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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 MICHAEL L. SMITH,

9 *Petitioner,*

10 vs.

11  
12 RENEE BAKER, et al.,

13 *Respondents.*  
14

3:13-cv-00246-RCJ-WGC

ORDER

15 This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed a  
16 counseled first amended petition (ECF #9). Before the court is respondents' motion to dismiss (ECF  
17 #25). Petitioner has opposed the motion (ECF #28), and respondents replied (ECF #30).

18 **I. Procedural History and Background**

19 On June 8, 2009, the jury trial of petitioner Michael L. Smith ("petitioner") and his co-defendant  
20 on nine counts including robbery and first-degree murder commenced (exhibits to first amended  
21 petition, ECF #9, exhs. 87, 89).<sup>1</sup> On June 18, 2009, the jury found petitioner guilty of all counts with  
22 the exception of count 8 where the jury found him guilty of battery instead of attempted murder. Exh.  
23 105. On July 30, 2009, petitioner was sentenced as follows: count 1: conspiracy to commit robbery -  
24 16 to 72 months, consecutive to case numbers C238184, C237933, and C237881; count 2: robbery -  
25 40 to 180 months, concurrent with count 1; count 3: conspiracy to commit robbery - 16 to 72 months,  
26 consecutive to count 2; count 4: battery with intent to commit a crime - 26 to 120 months, concurrent

27  
28 <sup>1</sup> All exhibits referenced in this order are exhibits to the amended petition, ECF #9, and are  
found at ECF #s 10-19.

1 with count 3: count 5: robbery, victim 60 years of age or older - 40 to 180 months plus an equal and  
2 consecutive term for a weapon enhancement, concurrent with count 4; count 6: robbery, victim 60 years  
3 of age or older - 40 to 180 months plus an equal and consecutive term for a weapon enhancement,  
4 consecutive count 5; count 7: first-degree murder, victim 60 years of age or older - life without the  
5 possibility of parole, plus an equal and consecutive term, consecutive to count 6; count 8: battery - 6  
6 months in Clark County Detention Center, consecutive to count 6; count 9: possession of a stolen  
7 vehicle - 26 to 120 months, consecutive to count 7. Judgment of conviction was entered on August 6,  
8 2009. Exh. 120. An amended judgment of conviction was filed on October 13, 2009 to correct the  
9 relevant enhancements from weapon to age enhancements. Exh. 129.

10 Petitioner appealed, and the Nevada Supreme Court affirmed his convictions on January 13,  
11 2011. Exh. 149. Remittitur issued on February 5, 2011. Exh. 150.

12 On July 20, 2011, petitioner filed his state postconviction petition for writ of habeas corpus.  
13 Exhs. 157, 161. The Nevada Supreme Court affirmed the state district court's denial of the petition on  
14 December 12, 2012, and remittitur issued on January 7, 2013. Exhs. 193, 199.

15 Petitioner dispatched his federal petition for writ of habeas corpus on April 29, 2013 (ECF #5).  
16 Through counsel, petitioner filed an amended petition on October 18, 2013 (ECF #9). Respondents  
17 argue that the petition should be dismissed because several grounds are unexhausted and/or are  
18 procedurally barred.

## 19 **II. Legal Standards**

### 20 **A. Exhaustion**

21 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has  
22 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28  
23 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims  
24 before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844  
25 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
26 petitioner has given the highest available state court the opportunity to consider the claim through direct  
27 appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004);  
28 *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

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

16 A claim is not exhausted unless the petitioner has presented to the state court the same operative  
17 facts and legal theory upon which his federal habeas claim is based. *Bland v. California Dept. Of*  
18 *Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the  
19 petitioner presents to the federal court facts or evidence which place the claim in a significantly different  
20 posture than it was in the state courts, or where different facts are presented at the federal level to  
21 support the same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
22 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458 (D. Nev.  
23 1984).

## 24 **B. Procedural Bar**

25 “Procedural default” refers to the situation where a petitioner in fact presented a claim to the  
26 state courts but the state courts disposed of the claim on procedural grounds, instead of on the merits.  
27 A federal court will not review a claim for habeas corpus relief if the decision of the state court  
28 regarding that claim rested on a state law ground that is independent of the federal question and

adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

The *Coleman* Court stated the effect of a procedural default, as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the 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.

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

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

### **III. Relevant Grounds in Instant Amended Petition**

Petitioner sets forth twelve grounds for relief in his amended petition (ECF #9, pp. 10-35). Respondents argue that all grounds except grounds 7 and 12 are unexhausted or procedurally barred (ECF #25, pp. 10-27).

#### **Ground 1**

In ground 1 of the federal petition, petitioner alleges that the trial court erred in refusing to sever petitioner's trial from his co-defendant's trial in violation of his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, confrontation, to present a defense, to be proven guilty beyond a reasonable doubt, and due process (ECF #9, pp. 10-16).

Respondents argue that ground 1 is procedurally barred by the contemporaneous objection rule, NRS 34.810, and the law of the case (ECF #25, pp. 11-15).

This court concludes that petitioner fairly presented the claims raised herein as federal ground 1 in his direct appeal. Contrary to respondents' arguments, petitioner raised the broader error of refusing to sever the trials as well as the more specific sub-claim that such failure to sever allowed the prosecution to ask leading questions on direct examination. *See* exh. 144, pp.

1 Respondents also argue that the Nevada Supreme Court declined to consider the leading-  
2 questions issue because petitioner failed to object to the leading questions at trial (ECF #25, p. 12-13).  
3 They assert that this court should dismiss at least this portion of federal ground 1 as procedurally barred  
4 under the contemporaneous-objection rule. *Id.* at 13. This court rejects respondents' contention  
5 because, while the Nevada Supreme Court noted in its order of affirmance that "[f]ailure to object  
6 during trial generally precludes appellate review unless it rises to the level of plain error that affects  
7 substantial rights," it went on to consider whether substantial rights were implicated. Exh. 149, pp. 5-6.

8 Here, we conclude that any prejudice that may have resulted from the leading  
9 questions did not rise to the level of affecting [petitioner's] substantial rights. In fact,  
10 the district court allowed leading questions to the benefit of both [petitioner] and his  
11 codefendant. Therefore, we reject [petitioner's] claim.

*Id.*

11 Accordingly, this court concludes that federal ground 1 is exhausted and is not procedurally  
12 barred.

## 13 **Ground 2**

14 In ground 2 of the federal petition, petitioner alleges that the admission of his co-defendant's  
15 statements at the joint trial violated petitioner's Sixth and Fourteenth Amendment rights to  
16 confrontation (ECF #9, pp. 16-17). Petitioner points out the he raised this claim in grounds 4 and 5 of  
17 his state postconviction petition. Exh. 161

18 Respondents argue that this claim should be dismissed as procedurally barred. In its order  
19 affirming the denial of petitioner's state postconviction petition, the Nevada Supreme Court clearly and  
20 expressly invoked NRS 34.810(1)(b) when it stated that "[t]o the extent that appellant raised any claims  
21 independently from his claim of ineffective assistance of counsel, those claims were waived as they  
22 could have been raised on direct appeal and [petitioner] has failed to demonstrate good cause and actual  
23 prejudice for his failure to do so." Exh. 193, p. 6, n.4 (citing NRS 34.810(1)(b)). Federal ground 2 is  
24 a substantive claim, not an ineffective assistance of counsel claim. Respondents contend that the state  
25 statute is an independent and adequate state law basis that bars this claim from review in this federal  
26 habeas proceeding.

27 Under Nevada law, the state district court shall dismiss a state postconviction claim that could  
28 have been raised in a direct appeal or a prior postconviction petition. NRS 34.810(1)(b). Petitioner

1 bears the burden of proving good cause for his failure to present the claim and of proving actual  
2 prejudice. NRS 34.810(3). The Nevada Supreme Court explicitly relied on this procedural bar when  
3 it declined to review the claims of the state habeas petition that correspond to federal ground 2. Exh.  
4 193, p. 6, n.4. The Ninth Circuit Court of Appeals has held that, at least in non-capital cases,  
5 application of the procedural bar at issue in this case – NRS 34.810 – is an independent and adequate  
6 state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see also Bargas v. Burns*, 179  
7 F.3d 1207, 1210-12 (9th Cir. 1999).

8 Therefore, this court finds that the Nevada Supreme Court’s holding that federal ground 2 was  
9 procedurally barred under NRS 34.810(1)(b) was an independent and adequate ground for the court’s  
10 dismissal of that ground in the state petition. Petitioner argues in his opposition to the motion to  
11 dismiss that the claim was actually raised on direct appeal (ECF #28, pp. 8-10). This court has  
12 reviewed the record and determines that this contention lacks merit. Federal ground 2, accordingly, is  
13 dismissed as procedurally barred.

### 14 **Ground 3**

15 In ground 3 of his federal petition, petitioner contends that the State presented a police  
16 detective’s false and highly prejudicial testimony in violation of his Fifth, Sixth, and Fourteenth  
17 Amendment rights to due process and a fair trial (ECF #9, pp. 18-21).

18 Having reviewed the state-court proceedings, this court concludes that petitioner fairly presented  
19 federal ground 3 in his state postconviction petition. Exh. 161, pp. 19-20. Accordingly, ground 3 is  
20 exhausted.

21 Respondents next argue that even if ground 3 is exhausted it is procedurally defaulted (ECF #25,  
22 p. 18). They point again to where, in affirming the denial of the state petition, the Nevada Supreme  
23 Court stated in a footnote that any claims other than ineffective assistance of counsel claims raised in  
24 the petition were waived pursuant to NRS 34.810 (ECF #25, p. 18; Exh. 193, p. 6, n.4). Petitioner notes  
25 that he also raised a claim of ineffective assistance of appellate counsel for failing to argue on appeal  
26 that the false and highly prejudicial testimony violated petitioner’s constitutional rights in his state  
27 postconviction petition. He argues that federal ground 3 was not procedurally defaulted at the state  
28 level because the Nevada Supreme Court adjudicated the ineffective assistance of counsel claim and

1 determined “that [petitioner’s] appellate counsel failed to argue that the prosecutor misstated evidence  
2 about appellant’s procuring stolen vehicles and committed perjury.” Exh. 193, p. 10. That court  
3 concluded that petitioner had failed to demonstrate that his counsel’s performance was deficient or that  
4 this issue would have had a reasonable likelihood of success on appeal, determining that: “[t]he  
5 prosecutor’s statements regarding the stolen vehicles were supported by the testimony of the detective.  
6 To the extent that [petitioner] claimed that the prosecutor suborned perjury, [petitioner] failed to  
7 demonstrate that the detective . . . committed perjury.” *Id.*

8         Petitioner’s argument—unsupported by any legal citation—is unavailing. As discussed above with  
9 respect to federal ground 2 the Nevada Supreme Court explicitly relied on NRS 34.810(1)(b), which  
10 is an independent and adequate state ground, when it declined to review the claims of the state habeas  
11 petition that correspond to federal ground 3. Exh. 193, p. 6, n.4.

12         Accordingly, federal ground 3 is procedurally defaulted. Petitioner offers no argument that  
13 cause existed for the default and that actual prejudice resulted, nor does he argue that failure to consider  
14 the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

#### 15         **Ground 4**

16         In ground 4 of the federal petition, petitioner claims that he was denied his Fifth, Sixth, and  
17 Fourteenth Amendment rights when the trial court denied a mistrial after highly prejudicial and  
18 irrelevant testimony (ECF #9, pp. 22-23). A third defendant had entered into a guilty plea agreement  
19 prior to trial, and this claim pertains to testimony by that third defendant’s girlfriend. *Id.*

20         Petitioner acknowledges that this claim was raised for the first time in the state postconviction  
21 petition (ECF # 9, p. 9; ECF #28, pp. 16-17; Exh. 161, p. 21). As with federal ground 3, he contends  
22 that because the Nevada Supreme Court considered his related ineffective assistance of counsel claim  
23 that it also necessarily considered the substantive claim set forth here. As with federal ground 3,  
24 petitioner’s argument is unavailing. The Nevada Supreme Court explicitly relied on NRS 34.810(1)(b),  
25 which is an independent and adequate state ground, when it declined, pursuant to NRS 34.810(1)(b),  
26 to review all claims in the state habeas petition that were not ineffective of assistance of counsel claims  
27 as waived because they could have been raised on direct appeal and petitioner failed to demonstrate  
28 good cause and actual prejudice for his failure to do so. Exh. 193, p. 6, n.4.

1 Accordingly, federal ground 4 is procedurally defaulted. Again, petitioner offers no argument  
2 that cause existed for the default and that actual prejudice resulted, nor does he argue that failure to  
3 consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

4 **Ground 5**

5 In federal ground 5, petitioner alleges a violation of his Fifth and Fourteenth Amendment rights  
6 to due process because no rational jury could have concluded beyond a reasonable doubt that he was  
7 guilty on the insufficient evidence presented at trial (ECF #9, pp. 13-24).

8 Here again, petitioner acknowledges that this claim was raised for the first time in the state  
9 postconviction petition (ECF # 9 p. 9; ECF #28, p. 17; Exh. 161, p. 18). As with federal grounds 3 and  
10 4, he contends that because the Nevada Supreme Court considered his related ineffective assistance of  
11 counsel claim that it also necessarily considered the substantive claim set forth here. However, as  
12 above, the Nevada Supreme Court explicitly relied on NRS 34.810(1)(b), which is an independent and  
13 adequate state ground, when it declined to review all claims in the state habeas petition that were not  
14 ineffective of assistance of counsel claims. Exh. 193, p. 6, n.4.

15 Accordingly, federal ground 5 is procedurally defaulted. Again, petitioner offers no argument  
16 that cause existed for the default and that actual prejudice resulted, nor does he argue that failure to  
17 consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

18 **Ground 6**

19 In federal ground 6, petitioner asserts a violation of his Fifth, Sixth, and Fourteenth Amendment  
20 rights to due process and a fair trial because the State withheld from the defense exculpatory  
21 information about the third defendant's plea deal and misrepresented the terms of that plea agreement  
22 to the jury (ECF #9, pp. 24-26). Petitioner acknowledges that this claim is unexhausted.

23 **Ground 8**

24 In federal ground 8, petitioner claims that his Fifth and Fourteenth Amendment rights to  
25 protection from self-incrimination were violated when he was subjected to a custodial interview without  
26 being properly advised of his *Miranda* rights (ECF #9, p. 29).

27 Here again, petitioner acknowledges that this claim was raised for the first time in the state  
28 postconviction petition (ECF # 9 p. 9; ECF #28, pp. 18-19; Exh. 161, p. 15). As with federal grounds



1 3, 4, and 5 he contends that because the Nevada Supreme Court considered his related ineffective  
2 assistance of counsel claim that it also necessarily considered the substantive claim set forth here.  
3 However, as above, the Nevada Supreme Court explicitly relied on NRS 34.810(1)(b), which is an  
4 independent and adequate state ground, when it declined to review all claims in the state habeas petition  
5 that were not ineffective of assistance of counsel claims. Exh. 193, p. 6, n.4.

6 Accordingly, federal ground 8 is procedurally defaulted. Again, petitioner offers no argument  
7 that cause existed for the default and that actual prejudice resulted, nor does he argue that failure to  
8 consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

#### 9 **Ground 9**

10 In federal ground 9, petitioner contends that his Fifth, Sixth, and Fourteenth Amendment rights  
11 to a fair trial and due process were violated when the prosecutor improperly introduced prejudicial and  
12 irrelevant information about the victim (ECF #9, p. 30).

13 Respondents point out that the claim that petitioner presented in his direct appeal was that his  
14 constitutional rights were violated when irrelevant and highly prejudicial evidence was admitted at his  
15 trial (ECF #25, p. 22; Exh. 144, pp. 31-32). Thus, respondents argue that the federal claim is  
16 unexhausted (ECF #25, p. 22). Petitioner contends that the difference between asserting an error by  
17 the court and prosecutorial misconduct is merely a “linguistic change” (ECF #28, p. 29). This court  
18 disagrees. Federal ground 9 presents a different legal theory than that presented on petitioner’s direct  
19 appeal. Accordingly, federal ground 9 is unexhausted.

#### 20 **Ground 10**

21 In federal ground 10, petitioner asserts that his trial counsel rendered ineffective assistance of  
22 counsel in violation of his Fifth, Sixth and Fourteenth Amendment rights when he failed to raise,  
23 preserve and litigate the issues raised in grounds 1 through 9 of the federal petition (ECF #9, pp. 31-34).

24 The first amended petition is not a model of clarity with respect to what ineffective assistance  
25 of trial counsel claims petitioner seeks to raise in federal court. Nevertheless, the court has extensively  
26 reviewed the briefing here, petitioner’s state postconviction petition and the Nevada Supreme Court’s  
27 order affirming the denial of the petition. This court concludes that the following ineffective assistance  
28 of trial counsel claims were argued to the Nevada Supreme Court and are therefore exhausted:

1 a) trial counsel failed to file a motion to suppress petitioner's statements to homicide detectives;  
2 b) trial counsel failed to object to numerous misstatements of facts not in evidence by the  
3 prosecutor;

4 c) trial counsel failed to present facts that the stolen cellphone that was not recovered was traced  
5 to an apartment occupied by petitioner's codefendant. Exh. 161, pp. 14, Exh. 193.

6 All other ineffective assistance of trial counsel claims in federal ground 10 are unexhausted.

7 **Ground 11**

8 Petitioner claims in federal ground 11 that appellate counsel rendered ineffective assistance in  
9 violation of his Fifth, Sixth, and Fourteenth Amendment rights in failing to raise the claims set forth  
10 as grounds 1 through 9 of the federal petition (ECF #9, pp. 34).

11 In his state postconviction petition, petitioner raised the following claims of ineffective  
12 assistance of appellate counsel:

13 a) appellate counsel failed to argue that petitioner's statements were obtained without a knowing  
14 and intelligent waiver;

15 b) appellate counsel failed to argue that the denial of the motion to sever prevented petitioner  
16 from confronting and cross-examining his codefendant and allowed the codefendant's redacted  
17 confession to be presented to the jury;

18 c) appellate counsel failed to argue that insufficient evidence supported the convictions;

19 d) appellate counsel failed to argue that the prosecutor misstated the evidence about petitioner  
20 procuring stolen vehicles and committed perjury;

21 e) appellate counsel failed to argue that the district court erred in denying a motion for a mistrial  
22 based on the testimony of the former third defendant's girlfriend's testimony that she did not come  
23 forward earlier because was afraid petitioner and his codefendant would harm the former third  
24 defendant's family;

25 f) appellate counsel failed to supply petitioner with transcripts and investigate and prepare for  
26 the direct appeal. Exhs. 161, 193.

27 Comparing the claims raised in state proceedings with the federal petition, the following  
28 portions of ground 11 are exhausted:

1 ineffective assistance of appellate counsel in failing to argue the claims raised in federal grounds  
2 2, 3, 4, 5, and 8. All other ineffective assistance of appellate counsel claims set forth in federal ground  
3 11 are unexhausted.

#### 4 **IV. Petitioner's Options Regarding Unexhausted Claims**

5 A federal court may not entertain a habeas petition unless the petitioner has exhausted available  
6 and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S.  
7 509, 510 (1982). A "mixed" petition containing both exhausted and unexhausted claims is subject to  
8 dismissal. *Id.* In the instant case, the court finds that (a) ground 1 is exhausted; (b) grounds 2, 3, 4, 5,  
9 and 8 are dismissed as procedurally barred; (c) grounds 6 and 9 are unexhausted; and (d) grounds 10  
10 and 11 are partially exhausted as set forth in this order. Because the court finds that the petition is a  
11 "mixed petition," containing both exhausted and unexhausted claims, petitioner has these options:

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

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

20 The *Rhines* Court stated:

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

*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 the question whether or not his unexhausted claims are plainly meritless. Respondent would

1 then be granted an opportunity to respond, and petitioner to reply.

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

7 **V. Conclusion**

8 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF #25) is  
9 **GRANTED** in part as follows:

10 1. Ground 1 is **EXHAUSTED**.

11 2. Grounds 2, 3, 4, 5, and 8 are **DISMISSED** as procedurally barred.

12 3. The following ineffective assistance of trial counsel claims in ground 10: a) trial counsel  
13 failed to file a motion to suppress petitioner's statements to homicide detectives; b) trial counsel failed  
14 to object to numerous misstatements of facts not in evidence by the prosecutor; and c) trial counsel  
15 failed to present facts that the stolen cellphone that was not recovered was traced to an apartment  
16 occupied by petitioner's codefendant are **EXHAUSTED**. All other ineffective assistance of trial  
17 counsel claims in ground 10 are **UNEXHAUSTED**.

18 4. The claims in ground 11 of ineffective assistance of appellate counsel in failing to argue the  
19 claims raised in federal grounds 2, 3, 4, 5, and 8 are **EXHAUSTED**. All other ineffective assistance  
20 of appellate counsel claims set forth in federal ground 11 are **UNEXHAUSTED**.

21 5. Grounds 6 and 9 are **UNEXHAUSTED**.

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 abandon the  
24 unexhausted grounds for relief in his federal habeas petition and proceed on the exhausted grounds; **OR**  
25 **(2)** inform this court in a sworn declaration that he wishes to dismiss this petition without prejudice in  
26 order to return to state court to exhaust his unexhausted claims; **OR (3)** file a motion for a stay and  
27 abeyance, asking this court to hold his exhausted claims in abeyance while he returns to state court to  
28 exhaust his unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or seek

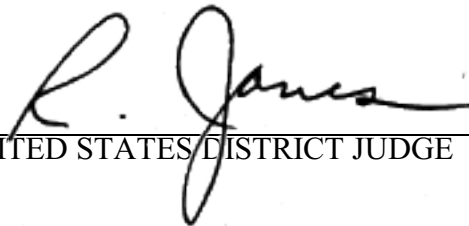
1 other appropriate relief, respondents may respond to such motion as provided in Local Rule 7-2.

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

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

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

11 Dated this 25th day of August, 2015.

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14 UNITED STATES DISTRICT JUDGE  
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