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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

WILLIAM MITCHELL,

Petitioner,

v.

BACA, et al.,

Respondents.

Case No. 3:16-cv-00384-LRH-WGC

ORDER

Before the court is respondents' motion to dismiss certain grounds in petitioner William Mitchell's *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 9). Mitchell opposed (ECF No. 24), and respondents replied (ECF No. 25).

Preliminarily, the court considers Mitchell's request to file an amended petition. Two months after he filed his opposition to the motion to dismiss, Mitchell filed a motion for leave to file an amended petition (ECF No. 28) and attached a proposed amended petition (ECF No. 28-1). Respondents opposed (ECF No. 29), and Mitchell replied (ECF No. 30). In Mitchell's proposed first-amended petition, he raises verbatim the two grounds in his original federal petition (*see* ECF No. 28-1). He purports to add a third ground. However, proposed ground 3 is a claim that his state postconviction counsel rendered ineffective assistance. *Id.* at 11-12. As will be discussed below, this claim is not cognizable in federal habeas corpus. Accordingly, Mitchell's motion for leave to file an amended petition is denied.

The court next considers respondents' motion to dismiss.

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1           **I. Procedural History and Background**

2           On April 27, 2011, Mitchell pleaded guilty to: count 1 – conspiracy to obtain  
3 money under false pretenses; count 2 – obtaining money under false pretenses, victim  
4 60 years of age or older; count 3 – first-degree kidnapping; and count 4 – robbery,  
5 victim 60 years of age or older (exhibit 13).<sup>1</sup> The state district court sentenced Mitchell  
6 as follows -- count 1: 12 months; count 2: 8 to 20 years; count 3: five years to life, with  
7 a consecutive term of 12 to 60 months for the age enhancement; and count 4: 48 to 120  
8 months, with a consecutive 19 to 48 months for the age enhancement; count 3 to run  
9 consecutively to count 2 and count 4 to run concurrently with counts 2 and 3, with 945  
10 days' credit for time served. Exh. 21. Judgment of conviction was filed on  
11 September 22, 2011. Exh. 32. Mitchell did not file an appeal.

12           On August 6, 2012, Mitchell filed a proper person state habeas petition. Exh. 29.  
13 The state district court appointed counsel, and a counseled brief was filed in support of  
14 the petition. Exh. 59. Following an evidentiary hearing, the state district court denied  
15 the petition. Exhs. 75, 80. Ultimately, the Nevada Court of Appeals affirmed the denial  
16 of Mitchell's petition on April 20, 2016. Exh. 111. Remittitur issued on May 16, 2016.  
17 Exh. 112. Mitchell dispatched his federal petition for mailing on June 21, 2016 (ECF  
18 No. 4, p. 1).

19           Respondents now move to dismiss parts of ground one on the basis that the  
20 claims are unexhausted and move to dismiss ground two as noncognizable in federal  
21 habeas corpus (ECF No. 9).

22           **II. Legal Standards & Analysis**

23           **Ground 1**

24           Respondents argue that parts of ground 1 are unexhausted. State prisoners  
25 seeking federal habeas relief must comply with the exhaustion rule codified in  
26 § 2254(b)(1):

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<sup>1</sup> Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 9, and are found at ECF Nos. 10-16.

1 An application for a writ of habeas corpus on behalf of a person in custody  
2 pursuant to the judgment of a State court shall not be granted unless it  
3 appears that –

- 4 (A) The applicant has exhausted the remedies available in the court of the  
5 State; or  
6 (B) (i) there is an absence of available State corrective process; or  
7 (ii) circumstances exist that render such process ineffective to protect the  
8 rights of the applicant.

9 The purpose of the exhaustion rule is to give the state courts a full and fair  
10 opportunity to resolve federal constitutional claims before those claims are presented to  
11 the federal court, and to “protect the state courts’ role in the enforcement of federal law.”  
12 *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *O’Sullivan v. Boerckel*, 526 U.S. 838, 844  
13 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains  
14 unexhausted until the petitioner has given the highest available state court the opportunity  
15 to consider the claim through direct appeal or state collateral review proceedings. *See*  
16 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374,  
17 376 (9th Cir. 1981).

18 A habeas petitioner must “present the state courts with the same claim he urges  
19 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal  
20 constitutional implications of a claim, not just issues of state law, must have been raised  
21 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.  
22 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must  
23 be “alerted to the fact that the prisoner [is] asserting claims under the United States  
24 Constitution” and given the opportunity to correct alleged violations of the prisoner’s  
25 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d  
26 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple  
27 and clear instruction to potential litigants: before you bring any claims to federal court, be  
28 sure that you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478,  
481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)). “[G]eneral  
appeals to broad constitutional principles, such as due process, equal protection, and the

1 right to a fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195 F.3d  
2 1098, 1106 (9th Cir. 1999) (citations omitted). However, citation to state caselaw that  
3 applies federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153,  
4 1158 (9th Cir. 2003) (en banc).

5 A claim is not exhausted unless the petitioner has presented to the state court  
6 the same operative facts and legal theory upon which his federal habeas claim is based.  
7 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
8 exhaustion requirement is not met when the petitioner presents to the federal court facts  
9 or evidence which place the claim in a significantly different posture than it was in the  
10 state courts, or where different facts are presented at the federal level to support the  
11 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*  
12 *v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,  
13 458 (D. Nev. 1984).

14 In ground 1, Mitchell argues that his plea counsel rendered ineffective assistance  
15 in violation of his Fifth, Sixth, and Fourteenth Amendment rights to due process and the  
16 effective assistance of counsel (ECF No. 4, pp. 4-5). Mitchell states that he told his  
17 counsel that, due to psychiatric medications that the Clark County Detention Center  
18 (CCDC) staff was administering to him and his fear for his safety because he was  
19 repeatedly attacked while at CCDC, he was unable to make complex decisions and to  
20 knowingly enter into the guilty plea agreement (ECF No. 4, pp. 4-5). He also contends  
21 that counsel was ineffective for a) lying about grand jury testimony; b) misrepresenting  
22 the plea agreement; c) coercing Mitchell to plead guilty; d) failing to obtain a  
23 competency hearing; and e) failing to file a direct appeal. *Id.*

24 Respondents point out that the only part of federal ground 1 that Mitchell  
25 presented on appeal of the denial of his state postconviction petition is that his plea  
26 counsel rendered ineffective assistance of counsel because he knew that Mitchell was  
27 under the influence of medication at the time and did not knowingly and voluntarily enter  
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1 his guilty plea (ECF No. 9, p. 4; exh. 104, pp. 10-15). That claim can essentially be  
2 viewed as ground 1(d). The other claims raised in federal ground 1 are unexhausted.

### 3 **Ground 2**

4 Mitchell argues that his Fifth, Sixth, and Fourteenth Amendment rights to due  
5 process and effective assistance of counsel were violated because his state  
6 postconviction counsel rendered ineffective assistance when he failed to pursue the  
7 issues that Mitchell directed him to raise (ECF No. 4, pp. 7-9). However, while  
8 ineffective assistance of postconviction counsel may be a basis to overcome the  
9 procedural bar of an underlying claim, it has not been recognized as a freestanding  
10 ground for federal habeas relief. *See Martinez v. Ryan*, 132 S.Ct. 1309, 1319-1320  
11 (2012) U.S.C.A. Const.Amend.VI. Accordingly, ground 2 is dismissed for failure to state  
12 a claim for which federal habeas relief may be granted.

### 13 **III. Petitioner's Options Regarding Unexhausted Claims**

14 A federal court may not entertain a habeas petition unless the petitioner has  
15 exhausted available and adequate state court remedies with respect to all claims in the  
16 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition containing both  
17 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the  
18 court finds that the following portion of ground 1 is exhausted: the claim that plea  
19 counsel rendered ineffective assistance of counsel because he knew that Mitchell was  
20 under the influence of medication at the time and did not knowingly and voluntarily enter  
21 his guilty plea grounds. The other claims in ground 1 are unexhausted. Ground 2 is  
22 dismissed for failure to state a claim for which federal habeas relief may be granted.  
23 Because the court finds that the petition contains unexhausted claims, petitioner has  
24 these options:

- 25 1. He may submit a sworn declaration voluntarily abandoning  
26 the unexhausted claims in his federal habeas petition, and proceed only  
27 on the exhausted claims;

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

4           3.     He may file a motion asking this court to stay and abey his  
5 exhausted federal habeas claims while he returns to state court to exhaust  
6 his unexhausted claims.

7           With respect to the third option, a district court has discretion to stay a petition  
8 that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005).

9           The *Rhines* Court stated:

10           [S]tay and abeyance should be available only in limited circumstances.  
11 Because granting a stay effectively excuses a petitioner's failure to  
12 present his claims first to the state courts, stay and abeyance is only  
13 appropriate when the district court determines there was good cause for  
14 the petitioner's failure to exhaust his claims first in state court. Moreover,  
15 even if a petitioner had good cause for that failure, the district court would  
16 abuse its discretion if it were to grant him a stay when his unexhausted  
17 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application  
18 for a writ of habeas corpus may be denied on the merits, notwithstanding  
19 the failure of the applicant to exhaust the remedies available in the courts  
20 of the State").

21           *Rhines*, 544 U.S. at 277.

22           If petitioner wishes to ask for a stay, he must file a motion for stay and abeyance  
23 in which he demonstrates good cause for his failure to exhaust his unexhausted claims  
24 in state court, and presents argument regarding the question of whether or not his  
25 unexhausted claims are plainly meritless. Respondents would then be granted an  
26 opportunity to respond, and petitioner to reply. Or petitioner may file a declaration  
27 voluntarily abandoning his unexhausted claims, as described above.

28           Petitioner's failure to choose any of the three options listed above, 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.

1 Finally, respondents ask the court to waive, for purposes of this action, the  
2 provision in Local Rule IA 10-3(e) that requires the cover page of each filed exhibit to  
3 include a description of the exhibit. See LR IA 10-3(e); see also LR IA 10-3(i).  
4 Respondents point out that Local Rule IA 1-4 provides that the court may waive any  
5 provision of the local rules, *sua sponte* or on a motion, if the interests of justice so require.  
6 See LR IA 1-4. Respondents state that adding descriptors to the cover pages of exhibits,  
7 which in this case now total 112, is unduly burdensome (ECF No. 17). Respondents state  
8 that they will still provide indexes of exhibits and exhibit cover sheets referencing each  
9 exhibit by number. *Id.*

10 In light of the number of exhibits in this habeas corpus action, the court finds that  
11 there is good cause for the requested waiver, and will grant the waiver for all parties.

#### 12 **IV. Conclusion**

13 **IT IS THEREFORE ORDERED** that petitioner's motion for leave to file an  
14 amended petition (ECF No. 28) is **DENIED** as set forth in this order.

15 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (ECF No. 9) is  
16 **GRANTED** as follows:

17 The following portion of ground 1 is exhausted: the claim that plea counsel  
18 rendered ineffective assistance of counsel because he knew that Mitchell was under the  
19 influence of medication at the time and did not knowingly and voluntarily enter his guilty  
20 plea.

21 The remaining claims in ground 1 are **UNEXHAUSTED**.

22 Ground 2 is **DISMISSED** for failure to state a claim for which habeas relief may  
23 be granted.

24 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** from the  
25 entry of this order to either: (1) inform this court in a sworn declaration that he wishes to  
26 formally and forever abandon the unexhausted grounds for relief in his federal habeas  
27 petition and proceed on the exhausted grounds; OR (2) inform this court in a sworn  
28 declaration that he wishes to dismiss this petition without prejudice in order to return to

1 state court to exhaust his unexhausted claims; OR (3) file a motion for a stay and  
2 abeyance, asking this court to hold his exhausted claims in abeyance while he returns  
3 to state court to exhaust his unexhausted claims. If petitioner chooses to file a motion  
4 for a stay and abeyance, or seek other appropriate relief, respondents may respond to  
5 such motion as provided in Local Rule 7-2.

6 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted  
7 grounds, respondents shall have **thirty (30) days** from the date petitioner serves his  
8 declaration of abandonment in which to file an answer to petitioner's remaining grounds  
9 for relief. The answer shall contain all substantive and procedural arguments as to all  
10 surviving grounds of the petition, and shall comply with Rule 5 of the Rules Governing  
11 Proceedings in the United States District Courts under 28 U.S.C. §2254.

12 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following  
13 service of respondents' answer in which to file a reply.

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

16 **IT IS THEREFORE ORDERED** that respondents' motion to partially waive Local  
17 Rule IA 10-3(e) and 10-3(i) (ECF No. 17) is **GRANTED**.

18  
19 IT IS SO ORDERED.

20 DATED this 16th day of August, 2017.

21   
22 LARRY R. HICKS  
23 UNITED STATES DISTRICT JUDGE  
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