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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KASHARD OMAR BROWN,

Petitioner,

v.

BRIAN E. WILLIAMS, et al.,

Respondents.

Case No. 2:11-cv-01058-JCM-CWH

ORDER

Before the court are the amended petition for a writ of habeas corpus (ECF No. 31), respondents' second motion to dismiss (ECF No. 79), petitioner's opposition (ECF No. 84), and respondents' reply (ECF No. 88). Ground 1(B) of the amended petition is procedurally defaulted, but the court defers ruling upon whether petitioner can excuse the procedural default until the parties fully brief the merits of the amended petition. The court rejects respondents' other arguments. For those reasons, the court denies the motion to dismiss.

After a jury trial in state district court, petitioner was convicted of one count of possession of a short-barreled shotgun and one count of murder with the use of a deadly weapon. R. Ex. 62 (ECF No. 44-16).¹ Petitioner appealed. At first, the Nevada Supreme Court affirmed on most grounds and reversed on the ground that the jury was not properly instructed on the prosecution's burden of disproving petitioner's defense that the killing was an accident. R. Ex. 86 (ECF No.

¹ Citations to "P. Ex." are to petitioner's exhibits. Citations to "R. Ex." are to respondents' exhibits.

1 45-10). After entertaining an untimely petition for rehearing, the Nevada Supreme Court vacated
2 its earlier order and affirmed on all grounds. R. Ex. 98 (ECF No. 45-22).

3 Petitioner, represented by retained counsel, filed a state habeas corpus petition and a
4 supplement. R. Ex. 107 (ECF No. 47-6), R. Ex. 108 (ECF No. 47-7). Petitioner, still represented
5 by counsel, then filed a proper-person motion for leave to amend his petition. R. Ex. 113 (ECF
6 No. 47-14). Along with that motion, he filed a proposed amended petition and a proposed
7 memorandum of points and authorities. R. Ex. 114 (ECF No. 47-15), 112 (ECF No. 47-11, 47-
8 12, and 47-13). Later, he filed a proper-person supplement. R. Ex. 115 (ECF No. 47-16). The
9 state district court held an evidentiary hearing on the claim that petitioner's trial counsel was
10 ineffective because counsel had not investigated or called as a witness Donna Lang. R. Ex. 136
11 (ECF No. 48-5). The state district court found that all of petitioner's claims lacked merit. R. Ex.
12 144 (ECF No. 48-13). Petitioner appealed, and new counsel was appointed.² R. Ex. 157 (ECF
13 No. 48-26). The Nevada Supreme Court affirmed. R. Ex. 214 (ECF No. 49-25).

14 Petitioner then commenced this action. The original petition was filed by the attorney
15 who represented petitioner in his state habeas corpus appeal. (ECF No. 1). The court then
16 appointed the Federal Public Defender, who filed an amended petition. (ECF No. 31).

17 Respondents then filed their first motion to dismiss. (ECF No. 42). The court found that
18 grounds 1(A) and 1(C) of the amended petition were timely because they did relate back to the
19 original petition. The court found that grounds 1(A) and 1(C) were exhausted because petitioner
20 had not fundamentally altered the claims from what he had presented in state court.³ The court
21 found that ground 2 was exhausted because the Nevada Supreme Court necessarily addressed
22 petitioner's claims, even if petitioner did not make those claims explicit on direct appeal. The
23 court found that ground 1(B) was unexhausted because petitioner had fundamentally altered the
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26 ² While that appeal was pending, petitioner filed a proper-person habeas corpus petition in this court, Brown
27 v. Neven, 2:08-cv-01609-RCJ-GWF. Counsel in the then-pending state post-conviction proceedings appeared in
28 Brown v. Neven and moved to dismiss that action because the state-court proceedings were not yet complete. The
court dismissed Brown v. Neven without prejudice.

³ The court found that ground 8, a claim of cumulative error that incorporated grounds 1(A) and 1(C), also
was timely and exhausted.

1 claim from what he had presented in state court. The court found that ground 6 was procedurally
2 defaulted, and the court dismissed that ground.

3 The court stayed the action to allow petitioner to exhaust ground 1(B). (ECF No. 68).
4 Petitioner filed a new post-conviction habeas corpus petition in the state district court. P. Ex. 160
5 (ECF No. 71-1). Petitioner raised all the claims that he raises in the amended petition. Id. The
6 state district court denied the petition because it was untimely under Nev. Rev. Stat. § 34.726(1),
7 successive under Nev. Rev. Stat. § 34.810(2), barred by laches under Nev. Rev. Stat. § 34.800,
8 and barred by the law of the case. P. Ex. 165 (ECF No. 71-6). Petitioner appealed, and the
9 Nevada Supreme Court affirmed. P. Ex. 175 (ECF No. 71-16).

10 The court then reopened the action. (ECF No. 72). Respondents' second motion to
11 dismiss followed. (ECF No. 79). The court will address the parties' arguments out of the order
12 presented.

13 Respondents argue that ground 1(B) is procedurally defaulted. Ground 1(B) is a claim
14 that trial counsel provided ineffective assistance because he did not tell the defense expert on
15 firearms that the shotgun used in the killing had a faulty stock. The court found that this ground
16 was unexhausted. Petitioner returned to state court. The state courts found that the ground was
17 procedurally barred as untimely under Nev. Rev. Stat. § 34.726(1) and as successive under Nev.
18 Rev. Stat. § 34.810(2).

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

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

25 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). The grounds for dismissal upon
26 which the Nevada Supreme Court relied in this case are adequate and independent state rules.
27 Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003) (Nev. Rev. Stat. § 34.810); Loveland v.
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1 Hatcher, 231 F.3d 640 (9th Cir. 2000) (Nev. Rev. Stat. § 34.726); Moran v. McDaniel, 80 F.3d
2 1261 (9th Cir. 1996) (same).

3 Petitioner argues that he has good cause to excuse the procedural default. Petitioner relies
4 upon Martinez v. Ryan, 566 U.S. 1 (2012), which held:

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

17 Id. at 14. Nevada generally requires a prisoner to raise a claim of ineffective assistance of
18 counsel in a post-conviction habeas corpus petition. Counsel did not represent petitioner in the
19 state district court during his first post-conviction habeas corpus proceedings.

20 The court prefers to address the matter in the same manner that it often does when a claim
21 of cause and prejudice is based upon an independent claim of constitutionally ineffective
22 assistance of either trial or appellate counsel. In such circumstances, the court often defers a
23 resolution of the cause-and-prejudice analysis until after the filing of an answer and reply
24 contingently addressing the claims also on the merits, so that the court may have the benefit of a
25 full factual and legal presentation as to all relevant claims. That is the procedure that the court
26 will follow herein.

27 Respondents argue that ground 2 is procedurally defaulted to the extent that it presents
28 legal theories not presented to the state courts before the second state post-conviction habeas
corpus petition. Before petitioner returned to state court, this court already had determined that
ground 2 was completely exhausted. (ECF No. 59, at 6-7). The court agrees with petitioner that
a successive rejection of a federal claim does not bar federal habeas corpus review of a claim that
the state court originally decided on the merits. Cone v. Bell, 556 U.S. 449, 466-67 & n.12
(2009). Ground 2 is not procedurally defaulted.

1 Respondents renew their argument from their first motion to dismiss that grounds 1(A)
2 and 1(C) are untimely. The court disagrees. The court explained in its earlier order that the
3 additional facts alleged in the amended petition still share a common core of operative fact with
4 the original petition. (ECF No. 59, at 3-4). Nothing has changed.

5 Respondents argue that grounds 1(A) and 1(C) are procedurally defaulted. This argument
6 follows from respondents' argument in their first motion to dismiss that grounds 1(A) and 1(C)
7 were unexhausted. The court rejected that argument. (ECF No. 59, at 4-5). However, the court
8 stayed the action while petitioner properly exhausted ground 1(B) in the state courts. (ECF No.
9 68). Back in state court, petitioner filed a post-conviction habeas corpus petition that raised all
10 his grounds for relief, including grounds 1(A) and 1(C). P. Ex. 160, at 14-17, 21-22 (ECF No.
11 71-1, at 15-18, 22-23). The state district court denied the petition for four reasons. First, the
12 second state petition was barred by laches under Nev. Rev. Stat. § 34.800. P. Ex. 165, at 3-4
13 (ECF No. 71-6, at 5-6). Second, the second state petition was untimely under Nev. Rev. Stat.
14 § 34.726(1). Id. at 4 (ECF No. 71-6, at 6). Third, petitioner conceded that all the grounds in the
15 second state petition were raised in previous state-court proceedings, thus barring the second state
16 petition under Nev. Rev. Stat. § 34.810(2). Id. at 4 (ECF No. 71-6, at 6). Fourth, the law of the
17 case barred consideration of ground 1(B) in the second state petition. Id. at 4-5 (ECF No. 71-6, at
18 6-7). Petitioner appealed, and the Nevada Supreme Court affirmed. P. Ex. 175 (ECF No. 71-16).
19 Respondents argue that because grounds 1(A) and 1(C) were unexhausted before petitioner's
20 return to state court, those grounds now should be procedurally defaulted because the state courts
21 applied state-law procedural bars.

22 Petitioner repudiates his arguments in his opposition to the first motion to dismiss that
23 grounds 1(A) and 1(C) were exhausted. Petitioner now concedes that grounds 1(A) and 1(C)
24 were unexhausted then, are procedurally defaulted now, and that he can overcome that procedural
25 default because of the ineffective assistance of initial state post-conviction counsel under
26 Martinez v. Ryan. ECF No. 84, at 17-24. Petitioner argues that the decision of the Ninth Circuit
27 in Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) (en banc), issued after this court's ruling on
28 the first motion to dismiss, means that grounds 1(A) and 1(C) must be considered new claims.

1 (ECF No. 84, at 17-18). Dickens stated, “A claim has not been fairly presented in state court if
2 new factual allegations either ‘fundamentally alter the legal claim already considered by the state
3 courts,’ Vasquez [v. Hillery], 474 U.S. 254, 260]; Beaty [v. Stewart], 303 F.3d 975, 989-90 (9th
4 Cir. 2002)], or ‘place the case in a significantly different and stronger evidentiary posture than it
5 was when the state courts considered it.’ Aiken [v. Spalding], 841 F.2d 881, 883 (9th Cir. 1988)];
6 accord Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir.1988).” Dickens is nothing new. It simply
7 restates the rule that the court applied, at petitioner’s urging, that new facts that do not
8 fundamentally alter the claim do not make a ground unexhausted. The court has reviewed again
9 grounds 1(A) and 1(C) with their equivalents in the opening brief on appeal from the denial of the
10 first state habeas corpus petition, R. Ex. 181, at 22, 26-27 (ECF No. 50-20, at 33, 37-38).
11 Nothing causes the court to depart from its earlier ruling that grounds 1(A) and 1(C) are
12 exhausted.⁴

13 Respondents also apply their arguments above to ground 8, a claim of cumulative error, to
14 the extent that ground 8 incorporates the claims in grounds 1(A) and 1(C). Because the court has
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17 ⁴ Respondents make an interesting argument that procedural default, lack of exhaustion, and untimeliness of
18 grounds 1(A) and 1(C) are intertwined based upon the peculiarities of this case. Lisa Rasmussen represented
19 petitioner in his appeal from the denial of the first state post-conviction habeas corpus petition. She also initially
20 represented petitioner in this action and filed the original petition (ECF No. 1). The equivalents to the amended
21 petition’s grounds 1(A) and 1(C) are parts V(A)(2) and V(A)(3) of the opening brief on appeal, ECF No. 50-20, at
22 22-26, 26-27, and grounds 1(B) and 1(D) in the original petition, ECF No. 1, at 41-46, 52-53. Unsurprisingly, the
23 facts alleged in the state appellate brief and in the original federal petition are identical. Respondents argue that if the
24 facts alleged in current grounds 1(A) and 1(C) fundamentally alter the claims from what petitioner alleged in his
25 appellate brief to the Nevada Supreme Court, then those facts necessarily do not relate back to what petitioner alleged
26 in his original petition in this court.

27 Petitioner has no real answer to this argument. He states, “Respondents do not provide any new law,
28 arguments, or facts in support of this ground for dismissal. As a result, it is barred by the law of the case.” ECF No.
84, at 25). However, petitioner himself provided the new arguments with his repudiation of his own argument that
grounds 1(A) and 1(C) are exhausted. In his opposition to the first motion to dismiss, his argument that those
grounds are exhausted and his argument that those grounds relate back are the same. ECF No. 55, at 3-8, 10-11. By
repudiating his argument for exhaustion, petitioner necessarily undercuts his argument that grounds 1(A) and 1(C)
relate back to the timely filed original petition.

Respondents argue that petitioner’s oppose-then, concede-now strategy is an attempt to use Martinez v.
Ryan to circumvent the requirements of 28 U.S.C. § 2254(d), as interpreted in Cullen v. Pinholster, 563 U.S 170
(2011). ECF No. 88, at 10 n.4. If so, then petitioner would be hoisted on his own petard if the court used his
concession on exhaustion to dismiss grounds 1(A) and 1(C) as untimely instead of reviewing the grounds on their
merits. Such are the incentives that Martinez creates. Nonetheless, the court has determined that grounds 1(A) and
1(C) are exhausted, and it will not change that determination now. As the court stated earlier, whether it can consider
the new factual allegations in its review of grounds 1(A) and 1(C) on their merits is a question that the court will
answer when it turns to those grounds’ merits. ECF No. 59, at 5 n.4.

1 rejected those arguments, the court necessarily finds that ground 8 is timely and not procedurally
2 defaulted.

3 Respondents have filed a motion for enlargement of time (second request) (ECF No. 87),
4 which the court grants.

5 IT THEREFORE IS ORDERED that respondents' motion for enlargement of time
6 (second request) (ECF No. 87) is **GRANTED**.


7 IT FURTHER IS ORDERED that respondents' motion to dismiss (ECF No. 79) is
8 **DENIED**.

9 IT FURTHER IS ORDERED that the court defers consideration of whether petitioner can
10 demonstrate cause and prejudice under Martinez v. Ryan, 566 U.S. 1 (2012), to overcome the
11 procedural default of Ground 1(B) until after the filing of an answer and reply in this action.

12 IT FURTHER IS ORDERED that that, within forty-five (45) days of entry of this order,
13 respondents must file an answer addressing all claims in the amended petition on the merits,
14 under a de novo standard of review as to ground 1(B), and addressing whether ground 1(B) is
15 barred by procedural default under federal law.

16 IT FURTHER IS ORDERED that petitioner will have forty-five (45) days from service of
17 the answer within which to file a reply.

18 DATED March 13, 2019.

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20 JAMES C. MAHAN
21 United States District Judge
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