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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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FRANCISCO A. LARA,

Case No. 3:17-cv-00544-MMD-WGC

Petitioner,

ORDER

v.

WARDEN BAKER, *et al.*,

Respondents.

I. INTRODUCTION

This action is a petition for writ of habeas corpus by Nevada prisoner Francisco A. Lara. Respondents have filed a motion to dismiss Ground 6 of Lara's amended habeas petition. (ECF No. 16.) The Court has reviewed Petitioner's response (ECF No. 24) and Respondents' reply (ECF No. 25). For the following reasons, the Court will deny the motion to dismiss and will set a schedule for Respondents to file an answer.

II. BACKGROUND

Following a jury trial in Nevada's Eighth Judicial District Court, in Clark County, Lara was convicted, on July 19, 2012, of five counts of sexual assault of a child under fourteen years of age and one count of attempt to suborn perjury. (See Judgment of Conviction, Petitioner's Exh. 1 (ECF No. 15-1).) Lara was sentenced to multiple life prison sentences, with parole eligibility after 70 years, plus a consecutive one-year sentence for the attempt to suborn perjury. (See *id.*)

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1 Lara appealed, and the Nevada Supreme Court affirmed the judgment of
2 conviction on October 16, 2013. (See Order of Affirmance, Petitioner’s Exh. 4 (ECF No.
3 15-4).)

4 Lara filed a petition for writ of habeas corpus, *pro se*, in the state district court on
5 July 25, 2012. (See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 115 (ECF
6 No. 19-34).) Subsequently, with counsel, Lara supplemented his petition. (See
7 Supplemental Petition, Exh. 157 (ECF No. 20-36); Supplemental Petition Reply, Exh. 162
8 (ECF No. 21-1).) The state district court held an evidentiary hearing (see Transcript of
9 Evidentiary Hearing, Exh. 167 (ECF No. 21-6)), and then denied Lara’s petition on
10 December 30, 2015. (See Findings of Fact, Conclusions of Law and Order, Exh. 171
11 (ECF No. 21-10).) Lara appealed, and the Nevada Court of Appeals affirmed on January
12 19, 2017. (See Order of Affirmance, Petitioner’s Exh. 8 (ECF No. 15-8).)

13 On September 12, 2017, Lara initiated a second state habeas action. (See Petition
14 for Writ of Habeas Corpus, Exh. 190 (ECF No. 21-29).) The state district court dismissed
15 that petition on December 4, 2017, ruling it procedurally barred. (See Findings of Fact,
16 Conclusions of Law and Order, Exh. 193 (ECF No. 21-32).) Lara appealed (see Notice of
17 Appeal, Exh. 194 (ECF No. 21-33)), and it appears that appeal remains pending. (See
18 Motion to Dismiss (ECF No. 16) at 3.)

19 This Court received Lara’s original *pro se* federal habeas corpus petition for filing,
20 initiating this action, on September 7, 2017 (ECF No. 6). The Court appointed counsel to
21 represent Lara (ECF No. 5), and Lara filed an amended habeas petition with counsel on
22 February 13, 2018 (ECF No. 14). Lara’s amended petition includes the following claims:

23 Ground 1: Lara’s federal constitutional rights were violated because “the
24 trial court refused to order a psychological exam of the child victim” (See
Amended Petition (ECF No. 14) at 13-22.)

25 Ground 2: Lara’s federal constitutional rights were violated because “the
26 trial court admitted cumulative hearsay testimony regarding the victim’s
statements.” (See *id.* at 22-25.)

27 Ground 3: Lara’s federal constitutional rights were violated because “the
28 trial court admitted coerced and involuntary statements by Lara.” (See *id.* at
25-30.)

1 Ground 4: Lara’s federal constitutional rights were violated as a result of
2 ineffective assistance of counsel “where his trial counsel did not adequately
3 explain the plea offer to Lara.” (*See id.* at 30-34.)

4 Ground 5: Lara’s federal constitutional rights were violated as a result of
5 ineffective assistance of counsel because his trial counsel “did not
6 adequately cross-examine the victim.” (*See id.* at 34-39.)

7 Ground 6: Lara’s federal constitutional rights were violated as a result of
8 ineffective assistance of counsel because his trial counsel “did not object to
9 the testimony of Faiza Ebrahim.” (*See id.* at 40-42.)

10 On April 16, 2018, Respondents filed a motion to dismiss Ground 6 of Lara’s
11 amended petition (ECF No. 16), arguing that Ground 6 has not been exhausted in state
12 court. On July 13, 2018, Lara filed an opposition to the motion to dismiss (ECF No. 24),
13 and on August 8, 2018, Respondents filed a reply (ECF No. 25).

14 **III. DISCUSSION**

15 A federal court may not grant habeas corpus relief on a claim not exhausted in
16 state court. 28 U.S.C. § 2254(b). The exhaustion requirement is based on the policy of
17 federal-state comity, and is intended to allow state courts the initial opportunity to correct
18 constitutional deprivations. *See Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust
19 a claim, a petitioner must fairly present the claim to the highest available state court, and
20 must give that court the opportunity to address and resolve it. *See Duncan v. Henry*, 513
21 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). A
22 claim is fairly presented to the state court if, before that court, the petitioner describes the
23 operative facts and legal theory upon which the claim is based. *See Anderson v. Harless*,
24 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*, 693 F.2d
25 859, 862 (9th Cir. 1982).

26 In Ground 6, Lara claims that his federal constitutional rights were violated as a
27 result of ineffective assistance of counsel because his trial counsel “did not object to the
28 testimony of Faiza Ebrahim.” (*See Amended Petition* (ECF No. 14) at 40-42). Lara did not
assert this claim on his direct appeal, or on the appeal in his first state habeas action.
(*See Appellant’s Opening Brief*, Petitioner’s Exh. 2 (ECF No. 15-2); *Appellant’s Opening*
Brief, Petitioner’s Exh. 6 (ECF No. 15-6).) Indeed, Lara concedes that he did not exhaust

1 Ground 6 on his direct appeal or in his first state habeas action. (See Amended Petition
2 (ECF No. 14) at 40 (“This issue is unexhausted.”); Opposition to Motion to Dismiss (ECF
3 No. 24) at 2-5.)

4 Lara goes on to argue, however, that Ground 6 is now barred in state court, and,
5 therefore, it is technically exhausted, but subject to the doctrine of procedural default in
6 this federal habeas action. (See Opposition to Motion to Dismiss (ECF No. 24) at 2-5.)
7 Respondents agree that this Court should consider Ground 6 to be procedurally barred
8 in state court and subject to the anticipatory procedural default doctrine. (See Reply in
9 Support of Motion to Dismiss (ECF No. 25) at 2.)

10 The Supreme Court has recognized that under certain circumstances it may be
11 appropriate for a federal court to anticipate the state-law procedural bar of an
12 unexhausted claim, and to treat such a claim as subject to the procedural default doctrine.
13 “An unexhausted claim will be procedurally defaulted, if state procedural rules would now
14 bar the petitioner from bringing the claim in state court.” *Dickens v. Ryan*, 740 F.3d 1302,
15 1317 (9th Cir. 2014) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)).

16 In *Coleman*, the Supreme Court held that a state prisoner who fails to comply with
17 the State’s procedural requirements in presenting his claims is barred by the adequate
18 and independent state ground doctrine from obtaining a writ of habeas corpus in federal
19 court. *Coleman*, 501 U.S. at 731-32 (“Just as in those cases in which a state prisoner fails
20 to exhaust state remedies, a habeas petitioner who has failed to meet the State’s
21 procedural requirements for presenting his federal claims has deprived the state courts
22 of an opportunity to address those claims in the first instance.”). Where such a procedural
23 default constitutes an adequate and independent state ground for denial of habeas
24 corpus, the default may be excused only if “a constitutional violation has probably resulted
25 in the conviction of one who is actually innocent,” or if the prisoner demonstrates cause
26 for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

27 To demonstrate cause for a procedural default, the petitioner must “show that
28 some objective factor external to the defense impeded” his efforts to comply with the state

1 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
2 must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499
3 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden
4 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
5 but that they worked to his actual and substantial disadvantage, infecting his entire
6 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
7 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

8 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
9 assistance of post-conviction counsel may serve as cause, to overcome the procedural
10 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme Court
11 noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
12 postconviction proceeding does not establish cause” to excuse a procedural default.
13 *Martinez*, 566 U.S. at 15 (citing *Coleman*, 501 U.S. at 746-47). The *Martinez* Court,
14 however, “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate assistance
15 of counsel at initial-review collateral proceedings may establish cause for a prisoner’s
16 procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. The Court described
17 “initial-review collateral proceedings” as “collateral proceedings which provide the first
18 occasion to raise a claim of ineffective assistance at trial.” *Id.* at 8.

19 Under *Martinez*, Lara might be able to overcome the anticipatory procedural
20 default of the claim of ineffective assistance of trial counsel in Ground 6 by showing
21 ineffective assistance of his state habeas counsel with respect to that claim.

22 Respondents argue that Lara cannot show good cause regarding the procedural
23 default of Ground 6, under *Martinez*, because the claim that his state habeas counsel was
24 ineffective is itself unexhausted and, therefore, procedurally defaulted. (See Reply in
25 Support of Motion to Dismiss (ECF No. 25) at 3-4.) That argument is without merit. A
26 claim of ineffective assistance of state post-conviction counsel is not a valid claim for
27 federal habeas corpus relief; there is no federal constitutional right to effective assistance
28 of counsel during state post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S.

1 551, 554 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). Therefore, there
2 is no such claim to be exhausted in state court.

3 Respondents also argue that “Lara has not asserted a claim of ineffective
4 assistance of post-conviction counsel for failing to raise the claims in Ground 6 in an effort
5 to overcome his procedural defaults in a state habeas petition.” (Reply in Support of
6 Motion to Dismiss (ECF No. 25) at 3-4.) That argument is also without merit. Under
7 Nevada law, in non-capital cases, ineffective assistance of post-conviction counsel is not
8 good cause, to excuse a procedural bar. *See Brown v. McDaniel*, 331 P.3d 867, 870 (Nev.
9 2014) (“We have consistently held that the ineffective assistance of post-conviction
10 counsel in a noncapital case may not constitute ‘good cause’ to excuse procedural
11 defaults.”).

12 Lara might possibly be able to show that ineffective assistance of his state post-
13 conviction counsel was cause for the procedural default of Ground 6. That issue,
14 however, is entwined with the question of the merits of the claim, such that it cannot be
15 properly addressed at this time, but will be better addressed, in conjunction with the merits
16 of the claim, after Respondents file an answer. The Court will, therefore, deny
17 Respondents’ motion to dismiss, without prejudice to Respondents asserting the
18 procedural default defense to Ground 6 in their answer, along with their argument
19 regarding the merits of the claim.

20 **IV. CONCLUSION**

21 It is therefore ordered that Respondents’ Motion to Dismiss (ECF No. 16) is denied
22 without prejudice.

23 It is further ordered that, within ninety (90) days from the date of this Order,
24 Respondents are to file an answer, responding to the claims in the amended habeas
25 petition.

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It is further ordered that, in all other respects, the schedule for further proceedings set forth in the order entered November 3, 2017 (ECF No. 10) will remain in effect.

DATED THIS 20th day of August 2018.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE