

OCT 14 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ABARA,

Petitioner - Appellant,

v.

RENEE BAKER, et al.,

Respondents - Appellees.

No. 13-16712

D.C. No. 3:10-cv-00688-HDM-
VPC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, Senior District Judge, Presiding

Argued and Submitted September 16, 2015
San Francisco, California

Before: W. FLETCHER, BERZON, and BEA, Circuit Judges.

David Abara appeals from the dismissal of his first amended federal petition for a writ of habeas corpus. This court granted a Certificate of Appealability as to grounds 1, 2, 7, 8, and 9 of Abara's amended petition.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Grounds 1, 2, and 7 of the amended petition relate back to Abara's original timely-filed federal habeas petition because these grounds share "a common core of operative facts" with grounds in Abara's original petition, and were therefore timely filed. *See Mayle v. Felix*, 545 U.S. 644, 664 (2005); *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013). Abara presented "the legal theory and operative facts" of his arguments in grounds 1, 2, and 7 to the Nevada Supreme Court, so these grounds are exhausted. *Davis v. Silva*, 511 F.3d 1005, 1011 (9th Cir. 2008). The district court erred in dismissing these grounds in Abara's amended petition.

Ground 8 of the amended petition is duplicative of ground 2 in the amended petition, and Abara does not claim that he was prejudiced by the district court's decision to dismiss the duplicative claim rather than consolidate the grounds for relief. Therefore, the district court did not err in dismissing ground 8.

The district court erred in dismissing ground 9 of the amended petition as conclusory and unexhausted. Abara sufficiently explained in ground 9 how the jury instructions prejudiced him, and the district court's contrary conclusion was erroneous. Ground 9 was exhausted because Abara presented "the legal theory and operative facts" of his argument in ground 9 to the Nevada Supreme Court. *Davis*, 511 F.3d at 1011.

AFFIRMED as to ground 8. **REVERSED** and **REMANDED** as to grounds 1, 2, 7, and 9.