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

8 MICHAEL JOHN MOE,

9 Petitioner,

3:14-cv-00410-RCJ-WGC

10 vs.

ORDER

11 BRIAN E. WILLIAMS, SR., *et al.*,

12 Respondents.
13 _____/

14
15 Introduction

16 In this habeas corpus action, the respondents have filed a motion to dismiss. The court will
17 grant that motion to dismiss in part and deny it in part. The court finds several claims in the habeas
18 petition in this case to be unexhausted in state court. The court will require the petitioner, Michael
19 John Moe, to make an election regarding his unexhausted claims.

20 Background

21 On May 22, 2009, Moe was convicted, in Nevada's Second Judicial District Court, pursuant
22 to a jury verdict, of one count of burglary. *See* Judgment, Exhibit 39. (The exhibits referred to in
23 this order were filed by respondents, and are located in the record at ECF Nos. 8, 9, 10, 11, 12, and
24 13.) The burglary involved Moe entering a sporting goods store and shoplifting items from that
25 store. Moe was adjudicated an habitual criminal and sentenced to 10 to 25 years in prison. *See id.*
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1 Moe appealed. On appeal he raised two claims, neither of which included any assertion that
2 his federal constitutional rights had been violated. *See* Fast Track Statement, Exhibit 53. The
3 Nevada Supreme Court affirmed Moe's judgment of conviction on November 5, 2009. *See* Order of
4 Affirmance, Exhibit 55.

5 On April 21, 2010, Moe filed a post-conviction petition for writ of habeas corpus in the state
6 district court. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 60. After counsel
7 was appointed for him, Moe filed a supplemental petition on August 7, 2011. *See* Supplemental
8 Petition for Writ of Habeas Corpus, Exhibit 88. Moe subsequently amended his petition.
9 *See* Motion for Leave to Amend, Exhibit 109; Order Granting Motion for Leave to Amend, Exhibit
10 117. On January 8, 2013, the state district court held an evidentiary hearing. *See* Transcript of
11 Proceedings, January 8, 2013, Exhibit 121. The state district court denied Moe's petition in a written
12 order on April 8, 2013. *See* Findings of Fact, Conclusions of Law and Judgment, Exhibit 124. Moe
13 appealed. On appeal he asserted only claims of ineffective assistance of trial counsel. *See* Fast
14 Track Statement, Exhibit 132. On September 18, 2013, the Nevada Supreme Court affirmed the
15 denial of Moe's petition. *See* Order of Affirmance, Exhibit 138.

16 This court received Moe's *pro se* federal habeas corpus petition on August 6, 2014. *See*
17 Petition for Writ of Habeas Corpus (ECF No. 4). Moe's federal habeas petition includes 44 grounds
18 for relief, some with several subparts. *See id.*

19 On February 17, 2015, respondents filed a motion to dismiss, contending that all Moe's
20 claims are unexhausted in state court. *See* Motion to Dismiss (ECF No. 7). Respondents also
21 contend that all Moe's claims are conclusory and that some of his claims are not cognizable in a
22 federal habeas action. *See id.* Moe filed an opposition to the motion to dismiss on June 8, 2015
23 (ECF No. 18), and respondents filed a reply on June 17, 2015 (ECF No. 19).

24 Discussion

25 A federal court may not grant habeas corpus relief on a claim not exhausted in state court.
26 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is

1 intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*
2 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the
3 claim to the highest state court, and must give that court the opportunity to address and resolve it.
4 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
5 10 (1992). A claim is fairly presented to the state’s highest court if, before that court, the petitioner
6 describes the operative facts and legal theory upon which the claim is based. *See Anderson v.*
7 *Harless*, 459 U.S. 4, 6 (1982) (*per curiam*); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*, 693 F.2d
8 859, 862 (9th Cir. 1982).

9 The question of Moe’ exhaustion of claims in state court is controlled by the claims that Moe
10 asserted on his direct appeal (*see* Fast Track Statement, Exhibit 53) and on the appeal in his state
11 habeas action (*see* Fast Track Statement, Exhibit 132).

12 Ground 1

13 In Ground 1 of his habeas corpus petition, Moe claims that his federal constitutional rights
14 were violated because law enforcement obtained statements from him without giving him a *Miranda*
15 warning, and without obtaining a voluntary, knowing and intelligent waiver of his constitutional
16 rights. *See* Petition for Writ of Habeas Corpus (ECF No. 4). Moe did not assert this claim on his
17 direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim on the
18 appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 1 is unexhausted.

19 Ground 2

20 In Ground 2, Moe claims that his federal constitutional rights were violated “due to trial
21 court’s error in admitting into evidence a statement by arresting officer which was filled with lies
22 and fabrications.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on his
23 direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim on the
24 appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 2 is unexhausted.

1 Ground 3

2 In Ground 3, Moe claims that his federal constitutional rights were violated because “[t]he
3 sentence of imprisonment of 10 to 25 years in Nevada State Prison for a burglary offense, which had
4 \$0.00 loss, was an excessive, disproportionate, and cruel and unusual sentence.” *See* Petition for
5 Writ of Habeas Corpus. Moe did not assert this claim on his direct appeal. *See* Fast Track
6 Statement, Exhibit 53. And, Moe did not assert this claim on the appeal in his state habeas action.
7 *See* Fast Track Statement, Exhibit 132. Ground 3 is unexhausted.

8 Ground 4

9 In Ground 4, Moe claims that his federal constitutional rights were violated because the State
10 failed to prove, beyond a reasonable doubt, that he committed burglary. *See* Petition for Writ of
11 Habeas Corpus. Moe did not assert this claim on his direct appeal. *See* Fast Track Statement,
12 Exhibit 53. And, Moe did not assert this claim on the appeal in his state habeas action. *See* Fast
13 Track Statement, Exhibit 132. Ground 4 is unexhausted.

14 Ground 5

15 In Ground 5, Moe claims that his federal constitutional rights were violated because Nevada
16 law permitted him to be convicted of burglary based solely on the “fabricated and uncorroborated
17 testimony” of the arresting officer. *See* Petition for Writ of Habeas Corpus. Moe did not assert this
18 claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim
19 on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 5 is
20 unexhausted.

21 Ground 6

22 In Ground 6, Moe claims that his federal constitutional right to confront and cross-examine
23 the witnesses against him was violated because “the trial court allowed trial to proceed without the
24 State’s witness, Burl Sutter.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim
25 on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim on
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1 the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 6 is
2 unexhausted.

3 Ground 7

4 In Ground 7, Moe claims that his federal constitutional rights were violated, on account of
5 ineffective assistance of his appellate counsel, because his appellate counsel failed to raise certain
6 issues on his direct appeal. *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on
7 his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim on
8 the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 7 is
9 unexhausted.

10 Ground 8

11 In Ground 8, Moe claims that his federal constitutional rights were violated because the trial
12 court denied a challenge for cause regarding a potential juror. *See* Petition for Writ of Habeas
13 Corpus. On his direct appeal, Moe made a claim regarding the trial court's denial of the challenge to
14 the prospective juror. *See* Fast Track Statement, Exhibit 53, pp. 4-8. However, Moe did not claim
15 that his federal constitutional rights were violated. *See id.* Therefore, Moe did not exhaust this
16 claim. *See Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir.2000) (“[T]he petitioner must make the
17 federal basis [of the claim] explicit either by citing federal law or the decisions of federal courts,
18 even if the federal basis of a claim is ‘self-evident,’ or the underlying claim would be decided under
19 state law on the same considerations that would control resolution of the claim on federal grounds.”),
20 *as amended by* 247 F.3d 904 (9th Cir.2001). Moe did not assert this claim on the appeal in his state
21 habeas action. *See* Fast Track Statement, Exhibit 132. Ground 8 is unexhausted.

22 Ground 9

23 In Ground 9, Moe claims that his federal constitutional rights were violated because of the
24 Nevada Supreme Court's unwillingness to conduct a fair and adequate appellate review. *See*
25 Petition for Writ of Habeas Corpus. Moe did not assert this claim on his direct appeal. *See* Fast
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1 Track Statement, Exhibit 53. And, Moe did not assert this claim on the appeal in his state habeas
2 action. *See* Fast Track Statement, Exhibit 132. Ground 9 is unexhausted.

3 Ground 10

4 In Ground 10, Moe claims that his federal constitutional rights were violated because “the
5 state court and district attorney ... sentenced and asked for habitual criminal status by using 3
6 misdemeanor convictions and 1 felony conviction that was uncounseled.” *See* Petition for Writ of
7 Habeas Corpus. On his direct appeal, Moe made a claim regarding his sentencing as an habitual
8 criminal, but he did not there challenge the sentencing on the basis that any of his prior convictions
9 were “uncounseled,” and, at any rate, he did not claim that his federal constitutional rights were
10 violated. *See* Fast Track Statement, Exhibit 53, pp. 8-11. Moe did not assert this claim on the
11 appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 10 is unexhausted.

12 Ground 11

13 In Ground 11, Moe claims that his federal constitutional rights were violated “due to the trial
14 court’s abuse of discretion in denying a meaningful opportunity to present his defense by allowing
15 less than 16 mins. for a defense.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this
16 claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. Nor did Moe present this federal
17 constitutional claim to the Nevada Supreme Court on the appeal in his state habeas action. Ground
18 11 is unexhausted

19 Ground 12

20 In Ground 12, Moe claims that his federal constitutional rights were violated “because trial
21 court admitted a statement ‘not’ made by petitioner which was the result of Officer Robertson lying
22 to court, which was either by his own doing or brought about by a request by prosecuting attorney.”
23 *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on his direct appeal. *See* Fast
24 Track Statement, Exhibit 53. And, Moe did not assert this claim on the appeal in his state habeas
25 action. *See* Fast Track Statement, Exhibit 132. Ground 12 is unexhausted.

1 Ground 13

2 In Ground 13, Moe claims that his federal constitutional rights were violated because “[t]he
3 state court ... enhanced the petitioner’s burglary charge to habitual criminal status because of a
4 Nevada law that allows for enhancement of a behavior or crime, which a person may have no control
5 over because of medical reasons and not criminal reasons.” *See* Petition for Writ of Habeas Corpus.
6 Moe did not assert this claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe
7 did not assert this claim on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit
8 132. Ground 13 is unexhausted.

9 Ground 14

10 In Ground 14, Moe claims that his federal constitutional rights were violated because of the
11 State’s failure to properly preserve evidence. *See* Petition for Writ of Habeas Corpus. Moe did not
12 assert this claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert
13 this claim on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground
14 14 is unexhausted.

15 Ground 15

16 In Ground 15, Moe claims that his federal constitutional rights were violated, as a result of
17 ineffective assistance of his appellate counsel. *See* Petition for Writ of Habeas Corpus. Moe claims
18 that his appellate counsel had a conflict of interest, and, as a result, did not raise, on Moe’s direct
19 appeal, any claims of ineffective assistance of trial counsel. Moe did not assert this claim before the
20 Nevada Supreme Court. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132.
21 Ground 15 is unexhausted.

22 Ground 16

23 In Ground 16, Moe claims that his federal constitutional rights were violated “due to the
24 State’s introduction of evidence of Burl Sutter’s GPS box, even though Burl Sutter was never
25 available for cross-examination.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this
26 claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim

1 on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 16 is
2 unexhausted.

3 Ground 17

4 In Ground 17, Moe claims that “[t]he GPS device and video games were admitted into
5 evidence in violation of the Fourth Amendment of the United States Constitution’s prohibition
6 against unreasonable searches and seizures. *See* Petition for Writ of Habeas Corpus. Moe did not
7 assert this claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert
8 this claim on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground
9 17 is unexhausted.

10 Ground 18

11 In Ground 18, Moe claims that he “is in custody in violation of his right to due process of law
12 under the Fifth and Fourteenth Amendments of the U.S. Constitution as the result of vindictive
13 prosecution, when an habitual criminal adjudication was sought by the prosecution, after trial was
14 complete and petitioner exercised his right to trial by jury.” *See* Petition for Writ of Habeas Corpus.
15 Moe did not assert this claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe
16 did not assert this claim on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit
17 132. Ground 18 is unexhausted.

18 Ground 19

19 In Ground 19, Moe claims he “is in custody in violation of his right to due process of law
20 under the Fifth and Fourteenth Amendments of the U.S. Constitution when the trial court abused its
21 discretion in adjudicating petitioner an habitual criminal.” *See* Petition for Writ of Habeas Corpus.
22 Moe asserts that the trial court abused its discretion because his prior convictions were “stale and
23 remote,” because one of his prior convictions was the result of a jury trial conducted without him
24 present, because all the prior convictions were for non-violent property crimes, and because “the
25 present offense had \$0 loss.” *See id.* On his direct appeal, Moe made a similar claim. *See* Fast
26 Track Statement, Exhibit 53, pp. 8-11. However, Moe did not claim that his federal constitutional

1 rights were violated. *See id.* Therefore, Moe did not exhaust this claim on his direct appeal. *See*
2 *Lyons*, 232 F.3d at 670 (“[T]he petitioner must make the federal basis [of the claim] explicit either
3 by citing federal law or the decisions of federal courts, even if the federal basis of a claim is
4 ‘self-evident,’ or the underlying claim would be decided under state law on the same considerations
5 that would control resolution of the claim on federal grounds.”), *as amended by* 247 F.3d 904. Moe
6 did not assert this claim on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit
7 132. Ground 19 is unexhausted.

8 Ground 20

9 In Ground 20, Moe claims he “was denied his Sixth and Fourteenth Amendment rights to
10 effective assistance of counsel when counsel failed to conduct any pretrial investigation on State’s
11 witnesses, and witnesses Petitioner requested to be investigated and called for trial.” *See* Petition for
12 Writ of Habeas Corpus.

13 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
14 action. On that appeal, Moe claimed that his trial counsel was ineffective for failure to investigate
15 witnesses Donnelly, Duncan, and Catron. *See* Fast Track Statement, Exhibit 132, pp. 5-9. To this
16 extent, the claim in Ground 20 is exhausted. In all other respects, Ground 20 is unexhausted.

17 Ground 21

18 In Ground 21, Moe claims that his federal constitutional rights were violated “due to the
19 failure of the Washoe County public defender’s office to provide him with resources necessary for
20 his defense.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on his direct
21 appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert this claim on the appeal in
22 his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground 21 is unexhausted.

23 Ground 22

24 In Ground 22, Moe claims that his federal constitutional rights were violated “because the
25 trial court was biased, prejudicial, and abused it’s discretion and misconducted himself during
26 motion hearings, trial, and during sentencing.” *See* Petition for Writ of Habeas Corpus. Moe did not

1 assert this claim on his direct appeal. *See* Fast Track Statement, Exhibit 53. And, Moe did not assert
2 this claim on the appeal in his state habeas action. *See* Fast Track Statement, Exhibit 132. Ground
3 22 is unexhausted.

4 Ground 23

5 In Ground 23, Moe claims that his federal constitutional rights were violated because of
6 prosecutorial misconduct. *See* Petition for Writ of Habeas Corpus. Ground 23 has 16 subparts,
7 designated A through P. *See id.* Moe did not assert any claim of prosecutorial misconduct on either
8 his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
9 Track Statement, Exhibit 132. Ground 23 is unexhausted.

10 Ground 24(2)

11 In Ground 24(2) (Ground 24 includes 31 subparts, numbered 2 through 32; there is no
12 Ground 24(1)), Moe claims that he was denied his federal constitutional right to effective assistance
13 of his trial counsel on account of his trial counsel's failure to call at least 5 witnesses petitioner told
14 him to call. *See* Petition for Writ of Habeas Corpus.

15 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
16 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to prepare,
17 encourage, and subpoena Pam Metzger to testify. *See* Fast Track Statement, Exhibit 132, pp. 12-14.
18 To this extent, the claim in Ground 24(2) is exhausted. In all other respects, Ground 24(2) is
19 unexhausted.

20 Ground 24(3)

21 In Ground 24(3), Moe claims that he was denied his federal constitutional right to effective
22 assistance of his trial counsel on account of his trial counsel's failure "to call and allow petitioner to
23 testify in motion to suppress hearing and at trial." *See* Petition for Writ of Habeas Corpus.

24 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
25 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to encourage
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1 Moe to testify at trial. *See* Fast Track Statement, Exhibit 132, pp. 10-12. To this extent, the claim in
2 Ground 24(3) is exhausted. In all other respects, Ground 24(3) is unexhausted.

3 Ground 24(4)

4 In Ground 24(4), Moe claims that he was denied his federal constitutional right to effective
5 assistance of his trial counsel on account of his trial counsel's failure "to object to prosecutorial
6 misconduct, judicial misconduct." *See* Petition for Writ of Habeas Corpus. Moe did not assert this
7 claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement,
8 Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(4) is unexhausted.

9 Ground 24(5)

10 In Ground 24(5), Moe claims that he was denied his federal constitutional right to effective
11 assistance of his trial counsel on account of his trial counsel's failure "to object to speculative
12 testimony by Scott Catron and Jeffrey Duncan, along with speculative testimony by Officer
13 Robertson." *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his
14 direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
15 Track Statement, Exhibit 132. Ground 24(5) is unexhausted.

16 Ground 24(6)

17 In Ground 24(6), Moe claims that he was denied his federal constitutional right to effective
18 assistance of his trial counsel on account of his trial counsel's failure "to object to the prosecutor's
19 constant leading in questions asked." *See* Petition for Writ of Habeas Corpus. Moe did not assert
20 this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track
21 Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(6) is unexhausted.

22 Ground 24(7)

23 In Ground 24(7), Moe claims that he was denied his federal constitutional right to effective
24 assistance of his trial counsel on account of trial counsel's failure "to object to prosecutorial abuse
25 and misconduct during voir dire questioning, opening statement, during trial, and during closing
26 arguments." *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his

1 direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
2 Track Statement, Exhibit 132. Ground 24(7) is unexhausted.

3 Ground 24(8)

4 In Ground 24(8), Moe claims that he was denied his federal constitutional right to effective
5 assistance of his trial counsel on account of trial counsel's failure "to instruct trial court to give jury
6 instruction #11, prior to the start, or during jury trial." *See* Petition for Writ of Habeas Corpus. Moe
7 did not assert this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast
8 Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(8) is unexhausted.

9 Ground 24(9)

10 In Ground 24(9), Moe claims that he was denied his federal constitutional right to effective
11 assistance of his trial counsel on account of trial counsel's failure "to investigate any of State's
12 witnesses along with lying about availability of petitioner's witnesses." *See* Petition for Writ of
13 Habeas Corpus.

14 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
15 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to investigate
16 witnesses Donnelly, Duncan, and Catron. *See* Fast Track Statement, Exhibit 132, pp. 5-9. To this
17 extent, the claim in Ground 24(9) is exhausted. In all other respects, Ground 24(9) is unexhausted.

18 Ground 24(10)

19 In Ground 24(10), Moe claims that he was denied his federal constitutional right to effective
20 assistance of his trial counsel because "[t]rial counsel misrepresented petitioner at and during
21 preliminary hearing." *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on
22 either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53;
23 Fast Track Statement, Exhibit 132. Ground 24(10) is unexhausted.

24 Ground 24(11)

25 In Ground 24(11), Moe claims that he was denied his federal constitutional right to effective
26 assistance of his trial counsel because "[t]rial counsel offered fabricated and forged evidence to court

1 at preliminary hearing.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on
2 either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53;
3 Fast Track Statement, Exhibit 132. Ground 24(11) is unexhausted.

4 Ground 24(12)

5 In Ground 24(12), Moe claims that he was denied his federal constitutional right to effective
6 assistance of his trial counsel because “[t]rial counsel attempted at [every] meeting and through
7 letters to coerce me, petitioner, into taking a deal.” *See* Petition for Writ of Habeas Corpus. Moe did
8 not assert this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast
9 Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(12) is unexhausted.

10 Ground 24(13)

11 In Ground 24(13), Moe claims that he was denied his federal constitutional right to effective
12 assistance of his trial counsel because “[t]rial counsel failed, to the point of abuse, to follow and
13 carry out [jury instruction number 11] during trial.” *See* Petition for Writ of Habeas Corpus. Moe
14 did not assert this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast
15 Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(13) is unexhausted.

16 Ground 24(14)

17 In Ground 24(14), Moe claims that he was denied his federal constitutional right to effective
18 assistance of his trial counsel because “[t]rial counsel failed to ask for a lesser included offense in
19 jury instruction.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his
20 direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
21 Track Statement, Exhibit 132. Ground 24(14) is unexhausted.

22 Ground 24(15)

23 In Ground 24(15), Moe claims that he was denied his federal constitutional right to effective
24 assistance of his trial counsel because “[t]rial counsel purposely violated [HIPAA] during
25 sentencing.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his
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1 direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
2 Track Statement, Exhibit 132. Ground 24(15) is unexhausted.

3 Ground 24(16)

4 In Ground 24(16), Moe claims that he was denied his federal constitutional right to effective
5 assistance of his trial counsel because “[t]rial counsel failed to present evidence at motion to
6 suppress hearing, at trial, and during sentencing.” *See* Petition for Writ of Habeas Corpus.

7 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
8 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to offer at trial,
9 as evidence, “the advertisement flyer showing sale jackets from Cabela’s store and [the receipt from]
10 Metzger’s gambling tournament at Boomtown.” *See* Fast Track Statement, Exhibit 132, p. 14. To
11 this extent, the claim in Ground 24(16) is exhausted. In all other respects, Ground 24(16) is
12 unexhausted.

13 Ground 24(17)

14 In Ground 24(17), Moe claims that he was denied his federal constitutional right to effective
15 assistance of his trial counsel because “[t]rial counsel attempted ... to coerce petitioner into not filing
16 an appeal on this case.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on
17 either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53;
18 Fast Track Statement, Exhibit 132. Ground 24(17) is unexhausted.

19 Ground 24(18)

20 In Ground 24(18), Moe claims that he was denied his federal constitutional right to effective
21 assistance of his trial counsel because “[t]rial counsel failed to object to the exclusion of the State’s
22 witness Burl Sutter during trial.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this
23 claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement,
24 Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(18) is unexhausted.

1 Ground 24(19)

2 In Ground 24(19), Moe claims that he was denied his federal constitutional right to effective
3 assistance of his trial counsel because “[t]rial counsel was psychologically unfit to be a lawyer and
4 represent me during trial.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on
5 either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53;
6 Fast Track Statement, Exhibit 132. Ground 24(19) is unexhausted.

7 Ground 24(20)

8 In Ground 24(20), Moe claims that he was denied his federal constitutional right to effective
9 assistance of his trial counsel because “[t]rial counsel failed to object to inadmissible evidence
10 during trial and during sentencing.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this
11 claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement,
12 Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(20) is unexhausted.

13 Ground 24(21)

14 In Ground 24(21), Moe claims that he was denied his federal constitutional right to effective
15 assistance of his trial counsel because “[t]rial counsel failed to adequately review and investigate
16 defendant’s case.” *See* Petition for Writ of Habeas Corpus.

17 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
18 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to “investigate
19 the prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam Metger
20 selling videotapes stolen by Moe.” *See* Fast Track Statement, Exhibit 132, pp. 20-21. To this extent,
21 the claim in Ground 24(21) is exhausted. In all other respects, Ground 24(21) is unexhausted.

22 Ground 24(22)

23 In Ground 24(22), Moe claims that he was denied his federal constitutional right to effective
24 assistance of his trial counsel because “[t]rial counsel failed to present evidence and to object to
25 evidence during sentencing that would of made habitual sentence improper sentence.” *See* Petition
26 for Writ of Habeas Corpus.

1 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
2 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to object to “the
3 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam Metger selling
4 videotapes stolen by Moe.” *See* Fast Track Statement, Exhibit 132, pp. 20-21. Also, on that appeal,
5 Moe claimed that his trial counsel was ineffective for failing to offer evidence at the sentencing that
6 one of his prior convictions was the result of a trial at which he was not present. *See id.* at 21. In
7 these respects, the claim in Ground 24(22) is exhausted. In all other respects, Ground 24(22) is
8 unexhausted.

9 Ground 24(23)

10 In Ground 24(23), Moe claims that he was denied his federal constitutional right to effective
11 assistance of his trial counsel because “[t]rial counsel failed to object to improper statements by
12 prosecuting attorney during voir dire questioning, trial, and sentencing.” *See* Petition for Writ of
13 Habeas Corpus.

14 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
15 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to object to “the
16 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam Metger selling
17 videotapes stolen by Moe.” *See* Fast Track Statement, Exhibit 132, pp. 20-21. To that extent, the
18 claim in Ground 24(23) is exhausted. In all other respects, Ground 24(23) is unexhausted.

19 Ground 24(24)

20 In Ground 24(24), Moe claims that he was denied his federal constitutional right to effective
21 assistance of his trial counsel because “[t]rial counsel failed to object to improper commentary by
22 prosecuting attorney during opening statements, and during closing arguments, and during
23 sentencing.” *See* Petition for Writ of Habeas Corpus.

24 Here again, the court finds that Moe exhausted this claim, in part, on the appeal in his state
25 habeas action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to object
26 to “the prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam Metger

1 selling videotapes stolen by Moe.” *See* Fast Track Statement, Exhibit 132, pp. 20-21. To that
2 extent, the claim in Ground 24(24) is exhausted. In all other respects, Ground 24(24) is
3 unexhausted.

4 Ground 24(25)

5 In Ground 24(25), Moe claims that he was denied his federal constitutional right to effective
6 assistance of his trial counsel because “[t]rial counsel failed to object to testimony that was the result
7 of an absent *Miranda* rights warning.” *See* Petition for Writ of Habeas Corpus. Moe did not assert
8 this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track
9 Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(25) is unexhausted.

10 Ground 24(26)

11 In Ground 24(26), Moe claims that he was denied his federal constitutional right to effective
12 assistance of his trial counsel because “[t]rial counsel failed to object to judicial misconduct and
13 judicial abuse of discretion during motion to suppress hearing, trial, and during sentencing.” *See*
14 Petition for Writ of Habeas Corpus.

15 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
16 action. On that appeal, Moe claimed that his trial counsel was ineffective for failing to object “when
17 the court ordered there were sixteen minutes left to finish the jury trial after the State’s case.” *See*
18 Fast Track Statement, Exhibit 132, pp. 9-10. To that extent, the claim in Ground 24(26) is
19 exhausted. In all other respects, Ground 24(26) is unexhausted.

20 Ground 24(27)

21 In Ground 24(27), Moe claims that he was denied his federal constitutional right to effective
22 assistance of his trial counsel because “[t]rial counsel failed to adequately cross-examine State’s
23 witnesses.” *See* Petition for Writ of Habeas Corpus. Moe bases this claim on his counsel’s alleged
24 failure to adequately cross-examine Officer Robertson. *See id.* Moe did not assert this claim on
25 either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53;
26 Fast Track Statement, Exhibit 132. Ground 24(27) is unexhausted.

1 Ground 24(28)

2 In Ground 24(28), Moe claims that he was denied his federal constitutional right to effective
3 assistance of his trial counsel because “[t]rial counsel failed in calling Evo Novak as defense witness
4 [and Novak] testified in State’s favor.” *See* Petition for Writ of Habeas Corpus. Moe did not assert
5 this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track
6 Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(28) is unexhausted.

7 Ground 24(29)

8 In Ground 24(29), Moe claims that he was denied his federal constitutional right to effective
9 assistance of his trial counsel because “[t]rial counsel failed in having Evo Novak investigate
10 petitioner’s case and testify, since Evo Novak is [an] ex-cop.” *See* Petition for Writ of Habeas
11 Corpus. Moe did not assert this claim on either his direct appeal or his appeal in his state habeas
12 action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(29) is
13 unexhausted.

14 Ground 24(30)

15 In Ground 24(30), Moe claims that he was denied his federal constitutional right to effective
16 assistance of his trial counsel because “[t]rial counsel failed to adequately prepare for direct-
17 examination and cross-examination.” *See* Petition for Writ of Habeas Corpus. As supporting facts
18 for this claim, Moe states:

19 [Trial counsel] was not ready for anything in this case and since his only
20 position is really a go-between for the court and D.A. to get a satisfactory deal, it was
21 obvious [trial counsel] was going to be a joke at trial. For the court to say “[trial
22 counsel] did a good job” was appropriate to the go-between behavior [trial counsel]
did exhibit during this whole process. Was also appropriate for a conviction I was not
guilty of.

23 *Id.* Moe did not assert this claim on either his direct appeal or his appeal in his state habeas action.
24 *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 24(30) is
25 unexhausted.

1 Ground 24(31)

2 In Ground 24(31), Moe claims that he was denied his federal constitutional right to effective
3 assistance of his trial counsel because “[t]rial counsel failed to object to legality of the search of
4 petitioner’s person.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either
5 his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
6 Track Statement, Exhibit 132. Ground 24(31) is unexhausted.

7 Ground 24(32)

8 In Ground 24(32), Moe claims that he was denied his federal constitutional right to effective
9 assistance of his trial counsel because “[t]rial counsel failed to call impeachment witnesses and
10 failed to offer impeachment evidence to impeach the complaining witnesses.” *See* Petition for Writ
11 of Habeas Corpus.

12 The court finds that Moe exhausted this claim, in part, on the appeal in his state habeas
13 action. On that appeal, Moe claimed that his trial counsel “should have played the videotape from
14 Cabela’s security office to impeach Officer David Robertson’s supplemental report,” and should
15 have cross-examined Donnelly, Duncan, and Catron. *See* Fast Track Statement, Exhibit 132,
16 pp. 5-9. To that extent, the claim in Ground 24(32) is exhausted. In all other respects, Ground
17 24(32) is unexhausted.

18 Ground 25

19 In Ground 25, Moe claims that his federal constitutional rights were violated as a result of
20 cumulative error. *See* Petition for Writ of Habeas Corpus. This claim is exhausted to the extent of
21 Moe’s other exhausted claims.

22 Ground 26

23 In Ground 26, Moe claims that NRS 171.1965 is unconstitutional. *See* Petition for Writ of
24 Habeas Corpus. Moe did not assert this claim on either his direct appeal or his appeal in his state
25 habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 26
26 is unexhausted.

1 Ground 27

2 In Ground 27, Moe claims that his federal constitutional rights were violated “due to the
3 failure to provide him a pre
4 liminary hearing as provided by law.” *See* Petition for Writ of Habeas Corpus. Moe did not assert
5 this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track
6 Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 27 is unexhausted.

7 Ground 28

8 In Ground 28, Moe claims that his federal constitutional rights were violated “due to the
9 fact that jury instructions #3, #5, #7, #8, #10, #11, #13, #16, #17, #18, and #19 should of been given
10 to the jury prior to beginning of the trial.” *See* Petition for Writ of Habeas Corpus. Moe did not
11 assert this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track
12 Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 28 is unexhausted.

13 Ground 29

14 In Ground 29, Moe claims that his federal constitutional rights were violated “because jury
15 instruction #22 erroneously states ‘burglary is complete when a building is entered with the specific
16 intent to commit larceny therein,[’] also erroneously states ‘larceny is the unlawful stealing.’” *See*
17 Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his direct appeal or his
18 appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement,
19 Exhibit 132. Ground 29 is unexhausted.

20 Ground 30

21 In Ground 30, Moe claims that his federal constitutional rights were violated “because the
22 burglary statute in Nevada is unconstitutional on its face, by inappropriately defining burglary
23 beyond [its] definition found in appropriate dictionaries.” *See* Petition for Writ of Habeas Corpus.
24 Moe did not assert this claim on either his direct appeal or his appeal in his state habeas action. *See*
25 Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 30 is unexhausted.

1 Ground 31

2 In Ground 31, Moe claims that his federal constitutional rights were violated “due to the lack
3 of a complete and adequate record, which prevented petitioner an effective confrontation of the
4 State’s witnesses and rendered an inappropriate appellate review of his conviction and sentence
5 fundamentally unfair.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on
6 either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53;
7 Fast Track Statement, Exhibit 132. Ground 31 is unexhausted.

8 Ground 32

9 In Ground 32, Moe claims that his “sentencing as an habitual criminal was unconstitutional
10 because it denied him his due process rights, equal protection of laws, and twice put petitioner in
11 jeopardy of life or limb, by sentencing [him] to second sentence for crimes [he] had already served a
12 punishment.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his
13 direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
14 Track Statement, Exhibit 132. Ground 32 is unexhausted.

15 Ground 33

16 In Ground 33, Moe claims that his federal constitutional rights were violated because, in
17 sentencing him, the trial court considered crimes committed outside its jurisdiction. *See* Petition for
18 Writ of Habeas Corpus. Moe did not assert this claim on either his direct appeal or his appeal in his
19 state habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132.
20 Ground 33 is unexhausted.

21 Ground 34

22 In Ground 34, Moe claims that his federal constitutional rights were violated because of
23 “[t]he trial court’s refusal to grant petitioner’s motion to suppress and trial court’s prejudicial and
24 biased ruling on [photos] and GPS device during trial.” *See* Petition for Writ of Habeas Corpus.
25 Moe did not assert this claim on either his direct appeal or his appeal in his state habeas action. *See*
26 Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 34 is unexhausted.

1 Ground 35

2 In Ground 35, Moe claims that his federal constitutional rights were violated because of
3 repeated use of the word “shoplifting” during trial by the prosecutor, defense counsel, and witnesses.
4 *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his direct appeal or
5 his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement,
6 Exhibit 132. Ground 35 is unexhausted.

7 Ground 36

8 In Ground 36, Moe claims that his federal constitutional rights were violated because of
9 “[t]he trial court’s minimizing prosecutor misconduct on video tape comment.” *See* Petition for Writ
10 of Habeas Corpus. Moe did not assert this claim on either his direct appeal or his appeal in his state
11 habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 36
12 is unexhausted.

13 Ground 37

14 In Ground 37, Moe claims that his federal constitutional rights were violated “due to ... [an]
15 effort by trial court, district attorney, and trial counsel to keep this trial one day only.” *See* Petition
16 for Writ of Habeas Corpus. Moe did not assert this claim on either his direct appeal or his appeal in
17 his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132.
18 Ground 37 is unexhausted.

19 Ground 38

20 In Ground 38, Moe claims that his “sentence to a term of 10 to 25 years was an excessive,
21 disproportionate sentence that constituted cruel and unusual punishment in violation of the Eighth
22 and Fourteenth Amendments to the U.S. Constitution and his right to equal protection of the law
23 under the Fifth and Fourteenth Amendments.” *See* Petition for Writ of Habeas Corpus. Moe did not
24 assert this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast Track
25 Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 38 is unexhausted.
26

1 Ground 39

2 In Ground 39, Moe claims that his federal constitutional rights were violated “because trial
3 counsel failed to point out that \$0.00 loss failed to meet the larceny threshold of less than \$250 for
4 petit larceny, or more that \$250 for grand larceny.” *See* Petition for Writ of Habeas Corpus. Moe
5 did not assert this claim on either his direct appeal or his appeal in his state habeas action. *See* Fast
6 Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 39 is unexhausted.

7 Ground 40

8 In Ground 40, Moe claims that his federal constitutional rights were violated “due to trial
9 counsel’s failure to instruct trial court to instruct or give instructions on a lesser crime.” *See* Petition
10 for Writ of Habeas Corpus. Moe did not assert this claim on either his direct appeal or his appeal in
11 his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132.
12 Ground 40 is unexhausted.

13 Ground 41

14 In Ground 41, Moe claims that his federal constitutional rights were violated “because jury
15 instruction #9 is unconstitutional and allowed the trial court to proceed with trial without the
16 availability of Burl Sutter.” *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim
17 on either his direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit
18 53; Fast Track Statement, Exhibit 132. Ground 41 is unexhausted.

19 Ground 42

20 In Ground 42, Moe claims that his federal constitutional rights were violated “because of
21 prosecutorial misconduct introducing evidence that is of a *Brady* violation, along with a ... judicial
22 abuse of discretion, when trial court admitted *Brady* violation evidence during trial in order to
23 achieve a biased and prejudicial verdict against petitioner.” *See* Petition for Writ of Habeas Corpus.
24 Moe did not assert this claim on either his direct appeal or his appeal in his state habeas action. *See*
25 Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. Ground 42 is unexhausted.

1 Ground 43

2 In Ground 43, Moe claims that his federal constitutional rights were violated “due to trial
3 court’s abuse of discretion sentencing petitioner to habitual criminal status due to past conviction[s]
4 that are remote in time, all non-violent offenses, and trivial in nature; also, the sentence was a
5 reflection of petitioner exercising petitioner’s right to trial by jury.” *See* Petition for Writ of Habeas
6 Corpus. Moe did not assert this claim on either his direct appeal or his appeal in his state habeas
7 action. *See* Fast Track Statement, Exhibit 53; Fast Track Statement, Exhibit 132. On his direct
8 appeal, Moe did argue that the imposition of an habitual criminal sentence was an abuse of
9 discretion; however, Moe did not claim a federal constitutional violation. *See* Fast Track Statement,
10 Exhibit 53. Ground 43 is unexhausted.

11 Ground 44

12 In Ground 44, Moe claims that he was denied his federal constitutional right to effective
13 assistance of his trial counsel because his counsel was ineffective in his state post-conviction
14 proceedings. *See* Petition for Writ of Habeas Corpus. Moe did not assert this claim on either his
15 direct appeal or his appeal in his state habeas action. *See* Fast Track Statement, Exhibit 53; Fast
16 Track Statement, Exhibit 132. Ground 44 is unexhausted.

17 Summary Regarding Exhaustion of Claims

18 The court, therefore, finds that Moe’s habeas corpus petition is mixed, in that it contains both
19 exhausted and unexhausted claims. The following claims in Moe’s habeas petition are exhausted:

20 Ground 20 (to the extent based on trial counsel’s alleged failure to investigate
21 witnesses Donnelly, Duncan and Catron);

22 Ground 24(2) (to the extent based on trial counsel’s alleged failure to call Pam
23 Metzger to testify);

24 Ground 24(3) (to the extent based on trial counsel’s alleged failure to encourage Moe
25 to testify at trial);

26 Ground 24(9) (to the extent based on trial counsel’s alleged failure to investigate
witnesses Donnelly, Duncan and Catron);

1 Ground 24(16) (to the extent based on trial counsel's alleged failure to offer at trial,
2 as evidence, "the advertisement flyer showing sale jackets from Cabela's store and
[the receipt from] Metzger's gambling tournament at Boomtown");

3 Ground 24(21) (to the extent based on trial counsel's alleged failure to "investigate
4 the prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about
Pam Metger selling videotapes stolen by Moe");

5 Ground 24(22) (to the extent based on trial counsel's alleged failure to object to "the
6 prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about Pam
Metger selling videotapes stolen by Moe," and to offer evidence that one of his prior
7 convictions was the result of a trial at which he was not present);

8 Ground 24(23) (to the extent based on trial counsel's alleged failure to object to "the
9 prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about Pam
Metger selling videotapes stolen by Moe");

10 Ground 24(24) (to the extent based on trial counsel's alleged failure to object to "the
11 prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about Pam
Metger selling videotapes stolen by Moe");

12 Ground 24(26) (to the extent based on trial counsel's alleged failure to object "when
13 the court ordered there were sixteen minutes left to finish the jury trial after the
State's case");

14 Ground 24(32) (to the extent based on trial counsel's alleged failure to play "the
15 videotape from Cabela's security office to impeach Officer David Robertson's
supplemental report," and to cross-examine Donnelly, Duncan, and Catron); and

16 Ground 25 (to the extent of Moe's other exhausted claims)

17 The following claims in Moe's habeas petition are unexhausted: Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
18 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 (except to the extent based on trial counsel's alleged failure to
19 investigate witnesses Donnelly, Duncan and Catron), 21, 22, 23, 24(2) (except to the extent based on
20 trial counsel's alleged failure to call Pam Metzger to testify), 24(3) (except to the extent based on
21 trial counsel's alleged failure to encourage Moe to testify at trial), 24(4), 24(5), 24(6), 24(7), 24(8),
22 24(9) (except to the extent based on trial counsel's alleged failure to investigate witnesses Donnelly,
23 Duncan and Catron), 24(10), 24(11), 24(12), 24(13), 24(14), 24(15), 24(16) (except to the extent
24 based on trial counsel's alleged failure to offer at trial, as evidence, "the advertisement flyer showing
25 sale jackets from Cabela's store and [the receipt from] Metzger's gambling tournament at
26 Boomtown"), 24(17), 24(18), 24(19), 24(20), 24(21) (except to the extent based on trial counsel's

1 alleged failure to “investigate the prosecutor’s hearsay remarks regarding Game Stop contacting
2 Cabela’s about Pam Metger selling videotapes stolen by Moe”), 24(22) (except to the extent based
3 on trial counsel’s alleged failure to object to “the prosecutor’s hearsay remarks regarding Game Stop
4 contacting Cabela’s about Pam Metger selling videotapes stolen by Moe,” and to offer evidence that
5 one of his prior convictions was the result of a trial at which he was not present), 24(23) (except to
6 the extent based on trial counsel’s alleged failure to object to “the prosecutor’s hearsay remarks
7 regarding Game Stop contacting Cabela’s about Pam Metger selling videotapes stolen by Moe”),
8 24(24) (except to the extent based on trial counsel’s alleged failure to object to “the prosecutor’s
9 hearsay remarks regarding Game Stop contacting Cabela’s about Pam Metger selling videotapes
10 stolen by Moe”), 24(25), 24(26) (except to the extent based on trial counsel’s alleged failure to
11 object “when the court ordered there were sixteen minutes left to finish the jury trial after the State’s
12 case”), 24(27), 24(28), 24(29), 24(30), 24(31), Ground 24(32) (except to the extent based on trial
13 counsel’s alleged failure to play “the videotape from Cabela’s security office to impeach Officer
14 David Robertson’s supplemental report,” and to cross-examine Donnelly, Duncan, and Catron), 25
15 (except to the extent of Moe’s exhausted claims), 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38,
16 39, 40, 41, 42, 43, and 44.

17 Respondents’ Other Arguments

18 Respondents argue in their motion to dismiss that all Moe’s claims are conclusory, and that
19 some of Moe’s claims are not cognizable in this federal habeas corpus action. *See* Motion to
20 Dismiss, pp. 6-8, 20-36. The court finds that these arguments will be better addressed in conjunction
21 with consideration of the merits of Moe’s claims. Therefore, if and when respondents are called
22 upon to answer Moe’s claims with respect to their merits, respondents may assert these arguments in
23 their answer, and the court will consider them at that time.

24 Moe’s Election

25 The court will require Moe to make an election with respect to his unexhausted claims. With
26 respect to his unexhausted claims, Moe must elect one of the following: (1) file a declaration stating

1 that he wishes to abandon his unexhausted claims, and proceed, in this action, with the litigation of
2 his exhausted claims; (2) file a motion for a stay, under *Rhines v. Weber*, 544 U.S. 269 (2005),
3 requesting a stay of this action while he exhausts his unexhausted claims in state court; or
4 (3) voluntarily dismiss this entire action, without prejudice. The court will set a schedule for Moe to
5 make that election.

6 Moe is warned that, if he does not make his election, as required, within the time allowed,
7 the court will dismiss his entire petition, “without prejudice,” pursuant to *Rose v. Lundy*, 455 U.S.
8 509 (1982).

9 Moe is further warned that if his action is dismissed in its entirety “without prejudice,” either
10 because he elects such dismissal or because he does not make an election within the time allowed,
11 he may be barred by the statute of limitations from ever initiating any subsequent federal habeas
12 corpus action. That is because -- unless there is some form of tolling available to Moe that is not
13 now apparent to the court from the record -- the limitations period imposed by 28 U.S.C. § 2244(d)
14 has likely run out during the pendency of this action. A federal habeas corpus petition does not toll
15 the statute of limitations relative to a subsequent federal habeas action. *See Duncan v. Walker*, 533
16 U.S. 167, 181-82 (2001) (holding that “an application for federal habeas corpus review is not an
17 ‘application for State post-conviction or other collateral review’ within the meaning of 28 U.S.C.
18 § 2244(d)(2).”).

19 If Moe elects to file a motion for stay, he must make a showing in such motion that a stay is
20 warranted under *Rhines*. In *Rhines*, the Supreme Court circumscribed the discretion of federal
21 district courts to impose stays to facilitate habeas petitioners’ exhaustion of claims in state court.

22 The *Rhines* Court stated:

23 [S]tay and abeyance should be available only in limited circumstances. Because
24 granting a stay effectively excuses a petitioner’s failure to present his claims first to
25 the state courts, stay and abeyance is only appropriate when the district court
26 determines there was good cause for the petitioner’s failure to exhaust his claims first
in state court. Moreover, even if a petitioner had good cause for that failure, the
district court 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

1 for a writ of habeas corpus may be denied on the merits, notwithstanding the failure
2 of the applicant to exhaust the remedies available in the courts of the State”).

3 * * *

4 [I]t likely would be an abuse of discretion for a district court to deny a stay and to
5 dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his
6 unexhausted claims are potentially meritorious, and there is no indication that the
petitioner engaged in intentionally dilatory litigation tactics. In such circumstances,
the district court should stay, rather than dismiss, the mixed petition.

7 *Rhines*, 544 U.S. at 277-78. In short, in a motion for stay, Jones must show (1) that there was good
8 cause for his failure to exhaust his unexhausted claims, (2) that his unexhausted claims are not
9 plainly meritless, and (3) that he has not engaged in intentionally dilatory litigation tactics.

10 **IT IS THEREFORE ORDERED** that respondents’ Motion to Dismiss Petition for Writ of
11 Habeas Corpus (Doc. 8) is **GRANTED IN PART AND DENIED IN PART**. The court finds the
12 following claims in petitioner’s habeas petition to be exhausted:

13 Ground 20 (to the extent based on trial counsel’s alleged failure to investigate
14 witnesses Donnelly, Duncan and Catron);

15 Ground 24(2) (to the extent based on trial counsel’s alleged failure to call Pam
Metzger to testify);

16 Ground 24(3) (to the extent based on trial counsel’s alleged failure to encourage Moe
17 to testify at trial);

18 Ground 24(9) (to the extent based on trial counsel’s alleged failure to investigate
witnesses Donnelly, Duncan and Catron);

19 Ground 24(16) (to the extent based on trial counsel’s alleged failure to offer at trial,
20 as evidence, “the advertisement flyer showing sale jackets from Cabela’s store and
[the receipt from] Metzger’s gambling tournament at Boomtown”);

21 Ground 24(21) (to the extent based on trial counsel’s alleged failure to “investigate
22 the prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about
Pam Metzger selling videotapes stolen by Moe”);

23 Ground 24(22) (to the extent based on trial counsel’s alleged failure to object to “the
24 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
Metzger selling videotapes stolen by Moe,” and to offer evidence that one of his prior
25 convictions was the result of a trial at which he was not present);

26 Ground 24(23) (to the extent based on trial counsel’s alleged failure to object to “the
prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
Metzger selling videotapes stolen by Moe”);

1 Ground 24(24) (to the extent based on trial counsel's alleged failure to object to "the
2 prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about Pam
Metzger selling videotapes stolen by Moe");

3 Ground 24(26) (to the extent based on trial counsel's alleged failure to object "when
4 the court ordered there were sixteen minutes left to finish the jury trial after the
State's case");

5 Ground 24(32) (to the extent based on trial counsel's alleged failure to play "the
6 videotape from Cabela's security office to impeach Officer David Robertson's
supplemental report," and to cross-examine Donnelly, Duncan, and Catron); and

7 Ground 25 (to the extent of Moe's other exhausted claims)


8 The court finds the following claims in petitioner's habeas petition to be unexhausted:

9 Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 (except to the
10 extent based on trial counsel's alleged failure to investigate witnesses Donnelly,
Duncan and Catron), 21, 22, 23, 24(2) (except to the extent based on trial counsel's
11 alleged failure to call Pam Metzger to testify), 24(3) (except to the extent based on
trial counsel's alleged failure to encourage Moe to testify at trial), 24(4), 24(5), 24(6),
12 24(7), 24(8), 24(9) (except to the extent based on trial counsel's alleged failure to
investigate witnesses Donnelly, Duncan and Catron), 24(10), 24(11), 24(12), 24(13),
13 24(14), 24(15), 24(16) (except to the extent based on trial counsel's alleged failure to
offer at trial, as evidence, "the advertisement flyer showing sale jackets from Cabela's
14 store and [the receipt from] Metzger's gambling tournament at Boomtown"), 24(17),
24(18), 24(19), 24(20), 24(21) (except to the extent based on trial counsel's alleged
15 failure to "investigate the prosecutor's hearsay remarks regarding Game Stop
contacting Cabela's about Pam Metzger selling videotapes stolen by Moe"), 24(22)
16 (except to the extent based on trial counsel's alleged failure to object to "the
prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about Pam
17 Metzger selling videotapes stolen by Moe," and to offer evidence that one of his prior
convictions was the result of a trial at which he was not present), 24(23) (except to the
18 extent based on trial counsel's alleged failure to object to "the prosecutor's hearsay
remarks regarding Game Stop contacting Cabela's about Pam Metzger selling
19 videotapes stolen by Moe"), 24(24) (except to the extent based on trial counsel's
alleged failure to object to "the prosecutor's hearsay remarks regarding Game Stop
20 contacting Cabela's about Pam Metzger selling videotapes stolen by Moe"), 24(25),
24(26) (except to the extent based on trial counsel's alleged failure to object "when
21 the court ordered there were sixteen minutes left to finish the jury trial after the
State's case"), 24(27), 24(28), 24(29), 24(30), 24(31), Ground 24(32) (except to the
22 extent based on trial counsel's alleged failure to play "the videotape from Cabela's
security office to impeach Officer David Robertson's supplemental report," and to
23 cross-examine Donnelly, Duncan, and Catron), 25 (except to the extent of Moe's
exhausted claims), 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,
24 and 44.

25 The court will require the petitioner to make an election regarding his unexhausted claims. In all
26 other respects, respondents' motion to dismiss is denied.

IT IS FURTHER ORDERED that, with respect to the unexhausted claims in his habeas petition, petitioner must, no later than **July 31, 2015**, make an election. By that date, petitioner must do one of the following: (1) file a declaration stating that he wishes to abandon all the claims found by this court to be unexhausted, (2) file a motion for a stay, requesting that this case be stayed while he exhausts his unexhausted claims, or (3) file a declaration stating that he wishes to voluntarily dismiss his entire habeas petition in this case without prejudice. If petitioner does not make that election within the time allowed, the court will dismiss his entire habeas petition, without prejudice, pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

Dated this 25th day of June, 2015.


UNITED STATES DISTRICT JUDGE