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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARC RUSSELL TRUSTY,

Petitioner,

v.

WARDEN RENEE BAKER, et al.,

Respondents.

Case No. 3:13-cv-00034-MMD-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Pending before the Court is respondents' motion to dismiss. (Dkt. no. 13.)

**I. PROCEDURAL HISTORY**

On January 14, 2009, the State of Nevada charged petitioner by way of criminal indictment with four counts of robbery with the use of a firearm. (Exhibit 2.)<sup>1</sup> Petitioner elected to plead guilty to three of the four robbery counts, and the State agreed to dismiss the pending criminal charges in four other cases. (Exhibit 18.) On July 22, 2009, the state district court entered a judgment of conviction sentencing petitioner to three consecutive terms of imprisonment of 30 to 75 months on each of the three counts, with

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<sup>1</sup>The exhibits referenced in this order are found in the Court's record at dkt. nos. 14-18.

1 an additional three equal and consecutive terms of imprisonment for the use of a deadly  
2 weapon. (Exhibit 22.)

3 Petitioner appealed his convictions to the Nevada Supreme Court. (Exhibit 23.) In  
4 his direct appeal brief (fast track statement), he raised two claims: (1) the district court  
5 abused its discretion by sentencing petitioner to consecutive prison terms; and (2) the  
6 district court failed to adequately canvass petitioner concerning the maximum  
7 punishment he could receive under the plea deal. (Exhibit 37.) On January 7, 2010, the  
8 Nevada Supreme Court affirmed petitioner's convictions. (Exhibit 39.) In its order of  
9 affirmance, the Nevada Supreme Court expressly declined to consider petitioner's claim  
10 concerning the adequacy of the district court's plea canvass because he had not  
11 previously raised the claim and the alleged error did not clearly appear on record.  
12 (Exhibit 39, at p. 2.)

13 On August 9, 2010, petitioner filed a post-conviction habeas petition in the state  
14 district court. (Exhibit 51.) The state district court dismissed a number of petitioner's  
15 claims by order filed April 1, 2011. (Exhibit 61.) The state district court conducted an  
16 evidentiary hearing on the remaining claims. (Exhibits 79 & 83.) The state district court  
17 denied the petition by written order filed April 3, 2012. (Exhibit 93.)

18 Petitioner appealed the denial of his post-conviction state habeas petition.  
19 (Exhibit 85.) In his appellate brief (fast track statement), petitioner raised the following  
20 claims: (1) the use of news footage in identifying petitioner violated his due process  
21 rights; (2) trial counsel was ineffective for failing to challenge the identification of  
22 petitioner through pretrial motion practice; (3) trial counsel was ineffective for failing to  
23 stop the plea hearing when petitioner incorrectly states the maximum sentences; and  
24 (4) trial counsel was ineffective at sentencing for failing to object to the State's reference  
25 to unrelated crimes. (Exhibit 104.) On December 2, 2012, the Nevada Supreme Court  
26 affirmed the denial of petitioner's state habeas petition. (Exhibit 108.)

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1 Petitioner dispatched his federal habeas corpus petition to this Court on January  
2 17, 2013. (Dkt. no. 6, at p. 1.) In the federal petition, petitioner raises the following  
3 claims:

4 Claim 1: Trial counsel was ineffective for failing to investigate an alibi  
witness or otherwise pursue a false identification defense.

5 Claim 2: The district court failed to adequately canvass petitioner  
6 concerning the maximum punishment he could receive under the plea  
deal in violation of NRS 174.035 and petitioner's constitutional rights.

7 Claim 3: The State failed to turn over discovery material, including  
8 surveillance video and witness interview transcripts, in violation of  
petitioner's constitutional rights.

9 (Dkt. no. 6.) Respondents filed the instant motion to dismiss the petition. (Dkt. no. 13).  
10 Petitioner filed an opposition. (Dkt. no. 22.) Respondents filed a reply brief. (Dkt. no.  
11 23.)

## 12 **II. DISCUSSION**

### 13 **A. Exhaustion**

14 A federal court will not grant a state prisoner's petition for habeas relief until the  
15 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*  
16 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state  
17 courts a fair opportunity to act on each of his claims before he presents those claims in  
18 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*  
19 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
20 petitioner has given the highest available state court the opportunity to consider the  
21 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,  
22 386 F.3d 896, 916 (9<sup>th</sup> Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9<sup>th</sup> Cir.  
23 1981).

24 A habeas petitioner must "present the state courts with the same claim he urges  
25 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). To satisfy  
26 exhaustion, each of petitioner's claims must have been previously presented to the  
27 Nevada Supreme Court, with references to a specific constitutional guarantee, as well  
28 as a statement of facts that entitle petitioner to relief. *Koerner v. Grigas*, 328 F.3d 1039,

1 1046 (9<sup>th</sup> Cir. 2002). The federal constitutional implications of a claim, not just issues of  
2 state law, must have been raised in the state court to achieve exhaustion. *Ybarra v.*  
3 *Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (*citing Picard*, 404 U.S. at 276)). To  
4 achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is]  
5 asserting claims under the United States Constitution” and given the opportunity to  
6 correct alleged violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S.  
7 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999). It is well  
8 settled that 28 U.S.C. § 2254(b) “provides a simple and clear instruction to potential  
9 litigants: before you bring any claims to federal court, be sure that you first have taken  
10 each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9<sup>th</sup> Cir. 2001) (*quoting*  
11 *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

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

21 In Ground 3 of the federal petition, petitioner asserts that the State failed to turn  
22 over discovery material, including surveillance video footage and witness interview  
23 transcripts, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (Dkt. no. 6, at p.  
24 7.) Petitioner raised a similar claim in his *pro per* post-conviction habeas petition filed in  
25 state district court. (Exhibit 51, at p. 11.) However, the claim was not presented to the  
26 Nevada Supreme Court in petitioner’s appellate brief (fast track statement). (Exhibit  
27 104.) Ground 3 of the federal petition has never been presented to Nevada’s highest  
28 court and therefore the claim is unexhausted. *See Castillo v. McFadden*, 399 F.3d 993,

1 1000 (9<sup>th</sup> Cir. 2005) (noting that the state high court “was not required to review the  
2 parties’ trial court pleadings,” and that the petitioner must have presented his federal  
3 claims “within the four corners of his appellate briefing” in order to properly exhaust the  
4 claims).

#### 5 **B. Procedural Default**

6 In Ground 2 of the federal petition, petitioner asserts that the state district court  
7 failed to adequately canvass him concerning the maximum punishment he could receive  
8 under the plea agreement. (Dkt. no. 6, at p. 5.) Respondents contend that Ground 2 of  
9 the federal petition is procedurally barred.

10 “Procedural default” refers to the situation where a petitioner in fact presented a  
11 claim to the state courts but the state courts disposed of the claim on procedural  
12 grounds, instead of on the merits. A federal court will not review a claim for habeas  
13 corpus relief if the decision of the state court regarding that claim rested on a state law  
14 ground that is independent of the federal question and adequate to support the  
15 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The *Coleman* Court  
16 stated the effect of a procedural default, as follows:

17 In all cases in which a state prisoner has defaulted his federal claims in  
18 state court pursuant to an independent and adequate state procedural  
19 rule, federal habeas review of the claims is barred unless the prisoner can  
20 demonstrate cause for the default and actual prejudice as a result of the  
alleged violation of federal law, or demonstrate that failure to consider the  
claims will result in a fundamental miscarriage of justice.

21 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The  
22 procedural default doctrine ensures that the state’s interest in correcting its own  
23 mistakes is respected in all federal habeas cases. *See Koerner v. Grigas*, 328 F.3d  
24 1039, 1046 (9<sup>th</sup> Cir. 2003). To demonstrate cause for a procedural default, the petitioner  
25 must be able to “show that some *objective factor external to the defense* impeded” his  
26 efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis  
27 added). For cause to exist, the external impediment must have prevented the petitioner  
28 from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

1 Ground 2 of the federal petition asserts that the state district court failed to  
2 adequately canvass petitioner concerning the maximum punishment he could receive  
3 under the plea agreement. (Dkt. no. 6, at p. 5.) Petitioner raised a similar claim on direct  
4 appeal. (Exhibit 37, at pp. 4-5.) The Nevada Supreme Court declined to consider the  
5 claim because petitioner raised the claim in a procedurally deficient manner. (Exhibit 39,  
6 at p. 2.) In declining to consider the claim, the Nevada Supreme Court ruled: “Trusty  
7 does not claim that he previously raised a challenge to the validity of his plea in the  
8 district court and the alleged error does not clearly appear on the record, therefore we  
9 decline to consider his contention.” (Exhibit 39, at p. 2) (*citing Bryant v. State*, 102 Nev.  
10 268, 272, 721 P.2d 364, 368 (1986)). The Nevada Supreme Court’s refusal to consider  
11 petitioner’s claim rested on a state law procedural ground that is independent of the  
12 federal question and adequate to support the judgment. *See Coleman v. Thompson*,  
13 501 U.S. at 730-31. Petitioner has failed to demonstrate cause and prejudice to excuse  
14 the procedural default. Ground 2 of the petition was procedurally defaulted in state  
15 court, therefore, the claim is barred from review by this Court.

16 **C. Tollett Bar**

17 In *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the United States Supreme  
18 Court held that “when a criminal defendant has solemnly admitted in open court that he  
19 is in fact guilty of the offense with which he is charged, he may not thereafter raise  
20 independent claims relating to the deprivation of constitutional rights that occurred prior  
21 to the entry of the guilty plea.” Instead, [h]e may only attack the voluntary and intelligent  
22 character of the guilty plea . . . .” *Id.*; *see also Menna v. New York*, 423 U.S. 61, 63, n.2  
23 (1975) (discussing purpose and scope of *Tollett* bar). The Ninth Circuit has applied the  
24 *Tollett* rule to both independent constitutional claims and claims of ineffective assistance  
25 of counsel. *See United States v. Bohn*, 956 F.2d 208, 209 (9<sup>th</sup> Cir. 1992) (per curium)  
26 (holding that defendant’s pre-plea ineffective assistance of counsel claim, and  
27 underlying speedy trial claim, were barred by *Tollett*; *see also United States v. Jackson*,  
28 F.3d 1141, 1144 (9<sup>th</sup> Cir. 2012) (citing *Tollett* and *Bohn* with approval).

1 Ground 1 of the federal petition asserts that counsel was ineffective for failing to  
2 investigate and pursue a potential defense. (Dkt. no. 6, at p. 3.) Ground 3 of the federal  
3 petition asserts that the State failed to turn over discovery material. (Dkt. no. 6, at p. 7.)  
4 Under *Tollett*, petitioner cannot raise Grounds 1 and 3 of the federal petition, which are  
5 independent constitutional claims of events that occurred prior to entry of the guilty plea.  
6 Because petitioner seeks to collaterally attack his factual guilt in Grounds 1 and 3, but  
7 has already admitted that guilt through the plea agreement, *Tollett* bars consideration of  
8 those claims in his federal habeas corpus proceeding.

### 9 **III. CERTIFICATE OF APPEALABILITY**

10 In order to proceed with any appeal, petitioner must receive a certificate of  
11 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v.*  
12 *Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236  
13 F.3d 550, 551-52 (9th Cir. 2001). District courts are required to rule on the certificate of  
14 appealability in the order disposing of a proceeding adversely to the petitioner or  
15 movant, rather than waiting for a notice of appeal and request for certificate of  
16 appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255  
17 Cases. Generally, a petitioner must make “a substantial showing of the denial of a  
18 constitutional right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);  
19 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that  
20 reasonable jurists would find the district court’s assessment of the constitutional claims  
21 debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold  
22 inquiry, the petitioner has the burden of demonstrating that the issues are debatable  
23 among jurists of reason; that a court could resolve the issues differently; or that the  
24 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,  
25 no reasonable jurist would find this Court’s dismissal of the petition debatable or wrong.  
26 The Court therefore denies petitioner a certificate of appealability.

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1 **IV. CONCLUSION**

2 It is therefore ordered that respondents' motion to dismiss (dkt. no. 13) is  
3 granted.


4 It is further ordered that the petition is dismissed with prejudice.

5 It is further ordered that petitioner is denied a certificate of appealability.

6 It is further ordered that the Clerk shall enter judgment accordingly.

7 DATED THIS 18<sup>th</sup> day of November 2013.

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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE