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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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REGINALD FRANKLIN,

Petitioner,

v.

ROBERT LEGRAND, et al.,

Respondents.

Case No. 3:13-cv-00613-MMD-WGC

ORDER

I. SUMMARY

Before the Court are the first amended petition for writ of habeas corpus (ECF No. 20), Respondents' renewed motion to dismiss (ECF No. 54), Petitioner's opposition (ECF No. 57), and Respondents' reply (ECF No. 60). The Court finds that Petitioner has procedurally defaulted grounds 2(C), 2(D), 3(A), and 3(B). The Court also finds that Petitioner has not shown cause and prejudice to excuse the procedural default. Accordingly, the Court grants the motion to dismiss.

II. BACKGROUND

After a jury trial in state district court, Petitioner was convicted of five counts of lewdness with a child under the age of 14. (Ex. 53 (ECF No. 28-2) (second amended information); Ex. 56 (ECF No. 28-6) (judgment of conviction).) Petitioner appealed, and the Nevada Supreme Court affirmed. (Ex. 80 (ECF No. 29-5).)

Petitioner then filed a proper-person post-conviction habeas corpus petition in the state district court. (Ex. 83 (ECF No. 30).) The state district court appointed counsel, who filed a supplement to the petition. (Ex. 99 (ECF No. 32-5).) The state district court denied

1 the petition. (Ex. 106 (ECF No. 32-12).) Petitioner appealed, and the Nevada Supreme
2 Court affirmed. (Ex. 117 (ECF No. 32-23).)

3 Petitioner then commenced this action. The Court appointed counsel, who filed the
4 first amended petition (ECF No. 20). Respondents filed their first motion to dismiss (ECF
5 No. 36). The Court found that Petitioner had not exhausted grounds 2(C), 2(D), 3(A), and
6 3(B) (ECF No. 43). The Court stayed the action while Petitioner exhausted those grounds
7 in state court (ECF No. 46).

8 Petitioner filed another post-conviction habeas corpus petition in the state district
9 court. (Ex. 13 (ECF No. 50-1).¹) The state district court dismissed the petition. (Ex. 15
10 (ECF No. 50-4).) Petitioner appealed. The Nevada Court of Appeals affirmed. (Ex. 18
11 (ECF No. 50-7).²) It held that the petition was untimely under Nev. Rev. Stat. § 34.726(1)
12 and successive under Nev. Rev. Stat. § 34.810(2), and that petitioner had not shown good
13 cause to excuse those procedural bars. Id.

14 Petitioner then moved to reopen this action (ECF No. 49). The court granted the
15 motion. Respondents then filed their renewed motion to dismiss (ECF No. 54).

16 **III. LEGAL STANDARD**

17 A federal court will not review a claim for habeas corpus relief if the decision of the
18 state court regarding that claim rested on a state-law ground that is independent of the
19 federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S.
20 722, 730-31 (1991).

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22 ¹The numbering of exhibits in ECF No. 50 is odd. In support of his first amended
23 petition (ECF No. 20), Petitioner filed a set of exhibits numbered 1 through 118 (ECF Nos.
24 21-32). Then, in support of his motion to reopen case (ECF No. 49), Petitioner filed another
25 set of exhibits (ECF No. 50). However, the new exhibits do not continue the existing
26 numbering sequence (i.e., resuming with exhibit 119). Instead, Petitioner numbered the
27 new exhibits as 13, 13.1, and 14 through 19 (ECF Nos. 50-1 to 50-8). Now Petitioner has
two sets of distinct exhibits numbered 13 through 19, with exhibit 13.1 in the new set being
unique. This will be confusing because original exhibits 13 and 14, which are the transcript
of the hearing and the written order on the prosecution's motion to admit evidence of other
acts, are important to this order. The Court will refer to both the ECF number and the
exhibit number to avoid confusion.

28 ²This exhibit is truncated after the first page of the order of the Nevada Court of
Appeals.

1 In all cases in which a state prisoner has defaulted his federal claims in state
2 court pursuant to an independent and adequate state procedural rule,
3 federal habeas review of the claims is barred unless the prisoner can
4 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.

5 Id. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The grounds for dismissal
6 upon which the Nevada Supreme Court relied in this case are adequate and independent
7 state rules. *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003) (NRS § 34.810);
8 *Loveland v. Hatcher*, 231 F.3d 640 (9th Cir. 2000) (NRS § 34.726); *Moran v. McDaniel*,
9 80 F.3d 1261 (9th Cir. 1996) (same).

10 [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-
11 counsel claim in a collateral proceeding, a prisoner may establish cause for
12 a default of an ineffective-assistance claim in two circumstances. The first is
13 where the state courts did not appoint counsel in the initial-review collateral
14 proceeding for a claim of ineffective assistance at trial. The second is where
15 appointed counsel in the initial-review collateral proceeding, where the claim
16 should have been raised, was ineffective under the standards of *Strickland*
v. Washington, 466 U.S. 668 (1984). To overcome the default, a prisoner
must also demonstrate that the underlying ineffective-assistance-of-trial-
counsel claim is a substantial one, which is to say that the prisoner must
demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U.S.
322 (2003) (describing standards for certificates of appealability to issue).

17 *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). The Court then re-stated *Martinez* as a four-part
18 test:

19 [W]here (1) the claim of “ineffective assistance of trial counsel” was a
20 “substantial” claim; (2) the “cause” consisted of there being “no counsel” or
21 only “ineffective” counsel during the state collateral review proceeding; (3)
22 the state collateral review proceeding was the “initial” review proceeding in
respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state
law requires that an “ineffective assistance of trial counsel [claim] . . . be
raised in an initial-review collateral proceeding.”

23 *Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

24 **IV. DISCUSSION**

25 Respondents argue that grounds 2(C), 2(D), 3(A), and 3(B) are procedurally
26 defaulted. Petitioner responds that he can show cause to excuse the defaults under
27 *Martinez*. Petitioner presents no other arguments for cause and prejudice.

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1 Martinez does not apply to grounds 3(A) and 3(B) because they are procedurally
2 defaulted claims of ineffective assistance of appellate counsel, not trial counsel. Davila v.
3 Davis, 137 S. Ct. 2058 (2017). Petitioner recognizes this and maintains the argument to
4 preserve it. (ECF No. 57 at 11.) The Court will dismiss grounds 3(A) and 3(B).

5 Martinez does not apply to ground 2(C) because of the way it was procedurally
6 defaulted. Petitioner raised the same claim in his first state post-conviction habeas corpus
7 petition. (Ex. 83 at 7g (ECF No. 30 at 16).) On appeal from the denial of that petition,
8 Petitioner did not raise the claim. (See Ex. 115 (ECF No. 32-21).) For that reason,
9 Petitioner had not exhausted, and now has procedurally defaulted, ground 2(C). Martinez
10 does not apply to a procedurally defaulted claim of ineffective assistance of trial counsel
11 when the procedural default occurred because the Petitioner did not raise the claim on
12 post-conviction appeal. 566 U.S. at 14. The Court will dismiss ground 2(C).

13 Ground 2(D) is a claim that Petitioner received ineffective assistance because trial
14 counsel did not object to the introduction of prior-bad-act evidence. Petitioner had not
15 exhausted this claim because he had not presented it to any state court in any form before
16 he raised it in the first amended petition. Ground 2(D) now is procedurally defaulted.
17 Martinez is applicable to ground 2(D).

18 Before trial, the prosecution filed a motion to admit evidence of other acts. (Ex. 7
19 (ECF Nos. 22-3, 22-4).) Petitioner, through trial counsel, filed an opposition. (Ex. 11 (ECF
20 No. 23-2).) The opposition contained arguments why the trial court should deny the
21 prosecution's motion; it was more than pro forma. (Id. (ECF No. 23-2).) Trial counsel then
22 argued at a hearing why the trial court should deny the prosecution's motion. (Ex. 13 at
23 10-14 (ECF No. 23-4 at 11-15).) The trial court agreed with Petitioner's trial counsel and
24 denied the prosecution's motion. (Ex. 13 at 14-15 (ECF No. 23-4 at 15-16); Ex. 14 (ECF
25 No. 23-5).³) The prosecution then filed a petition for a writ of mandamus in the Nevada

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28 ³Again, these exhibits 13 and 14 are different from the exhibits 13 and 14 that
Petitioner filed in support of his motion to reopen.

1 Supreme Court. (Ex. 75 (ECF No. 29 at 7-12).⁴) Petitioner, through trial counsel, filed an
2 answer to the petition. (Ex. 75 (ECF No. 29 at 14-18).) The Nevada Supreme Court
3 granted the petition with respect to Petitioner's other criminal acts. (Ex. 75 (ECF No. 29 at
4 19-23).⁵) It directed the trial court to allow the prosecution to introduce evidence of
5 Petitioner's other criminal acts. (Id. (ECF No. 29 at 22-23).) At trial, when the prosecution
6 called the witness whose testimony was the evidence of those other criminal acts, trial
7 counsel did not object. (Ex. 50 at 140-41 (ECF No. 27-1 at 8).)

8 Petitioner has not shown cause under Martinez because he has not demonstrated
9 that ground 2(D) is a substantial claim of ineffective assistance of counsel. Trial counsel
10 fully litigated the admissibility of Petitioner's other criminal acts, but to an unfavorable
11 conclusion. If Petitioner believes that trial counsel failed to make an argument during that
12 litigation, then he does not allege now what that argument was. It simply is untrue that trial
13 counsel failed to object to the admission of the other criminal acts, unless Petitioner means
14 that trial counsel should have lodged a formal objection at trial. If Petitioner believes that
15 trial counsel should have lodged a formal objection at trial, then he cannot demonstrate a
16 reasonable probability of a different outcome. The trial court would have overruled the
17 objection based upon the Nevada Supreme Court's order. If Petitioner believes that an
18 objection at trial would have preserved the issue for appeal, then he still cannot
19 demonstrate a reasonable probability of a different outcome. The Nevada Supreme Court
20 already had decided the issue. On direct appeal, it simply would have held that the prior
21 decision was the law of the case. Given the record, the Court sees no way that ground
22 2(D) could be a substantial claim of ineffective assistance of trial counsel. The Court
23 therefore dismisses ground 2(D).

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26 ⁴Exhibit 75 is the appendix filed on direct appeal. It contains only excerpts of the
27 prosecution's petition for a writ of mandamus and Petitioner's answer to that petition.

28 ⁵The Nevada Supreme Court denied the mandamus petition in part with respect to
other issues that are not relevant to ground 2(D).

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V. CONCLUSION

It is therefore ordered that Respondents' renewed motion to dismiss (ECF No. 54) is granted. The Court dismisses grounds 2(C), 2(D), 3(A), and 3(B) because they are procedurally defaulted.

It is further ordered that Respondents will have 45 days from the date of entry of this order to file and serve an answer, which must comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner will have 45 days from the date on which the answer is served to file a reply.

DATED THIS 21st day of December 2018.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE