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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JOSEPH HENDERSON,

Case No. 3:14-cv-00639-RCJ-WGC

Petitioner,

ORDER

v.

RENEE BAKER, et al.,

Respondents.

This counseled habeas matter under 28 U.S.C. § 2254 is before the court on respondents' motion to dismiss petitioner Joseph Henderson's first-amended petition (ECF No. 23). Henderson opposed (ECF No. 34), and respondents replied (ECF No. 36).

**I. Procedural History and Background**

On June 27, 2008, a jury found Henderson guilty of count 1: conspiracy to commit burglary; count 2: burglary while in possession of a firearm; count 3: conspiracy to commit first-degree kidnapping; counts 4 and 5: first-degree kidnapping with use of a deadly weapon; count 6: conspiracy to commit sexual assault; counts 7, 8 and 9: sexual assault with use of a deadly weapon; count 10: conspiracy to commit robbery; counts 11 and 12: robbery with use of a deadly weapon; count 13: open or gross lewdness; and count 14: battery with use of a deadly weapon resulting in substantial bodily harm (exhibit 42).<sup>1</sup> The state district court sentenced him as follows: count 1 - 12 months in

<sup>1</sup> The exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 23, and are found at ECF Nos. 24-29.

1 the county jail; count 2 - 62 to 156 months in prison, to run concurrently with count 1;  
2 count 3 – 24 to 60 months, consecutive; counts 4 and 5: two terms of 60 months to life,  
3 each with a consecutive, identical term for the deadly weapon enhancement,  
4 consecutive; count 6 – 24 to 60 months, consecutive; counts 7, 8 and 9 - three terms of  
5 120 months to life, each with a consecutive term of 120 months to life for the deadly  
6 weapon enhancement; count 7 to run concurrently with all other counts, counts 8 and 9  
7 to run consecutively; count 10 – 24 to 60 months, consecutive; counts 11 and 12 – two  
8 terms of 72 to 180 months, each with a consecutive term of 72 months to 180 for the  
9 deadly weapon enhancement, count 11 to run concurrently with the other counts, count  
10 12 to run consecutively; count 13 - 12 months in the county jail, to run concurrently with  
11 the other counts; and count 14 – 62 to 156 months. Exh. 45. The aggregate sentence  
12 amounted to a life term with a minimum parole eligibility of about 116 years, with almost  
13 3 and one-half years' credit for time served. *Id.* Judgment of conviction was filed  
14 September 24, 2008. Exh. 46.

15 The Nevada Supreme Court affirmed Henderson's convictions on February 3, 2010,  
16 and remittitur issued on March 2, 2010. Exhs. 61, 62.

17 On September 18, 2014, the Nevada Supreme Court affirmed the denial of  
18 Henderson's state postconviction petition, and remittitur issued on October 20, 2014.  
19 Exhs. 103, 104.

20 On November 28, 2014, Henderson dispatched his federal habeas petition for filing  
21 (ECF No. 7). This court appointed the Federal Public Defender as counsel for  
22 Henderson. Respondents now argue that ground 3 of the first-amended petition does  
23 not relate back to any timely-filed earlier petition and that grounds 1 and 2 are  
24 unexhausted (ECF No. 23).

## 25 **II. Legal Standards & Analysis**

### 26 **a. Relation Back**

27 Respondents argue that ground 3 of the first-amended petition does not relate back  
28 to a timely-filed petition and should thus be dismissed as untimely (ECF No. 23, pp. 6-

1 7). A new claim in an amended petition that is filed after the expiration of the  
2 Antiterrorism and Effective Death Penalty Act (“AEDPA”) one-year limitation period will  
3 be timely only if the new claim relates back to a claim in a timely-filed pleading under  
4 Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out  
5 of “the same conduct, transaction or occurrence” as a claim in the timely pleading.  
6 *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held  
7 that habeas claims in an amended petition do not arise out of “the same conduct,  
8 transaction or occurrence” as claims in the original petition merely because the claims  
9 all challenge the same trial, conviction or sentence. 545 U.S. at 655–64. Rather, under  
10 the construction of the rule approved in *Mayle*, Rule 15(c) permits relation back of  
11 habeas claims asserted in an amended petition “only when the claims added by  
12 amendment arise from the same core facts as the timely filed claims, and not when the  
13 new claims depend upon events separate in ‘both time and type’ from the originally  
14 raised episodes.” 545 U.S. at 657. In this regard, the reviewing court looks to “the  
15 existence of a common ‘core of operative facts’ uniting the original and newly asserted  
16 claims.” A claim that merely adds “a new legal theory tied to the same operative facts  
17 as those initially alleged” will relate back and be timely. 545 U.S. at 659 and n.5; *Ha*  
18 *Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9<sup>th</sup> Cir. 2013).

19 Here, the parties do not dispute that Henderson filed his first-amended federal  
20 habeas petition about 18 months after the AEDPA statute of limitations expired and that  
21 his claims in the first-amended petition must relate back to his original *pro se* federal  
22 petition in order to be timely (ECF Nos. 23, 34).

### 23 **Ground 3**

24 In the first-amended petition, Henderson claims that his Sixth and Fourteenth  
25 Amendment rights to effective assistance of trial counsel were violated when his trial  
26 counsel failed to preserve the record by allowing the trial court to conduct unrecorded  
27 bench conferences (ECF No. 18, pp. 28-29). Henderson acknowledges that he did not  
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1 raise this claim in his original federal petition (see ECF No. 7), but he argues that the  
2 factual background is the same as other claims timely raised: “ground 3 sets forth a  
3 claim that, by necessity, permeated the entire trial record. Every instance of alleged  
4 trial error, and Henderson alleges many, is impacted by the trial court’s incomplete  
5 record” (ECF No. 34, p. 7).

6 This court disagrees that the core of operative facts can be fairly characterized as  
7 essentially the entire trial court record. As the Court held in *Mayle*, claims in an  
8 amended petition do not arise out of “the same conduct, transaction or occurrence” as  
9 claims in the original petition merely because the claims all challenge the same trial.  
10 545 U.S. at 655–64. The underlying factual background of the ineffective assistance of  
11 counsel claims in the original petition differs from the claim in first-amended ground 3  
12 that counsel was ineffective for failing to ensure that the trial court recorded all bench  
13 conferences. Accordingly, ground 3 of the first-amended petition does not relate back  
14 and is dismissed as untimely.

15 **b. Exhaustion**

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

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

16 A claim is not exhausted unless the petitioner has presented to the state court the  
17 same operative facts and legal theory upon which his federal habeas claim is based.  
18 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
19 exhaustion requirement is not met when the petitioner presents to the federal court facts  
20 or evidence which place the claim in a significantly different posture than it was in the  
21 state courts, or where different facts are presented at the federal level to support the  
22 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*  
23 *v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,  
24 458 (D. Nev. 1984).

25 **Ground 1**

26 In the first-amended petition, Henderson contends that the State violated his  
27 Fourteenth Amendment rights to due process and a fair trial by failing to ensure that  
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1 DNA samples remained for retesting (ECF No. 18, pp. 20-25). Henderson argues that  
2 he was thereby deprived of a meaningful opportunity to challenge the State's most  
3 critical, if not sole, evidence. He also argues in ground 1 that the trial court erred by  
4 failing to preclude the State from presenting evidence of the DNA and/or by failing to  
5 limit the State's use of the evidence. *Id.* Respondents argue that ground 1 is  
6 unexhausted or partially unexhausted (ECF No. 23, pp. 8-9; ECF No. 36, pp. 4-5).  
7 However, having reviewed the state-court record, this court determines that Henderson  
8 fairly presented the claims that the State and the trial court violated his rights in the  
9 operative federal ground 1 to the Nevada Supreme Court in his direct appeal. Exh. 55,  
10 pp. 10-12. Accordingly, ground 1 is exhausted.

### 11 **Ground 2**

12 Henderson alleges that his trial counsel was ineffective in violation of his Sixth and  
13 Fourteenth Amendment rights when they failed to retest the DNA materials the State  
14 had preserved (ECF No. 18, pp. 25-27). Respondents argue that ground 2 is  
15 unexhausted. However, Henderson raised the claims in federal ground 2 to the Nevada  
16 Supreme Court in his appeal of the denial of his state postconviction petition. Exh. 91,  
17 pp. 31-33). Ground 2 is, therefore, exhausted.

### 18 **III. Conclusion**

19 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 23)  
20 is **GRANTED** in part as follows:

21 Ground 3 is dismissed as untimely;

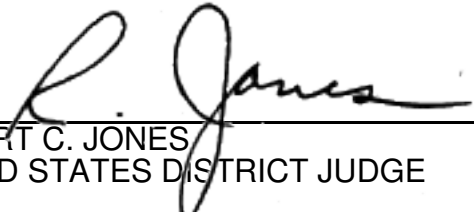
22 Grounds 1 and 2 are exhausted.

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

**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 6<sup>th</sup> day of March, 2017.

  
ROBERT C. JONES  
UNITED STATES DISTRICT JUDGE