle*, 545 U.S. at 657.
10 Ground 2(d) relates back to the original petition and is therefore timely.

11 **2. Grounds 4 and 5**

12 Clark alleges in ground 4 that state postconviction counsel rendered ineffective
13 assistance in violation of his Fifth, Sixth and Fourteenth Amendment rights by failing to
14 argue to the Nevada Supreme Court that trial counsel was ineffective when he did not
15 obtain certified judgments of conviction for the purposes of impeaching one of the
16 State's witnesses at trial. (Dkt. no. 48 at 29-30.) In ground 5, Clark claims that state
17 postconviction counsel was ineffective for failing to present a claim of cumulative error.
18 (Dkt. no. 48 at 31.) As respondents point out, the federal habeas statute precludes
19 Clark from relying on the ineffectiveness of his postconviction attorney as a ground for
20 relief in cases brought under § 2254. See 28 U.S.C. § 2254(l) (“[t]he ineffectiveness or
21 incompetence of counsel during Federal or State collateral postconviction proceedings
22 shall not be a ground for relief in a proceeding arising under section 2254”).
23 Accordingly, grounds 4 and 5 are not cognizable in this proceeding.

24 In conclusion, ground 2(d) relates back and is therefore timely. Grounds 4 and 5
25 are dismissed as not cognizable in federal habeas corpus.

26 **B. Exhaustion**

27 Next, while this Court has determined that ground 2(d) is timely, respondents
28 also argue that ground 2(d), as well as ground 3, are unexhausted. (Dkt. no. 51 at 11.)

1 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner
2 has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455
3 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair
4 opportunity to act on each of his claims before he presents those claims in a federal
5 habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v.*
6 *Henry*, 513 U.S. 364, 365 (1995). "A claim remains unexhausted until the petitioner has
7 given the highest available state court the opportunity to consider the claim through
8 direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896,
9 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).
10 Submitting a new claim to the state's highest court in a procedural context in which its
11 merits will not be considered absent special circumstances does not, however,
12 constitute fair presentation. *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing
13 *Castille v. Peoples*, 489 U.S. 346, 351 (1989)).

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

1 federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158
2 (9th Cir. 2003) (en banc).

3 A claim is not exhausted unless the petitioner has presented to the state court
4 the same operative facts and legal theory upon which his federal habeas claim is based.
5 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
6 exhaustion requirement is not met when the petitioner presents to the federal court facts
7 or evidence which place the claim in a significantly different posture than it was in the
8 state courts, or where different facts are presented at the federal level to support the
9 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
10 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,
11 458 (D. Nev. 1984).

12 **1. Ground 2(d)**

13 Again, Clark claims in ground 2(d) that his trial counsel rendered ineffective
14 assistance of counsel when he was unprepared for the state's expert fingerprint
15 testimony. (Dkt. no. 48 at 19-22.) Counsel allegedly failed to elicit testimony to
16 emphasize that none of the fingerprints were identified as Clark's. (*Id.*)

17 In his appeal of the denial of his state postconviction petition, Clark argued that
18 his counsel

19 proved that he was unprepared for trial when the fingerprint expert began
20 her testimony. During said testimony, she stated that a palm print found at
21 the scene belonged to [Clark]. Unprepared for this information, [trial
22 counsel] asked [Clark] during the expert's testimony if those, in fact, were
23 his prints. . . [and Clark] repeatedly was forced to assure his own attorney
24 that they were not.

23 (Exh. 98 at 17.)

24 Respondents contend that ground 2(d) is an entirely different claim than the
25 claim presented in state court. (Dkt. no. 51 at 11.) Arguably, federal ground 2(d)
26 presents some expansion of the factual allegations raised to the state supreme court,
27 where petitioner includes specific allegations about his trial counsel's lack of preparation
28 for the fingerprint testimony. (Dkt. no. 48 at 21.) However, this Court concludes that

1 petitioner has presented to the state supreme court the same operative facts and legal
2 theory upon which this federal ground is based. *Bland*, 20 F.3d at 1473. Ground 2(d) is
3 exhausted.

4 **2. Ground 3**

5 Clark asserts that his trial counsel rendered ineffective assistance when he failed
6 to adequately cross examine a police officer regarding false information in the
7 declaration of arrest in violation of Clark’s Fifth, Sixth and Fourteenth Amendment rights
8 to due process and a fair trial. (Dkt. no. 48 at 26-29.) The Nevada Supreme Court
9 declined to consider this claim because it was raised for the first time in Clark’s appeal
10 of the denial of his state postconviction petition. (Exh. 98 at 16-17; Exh. 105 at 3.)
11 Therefore, respondents are correct that ground 3 was not fairly presented to the state
12 supreme court and is thus unexhausted. This Court declines to engage in an
13 “anticipatory default” analysis here.

14 **III. PETITIONER’S OPTIONS REGARDING UNEXHAUSTED CLAIM**

15 A federal court may not entertain a habeas petition unless the petitioner has
16 exhausted available and adequate state court remedies with respect to all claims in the
17 petition. *Rose v. Lundy*, 455 U.S. at 510. A “mixed” petition containing both exhausted
18 and unexhausted claims is subject to dismissal. *Id.* In the instant case, the Court finds
19 that ground 3 is unexhausted. Ground 2(d) is exhausted. Grounds 4 and 5 are
20 dismissed as not cognizable. Thus the petition is a “mixed petition,” containing both
21 exhausted and unexhausted claims, and therefore, petitioner, through counsel, has
22 these options:

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

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

3 The *Rhines* court stated:

4 [S]tay and abeyance should be available only in limited
5 circumstances. Because granting a stay effectively excuses a petitioner's
6 failure to present his claims first to the state courts, stay and abeyance is
7 only appropriate when the district court determines there was good cause
8 for the petitioner's failure to exhaust his claims first in state court.
9 Moreover, even if a petitioner had good cause for that failure, the district
court 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) ("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").

10 *Rhines*, 544 U.S. at 277. Thus the court held that it likely would be an abuse of
11 discretion for a district court to deny a stay and to dismiss a mixed petition if the
12 petitioner had good cause for his failure to exhaust, his unexhausted claims are
13 potentially meritorious, and there is no indication that the petitioner engaged in
14 intentionally dilatory litigation tactics. *Id.* at 278.

15 **IV. CONCLUSION**

16 It is therefore ordered that respondents' motion to dismiss certain grounds in the
17 amended petition (dkt. no. 51) is granted in part as follows:

- 18 1. Ground 2(d) is exhausted.
- 19 2. Ground 3 is unexhausted.
- 20 3. Grounds 4 and 5 are dismissed as not cognizable in federal habeas
21 corpus.

22 It is further ordered that petitioner, through counsel, shall have thirty (30) days to
23 either: (1) inform this Court in a sworn declaration that he wishes to formally and forever
24 abandon the unexhausted ground for relief in his federal habeas petition and proceed
25 on the exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes
26 to dismiss this petition without prejudice in order to return to state court to exhaust his
27 unexhausted claim; or (3) file a motion for a stay and abeyance, asking this Court to
28 hold his exhausted claims in abeyance while he returns to state court to exhaust his

1 unexhausted claim. If petitioner chooses to file a motion for a stay and abeyance, or
2 seek other appropriate relief, respondents may respond to such motion as provided in
3 Local Rule 7-2.

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

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

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

14 It is further ordered that respondents' motion for extension of time to file a
15 response to the first-amended petition (dkt. no. 50) is granted *nunc pro tunc*.

16 DATED THIS 24th day of September 2015.

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21 MIRANDA M. DU
22 UNITED STATES DISTRICT JUDGE
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