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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CASTRO V. DECASTRO,

Case No. 3:14-cv-00529-RCJ-WGC

Petitioner,

ORDER

v.

ROBERT LEGRAND, et al.,

Respondents.

This counseled habeas matter under 28 U.S.C. § 2254 is before the court on respondents' motion to dismiss petitioner Castro V. DeCastro's first-amended petition (ECF No. 36). DeCastro has opposed (ECF No. 37), and respondents replied (ECF No. 38).

I. Procedural History and Background

On September 4, 2009, a jury convicted DeCastro of count 1: sexual assault of a minor under age 14; count 3: lewdness with a child under age 14; and count 4: attempted sexual assault of a minor under age 14 (exhibit 54).¹ The state district court sentenced him as follows: count 1 - life with the possibility of parole after 240 months; count 3 – life with the possibility of parole after 120 months, to run concurrently with count 1; and count 4 – 96 months with the possibility of parole after 38 months, to run consecutively to counts 1 and 3. Exh. 58. Judgment of conviction was entered on December 7, 2009. *Id.*

¹ The exhibits referenced in this order are exhibits to respondents' first motion to dismiss, ECF No. 11, and are found at ECF Nos. 12-17.

1 The Nevada Supreme Court affirmed DeCastro's convictions on February 24, 2012,
2 and remittitur issued on March 20, 2012. Exhs. 100, 101.

3 DeCastro filed a counseled state postconviction petition for habeas corpus on
4 August 22, 2012. Exhs. 104, 105. The state district court denied the petition on April 2,
5 2013. Exh. 118. On June 11, 2014, the Nevada Supreme Court affirmed the denial of
6 the petition, and remittitur issued on July 8, 2014. Exh. 134.

7 On October 10, 2014, DeCastro dispatched his federal habeas petition for filing
8 (ECF No. 4). Ultimately, this court appointed the Federal Public Defender as counsel
9 for DeCastro, and DeCastro filed a counseled first-amended petition on January 29,
10 2016 (ECF No. 31). Respondents now argue that the first-amended petition does not
11 relate back to the original petition and that petitioner failed to develop the factual basis
12 for the claim alleged in ground 1 (ECF No. 36).

13 **II. Legal Standards & Analysis**

14 **a. Relation Back**

15 Respondents argue that the two grounds raised in the amended petition do not
16 relate back to the original petition and should thus be dismissed as untimely (ECF No.
17 36, pp. 4-6). A new claim in an amended petition that is filed after the expiration of the
18 Antiterrorism and Effective Death Penalty Act ("AEDPA") one-year limitation period will
19 be timely only if the new claim relates back to a claim in a timely-filed pleading under
20 Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out
21 of "the same conduct, transaction or occurrence" as a claim in the timely pleading.
22 *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held
23 that habeas claims in an amended petition do not arise out of "the same conduct,
24 transaction or occurrence" as claims in the original petition merely because the claims
25 all challenge the same trial, conviction or sentence. 545 U.S. at 655-64. Rather, under
26 the construction of the rule approved in *Mayle*, Rule 15(c) permits relation back of
27 habeas claims asserted in an amended petition "only when the claims added by
28 amendment arise from the same core facts as the timely filed claims, and not when the

1 new claims depend upon events separate in 'both time and type' from the originally
2 raised episodes." 545 U.S. at 657. In this regard, the reviewing court looks to "the
3 existence of a common 'core of operative facts' uniting the original and newly asserted
4 claims." A claim that merely adds "a new legal theory tied to the same operative facts
5 as those initially alleged" will relate back and be timely. 545 U.S. at 659 and n.5; *Ha*
6 *Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013).

7 DeCastro filed his first-amended petition on January 29, 2016, about sixteen months
8 after he dispatched his original petition for filing. The claims in the first-amended
9 petition must therefore relate back to DeCastro's original petition in order to be deemed
10 timely.

11 **Ground 1**

12 In the amended petition, DeCastro claims that his trial counsel rendered ineffective
13 assistance in violation of his Sixth and Fourteenth Amendment rights by failing to
14 adequately advise DeCastro of the terms of the plea and the dangers of rejecting the
15 offer (ECF No. 31, pp. 14-16). Prior to trial, attorney Mark Cichoski negotiated a plea
16 deal with the State, wherein DeCastro would plead guilty to two counts of attempted
17 lewdness, which carried two sentences of five to twenty years, with the State reserving
18 the right to argue the sentence. *Id.*

19 Instead, DeCastro was convicted by a jury and sentenced to serve twenty years
20 before the possibility of parole, followed by a minimum of thirty-eight months before the
21 possibility of parole. DeCastro argues that Cichoski failed to fully explain the mandatory
22 sentencing that would be imposed if he was convicted. He also contends that he felt
23 afraid, bullied and did not understand his situation. *Id.* at 15-16.

24 In ground 1 of the original petition, DeCastro claimed that his Fifth, Sixth, and
25 Fourteenth Amendment rights were violated because his plea counsel rendered
26 ineffective assistance (ECF No. 4, p. 3). DeCastro alleged that, while counsel
27 negotiated the plea deal described above, counsel did not communicate with him about
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1 his case. DeCastro stated that he was afraid, he did not understand the situation and
2 he felt bullied. DeCastro stated that counsel's failure to communicate with him
3 prevented him from being able to make an informed decision about the plea agreement.
4 Also, in ground 5 of the original petition, DeCastro cited *Lafler v. Cooper*, 132 S. Ct.
5 1376 (2012) (a case regarding the proper remedy when a petitioner was prejudiced by
6 counsel's ineffective assistance in advising petitioner to reject the plea offer and go to
7 trial), and DeCastro again asserted that plea counsel was ineffective for failing to
8 communicate with him so that he could make an informed decision about the plea deal.
9 *Id.* at 11.

10 This court concludes that ground 1 of the amended petition is sufficiently tied to a
11 common core of operative facts with grounds 1 and 5 of the original petition and does
12 not depend upon events separate in 'both time and type' from the originally raised
13 allegations. Ground 1 of the amended petition, therefore, relates back and is timely.

14 **Ground 2**

15 DeCastro contends that his Fourteenth Amendment rights were violated because
16 insufficient evidence supported his conviction for attempted sexual assault (ECF No. 31,
17 pp. 16-18). Respondents argue that DeCastro did not properly raise this claim in his
18 original federal habeas petition.

19 In this court's order dated November 19, 2014, the court advised petitioner that if his
20 petition did not include all grounds he wished to raise "he should notify this court as
21 soon as possible, perhaps by means of a motion to amend his petition to add the claim
22 (ECF No. 3, p. 1).

23 Thereafter, DeCastro filed a *pro se* statement of additional claims as well as a
24 motion for appointment of counsel (ECF No. 9). DeCastro wrote: "attached hereto is an
25 order of affirmance from the Nevada Supreme Court on direct appeal from trial showing
26 7 additional claims that I am unable to formulate for federal court review." *Id.* DeCastro
27 attached the Nevada Supreme Court order affirming his convictions; one claim
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1 DeCastro raised on appeal to the state supreme court was that insufficient evidence
2 supported his conviction for attempted sexual assault (ECF No. 9, pp. 11-13). Based on
3 DeCastro's filings and the information he provided in his motion for appointment of
4 counsel, this court subsequently determined that DeCastro appeared unable to
5 represent himself and appointed counsel in order to ensure due process.

6 This court determines that DeCastro's attempted *pro se* statement of additional
7 claims, construed liberally, is fairly viewed as part of the original petition. Accordingly,
8 ground 2 of the amended petition relates back and is timely.

9 **b. Factual Basis for Ground 1**

10 Respondents also argue that amended ground 1 should be dismissed because
11 DeCastro makes specific factual allegations that were not developed during an
12 evidentiary hearing in state court (ECF No. 36, pp. 6-7). DeCastro's supplemental state
13 postconviction petition raised the claim that is currently before this court as federal
14 amended ground 1: the claim that trial counsel was ineffective for failing to completely
15 and effectively explain the plea negotiations and the potential mandatory sentence
16 which would be imposed if DeCastro was convicted of all counts. Exh. 105, pp. 25-26,
17 39-40. The state district court heard arguments as to whether to grant an evidentiary
18 hearing, denied an evidentiary hearing, and denied the petition on the pleadings. Exh.
19 110. DeCastro then presented the claims to the Nevada Supreme Court in his appeal
20 of the denial of the state petition. Exh. 130, pp. 47-48. Accordingly, DeCastro has
21 raised the same factual allegations to the Nevada Supreme Court that he raises in
22 federal amended ground 1. Respondents' argument that amended ground 1 is subject
23 to dismissal at this time for failure to develop a factual record lacks merit.

24 **III. Conclusion**

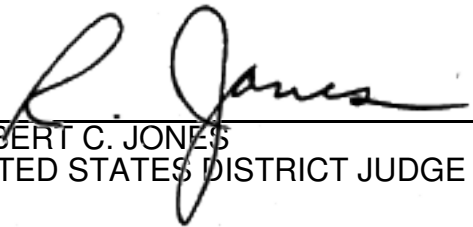
25 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 36)
26 is **DENIED**.

27 **IT IS FURTHER ORDERED** that respondents shall have **forty-five (45) days** to
28 file an answer to the first-amended petition.

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IT IS FURTHER ORDERED that petitioner shall have **thirty (30) days** after the date of service of the answer in which to file the reply in support of the petition.

Dated: This 16th day of February, 2017.



ROBERT C. JONES
UNITED STATES DISTRICT JUDGE