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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

ELIBERTO RIOS-LOPEZ,

Petitioner,

v.

TOM BEAUCLAIR,

Respondent.

CASE NO. C06-164RJB

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS

This matter comes before the Court on Petitioner’s Amended Petition for Writ of Habeas Corpus (Dkt. #18). The Court has considered the pleadings filed in support of and in opposition to the petition and the remainder of the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Eliberto Rios-Lopez (“Petitioner”) was charged with two counts of delivering more than twenty-eight but less than two hundred grams of methamphetamine to a confidential informant and failing to affix illegal drug tax stamps. The drug charges arose from instances where law enforcement officers used a confidential informant, Jesus Vega, to set up several drug buys from Petitioner in June of 2000. Some of the conversations between Vega and Rios-Lopez were recorded. In a jury trial, Petitioner was convicted of several drug charges in the Fifth Judicial District Court, Blaine County, Idaho.

1 After conviction, the court entered judgment on the jury's verdicts and imposed an
2 aggregate unified 24-year sentence with 12 years fixed. Petitioner filed a Rule 35 motion for
3 reduction or correction of sentence, which the trial court denied.

4 On appeal, Petitioner alleged the district court erred by: (1) allowing transcripts of a
5 flawed audio-recording of a drug transaction into evidence; (2) giving an excessive sentence; and
6 (3) refusing to rule on a Rule 35 motion due to lack of jurisdiction. The Idaho Court of Appeals
7 affirmed Petitioner's convictions and sentences. Petitioner then filed a petition for review with the
8 Idaho Supreme Court, which was denied. The Remittitur, which signifies that the judgment or
9 decision of an Idaho court has become final, was issued on November 20, 2003.

10 In April 2003, Petitioner filed a Petition for Post Conviction Relief in state court,
11 presenting seven claims. After the state filed an answer, Petitioner filed an amended petition
12 adding new claims. The state filed a Motion for Summary Disposition, which the state district
13 court granted. Petitioner appealed from that order. The Idaho Court of Appeals affirmed the
14 district court's order summarily dismissing the post-conviction petition, and a Remittitur was
15 issued on April 22, 2005.

16 In the successive post-conviction petition which Petitioner filed in state court in November
17 2004, he raised approximately ten claims alleging ineffective assistance of his appellate counsel,
18 and one claim of ineffectiveness by his state post-conviction counsel. The state filed an answer
19 and a Motion to Dismiss, and the state district court subsequently issued an Order Granting
20 Summary Disposition. Petitioner then filed an appeal from that order, in which he raised only one
21 issue: whether the district court erred in denying his motion for new counsel without providing
22 him with any notice of the hearing or an opportunity to be heard.

23 In April 2006, Petitioner filed a federal Petition for Writ of Habeas Corpus in which he
24 asserted four constitutional claims. After receiving Petitioner's federal habeas case, the state
25 learned of Petitioner's then-pending appeal from the order granting summary dismissal of his
26 successive post-conviction petition. On July 25, 2006, the state filed a motion for dismissal
27 without prejudice, or alternatively, to stay the habeas proceedings, in order to allow completion of
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1 Petitioner’s appeal of the dismissal of his successive post-conviction petition. On October 27,
2 2006, the United States District Court for the District of Idaho denied the motion to dismiss, but
3 granted a stay of these proceedings and ordered the parties to notify it within 30 days of the
4 completion of Petitioner’s state court matter to request that the stay in this case be lifted.

5 The Idaho Court of Appeals affirmed the district court’s order summarily dismissing
6 Petitioner’s successive post-conviction petition. Petitioner then filed a petition for review to the
7 Idaho Supreme Court, which was denied on June 26, 2007. A Remittitur was issued on June 28,
8 2007.

9 In July of 2007, Petitioner and Respondent filed separate notices with the United States
10 District Court for the District of Idaho that Petitioner’s state court proceedings were completed.
11 The court responded by lifting the stay of proceedings and setting a briefing schedule. Pursuant
12 to the court’s order, Petitioner filed an Amended Petition for Writ of Habeas Corpus in which he
13 raised five claims. The first four claims consisted of the same four claims that Petitioner raised in
14 his initial habeas petition, and his new fifth claim alleged due process violations when the state
15 district court denied his motion for new counsel on his successive post-conviction petition.

16 **II. DISCUSSION**

17 **A. STANDARD OF LAW FOR SUMMARY DISMISSAL**

18 Federal habeas corpus relief under 28 U.S.C. § 2254 is available to petitioners who show
19 that they are held in custody under a state court judgment and that such custody violates the
20 Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2254(a). This Court is
21 required to review a habeas corpus petition upon receipt to determine whether it is subject to
22 summary dismissal. Rule 4 of the Rules Governing Section 2254 Cases. Summary dismissal is
23 appropriate where “it plainly appears from the face of the petition and any exhibits annexed to it
24 that the petitioner is not entitled to relief in the district court.” *Id.*

25 **B. EXHAUSTION AND PROCEDURAL DEFAULT**

26 Habeas corpus law requires that a petitioner “exhaust” his state court remedies before
27 pursuing a claim in a federal habeas petition. 28 U.S.C. § 2254(b). To exhaust a claim, a habeas
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1 petitioner must fairly present it to the highest state court for review in the manner prescribed by
2 state law. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Unless a petitioner has
3 exhausted his state court remedies relative to a particular claim, a federal district court cannot
4 grant relief on that claim, although it does have the discretion to deny the claim. 28 U.S.C. §
5 2254(b)(2).

6 State remedies are considered technically exhausted, but not *properly* exhausted, if a
7 petitioner failed to pursue a federal claim in state court and there are no remedies now available.
8 *O’Sullivan*, 526 U.S. at 848. A claim may also be considered exhausted, though not properly
9 exhausted, if a petitioner pursued a federal claim in state court, but the state court rejected the
10 claim on an independent and adequate state law procedural ground. *Coleman v. Thompson*, 501
11 U.S. 722, 731-732 (1991). Under these circumstances, the claim is considered “procedurally
12 defaulted.” *Id.* at 731.

13 **C. CAUSE AND PREJUDICE OR MISCARRIAGE OF JUSTICE**
14 **EXCEPTIONS**

15 If a petitioner’s claim is procedurally defaulted, the federal district court cannot hear the
16 merits of the claim unless a petitioner meets one of two exceptions: a showing of adequate legal
17 cause for the default and prejudice arising from the default; or a showing of actual innocence,
18 which means that a miscarriage of justice will occur if the claim is not heard in federal court. *See*
19 *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Schlup v. Delo*, 513 U.S. 298, 329 (1995).

20 To show “cause” for a procedural default, a petitioner must ordinarily demonstrate that
21 some objective factor external to the defense impeded his or his counsel’s efforts to comply with
22 the state procedural rule at issue. *Murray*, 477 U.S. at 488. To show “prejudice,” a petitioner
23 bears “the burden of showing not merely that the errors [in his proceeding] constituted a
24 possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting
25 his entire [proceeding] with errors of constitutional dimension.” *United States v. Frady*, 456 U.S.
26 152, 170 (1982).

27 If a petitioner cannot show cause and prejudice for his procedural default, he can still
28 bring the claim in a federal habeas petition if he demonstrates that failure to consider the claim will

1 result in a “fundamental miscarriage of justice,” which means that a constitutional violation has
2 probably resulted in the conviction of someone who is actually innocent. *Murray*, 477 U.S. at
3 496. Application of the fundamental miscarriage of justice exception “makes clear that a claim of
4 ‘actual innocence’ is not itself a constitutional claim, but instead a gateway through which a
5 habeas petitioner must pass in order to have his otherwise barred constitutional claim considered
6 on the merits.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

7 To establish actual innocence, a petition must demonstrate that, “in light of all the
8 evidence,” “it is more likely than not that no reasonable juror would have convicted him.”
9 *Schlup*, 513 U.S. at 327-28. The “actual innocence exception” is triggered when there is evidence
10 of factual innocence coupled with a constitutional violation. *Pitts v. Norris*, 85 F.3d 348, 350
11 (8th Cir. 1996). Types of evidence “which may establish factual innocence include credible
12 declarations of guilt by another, *see Sawyer v. Whitley*, 505 U.S. 333, 340 (1992), trustworthy
13 eyewitness accounts, *see Schlup*, 513 U.S. at 331, and exculpatory scientific evidence.” *Id.* at
14 350-51.

15 **D. PETITIONER’S FIRST CLAIM**

16 Petitioner’s first claim is that his Fifth and Fourteenth Amendment rights were violated
17 when the trial judge admitted a Spanish-to-English transcription of an audio-recorded drug
18 transaction into evidence. Petitioner alleges that this transcription contained significant inaudible
19 portions and omissions which were so substantial as to render the tape unreliable, which allowed
20 the jury to speculate about the inaudible portions and improperly bolstered the testimony of the
21 confidential informant.

22 However, Petitioner failed to present this claim to the Idaho Supreme Court. As
23 previously stated, a habeas petitioner must fairly present a claim to the state’s highest court for
24 review in order to exhaust that claim. *O’Sullivan*, 526 U.S. at 845. In his petition for review
25 before the Idaho Supreme Court, Petitioner failed to claim that the admission of the transcription
26 at issue violated his Fifth and Fourteenth Amendment rights. Therefore, Petitioner’s first claim is
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1 procedurally defaulted and can only be considered if the Petitioner shows cause and prejudice or a
2 miscarriage of justice.

3 Petitioner advances a number of arguments for why there is sufficient “cause and
4 prejudice” to overcome the procedural default of his first claim. None of his arguments are
5 persuasive.

6 First, Petitioner suggests that this claim may not have actually been procedurally defaulted
7 because the Idaho Supreme Court may have had notice of the federal nature of the claim.
8 Petitioner relies on the fact that the appellate brief for his appeal from the Idaho District Court’s
9 judgment contained a single citation to an *American Law Review* article, which may or may not
10 have cited federal cases. However, a petitioner is required to present his federal constitutional
11 claim “within the four corners of his appellate briefing.” *Castillo v. McFadden*, 399 F.3d 993,
12 1000 (9th Cir. 2004). Here, Petitioner argues the Idaho Supreme Court had notice of the federal
13 nature of his claim because he cited to a source which may have cited to another source. The
14 federal nature of Petitioner’s claim was not presented within the four corners of his appellate
15 briefing; therefore, his first claim is indeed procedurally defaulted.

16 Petitioner also argues that he did not have proper legal materials in the prison system to be
17 able to properly exhaust his federal remedies in state court. However, Petitioner has made no
18 factual allegations that he actually attempted to use the prison legal resource system and was
19 unable to do so. Petitioner also fails to allege that he ever complained to prison officials about the
20 lack of a law library to help him exhaust his state remedies. Petitioner does not even allege that
21 he had an intention of pursuing his remedies, or that he made any effort whatsoever to do so.
22 Given these circumstances, Petitioner’s allegation of lack of access to a law library is too vague to
23 constitute cause or prejudice. *See Nigro v. Sullivan*, 40 F.3d 990, 997 (9th Cir. 1994).

24 Next, Petitioner argues that he was “blameless in the matter,” because it was his attorney,
25 not him, who failed to explicitly present his first claim to the Idaho Court of Appeals or the Idaho
26 Supreme Court as a federal constitutional claim. *Petitioner’s Response Opposing Motion for*
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1 *Summary Dismissal*, p. 7. In effect, Petitioner is arguing that the failure to present this claim is
2 the result of ineffective counsel.

3 An attorney’s errors that rise to the level of a violation of the Sixth Amendment’s right to
4 effective counsel may, under certain circumstances, serve as cause to excuse the procedural
5 defaults of other claims. *Murray*, 477 U.S. at 488. However, an allegation of ineffective
6 assistance of counsel will serve as cause to excuse the procedural default of other claims *only* if
7 the ineffective assistance claim is, itself, not procedurally defaulted. *Edwards v. Carpenter*, 529
8 U.S. 446, 454 (2000). In other words, before a federal court can consider ineffective assistance
9 of counsel as cause to excuse the default of underlying habeas claims, a petitioner generally must
10 have presented the ineffective assistance claim in a procedurally proper manner to the state courts,
11 such as in a post-conviction relief petition.

12 Here, Petitioner has failed to present any of the alleged errors of his counsel to the Idaho
13 Supreme Court in a procedurally proper manner. Therefore, his claimed attorney error cannot
14 serve as cause for the default of his claims.

15 Additionally, Petitioner stresses that he does not speak very good English, and that he
16 relied on other inmates to help him write letters to counsel. Petitioner argues that his ignorance of
17 the word “federalize” and his inability to explain this concept to his counsel is adequate cause to
18 overcome the procedural default of his claim.

19
20 However, “cause” is defined as something external to the petitioner: “the existence of
21 cause for a procedural default must ordinarily turn on whether the prisoner can show that some
22 objective factor external to the defense impeded counsel’s efforts.” *Coleman*, 501 U.S. at 753
23 (quoting *Murray*, 477 U.S. at 488). Moreover, illiteracy and a petitioner’s mental deficiencies
24 have been found not to be “external impediments preventing counsel from constructing or raising
25 the claim.” *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 908-09 (9th Cir. 1986). By
26 extension of that reasoning, a petitioner’s lack of familiarity with a language and inability to
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1 explain legal concepts does not rise to the level of an “objective factor external to the defense.”
2 Therefore, Petitioner has failed to show cause on this ground.

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4 Finally, Petitioner invites the Court to speculate as to what may have happened had his
5 attorney agreed to meet with him in September 2002. Petitioner claims that had his attorney
6 agreed to a meeting, then Petitioner would have explained his intention that his claims be
7 presented in such a way as to be preserved for federal review. However, Petitioner provides no
8 evidence of such an intention at that time; instead he merely points to a letter written by another
9 inmate on his behalf stating “Mr. Rios-Lopez would very much like to meet with you in person to
10 discuss his case, he indicates there are many issues he wants to make you aware of that may not
11 be discovered from the case transcript.” *Petitioner’s Response Opposing Motion for Summary*
12 *Dismissal*, Exhibit A. Nowhere in this letter does Petitioner show any evidence of his intent to
13 preserve his claims for federal review. This Court will not speculate as to what Petitioner may
14 have said had such a meeting occurred. This argument is insufficient to establish cause for the
15 procedural default of Petitioner’s first claim.
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17 Because the Petitioner has failed to show cause to overcome the procedural default of his
18 first claim, there is no need to examine the issue of “prejudice.” Moreover, no analysis of the
19 miscarriage of justice exception is required because Petitioner makes no claim of “actual
20 innocence.” Petitioner’s first claim should be dismissed.
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22 **E. PETITIONER’S SECOND CLAIM**

23 Petitioner’s second claim is that his Sixth Amendment right to a trial by a jury of
24 his peers was violated because there were no persons with Hispanic surnames in the list of 90
25 potential jurors. Although Petitioner raised this issue as a federal claim in a post-conviction
26 petition, and later on appeal to the Idaho Court of Appeals, he failed to bring this claim before the
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1 Supreme Court of Idaho. Because Petitioner did not present this claim to the highest state court,
2 Petitioner's second claim is also procedurally defaulted.

3 As discussed above, in order to overcome a procedurally defaulted claim, a petitioner
4 must show both cause and prejudice. Here, Petitioner argues that "'cause' for any procedural
5 default regarding this claim rests squarely with Petitioner's former attorneys." *Petitioner's*
6 *Response Opposing Motion for Summary Dismissal*, p. 12. To illustrate, Petitioner asserts "post-
7 conviction appellate counsel, recognizing the futility of proceeding further, failed to file a petition
8 for review with the Idaho Supreme Court." *Id.*

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10 The "post-conviction appellate counsel" referred to did present Petitioner's second claim
11 to the Idaho Court of Appeals. After losing that appeal, Petitioner's attorney wrote a letter
12 explaining "I do not see any realistic chance of getting your conviction overturned by either the
13 Court of Appeals or the Supreme Court at this point. Therefore, I will not be doing anything
14 further in your case." *Id.*, Exhibit C. This attorney also informed Petitioner that he could ask the
15 Idaho Supreme Court to review the case, and informed him of the deadlines for filing a Petition of
16 Review and a Brief in Support of the Petition for Review.

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18 In arguing that cause for the procedural default of his second claim rests upon his
19 attorneys, Petitioner is essentially making another claim of ineffective counsel. Specifically,
20 Petitioner is claiming that his attorney's failure to file a Petition for Review with the Idaho
21 Supreme Court, and his failure to explain that filing a Petition for Review was necessary to
22 preserve the federal issue for federal review, constitutes ineffective assistance of counsel.
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24 However, the law is clear that Petitioner does not have a federal constitutional right to the
25 effective assistance of counsel during state post-conviction proceedings. *Pennsylvania v. Finley*,
26 481 U.S. 551 (1987); *see also Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). Therefore,
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1 any shortcoming in the post-conviction performance of counsel cannot serve as cause to excuse
2 the procedural default of Petitioner’s other federal claims. *See Coleman*, 501 U.S. at 752 (“a
3 petitioner cannot claim constitutionally ineffective assistance of counsel in [post-conviction]
4 proceedings”).

5
6 Petitioner has failed to establish cause for the procedural default of his second claim.

7 Absent a show of cause, it is unnecessary to address the issue of prejudice. Additionally, there is
8 no need to conduct a miscarriage of justice analysis because Petitioner is not asserting “actual
9 innocence.” Petitioner’s second claim should be dismissed.

10 **F. PETITIONER’S THIRD CLAIM**

11 In his third claim, Petitioner asserts that his Sixth Amendment right to counsel was
12 violated when (a) counsel failed to develop an argument about the systematic exclusion of
13 Hispanics from the jury pool; and (b) counsel failed to adequately impeach the state’s confidential
14 informant. Again, Petitioner’s failure to present this claim to the Idaho Supreme Court results in
15 procedural default.

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17 Once more, Petitioner attributes the procedural default of this claim to ineffective counsel.
18 Specifically, Petitioner argues “appellate counsel declined to file a petition for review, so any
19 procedural default regarding the failure to present this issue to the Idaho Supreme Court was
20 caused by ineffectiveness of appellate counsel.” *Petitioner’s Response Opposing Motion for*
21 *Summary Dismissal*, p. 15.

22
23 Petitioner’s ineffective counsel argument for his third claim is as unpersuasive as it was for
24 his second claim. Just as Petitioner has failed to establish cause for the procedural default of his
25 second claim, so has he failed to show cause for the procedural default of his third claim. Once
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1 again, no discussion of prejudice or miscarriage of justice is required. Petitioner's third claim
2 should be dismissed.

3 **G. PETITIONER'S FOURTH CLAIM**

4 Petitioner's fourth claim is that his appellate counsel was ineffective on direct appeal by
5 failing to raise the issue of systematic exclusion of Hispanics from the jury pool. Although
6 Petitioner presented this claim to the Idaho Court of Appeals in his successive post-conviction
7 petition, he failed to include this claim in his petition for review before the Idaho Supreme Court.
8 As a result, Petitioner's fourth claim is also procedurally defaulted.
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10 Again, Petitioner insists that the ineffectiveness of his counsel establishes cause for the
11 procedural default of his fourth claim. Petitioner's arguments are unconvincing for the reasons set
12 forth in the discussion of Petitioner's second claim. Accordingly, Petitioner has failed to show
13 cause, and an analysis of prejudice or miscarriage of justice is not necessary. Petitioner's fourth
14 claim should be dismissed.
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16 **H. PETITIONER'S FIFTH CLAIM**

17 In his final claim, Petitioner argues that his First, Fourth, Fifth, and Fourteenth
18 Amendment rights were violated when the state district court denied his motion for new counsel
19 during his successive post-conviction petition by failing to provide him with notice of the hearing
20 or an opportunity to be heard. Additionally, Petitioner is claiming that his First Amendment right
21 to access the courts was violated when the state district court summarily disposed of his
22 successive post-conviction petition.
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24 Petitioner did in fact bring this claim before the Idaho Supreme Court in his petition for
25 direct review. Therefore, Petitioner's fifth claim is not procedurally defaulted, and the
26 circumstances underlying this claim merit further discussion.
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1 In 2004, Petitioner filed a second Petition for Post-Conviction Relief in the Idaho District
2 Court. Counsel was appointed to represent Petitioner in this petition, but was later found to have
3 had a conflict of interest. Accordingly, substitute counsel was appointed.

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5 Apparently, Petitioner's new attorney did not contact Petitioner for several weeks after
6 the appointment, nor did she respond to his letters during this period. This initial lack of contact
7 prompted Petitioner to file a *pro se* motion for appointment of new counsel and a *pro se* request
8 for a hearing on the motion. The Idaho District Court denied these motions.

9 About six weeks later, the Idaho District Court held a hearing on the state's motion for
10 summary disposition of the petition. During this hearing, Petitioner's counsel revealed that she
11 had failed to make arrangements for Petitioner to be present at the hearing, despite Petitioner's
12 written request to be present. Additionally, she revealed that she had never spoken with
13 Petitioner, that she had no telephone number for him, and that she had not arranged for him to
14 participate in the hearing via telephone. The court held the hearing without the Petitioner present,
15 and granted the state's motion for summary disposition.

16
17 Petitioner argues that the denial of his motion for substitute counsel without any
18 opportunity to be heard was contrary to case law, was an abuse of discretion, and was a violation
19 of his due process rights under the U.S. Constitution.

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21 However, petitioners have no federal constitutional right to counsel during post-
22 conviction proceedings. *Coleman*, 501 U.S. at 752. In *Smith v. Idaho*, 392 F.3d 350, 357 (9th
23 Cir. 2004), the court explained:

24 [E]ven if we agree with Smith that the trial court erred as a matter of Idaho law in
25 failing to appoint him counsel during his post-conviction proceedings, Smith cannot
26 obtain habeas relief on that basis. *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir.
27 1996) (“[A]lleged errors in the application of state law are not cognizable in federal
28 habeas corpus.”) Smith had no federal constitutional right to counsel during his post-
conviction proceedings. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Therefore,

1 under *Coleman*, Smith cannot establish cause because of the state trial court's failure
2 to appoint him counsel, even if such failure was erroneous as a matter of state law.

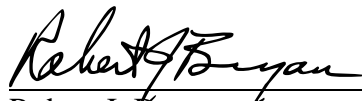
3 Because Petitioner had no right to counsel during his post-conviction proceedings, he had
4 no right to substitute counsel during the post-conviction proceedings. Without any federal
5 constitutional right to counsel during his post-conviction proceedings, all Petitioner can claim are
6 errors in the application of Idaho law. However, "alleged errors in the application of state law are
7 not cognizable in federal habeas corpus." *Langford*, 110 F.3d at 1389. Therefore, Petitioner's
8 fifth claim fails to constitute a cognizable federal habeas corpus claim. Accordingly, Petitioner's
9 fifth claim should be dismissed.
10

11 III. ORDER

12 Therefore, it is hereby

13 **ORDERED** that the Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. #18)
14 is **DENIED**, and this matter is dismissed.

15 DATED this 2nd day of September, 2008.

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18 Robert J. Bryan
19 United States District Judge
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