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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JAMES KENNETH FLOYD,

Petitioner,

v.

WARDEN BACA, *et al.*,

Respondents.

Case No. 3:17-cv-00400-MMD-WGC

ORDER

This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Nevada state prisoner James Kenneth Floyd (“Floyd”) is before the Court on Respondents’ motion to dismiss several grounds (ECF No. 7). The Court has also reviewed Floyd’s response (ECF No. 10), and Respondents’ reply (ECF No. 11).

**I. Procedural History and Background**

On March 20, 2014, Floyd pleaded guilty to the following counts: (1) burglary; (2) possession of stolen property; and (3) conspiracy to commit possession of stolen property. (See ECF No. 8-9.) The state district court sentenced Floyd as follows: count 1, 48 to 120 months; count 2, 12 to 120 months consecutive to count 1; and count 3, 364 days in the Clark County Detention Center concurrent with count 2. (See ECF No. 8-10.) The judgment of conviction was filed on May 23, 2014. (See ECF No. 8-11.) Floyd did not file a direct appeal.

On February 4, 2015, Floyd filed his *pro se* petition for writ of habeas corpus. (ECF No. 8-18.) The state district court granted his motion to appoint counsel, and he filed a supplemental petition with the assistance of counsel. (See ECF No. 8-18, 8-19, 8-24.) The state district court held a hearing and denied Floyd’s petition on the merits. (See ECF

1 No. 8-30, 9-32.) The Nevada Court of Appeals affirmed the denial of the petition on April  
2 19, 2017, and remittitur issued on May 17, 2017. (See ECF No. 9-13, 9-14.)

3 Floyd dispatched his federal habeas petition for filing on or about June 11, 2017.  
4 (See ECF No. 4 at 9.) Respondents now argue that several grounds are subject to  
5 dismissal as unexhausted or noncognizable in federal habeas corpus. (See ECF No. 7.)

## 6 **II. Discussion**

### 7 **a. Guilty Plea and Federally Cognizable Claims**

8 In *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the United States Supreme  
9 Court held that “when a criminal defendant has solemnly admitted in open court that he  
10 is in fact guilty of the offense with which he is charged, he may not thereafter raise  
11 independent claims relating to the deprivation of constitutional rights that occurred prior  
12 to the entry of the guilty plea.” A petitioner may only attack the voluntary and intelligent  
13 character of the guilty plea. See *id.* When a petitioner has entered a guilty plea then  
14 subsequently seeks to claim his counsel rendered ineffective assistance, such claim is  
15 limited to the allegation that defense counsel was ineffective in advising petitioner to plead  
16 guilty. See *Fairbank v. Ayers*, 650 F.3d 1243, 1254–1255 (9th Cir. 2011) (citing *Tollett*,  
17 411 U.S. at 266–267, and explaining that because a guilty plea precludes a claim of  
18 constitutional violations prior to the plea, the petitioner’s sole avenue for relief is  
19 demonstrating that advice of counsel to plead guilty was deficient); see also *Lambert v.*  
20 *Blodgett*, 393 F.3d 943, 979 (9th Cir. 2004).

#### 21 **i. Grounds 1(d) and 1(f)**

22 Respondents argue that the ineffective assistance of counsel claims in grounds  
23 1(d) and 1(f) are barred under *Tollett*. (See ECF No. 7 at 6-7.) Floyd argues that trial  
24 counsel was ineffective for failing to obtain a mental health evaluation (ground 1(d)) and  
25 for failing to raise any objections between his arrest and his subsequent sentencing  
26 (ground 1(f)). (See ECF No. 4 at 4-5.)

27 The Court agrees with Respondents that ground 1(f) alleges a pre-plea  
28 constitutional violation and is foreclosed by *Tollett*. Accordingly, ground 1(f) is dismissed.

1 However, ground 1(d) is a claim that could have impacted whether Floyd entered his guilty  
2 plea knowingly and voluntarily. Therefore, it is not subject to dismissal pursuant to *Tollett*.

3 **b. Exhaustion**

4 A federal court will not grant a state prisoner' petition for habeas relief until the  
5 prisoner has exhausted his available state remedies for all claims raised. *See Rose v.*  
6 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts  
7 a fair opportunity to act on each of his claims before he presents those claims in a federal  
8 habeas petition. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan*  
9 *v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has  
10 given the highest available state court the opportunity to consider the claim through direct  
11 appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916  
12 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

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

1 omitted). However, citation to state caselaw that applies federal constitutional principles  
2 will suffice. *See Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (*en banc*).

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

11 **i. Ground 1**

12 Respondents argue that most subparts of federal ground 1 as well as federal  
13 ground 2 are unexhausted. (*See* ECF No. 7 at 4-5.) The court has dismissed ground 1(f)  
14 under *Tollett*. In the remaining subparts of ground 1, Floyd asserts the following ineffective  
15 assistance of trial counsel (“IAC”) claims: (a) counsel failed to inform Floyd of the  
16 consequences of his guilty plea, did not allow him sufficient time to review the guilty plea  
17 agreement, and pressured Floyd into signing the agreement; (b) counsel provided  
18 incorrect information at sentencing regarding Floyd’s substance abuse history; (c)  
19 counsel failed to ensure Floyd had an opportunity to review his presentence investigation  
20 report (“PSI”) prior to sentencing and only provided the PSI to Floyd after sentencing; (d)  
21 counsel failed to obtain a mental health evaluation; and (e) counsel failed to point out that  
22 the PSI provided incorrect information regarding Floyd’s substance abuse history.<sup>1</sup> (*See*  
23 ECF No. 4 at 4-5.)

24 In his appeal of the denial of his state postconviction petition, Floyd raised the  
25 following claims of IAC: (1) counsel failed to explain the direct consequences of the guilty  
26 plea agreement, did not allow Floyd sufficient time to review the agreement, and

27 \_\_\_\_\_  
28 <sup>1</sup>The Court adopts Respondents’ separation of ground 1 into these 6 subparts for  
convenience.

1 pressured Floyd into signing it; and (2) counsel provided incorrect information regarding  
2 Floyd's criminal history at sentencing, and did not give Floyd the opportunity to review the  
3 PSI. (See ECF No. 9-9 at 14-22.)

4 Thus, Floyd raised what are now federal grounds 1(a) and 1(c) to the Nevada Court  
5 of Appeals. Those grounds are, therefore, exhausted. He did not present grounds 1(b),  
6 1(d), and 1(e) to the Nevada Court of Appeals, and thus they are unexhausted.

### 7 **ii. Ground 2**

8 Floyd argues that his sentence is excessive in violation of his Eighth Amendment right  
9 to be free from cruel and unusual punishment. (See ECF No. 4 at 7.) Respondents point  
10 out that Floyd did not file a direct appeal, and therefore, did not exhaust any claims on  
11 direct appeal. Nor did Floyd raise this claim in his state habeas proceedings. (See ECF  
12 No. 9-9.)<sup>2</sup> Accordingly, ground 2 is unexhausted.

### 13 **III. Floyd'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. See *Rose*, 455 U.S. at 510. A "mixed" petition containing both exhausted and  
17 unexhausted claims is subject to dismissal. *Id.* Here, the Court finds that ground 1(f) is  
18 dismissed as noncognizable on federal habeas review and grounds 1(b), 1(d), 1(e), and  
19 ground 2 are unexhausted. Because the Court finds that the petition contains  
20 unexhausted claims, Floyd has these options:

- 21 1. He may submit a sworn declaration voluntarily abandoning the unexhausted  
22 claims in his federal habeas petition, and proceed only on the exhausted claims;
- 23 2. He may return to state court to exhaust his unexhausted claims, in  
24 which case his federal habeas petition will be denied without prejudice; or
- 25 3. He may file a motion asking this court to stay and abey his exhausted  
26 federal habeas claims while he returns to state court to exhaust his  
27 unexhausted claims.

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28 <sup>2</sup>See also *supra* the Court's discussion of ground 1.

1 With respect to the third option, a district court has discretion to stay a petition that  
it may validly consider on the merits.

2 See *Rhines v. Weber*, 544 U.S. 269, 276, (2005). However, the *Rhines* Court further  
3 stated:

4 [S]tay and abeyance should be available only in limited circumstances.  
5 Because granting a stay effectively excuses a petitioner’s failure to present  
6 his claims first to the state courts, stay and abeyance is only appropriate  
7 when the district court determines there was good cause for the petitioner’s  
8 failure to exhaust his claims first in state court. Moreover, even if a petitioner  
9 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”).

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

11 If Floyd wishes to ask for a stay, he must file a motion for stay and abeyance in  
12 which he demonstrates good cause for his failure to exhaust his unexhausted claims in  
13 state court, and present argument regarding the question of whether or not his  
14 unexhausted claims are plainly meritless. Respondents would then be granted an  
15 opportunity to respond, and Floyd to reply. Or Floyd may file a declaration voluntarily  
16 abandoning his unexhausted claims, as described above.

17 Floyd’s failure to choose any of the three options listed above, or seek other  
18 appropriate relief from this Court, will result in the dismissal of his federal habeas petition.  
19 Floyd is advised to familiarize himself with the limitations periods for filing federal habeas  
20 petitions contained in 28 U.S.C. § 2244(d), as those limitations periods may have a direct  
21 and substantial effect on whatever choice he makes regarding his petition.

22 **IV. Unsigned Declaration**

23 Finally, Respondents note that Floyd did not sign the Declaration Under Penalty of  
24 Perjury at the end of the form petition, as required by Rule 2(c) of the Rules Governing  
25 Habeas Cases. (ECF No. 7 at 7.) The Court will give Floyd the opportunity to correct this  
26 defect. Accordingly, within 30 days of this order, Floyd shall file a corrected petition that  
27 bears his signature in both required places on the final page of the form petition (page 9  
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1 of the form). The Clerk of Court will send Floyd a copy of his petition. Floyd shall not make  
2 any other changes to the petition without first seeking and obtaining leave of this Court.

3 **V. Conclusion**

4 It is therefore ordered that Respondents' motion to dismiss (ECF No. 7) is granted  
5 in part as follows: ground 1(f) is dismissed; grounds 1(b), 1(d), 1(e), and ground 2 are  
6 unexhausted.

7 It is further ordered that Floyd shall have thirty (30) days to either: (1) inform this  
8 Court in a sworn declaration that he wishes to formally and forever abandon the  
9 unexhausted grounds for relief in his federal habeas petition and proceed on the  
10 exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes to  
11 dismiss this petition without prejudice in order to return to state court to exhaust his  
12 unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to hold  
13 his exhausted claims in abeyance while he returns to state court to exhaust his  
14 unexhausted claims. If Floyd chooses to file a motion for a stay and abeyance, or seek  
15 other appropriate relief, Respondents may respond to such motion as provided in Local  
16 Rule 7-2.

17 It is further ordered that if Floyd elects to abandon his unexhausted grounds,  
18 Respondents shall have thirty (30) days from the date Floyd serves his declaration of  
19 abandonment in which to file an answer to Floyd remaining grounds for relief. The answer  
20 shall contain all substantive and procedural arguments as to all surviving grounds of the  
21 petition, and shall comply with Rule 5 of the Rules Governing Proceedings in the United  
22 States District Courts under 28 U.S.C. § 2254.

23 It is further ordered that Floyd shall have thirty (30) days following service of  
24 Respondents' answer in which to file a reply.

25 It is further ordered that if Floyd fails to respond to this order within the time  
26 permitted, this case may be dismissed.

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It is further ordered that the Clerk shall send to Floyd one copy of the petition. (See ECF No. 4 at 1-10.)

It is further ordered that, within 30 days of the date of this order, Floyd shall file a corrected petition, with the required signatures on page 9, in conformance with this order.

DATED THIS 10 September 2018.



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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE