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28UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MATTHEW KRIEGER,

Case No. 3:15-cv-00003-HDM-VPC

Petitioner,

ORDER

v.

MR. BACA, et al.,

Respondents.

This habeas matter under 28 U.S.C. § 2254 comes before the court on respondents' motion to dismiss petitioner Matthew Krieger's *pro se* petition (ECF No. 14). Krieger has not filed an opposition to the motion to dismiss or responded to the motion in any way. Respondents filed their notice of petitioner's failure to respond to the motion to dismiss on July 28, 2016 (ECF No. 19).

I. Procedural History and Background

On or about February 26, 2013, Kreiger pleaded guilty to count I: voluntary manslaughter and count II: aiding and abetting kidnapping in the second degree (exhibit 22 to respondents' motion to dismiss, ECF No. 14).¹

The state district court sentenced Krieger to 48 to 120 months on count I and to 72 to 180 months on count II, to run consecutive to count I. Exhs. 28, 29. Judgment of conviction was filed on February 27, 2013. Exh. 30.

¹ The exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 14, and are found at ECF Nos. 15-17.

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The Nevada Supreme Court affirmed his conviction on May 6, 2014, and remittitur issued on June 2, 2014. Exhs. 69, 71.

On August 25, 2014, Krieger filed a motion to correct an illegal sentence in the state district court alleging that “the district court abused its discretion and violated [his] constitutional right to equal protection by sentencing [him] disproportionately to the sentences given to [his] co-defendants” and that the use of his “juvenile criminal history” at sentencing violated state statutes and due process. Exh. 73. That motion was still pending in state district court when respondents filed the motion to dismiss. Krieger has not filed a state postconviction habeas corpus petition.

Krieger signed his federal habeas petition on December 27, 2014, and the court received it on January 5, 2015 (ECF No. 5). Respondents have now filed a motion to dismiss the five grounds as unexhausted, conclusory, or noncognizable (ECF No. 14). As discussed, Krieger has failed to oppose the motion to dismiss. The court notes that, pursuant to Local Rule 7-2(d), petitioner’s failure to oppose constitutes consent to the granting of the motion.

II. Legal Standards & Analysis

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides that this court may grant habeas relief if the relevant state court decision was either (1) contrary to clearly established federal law, as determined by the Supreme Court, or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court.

A. Claims Cognizable in Federal Habeas Corpus

A state prisoner is entitled to federal habeas relief only if he is being held in custody in violation of the constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). Unless an issue of federal constitutional or statutory law is implicated by the facts presented, the claim is not cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). A petitioner may not transform a state-law issue into

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4 a federal one merely by asserting a violation of due process. *Langford v. Day*, 110 F.3d
5 1380, 1381 (9th Cir. 1996). Alleged errors in the interpretation or application of state
6 law do not warrant habeas relief. *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir.
7 2004).

8 **Ground 1²**

9 Krieger argues that the trial court violated his Fifth and Fourteenth Amendment due
10 process rights when it considered his sealed juvenile record, which is impermissible
11 under Nevada state law, during the sentencing phase (ECF No. 5, pp. 4). The court
12 agrees with respondents that this is a state-law issue and is not cognizable in federal
13 habeas corpus. *Estelle*, 502 U.S. at 68; 62, *Hubbart*, 379 F.3d at 779-80; *Langford*, 110
14 F.3d at 1381. Accordingly, ground 1 is dismissed.

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. McCarthey*, 653 F.2d 374, 376 (9th Cir.
25 1981).

26 **Ground 2**

27 Krieger claims that he was deceived by his trial counsel and pressured into
28 accepting the plea deal (ECF No. 5, p. 4). He asserts that his counsel "assured" him
that he would not get the maximum sentence or consecutive terms but he ended up with

² While Krieger sets forth his federal claims as grounds 1 and 2, respondents break them down into five grounds. The court shall refer to his claims as grounds 1-5.

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4 both. *Id.* Ground 2, therefore, states a claim that Krieger did not voluntarily, knowingly
5 and intelligently enter his guilty plea “with sufficient awareness of the relevant
6 circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748
7 (1970). However, Krieger has not presented federal ground 2 to the Nevada Supreme
8 Court. See exhs. 47, 57. Ground 2 is, therefore, unexhausted.

9 **Ground 4**

10 Krieger contends that his trial counsel rendered ineffective assistance in violation of
11 his Fifth and Sixth Amendment rights when he failed to object to the improper unsealing
12 and use of Krieger’s juvenile records, misled Krieger, and convinced him to enter a
13 guilty plea (ECF No. 5, pp. 4, 6). Krieger has not presented ground 4 to the Nevada
14 Supreme Court and, accordingly, it is unexhausted.

15 **C. Conclusory Claims**

16 In federal habeas proceedings, notice pleading is not sufficient. Mere conclusions of
17 violations of federal rights without specifics do not state a basis for federal habeas relief.
18 *Mayle v. Felix*, 545 U.S. 644, 655 (2005). A petition may be summarily dismissed if the
19 allegations in it are “vague, conclusory, palpably incredible, patently frivolous or false.”
20 *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (internal citations omitted); see
21 also *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

22 **Ground 3**

23 Krieger asserts that he was forced to enter a guilty plea to aiding and abetting
24 kidnapping and did not verbally enter a guilty plea (ECF No. 5, p. 4). This vague,
25 conclusory claim does not plausibly implicate federal constitutional error. Ground 3 is
26 dismissed.

27 **Ground 5**

28 Krieger contends that his appellate counsel was ineffective because counsel “did not
demonstrate my appealable issues properly causing affirmation by Supreme Court
judges” (ECF No. 5, p. 7). The court agrees with respondents that ground 5 is entirely

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4 conclusory and sets forth no factual allegations whatsoever that could entitle Krieger to
5 habeas relief. Ground 5 is, accordingly, dismissed.

6 **I. Petitioner's Options Regarding Unexhausted Claims**

7 A federal court may not entertain a habeas petition unless the petitioner has
8 exhausted available and adequate state court remedies with respect to all claims in the
9 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A petition containing only
10 unexhausted claims is subject to dismissal. *Id.*; *Mena v. Long*, 813 F.3d 907, 912 (9th
11 Cir. 2016). In the instant case, the court finds that (a) ground 1 is dismissed as not
12 cognizable in federal habeas corpus; (b) grounds 3 and 5 are dismissed as conclusory;
13 and (c) grounds 2 and 4 are unexhausted. Because the court finds that the grounds
14 remaining before the court are both unexhausted, petitioner has these options:

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16 1. He may return to state court to exhaust his unexhausted
17 claims, in which case his federal habeas petition will be denied without
18 prejudice; or

19 2. He may file a motion asking this court to stay and abey his
20 federal habeas petition while he returns to state court to exhaust his
21 unexhausted claims.

22 With respect to the second option, a district court has the discretion to stay a fully
23 unexhausted petition. *Mena*, 813 F.3d at 912. The *Rhines* Court stated:

24 [S]tay and abeyance should be available only in limited circumstances.
25 Because granting a stay effectively excuses a petitioner's failure to
26 present his claims first to the state courts, stay and abeyance is only
27 appropriate when the district court determines there was good cause for
28 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
for a writ of habeas corpus may be denied on the merits, notwithstanding
the failure of the applicant to exhaust the remedies available in the courts
of the State").

Rhines v. Weber, 544 U.S. 269, 277 (2005).

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Accordingly, if petitioner files a motion for stay and abeyance, he would be required to show good cause for his failure to exhaust his unexhausted claims in state court, and to present argument regarding whether or not his unexhausted claims are plainly meritless. Respondent would then be granted an opportunity to respond and petitioner to reply.

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

II. Conclusion

IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 14) is **GRANTED** as follows:

- Grounds 2 and 4 are unexhausted;
- Ground 1 is dismissed as noncognizable in federal habeas corpus;
- Grounds 3 and 5 are dismissed as conclusory.

IT IS FURTHER ORDERED that petitioner shall have **thirty (30) days** to either: (1) inform this court in a sworn declaration that he wishes to dismiss this petition without prejudice in order to return to state court to exhaust his unexhausted claims; OR (2) file a motion for a stay and abeyance, asking this court to hold his federal petition in abeyance while he returns to state court to exhaust his unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or seek other appropriate relief, respondents may respond to such motion as provided in Local Rule 7-2.

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

DATED: August 5, 2016.



 HOWARD D. MCKIBBEN
 UNITED STATES DISTRICT JUDGE