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28UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JOSEPH A. HERNANDEZ,

Case No. 3:17-cv-00697-MMD-WGC

Petitioner,

ORDER

v.

LEGRAND, *et al.*,

Respondents.

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by Petitioner Joseph A. Hernandez, a Nevada prisoner who is represented by counsel. Currently before the Court is Respondents' Motion to Dismiss Amended Petition (ECF No. 15). Respondents seek dismissal of the claims asserted in Ground 2 of Hernandez's Amended Petition (ECF No. 14) as unexhausted or procedurally barred. Hernandez has opposed (ECF No. 24), and Respondents have replied (ECF No. 27). For the reasons discussed below, Respondents' motion is denied.

**I. BACKGROUND****A. State Procedural History**

Hernandez challenges a conviction and sentence imposed by the state district court for Pershing County, Nevada. In September 2011, Hernandez entered a guilty plea to two counts of lewdness with a child under the age of 14 years. (ECF No. 16-25.) He moved to withdraw his guilty plea; however, the state district court denied his motion. (ECF Nos. 16-31, 16-40.) On March 27, 2012, the state district court entered a judgment of conviction sentencing Hernandez to two consecutive sentences of life with eligibility for parole after ten years. (ECF Nos. 17-1, 17-2.) He appealed. In February 2013, the Nevada Supreme Court affirmed Hernandez's convictions on direct appeal, then issued a remittitur on March 12, 2013. (ECF Nos. 17-12, 17-13.)

1 Hernandez filed a pro se state post-conviction petition for habeas corpus relief on  
2 April 17, 2013. (ECF Nos. 17-17, 17-18.) The state district court appointed counsel, who  
3 filed a supplemental petition. (ECF No. 17-31.) The court denied the petition on September  
4 30, 2016. (ECF No. 19-8.) Hernandez appealed. The Nevada Court of Appeals affirmed  
5 the state district court's ruling in October 2017. (ECF No. 19-42.) Remittitur issued on  
6 November 6, 2017. (ECF No. 19-44.)

7 **B. Federal Habeas Proceedings**

8 In November 2017, Hernandez initiated this federal habeas corpus proceeding pro  
9 se. (ECF No. 1.) He also filed a motion for appointment of counsel, which the Court  
10 granted. (ECF Nos. 3, 5.) On October 31, 2018, Hernandez filed a counseled, Amended  
11 Petition (ECF No. 14), raising the following claims:

12 **Ground 1:** Mr. Hernandez did not plead guilty knowingly, voluntarily, and  
13 intelligently; his plea thus violates the Due Process Clause of the Fourteenth Amendment  
14 to the United States Constitution and is void.

15 **Ground 2:** Trial counsel was ineffective prior to Mr. Hernandez's guilty plea, in  
16 violation of the Sixth and Fourteenth Amendments to the United States Constitution,  
17 rendering his guilty plea void.

18 A. Trial counsel was ineffective for failing to move to suppress Mr. Hernandez's  
19 confession to Idaho law enforcement, or otherwise to inform Mr. Hernandez of his  
20 ability to do so, before advising Mr. Hernandez to accept a plea offer.

21 B. Trial counsel was ineffective for failing to adequately investigate prior to advising  
22 Mr. Hernandez to plead guilty.

23 C. Trial counsel was ineffective for failing to provide Mr. Hernandez with discovery  
24 in a timely fashion, such that he can make a knowing, intelligent, and voluntary  
25 decision whether to proceed with a plea.

26 Respondents move to dismiss Ground 2 as unexhausted or procedurally barred.

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1     **II.     DISCUSSION**

2             Pursuant to 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state  
3 court remedies on a claim before presenting that claim to the federal courts. This  
4 exhaustion requirement ensures that the state courts, as a matter of comity, will have the  
5 first opportunity to address and correct alleged violations of federal constitutional  
6 guarantees. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). “A petitioner has  
7 exhausted his federal claims when he has fully and fairly presented them to the state  
8 courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing *O’Sullivan v.*  
9 *Boerckel*, 526 U.S. 838, 844–45 (1999) (“Section 2254(c) requires only that state prisoners  
10 give state courts a *fair* opportunity to act on their claims.”)). To satisfy the exhaustion  
11 requirement, a claim must have been raised through one complete round of either direct  
12 appeal or collateral proceedings to the highest state court level of review available.  
13 *O’Sullivan*, 526 U.S. at 844–45; *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)  
14 (en banc). A properly exhausted claim “must include reference to a specific federal  
15 constitutional guarantee, as well as a statement of the facts that entitle the petitioner to  
16 relief.” *Woods*, 764 F.3d at 1129 (quoting *Gray v. Netherland*, 518 U.S. 152, 162–63  
17 (1996)). Fair presentation requires a petitioner to present the state courts with both the  
18 operative facts and the federal legal theory upon which the claim is based. *Castillo v.*  
19 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005).

20             In Ground 2, Hernandez alleges three claims of ineffective assistance of counsel  
21 (“IAC”). Although Respondents concede that Hernandez raised these claims in his state  
22 habeas appeal, they argue Ground 2 is unexhausted in its entirety because he presented  
23 the claims in a procedurally improper manner by failing to provide the appellate court with  
24 copies of the habeas petitions filed in the state district court. Hernandez counters that his  
25 failure to provide the state appellate court with a copy of his state habeas petitions did not  
26 deprive the Nevada Court of Appeals of a fair opportunity to consider his claims because  
27 he presented the facts and law of his constitutional claim in his appellate brief, and this  
28 was all federal law requires for exhaustion. Hernandez maintains that a failure to provide

1 an adequate appellate record does not deprive the state court of a fair opportunity to act  
2 on the merits of a claim for the purposes of exhaustion, particularly because the Nevada  
3 Rules of Appellate Procedure provide multiple ways for the court to address an appendix's  
4 deficiencies.<sup>1</sup> Furthermore, Hernandez argues Ground 2 is exhausted because the  
5 Nevada Court of Appeals actually addressed it on the merits. Respondents respond that  
6 the Nevada Court of Appeals did not rule on the merits of Hernandez's claims, but merely  
7 concluded the district court applied the proper standard to deny his petition.

8 The Court finds that Hernandez has sufficiently exhausted Ground 2. The motion  
9 cites no authority—binding or otherwise—supporting Respondents' argument that  
10 Hernandez's failure to provide to his state petitions to the Nevada Court of Appeals  
11 renders his claim unexhausted. Supreme Court precedent requires habeas petitioners to  
12 present their habeas claims to a state court in "a petition or a brief (or a similar document)."  
13 *Baldwin v. Reese*, 541 U.S. 27, 32 (2004); *see also Castillo*, 399 F.3d at 999 (stating that  
14 a petitioner must present his claim "within the four corners of his appellate briefing").  
15 Respondents do not contend that Hernandez's appellate briefing was deficient, or that he  
16 has fundamentally altered the substance of his federal claims. Because Hernandez  
17 sufficiently described the factual and legal basis for his claims in his appellate brief, any  
18 deficiency in his appendix did not deny the Nevada Court of Appeals of a fair opportunity  
19 to act on his claims. *See, e.g., Boyko v. Parke*, 259 F.3d 781, 789 (7th Cir. 2001) (failure  
20 to submit transcript in state proceedings did not render claim unexhausted; transcript did  
21 not change the substance of the petitioner's argument, but "merely supplie[d] an additional  
22 piece of evidence" supporting the claim); Brian R. Means, *Federal Habeas Manual* § 9C:33  
23 (2019 ed.). Accordingly, Ground 2 is exhausted.

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25 <sup>1</sup>Hernandez notes that, *inter alia*, the Nevada Court of Appeals could have  
26 threatened or imposed sanctions against him or his counsel until they remedied the  
27 deficiency in the appellate record. (ECF No. 24 at 6 ) (citing Nev. R. App. 30(g)(2) (stating  
28 that the court may impose monetary sanctions when "an appellant's appendix is so  
inadequate that justice cannot be done without requiring inclusion of documents in the  
respondent's appendix which should have been in the appellant's appendix, or without the  
court's independent examination of portions of the original record which should have been  
in the appellant's appendix"))).

1 **III. CONCLUSION**

2 It is therefore ordered that Respondents' Motion to Dismiss (ECF No. 15) is denied  
3 in its entirety.

4 It is further ordered that Respondents must file an answer to the Amended Petition  
5 (ECF No. 14) within 60 days of the date of this order. Hernandez will have 30 days from  
6 service of the answer within which to file a reply.

7 DATED THIS 4<sup>th</sup> day of June 2019.

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10 MIRANDA M. DU  
11 UNITED STATES DISTRICT JUDGE  
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