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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTOPHER KELLER,

Petitioner,

v.

NETHANJAH BREITENBACH,¹ et al.,

Respondents.

Case No. 3:22-cv-00481-ART-CLB

ORDER DENYING
MOTION TO DISMISS

On August 9, 2023, counseled Petitioner Christopher Keller filed his second-amended § 2254 petition. (ECF No. 20.) This matter comes before the Court on Respondents' motion to dismiss Keller's second-amended petition. (ECF No. 25.) Keller opposed the motion, and Respondents replied. (ECF Nos. 32, 33.) For the reasons stated below, the Court denies the motion.

I. BACKGROUND

The Nevada Supreme Court described the crime, as revealed by the evidence at the trial, as follows:

Inside Keller's car, officers found 344.29 grams of methamphetamine, 33.92 grams of heroin, .537 grams of cocaine, a mixture of the three controlled substances, and a gun. The quantity of methamphetamine and heroin exceed personal use levels, and the discovery of 1-inch by 1-inch baggies, a large amount of cash, as well as a gun, fairly indicated to the officers that Keller was trafficking in drugs.

(ECF No. 27-30 at 6.) A jury found Keller guilty of seven drug-related crimes and two counts of ownership or possession of a firearm by a prohibited person. (ECF No. 27-17.) Keller was sentenced to an aggregate term of life in prison with parole

¹The state corrections department's inmate locator page states that Keller is incarcerated at Lovelock Correctional Center. Nethanjah Breitenbach is the warden for that facility. At the end of this order, this Court direct the clerk to substitute Nethanjah Breitenbach as a respondent for Respondent Timothy Garrett under Federal Rule of Civil Procedure 25(d).

1 eligibility after 20 years. (*Id.* at 5.) Keller’s amended judgment of conviction was
2 entered on December 12, 2017. (*Id.*) Keller appealed, and the Nevada Supreme
3 Court affirmed his judgment of conviction on October 15, 2018. (ECF No. 27-30.)
4 Remittitur issued on November 9, 2018. (ECF No. 27-31.)

5 Keller filed his *pro se* state post-conviction habeas petition on August 26,
6 2019. (ECF No. 27-37.) The state court denied Keller post-conviction relief on
7 November 2, 2020. (ECF No. 28-3.) Keller appealed, and the Nevada Court of
8 Appeals dismissed the appeal on September 28, 2021. (ECF No. 28-20.)
9 Remittitur issued on October 26, 2021. (ECF No. 28-21.) Following a motion to
10 amend the state court’s order, the state court issued a new order on April 11,
11 2022. (ECF No. 28-28.) Keller appealed, and the Nevada Court of Appeals affirmed
12 on September 9, 2022. (ECF No. 28-40.) Remittitur issued on October 4, 2022.
13 (ECF No. 28-41.)

14 In his instant second-amended petition, Keller presents the following
15 grounds for relief:

- 16 1. The state court violated his right to counsel of his choice.
- 17 2. He was denied his right to counsel when the state court did
not appoint new counsel even though his trial counsel was
18 conflicted.
- 19 3. His counsel failed to include important facts and argue key
legal issues in his motion to suppress the evidence found in
20 his car and apartment.
- 21 4. His counsel failed to request an adverse inference instruction
based on the destruction of body camera footage.
- 22 5. There were cumulative errors.

(ECF No. 20.)

23 **II. DISCUSSION**

24 Respondents argue that (1) the second-amended petition is untimely and
25 ground 4 does not relate back to a timely-filed petition, and (2) grounds 1, 2, 3,
26 4, and 5 are unexhausted. (ECF No. 25.)

27 **A. Relation back of ground 4**

28 Respondents contend that only Keller’s original *pro se* federal petition and

1 counseled first-amended petition were timely, and ground 4 of his second-
2 amended petition does not relate back to either of those petitions because it
3 “differ[s] in both time and type.” (ECF No. 25 at 6–8.) Keller does not dispute that
4 his second-amended petition is untimely; rather, he contends that ground 4 of
5 his second-amended petition relates back to grounds 8 and 31 of his timely-filed
6 first-amended petition. (ECF No. 32 at 7.)

7 A new claim in an amended petition that is filed after the expiration of the
8 Antiterrorism and Effective Death Penalty Act (“AEDPA”) one-year limitation
9 period will be timely only if the new claim relates back to a claim in a timely-filed
10 pleading on the basis that the claim arises out of “the same conduct, transaction
11 or occurrence” as a claim in the timely pleading. *Mayle v. Felix*, 545 U.S. 644
12 (2005). In *Mayle*, the United States Supreme Court held that habeas claims in an
13 amended petition do not arise out of “the same conduct, transaction or
14 occurrence” as claims in the original petition merely because the claims all
15 challenge the same trial, conviction, or sentence. *Id.* at 655–64. Rather, habeas
16 claims asserted in an amended petition relate back “only when the claims added
17 by amendment arise from the same core facts as the timely filed claims, and not
18 when the new claims depend upon events separate in ‘both time and type’ from
19 the originally raised episodes.” *Id.* at 657. In this regard, the reviewing court looks
20 to “the existence of a common ‘core of operative facts’ uniting the original and
21 newly asserted claims.” *Id.* at 659. A claim that merely adds “a new legal theory
22 tied to the same operative facts as those initially alleged” will relate back and be
23 timely. *Id.* at 659 n.5; *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir.
24 2013).

25 In ground 8 of his first-amended petition, Keller argued that his “trial
26 counsel was ineffective for failing to argue that the state improperly destroyed
27 evidence or lost evidence stemming from Officer J. Henry’s body camera being
28 lost.” (ECF No. at 12 at 22.) And in ground 31 of his first-amended petition, Keller

1 argued that his “appellate counsel was ineffective for failing to argue that the
2 district court erred by failing to dismiss the case with prejudice due to the lost
3 body camera video from Officer Henry, which would have verified Keller’s version
4 of the stopping and searches of Keller, his vehicle, and his home.” (*Id.* at 68.)
5 Comparatively, in ground 4 of his second-amended petition, Keller argues that
6 his trial counsel ineffectively failed to request an adverse inference instruction
7 based on the destruction of the body camera footage in violation of his Sixth and
8 Fourteenth Amendment rights. (ECF No. 20 at 12.)

9 This Court finds that ground 4 of the second-amended petition relates back
10 to grounds 8 and 31 of the first-amended petition. Although ground 4 of the
11 second-amended petition involves the failure to request an adverse inference
12 instruction, it still arises from the same core facts as grounds 8 and 31 of the
13 first-amended petition: his trial counsel erred regarding the spoilation of Officer
14 Henry’s body camera footage. Indeed, the inclusion of the failure to request a jury
15 instruction regarding the spoilation—rather than just failing to argue about the
16 spoilation—merely adds a new legal theory to the same operative facts as those
17 initially alleged. Accordingly, ground 4 of the second-amended petition is timely.

18 **B. Exhaustion of grounds 1, 2, 3, 4, and 5**

19 A state prisoner first must exhaust state court remedies on a habeas claim
20 before presenting that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). This
21 exhaustion requirement ensures that the state courts, as a matter of comity, will
22 have the first opportunity to address and correct alleged violations of federal
23 constitutional guarantees. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991).
24 “A petitioner has exhausted his federal claims when he has fully and fairly
25 presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th
26 Cir. 2014) (citing *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999) (“Section
27 2254(c) requires only that state prisoners give state courts a fair opportunity to
28 act on their claims.”)).

1 A petitioner must present the substance of his claim to the state courts,
2 and the claim presented to the state courts must be the substantial equivalent of
3 the claim presented to the federal court. *Picard v. Connor*, 404 U.S. 270, 278
4 (1971). The state courts have been afforded a sufficient opportunity to hear an
5 issue when the petitioner has presented the state court with the issue’s factual
6 and legal basis. *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999); *see also*
7 *Scott v. Schriro*, 567 F.3d 573, 582–83 (9th Cir. 2009) (“Full and fair presentation
8 additionally requires a petitioner to present the substance of his claim to the state
9 courts, including a reference to a federal constitutional guarantee and a
10 statement of facts that entitle the petitioner to relief.”). A petitioner may
11 reformulate his claims so long as the substance of his argument remains the
12 same. *Picard*, 404 U.S. at 277–78.

13 **1. Ground 1**

14 In ground 1, Keller argues that the district court violated his right to
15 counsel of choice in violation of the Sixth and Fourteenth Amendments. (ECF No.
16 20 at 5.) Keller explains that he retained an attorney to replace his court-
17 appointed attorney, but the trial court would not allow the substitution because
18 doing so would have required a continuance. (*Id.*) Keller also included the
19 following five facts: (1) he had expressed dissatisfaction and lack of confidence in
20 his court-appointed attorney, (2) his court-appointed attorney had attempted to
21 withdraw as counsel, (3) his retained counsel had notified chambers of her
22 representation of Keller, (4) his court-appointed attorney explained to the court
23 that he lacked sufficient time to consult with Keller, and (5) the trial court erred
24 because Keller was facing a life sentence. (*Id.*)

25 Respondents contend that while ground 1 is based on similar facts as
26 claims presented during Keller’s direct appeal, it has been fundamentally altered
27 due to the addition of new legal allegations. (ECF No. 25 at 9.) Specifically,
28 Respondents contend that Keller’s five facts outlined above were not alleged

1 before the state courts. (*Id.*)

2 In his opening brief on direct appeal to the Nevada Supreme Court, Keller
3 argued that “the district court erred in not allowing a continuance and to allow
4 [Keller’s retained counsel] to substitute in as counsel.” (ECF No. 27-19.) Within
5 this ground for relief, Keller explained that he and his court-appointed counsel
6 “had a breakdown in communication” and he “even filed a bar complaint.” (*Id.*)
7 The Nevada Supreme Court then thoroughly addressed this argument in its order
8 of affirmance. (*See* ECF No. 27-30 at 2–5.)

9 This Court finds that the five above-mentioned facts did not fundamentally
10 alter the claim presented on direct appeal to the Nevada Supreme Court. These
11 facts simply added details to support ground 1 and did not fundamentally alter
12 the claim. The substance of the claim remained the same: the trial court violated
13 Keller’s right to choice of counsel by not allowing his retained counsel to
14 substitute in because doing so would have meant continuing the trial.

15 Ground 1 is exhausted.

16 **2. Ground 2**

17 In ground 2, Keller argues that he was denied his right to counsel when
18 the trial court did not appoint new counsel even though his trial counsel was
19 conflicted in violation of the Fifth, Sixth, and Fourteenth Amendment. (ECF No.
20 20 at 7.) In support of this claim, Keller gave the following facts: (1) he filed a *pro*
21 *se* motion asking the court to appoint different counsel, (2) two months later, his
22 court-appointed counsel filed a motion to withdraw as counsel, explaining he had
23 difficulty communicating with Keller and Keller refused to speak to him, and (3)
24 at a subsequent hearing, Keller’s court-appointed attorney explained that Keller
25 no longer wanted to see the investigator that had been hired. (*Id.*)

26 Respondents contend that while ground 2 is based on similar facts as
27 claims presented during Keller’s direct appeal, it has been fundamentally altered
28 due to the addition of new legal allegations. (ECF No. 25 at 10.) Specifically,

1 Respondents contend that Keller’s three facts outlined above were not alleged
2 before the state courts. (*Id.*) Respondents also argue that ground 2 may not have
3 been federalized. (*Id.*)

4 Regarding whether ground 2 has been federalized, the Nevada Supreme
5 Court cited federal law in deciding this claim during Keller’s direct appeal
6 proceedings. (See ECF No. 27-30 at 2–3 (citing *United States v. Moore*, 159 F.3d
7 1154, 1158–1159 (9th Cir. 1998) (discussing the factors to consider regarding a
8 claim that the petitioner was denied his Sixth Amendment right to counsel
9 because of an irreconcilable conflict between himself and his attorney)).) Because
10 the Nevada Supreme Court decided the federal claim during Keller’s direct appeal,
11 ground 2 is exhausted in that regard. See *Casey v. Moore*, 386 F.3d 896, 916
12 n.18 (9th Cir. 2004) (“[A] claim is exhausted if the State’s highest court expressly
13 addresses the claim, whether or not it was fairly presented.”).

14 Turning to Respondents’ former argument, in the affirmance of Keller’s
15 judgment of conviction, the Nevada Supreme Court held as follows:

16 While Keller previously moved to dismiss his appointed counsel over
17 eight months before trial and had filed a bar complaint against him,
18 Keller’s primary conflict with his appointed counsel at the time of
19 trial was counsel’s use of an investigator Keller disliked. Keller’s
20 objection to appointed counsel’s choice of investigator and a
21 newfound ability to afford private counsel shortly before trial do not
22 constitute an irreconcilable conflict. Compare *Brinkley v. State*, 101
23 Nev. 676, 678–79, 708 P.2d 1026, 1028 (1985) (characterizing
24 reasons for substituting counsel as “unnoteworthy” when due to
25 displeasure with a lack of communication and a newfound ability to
26 afford private counsel), and *Rimer v. State*, 131 Nev. 307, 327, 351
27 P.3d 697, 711–712 (2015) (denying motion to substitute counsel
28 where “private counsel had a different strategy and asked for a 90-
day continuance”), with *Young*, 120 Nev. at 969, 102 P.3d at 576–77
(holding that there was “strong evidence of an irreconcilable conflict”
where defendant complained about counsel five times to the court,
moved to substitute counsel twice, and counsel disobeyed a court
order to visit the defendant weekly).

(ECF No. 27-30 at 3.)

 Based on the Nevada Supreme Court’s holding, which discusses Keller’s
pro se motion and issues with his court-appointed counsel’s investigator, this

1 Court finds that two of the three above-mentioned facts were addressed by the
2 Nevada Supreme Court. This Court also finds that the remaining fact that Keller’s
3 court-appointed counsel filed a motion to withdraw did not fundamentally alter
4 the claim presented on direct appeal to the Nevada Supreme Court. This fact
5 merely added further support for ground 2 and did not fundamentally alter the
6 claim. The substance of the claim remained the same: Keller was denied his Sixth
7 Amendment right to counsel because of an irreconcilable conflict with his court-
8 appointed attorney.

9 Ground 2 is exhausted.

10 **3. Grounds 3 and 4**

11 In ground 3, Keller argues that his counsel was ineffective for failing to
12 include important facts and argue key legal issues in his motion to suppress the
13 evidence found in his car and apartment. (ECF No. 20 at 11.) And in ground 4,
14 as discussed previously, Keller argues that his trial counsel was ineffective for
15 failing to request an adverse inference instruction based on the destruction of the
16 body camera footage. (*Id.* at 12.) Keller argues that grounds 3 and 4 are
17 technically exhausted but procedurally defaulted and that he can overcome the
18 default under *Martinez v. Ryan*. (ECF No. 32 at 12.)

19 A claim may be considered procedurally defaulted if “it is clear that the
20 state court would hold the claim procedurally barred.” *Sandgathe v. Maass*, 314
21 F.3d 371, 376 (9th Cir. 2002). Keller would face several procedural bars if he were
22 to return to state court. *See, e.g.*, Nev. Rev. Stat. §§ 34.726 & 34.810. Nevada has
23 cause and prejudice and fundamental miscarriage of justice exceptions to its
24 procedural bars, which are substantially the same as the federal standards. If a
25 petitioner has a potentially viable cause-and-prejudice or actual-innocence
26 argument under the substantially similar federal and state standards, then
27 petitioner cannot establish that “it is clear that the state court would hold the
28 claim procedurally barred.” *Sandgathe*, 314 F.3d at 376. For that reason, the

1 courts in this district have generally declined to find a claim subject to
2 anticipatory procedural default unless the petitioner represents that he would be
3 unable to establish cause and prejudice in a return to state court. In such a case,
4 the claim would generally be subject to immediate dismissal as procedurally
5 defaulted, as the petitioner would have conceded that he has no grounds for
6 exception to the procedural default in federal court.

7 A different situation is presented, however, where the Nevada state courts
8 do not recognize a potential basis to overcome the procedural default arising from
9 the violation of a state procedural rule that is recognized under federal law. In
10 *Martinez v. Ryan*, the Supreme Court held that the absence or inadequate
11 assistance of counsel in an initial-review collateral proceeding may be relied upon
12 to establish cause excusing the procedural default of a claim of ineffective
13 assistance of trial counsel. 566 U.S. 1, 9 (2012). The Nevada Supreme Court does
14 not recognize *Martinez* as cause to overcome a state procedural bar under Nevada
15 state law. *Brown v. McDaniel*, 331 P.3d 867, 875 (Nev. 2014). Thus, a Nevada
16 habeas petitioner who relies upon *Martinez*—and only *Martinez*—as a basis for
17 overcoming a state procedural bar on an unexhausted claim can successfully
18 argue that the state courts would hold the claim procedurally barred but that he
19 nonetheless has a potentially viable cause-and-prejudice argument under federal
20 law that would not be recognized by the state courts when applying the state
21 procedural bars.

22 Here, Keller advances only *Martinez* as a basis for excusing the anticipatory
23 default of grounds 3 and 4. (See ECF No. 32 at 12–14.) Accordingly, the Court
24 considers grounds 3 and 4 to be technically exhausted and procedurally
25 defaulted. Keller demonstrates cause under *Martinez* because he had no counsel
26 during his initial-review collateral proceeding. Thus, this Court finds that Keller
27 has arguably met three of the elements under *Martinez*: (1) he had no counsel
28 during his initial-review collateral proceeding, (2) his state post-conviction

1 petition was the initial proceeding regarding claims of ineffective assistance of
2 trial counsel, and (3) Nevada law requires that a claim of ineffective of assistance
3 of trial counsel be raised in a post-conviction habeas corpus proceeding. However,
4 because the analysis of prejudice under *Martinez* to overcome the procedural
5 default of grounds 3 and 4 is necessarily intertwined with the merits of those
6 grounds, the Court defers a determination of the fourth element of *Martinez*:
7 whether the claims of ineffective assistance of trial counsel are substantial.

8 **4. Ground 5**

9 In ground 5, Keller argues that the cumulative effect of the errors at trial
10 violated his right to due process in violation of the Fifth, Sixth, and Fourteenth
11 Amendments. (ECF No. 20 at 14.) Keller raised a cumulative trial-court-error
12 claim on direct appeal. (See ECF No. 27-30 at 9-10.) And Keller raised a
13 cumulative counsel-error claim during his post-conviction appeal. (See ECF No.
14 28-40 at 19.) However, as Respondents correctly note, Keller has not presented
15 an all-encompassing cumulative error claim to the state courts.

16 Keller contends that this Court should conduct a cumulative error analysis
17 because “[t]he failure to undertake this analysis would contravene Supreme
18 Court and Ninth Circuit precedent.” (ECF No. 32 at 15.) However, cumulative
19 errors claims are not exempt from exhaustion requirements. *See Wooten v.*
20 *Kirkland*, 540 F.3d 1019, 1026 (9th Cir. 2008). As such, this Court finds that
21 ground 5 is unexhausted to the extent that it includes grounds 3 and 4, which
22 were not presented within Keller’s direct appeal cumulative error claim.

23 Accordingly, because Keller’s second-amended petition contains both
24 exhausted and unexhausted claims, Keller has three options for going forward:
25 (1) he may submit a sworn declaration voluntarily abandoning the unexhausted
26 portion of ground 5, (2) he may return to state court to exhaust the unexhausted
27 portion of ground 5, in which case his federal habeas petition will be denied
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1 without prejudice,² or (3) he may file a motion asking this court to stay his
2 exhausted federal habeas claims while he returns to state court to exhaust the
3 unexhausted portion of ground 5.³ See *Rose v. Lundy*, 455 U.S. 509, 510 (1982)
4 (holding that a federal court may not entertain a habeas petition unless the
5 petitioner has exhausted available and adequate state court remedies with
6 respect to all claims in the petition).

7 **III. CONCLUSION**

8 It is therefore ordered that Respondents' Motion (ECF No. 25) is denied as
9 follows: (1) ground 4 relates back and is timely, (2) grounds 1 and 2 are
10 exhausted, (3) grounds 3 and 4 are technically exhausted and procedurally
11 defaulted, and (4) ground 5 is unexhausted to the extent that it includes grounds
12 3 and 4. The court defers consideration of whether Keller can demonstrate
13 prejudice under *Martinez v. Ryan* to overcome the procedural default of grounds
14 3 and 4 until after the filing of an answer and reply in this action.

15 It is further ordered that Keller has 30 days from the date of this order to
16 inform the Court how he wishes to proceed on the unexhausted portion of ground
17 5 as outlined in this order. If Keller chooses to file a motion for a stay and
18 abeyance or seek other appropriate relief, Respondents may respond according
19 to Local Rule 7-2.

20 It is further ordered that if Keller elects to abandon the unexhausted
21 portion of ground 5, pursuant to this Court's scheduling order [ECF No. 11],
22 Respondents have 60 days from the date of abandonment in which to file an
23 answer to the second-amended petition. Keller will then have 30 days following
24 the filing of an answer to file a reply.

25 _____
26 ²This Court makes no assurances as to the timeliness of any future-filed petition.

27 ³If Keller wishes to ask for a stay, he must file a motion for stay and abeyance in
28 which he demonstrates good cause for his failure to exhaust his unexhausted
claim in state court and presents argument regarding the question of whether or
not his unexhausted claim is plainly meritless.

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It is further ordered that the Clerk substitute Nethanjah Breitenbach for Respondent Timothy Garrett.

DATED THIS 3rd day of January 2024.



ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE