

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DAVID TIFFANY,

Petitioner,

v.

ROBERT LeGRAND, et al.,

Respondents.

Case No. 3:13-cv-00682-MMD-VPC

ORDER

This is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. This matter comes before the Court on petitioner's motions for the appointment of counsel (dkt. nos. 5 & 8) and respondents' motion to dismiss (dkt. no. 12).

**I. PROCEDURAL HISTORY**

Petitioner was convicted, pursuant to a jury trial, of two counts of lewdness with a child under the age of 14, eight counts of sexual assault with a minor under the age of 14, three counts of solicitation of a minor, and five counts of child abuse and neglect. (Exh. 92.<sup>1</sup>) Petitioner was sentenced to ten (10) life sentences with the possibility of parole after twenty (20) years, and eight (8) definite terms, all running concurrently. *Id.* Petitioner appealed his conviction. (Exh. 100.) Through appellate counsel, petitioner filed his opening brief on June 26, 2008. (Exh. 130.) The Nevada Supreme Court rejected petitioner's claims and affirmed petitioner's convictions in an order filed April

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<sup>1</sup>The exhibits referenced in this order are found in the Court's record at dkt. nos. 13-23.

1 13, 2010. (Exh. 145.) Petitioner filed a motion for rehearing, which was denied by order  
2 filed June 23, 2010. (Exh. 148.) Remittitur issued October 18, 2010. (Exh. 154.)

3 While his direct appeal was pending, petitioner filed a federal habeas petition in  
4 this Court under Case No. 3:08-cv-00539-LRH-RAM. The action was dismissed without  
5 prejudice because petitioner had not exhausted his claims in state court. (Dkt. no. 15 in  
6 Case No. 3:08-cv-00539-LRH-RAM.)

7 Petitioner filed a *pro per* post-conviction habeas petition in the state district court  
8 on November 12, 2010. (Exh. 158.) The petition was 320 pages in length. (*Id.*) By order  
9 filed February 16, 2011, the state district court dismissed the petition without prejudice  
10 on the basis that the petition was too lengthy. (Exh. 176.) Petitioner appealed. (Exh.  
11 177.) On April 11, 2011, the Nevada Supreme Court reversed and remanded the state  
12 district court's denial of the petition based on its length. (Exh. 201.) The Nevada  
13 Supreme Court remanded the case to the state district court for consideration of the  
14 claims raised in the post-conviction habeas petition. (*Id.*)

15 On remand, the state district court appointed counsel to represent petitioner in  
16 his post-conviction proceedings. (Exh. 213.) On November 22, 2011, petitioner's  
17 counsel filed a supplemental memorandum in support of the post-conviction habeas  
18 petition. (Exh. 216.) Following an evidentiary hearing, by order filed July 12, 2012, the  
19 state district court denied the post-conviction habeas petition. (Exh. 233.) Petitioner  
20 appealed from the denial of his post-conviction petition. (Exh. 237.) Petitioner's opening  
21 brief on appeal was filed on January 28, 2013. (Exh. 245.) On September 18, 2013, the  
22 Nevada Supreme Court affirmed the denial of the post-conviction habeas petition. (Exh.  
23 267.) Remittitur issued on December 5, 2013. (Exh. 270.)

24 Approximately two years before his state habeas proceedings concluded,  
25 petitioner filed another federal habeas petition in this Court, under Case No. 3:11-cv-  
26 00806-LRH-WGC. The federal petition was dismissed without prejudice for failure to  
27 exhaust his state court remedies. (Dkt. no. 5, in Case No. 3:11-cv-00806-LRH-WGC.)

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1 On February 22, 2013, acting in *pro per*, petitioner filed a second state post-  
2 conviction habeas petition raising a single claim that trial counsel was ineffective for  
3 failing to negotiate a plea bargain. (Exh. 247.) By order filed May 31, 2013, the state  
4 district court denied petitioner's second post-conviction habeas petition. (Exh. 257.)  
5 Petitioner appealed. (Exh. 259.) On September 18, 2013, the Nevada Supreme Court  
6 affirmed the dismissal of the petition, finding the petition procedurally defaulted. (Exh.  
7 265.) Remittitur issued on October 15, 2013. (Exh. 268.)

8 Petitioner dispatched his third federal habeas petition on November 25, 2013,  
9 which was filed in the instant case. (Dkt. no. 2, at page 1, item 5.) The petition contains  
10 28 grounds for relief. (Dkt. nos. 2 & 2-1.) Respondents have filed a motion to dismiss  
11 the petition because it contains unexhausted claims. (Dkt. no. 12.) Petitioner filed an  
12 opposition to the motion to dismiss. (Dkt. no. 27.) Respondents have filed a reply to the  
13 opposition. (Dkt. no. 28.) Additionally, petitioner has filed two motions for the  
14 appointment of counsel. (Dkt. nos. 5 & 8.) The Court now addresses all pending  
15 motions in this case.

## 16 **II. DISCUSSION**

### 17 **A. Petitioner's Motions for Appointment of Counsel**

18 Petitioner has filed two motions seeking the appointment of counsel. (Dkt. nos. 5  
19 & 8.) Pursuant to 18 U.S.C. § 3006(a)(2)(B), the district court has discretion to appoint  
20 counsel when it determines that the "interests of justice" require representation. There is  
21 no constitutional right to appointed counsel for a federal habeas corpus proceeding.  
22 *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428  
23 (9th Cir. 1993). The decision to appoint counsel is generally discretionary. *Chaney v.*  
24 *Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor*  
25 *v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). The petition  
26 on file in this action is well-written and sufficiently clear in presenting the issues that  
27 petitioner wishes to bring. The issues in this case are not complex. Counsel is not  
28 justified in this instance. The motions for appointment of counsel are denied.

1           **B.       Respondents' Motion to Dismiss**

2           Respondents argue that the federal habeas petition contains unexhausted  
3 grounds. Pursuant to 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust  
4 state court remedies on a claim before presenting that claim to the federal courts. To  
5 satisfy the exhaustion requirement, the claim must have been fairly presented to the  
6 state courts completely through to the highest court available, in this case, the Nevada  
7 Supreme Court. *See, e.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003) (en  
8 banc); *Yang v. Nevada*, 329 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the  
9 petitioner must refer to the specific federal constitutional guarantee and must also state  
10 the facts that entitle the petitioner to relief on the federal constitutional claim. *Shumway*  
11 *v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir. 2000). Fair presentation requires that the petitioner  
12 present the state courts with both the operative facts and the federal legal theory upon  
13 which the claim is based. *See, e.g. Castillo v. McFadden*, 399 F.3d 993, 999 (9<sup>th</sup> Cir.  
14 2005). The exhaustion requirement ensures that the state courts, as a matter of federal-  
15 state comity, will have the first opportunity to pass upon and correct alleged violations of  
16 federal constitutional guarantees. *See Coleman v. Thompson*, 501 U.S. 722, 731  
17 (1991).

18           In this case, petitioner's federal habeas petition is almost identical to his *pro per*  
19 post-conviction habeas petition filed in state court on November 23, 2010. (*Compare*  
20 *dkt. no. 2 with Exh. 158.*) All grounds raised in the federal habeas petition were raised in  
21 petitioner's *pro per* state habeas petition. (*Id.*) In the state district court, on remand from  
22 the Nevada Supreme Court, petitioner was granted counsel, who filed a supplemental  
23 memorandum in support of the petition. (Exh. 216.) After the petition was denied,  
24 petitioner's appointed counsel selected only those claims that he believed were  
25 appropriate for appeal. (Exh. 245.) *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)  
26 ("Experienced advocates since time beyond memory have emphasized the importance  
27 of winnowing out weaker arguments on appeal and focusing on one central issue if  
28 possible, or at most on a few key issues."). As such, the opening brief on appeal from

1 the denial of the state habeas petition contained fewer claims than the petition filed in  
2 state district court contained. (*Compare* Exh. 158 with Exh. 245.) Only those claims that  
3 were presented to the Nevada Supreme Court on appeal were exhausted. *See Castillo*  
4 *v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005). On review of the opening brief on  
5 direct appeal (Exh. 130) and the opening brief on appeal from the denial of the state  
6 habeas petition (Exh. 245), certain claims in the federal habeas petition, as discussed  
7 below, were presented to the Nevada Supreme Court and are thus exhausted.

8 The claim in Ground 1 that the justice court's refusal to reduce the bail amount  
9 violated due process was presented to the Nevada Supreme Court in the opening brief  
10 on direct appeal. (Dkt. no. 2 at 47-52; Exh. 130 at 18-24.) The claim is therefore  
11 exhausted.

12 The claim in Ground 5 that petitioner's right to a speedy trial was violated was  
13 presented to the Nevada Supreme Court on direct appeal. (Dkt. no. 2 at 75-80; Exh.  
14 130 at 24-30.) The speedy trial claim is therefore exhausted. However, to the extent that  
15 Ground 5 also includes a claim of ineffective assistance of counsel, that claim is  
16 unexhausted.

17 The claim in Ground 8 that there was insufficient evidence to support his  
18 convictions for sexual assault, child abuse, and solicitation was presented to the  
19 Nevada Supreme Court on direct appeal. (Dkt. no. 2 at 93-102; Exh. 130 at 52-58.) The  
20 insufficiency of the evidence claim is therefore exhausted. However, to the extent that  
21 Ground 8 includes a claim of ineffective assistance of counsel, that claim is not  
22 exhausted.

23 The claim in Ground 9 that trial counsel was ineffective for failing to move to  
24 sever the counts of child abuse and neglect from the other charges was presented to  
25 the Nevada Supreme Court on appeal from the denial of petitioner's state habeas  
26 petition and is therefore exhausted. (Dkt. no. 2 at 103-09; Exh. 245, at p. 36 (stating  
27 only that counsel failed to file a motion to sever the marijuana charges despite  
28 petitioner's request and the failure was "prejudicial").) The Nevada Supreme Court

1 denied the claim as conclusory. (Exh. 267 at 4-5.) To the extent that petitioner offers  
2 new facts in support of this claim or has altered it by alleging that the solicitation counts  
3 should have been severed (dkt. no. 2 at 103-09), these are new claims that are  
4 unexhausted.

5 The claim in Ground 18 that trial counsel was ineffective for failing to obtain an  
6 independent psychological evaluation of the victim was presented to the Nevada  
7 Supreme Court on appeal from the denial of petitioner's state habeas petition and is  
8 therefore exhausted. (Dkt. no. 2-1 at 20-26; Exh. 245 at 32-35.) The related claim in  
9 Ground 18 that the trial court erred by denying the motion for a psychological evaluation  
10 was presented to the Nevada Supreme Court on direct appeal and is therefore  
11 exhausted. (Dkt. no. 2-1 at 20-26; Exh. 130 at 43-52.)

12 The claim in Ground 21 that the trial court erred in denying a pretrial motion for  
13 an investigator was presented to the Nevada Supreme Court on direct appeal and is  
14 therefore exhausted. (Dkt. no. 2-1 at 38-42; Exh. 130 at 15-18.) The claim in Ground 24  
15 that the Nevada Supreme Court erred by denying this claim (dkt. no. 2-1, at pp. 52-58)  
16 is redundant in light of the fact that the AEDPA review of Ground 21 will address  
17 whether the Nevada Supreme Court's resolution of the claim was reasonable. 28 U.S.C.  
18 § 2254(d).

19 In Ground 27, petitioner asserts a claim of cumulative error. (Dkt. no. 2-1 at 68-  
20 74.) In his opening brief on appeal from the denial of his state habeas petition, petitioner  
21 sought only the cumulative consideration of errors that were alleged during that appeal.  
22 (Exh. 245 at 42-43.) Petitioner's claim of cumulative error in the federal petition is much  
23 broader. (Dkt. no. 2-1 at 68-74.) Only the portion of Ground 27 that alleges cumulative  
24 error within the scope of petitioner's opening brief on appeal from the denial of the state  
25 habeas petition is exhausted. All other claims of cumulative error are unexhausted.

26 In his opposition, petitioner argues that he exhausted all claims in his federal  
27 habeas petition by presenting the claims in his state habeas petition filed in the state  
28 district court. (Dkt. no. 27 at 3-4.) Only those issues "within the four corners" of

petitioner's state appellate briefing were properly presented to the Nevada Supreme Court for exhaustion purposes. *Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005). Petitioner did not present the Nevada Supreme Court with the majority of the claims asserted in his federal habeas petition. The Court has outlined, *supra*, those claims in the federal habeas petition that were properly exhausted by their presentation to the Nevada Supreme Court. The following claims in the federal habeas petition are unexhausted, as they were not presented to the Nevada Supreme Court: Grounds 2, 3, and 4; the ineffective assistance of counsel portion of Ground 5; Grounds 6 and 7; the ineffective assistance of counsel portion of Ground 8; portions of Ground 9; Grounds 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 25 and 26; portions of Ground 27; and Ground 28.

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

A federal court may not entertain a habeas petition unless the petitioner has exhausted available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition contains both exhausted and unexhausted claims. *Id.* In the instant case, the Court finds that the following claims in the federal habeas petition are properly exhausted: (1) the claim in Ground 1 that the justice court's refusal to reduce the bail amount violated due process; (2) the claim in Ground 5 that petitioner's right to a speedy trial was violated; (3) the claim in Ground 8 that there was insufficient evidence to support his convictions for sexual assault, child abuse, and solicitation; (4) the claim in Ground 9 that trial counsel was ineffective for failing to move to sever the counts of child abuse and neglect from the other charges; (5) the claim in Ground 18 that trial counsel was ineffective for failing to obtain an independent psychological evaluation of the victim, and the related claim in Ground 18 that the trial court erred by denying the motion for a psychological evaluation; (6) the claim in Ground 21 that the trial court erred in denying a pretrial motion for an investigator; and (7) the portion of Ground 27 that alleges cumulative error within the scope of petitioner's opening brief on appeal from the denial of the state

1 habeas petition. The following claims in the federal habeas petition are unexhausted:  
2 Grounds 2, 3 and 4; the ineffective assistance of counsel portion of Ground 5; Grounds  
3 6 and 7; the ineffective assistance of counsel portion of Ground 8; portions of Ground 9;  
4 Grounds 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 25 and 26; portions of Ground  
5 27; and Ground 28. Because the Court finds that the petition is a “mixed petition,”  
6 containing both exhausted and unexhausted claims, petitioner has these options:

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

16 *See Rose v. Lundy*, 455 U.S. 509; *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v.*  
17 *Small*, 315 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).  
18 Petitioner’s failure to choose any of the three options listed above, or seek other  
19 appropriate relief from this Court, will result in his federal habeas petition being  
20 dismissed. Petitioner is advised to familiarize himself with the limitations periods for  
21 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations  
22 periods may have a direct and substantial effect on whatever choice he makes  
23 regarding his petition.

#### 24 **IV. CONCLUSION**

25 It is therefore ordered that petitioner’s motions for the appointment of counsel  
26 (dkt. nos. 5 & 8) are denied.

27 It is further ordered that respondents’ motion to dismiss (dkt. no. 12) is granted,  
28 as follows:

- 29 1. The following claims in the federal habeas petition are exhausted:  
30 (1) the claim in Ground 1 that the justice court’s refusal to reduce the bail amount  
31 violated due process; (2) the claim in Ground 5 that petitioner’s right to a speedy trial



1 was violated; (3) the claim in Ground 8 that there was insufficient evidence to support  
2 his convictions for sexual assault, child abuse, and solicitation; (4) the claim in Ground 9  
3 that trial counsel was ineffective for failing to move to sever the counts of child abuse  
4 and neglect from the other charges; (5) the claim in Ground 18 that trial counsel was  
5 ineffective for failing to obtain an independent psychological evaluation of the victim,  
6 and the related claim in Ground 18 that the trial court erred by denying the motion for a  
7 psychological evaluation; (6) the claim in Ground 21 that the trial court erred in denying  
8 a pretrial motion for an investigator; and (7) the portion of Ground 27 that alleges  
9 cumulative error within the scope of petitioner's opening brief on appeal from the denial  
10 of the state habeas petition.

11           2. The following claims in the federal habeas petition are  
12 unexhausted: Grounds 2, 3 and 4; the ineffective assistance of counsel portion of  
13 Ground 5; Grounds 6 and 7; the ineffective assistance of counsel portion of Ground 8;  
14 portions of Ground 9; Grounds 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 25 and 26;  
15 portions of Ground 27; and Ground 28.

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

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

1 answer shall contain all substantive and procedural arguments as to all surviving  
2 grounds of the petition, and shall comply with Rule 5 of the Rules Governing  
3 Proceedings in the United States District Courts under 28 U.S.C. §2254.

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

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

8 DATED THIS 17<sup>th</sup> day of February 2015.

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12 MIRANDA M. DU  
13 UNITED STATES DISTRICT JUDGE  
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