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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ALLEN S. HEUSNER,

Case No. 2:14-cv-01119-RFB-GWF

Petitioner,

ORDER

v.

WILLIAM HUTCHINGS,¹ et. al,

Respondents.

This is a habeas corpus proceeding under 28 U.S.C. § 2254. Respondents have filed a motion to dismiss in response to Petitioner Heusner’s second amended petition for a writ of habeas corpus (ECF No. 44). ECF No. 69. Respondents argue that the petition is untimely, that Ground 6 of the petition is procedurally defaulted, and that Ground 7 is unexhausted, in part.

For reasons that follow, the motion is granted in part and denied in part.

I. PROCEDURAL BACKGROUND²

After a trial in the Eighth Judicial District Court for Nevada, a jury found Heusner guilty of burglary while in possession of a deadly weapon, invasion of the home while in possession of a deadly weapon, first degree murder with use of a deadly weapon, and first-degree arson. The

¹ Because the Petitioner is currently incarcerated at the Southern Desert Correctional Center, William Hutchings, the warden of that facility, is substituted for Dwight Neven as the primary respondent in this case.

² The information in this section is drawn from the state court record filed at ECF No. 26 and this Court’s own docket.

1 court sentenced Heusner to consecutive terms of twenty years to life on the murder count, and
2 various terms of years on the remaining counts. A judgment of conviction was entered on June 18,
3 2008. Heusner appealed.

4 On May 3, 2010, the Nevada Supreme Court entered an order affirming Heusner's
5 judgment of conviction. On June 2, 2011, Heusner filed, pro se, a habeas corpus petition in the
6 state district court. He subsequently filed a supplement to the petition with the assistance of
7 appointed counsel. After an evidentiary hearing and additional briefing, the court entered a
8 decision denying relief. Heusner appealed. The Nevada Supreme Court affirmed the lower court's
9 decision and issued a remittitur on December 12, 2013.

10 On February 19, 2014, Heusner filed another state habeas petition in the state district court
11 that was denied because his allegations involved the conditions of his confinement and not the
12 validity of his confinement. The Nevada Supreme Court denied Heusner's appeal because his
13 claims were not cognizable in a petition for writ of habeas corpus.

14 Heusner initiated this federal proceeding on July 1, 2014. After resolving payment of the
15 filing fee, this Court directed Heusner to show cause why his petition should not be dismissed as
16 untimely. While awaiting this Court's decision on his response, Heusner filed his third state habeas
17 petition in the state district court on December 3, 2015. The state district court dismissed the
18 petition as procedurally-barred, and the Nevada Court of Appeals affirmed.

19 In June 2017, this Court determined that Heusner was entitled to equitable tolling with
20 respect to his federal petition and issued a scheduling order. When Heusner filed a statement of
21 additional claims, the Court directed him to file an amended petition, which he did on August 22,
22 2017. After screening the petition, the Court dismissed three grounds and ordered Respondents to
23 respond to Heusner's remaining claims. Respondents filed a motion to dismiss raising timeliness
24 and lack of exhaustion defenses. The Court rejected the former, but agreed that Heusner's petition
25 contained several unexhausted claims.

1 Prior to this Court’s ruling on the motion to dismiss, Heusner had filed, pro se, a petition
2 for writ of mandamus in the state district court, which the court denied as untimely, successive,
3 and without merit. The Nevada Court of Appeals subsequently affirmed the lower court’s decision.

4 On April 5, 2018, Heusner filed his fifth state habeas petition in the state district court.
5 Once again, the state district court dismissed the petition as procedurally-barred, and the Nevada
6 Court of Appeals affirmed.

7 On May 8, 2019, Heusner filed, with the assistance of appointed counsel, a second
8 amended federal petition containing seven grounds for relief. He also filed a motion for stay and
9 abeyance so he could present a claim based on McCoy v. Louisiana, 138 S.Ct. 1500 (2018), to the
10 state courts. This Court granted the motion. Proceedings on Heusner’s state petition concluded
11 with the Nevada Supreme Court deciding that McCoy is distinguishable from Heusner’s case and
12 declining to resolve Heusner’s argument that McCoy applies retroactively.

13 The Nevada Supreme Court’s remittitur issued on April 5, 2021.

14 In July 2021, this Court granted Heusner’s motion to reopen federal proceedings. On
15 January 24, 2022, Respondents filed the motion to dismiss now before the Court for decision.

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17 **II. DISCUSSION**

18 **A. Timeliness**

19 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year
20 filing period for § 2254 habeas petitions in federal court. 28 U.S.C. § 2244(d)(1). The one-year
21 period begins to run from the latest of four possible triggering dates, with the most common being
22 the date on which the petitioner's state court conviction became final (by either the conclusion of
23 direct appellate review or the expiration of time for seeking such review). *Id.* Statutory tolling of
24 the one-year time limitation occurs while a “properly filed” state post-conviction proceeding or
25 other collateral review is pending. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when
26 the post-conviction judgment becomes final upon issuance of the remittitur. Jefferson v. Budge,
27 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). However, an untimely state post-conviction petition is
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1 not “properly filed” and does not toll the period of limitation. Pace v. DiGuglielmo, 544 U.S. 408,
2 417 (2005).

3 Respondents argue that Heusner’s second amended petition was filed beyond the statutory
4 time period for filing a federal habeas petition under 28 U.S.C. § 2254. Accordingly, they argue
5 the claims in the petition must be dismissed as untimely unless Heusner can establish that they are
6 timely filed based on another provision of the statute of limitations or that their untimeliness should
7 be excused due to actual innocence, equitable tolling, or relation back to a prior timely-filed
8 pleading. In response, Heusner does not dispute that his second amended petition was filed well
9 beyond the statutory period, but he argues that Grounds 1 through 5 relate back to his initial pro
10 se petition. He further argues that Ground 6 is timely because it was filed within one year of the
11 Supreme Court's decision in McCoy and that Ground 7, a cumulative error claim, is timely because
12 all his other claims are timely for the reasons stated.

13 For amended federal petitions filed beyond the statutory period, the Supreme Court's
14 decision in Mayle v. Felix, 545 U.S. 644 (2005), limits a habeas petitioner's ability to have newly-
15 added claims “relate back” to the filing of an earlier petition and, therefore, be considered timely
16 under 28 U.S.C. § 2244(d). The Court held that an amended claim in a habeas petition relates back
17 for statute of limitations purposes only if it shares a “common core of operative facts” with claims
18 contained in the original petition. Mayle, 545 U.S. at 663-64. The common core of operative facts
19 must not be viewed at too high a level of generality, and an “occurrence,” for the purposes of Fed.
20 R. Civ. P. 15(c), will consist of each separate set of facts that supports a ground for relief. Id. at
21 661. The scope of Rule 15(c) must be read in light of Habeas Rule 2(c), which “instructs petitioners
22 to ‘specify all [available] grounds for relief’ and to ‘state the facts supporting each ground.’” Id.
23 (alteration in original).

24 **1. Ground 1**

25 In Ground 1, Heusner alleges a violation of his constitutional rights to due process and a
26 fair trial due to prosecutorial misconduct. Specifically, he contends the State improperly
27 disparaged Heusner during cross-examination and during its closing argument. ECF No. 44 at 10-
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1 12. He also claims the prosecutor, in her closing argument, improperly injected her personal
2 opinion about of Heusner’s claim that he attempted suicide. Id. at 12-13.

3 Ground 1 relates back to Claim 1 in Heusner’s initial pro se petition which shares a
4 common core of operative facts. ECF No. 14 at 3-4. Thus, Ground 1 is not time-barred.

5 **2. Ground 2**

6 In Ground 2, Heusner alleges a violation of his constitutional rights due to the admission
7 of testimony regarding his invocation of his right to remain silent after his arrest. Specifically, the
8 State elicited this testimony during its direct examination of Officer Farage and
9 Officer Lloyd. ECF No. 44 at 13-15. The State also informed jurors during voir dire that Heusner
10 “had refused to talk to officers, had not asked about the victim’s condition, had not exhibited any
11 remorse, ha[d] not told anyone about his suicide attempt, and that he did not want to deal with the
12 police after the killing.” Id. at 15.

13 Ground 2 relates back to Claim 2 in Heusner’s initial pro se petition which shares a
14 common core of operative facts. ECF No. 14 at 7. Thus, Ground 2 is not time-barred.

15 **3. Ground 3**

16 In Ground 3, Heusner alleges a violation of his constitutional right to effective assistance
17 of counsel because his counsel pursued a “heat a passion” defense despite overwhelming evidence,
18 including Heusner’s own testimony, that Heusner engaged in numerous calculated and deliberate
19 actions between the initial provocation and the killing. ECF No. 44 at 16-18. Heusner concedes
20 that he did not make these allegations in the body of his of his initial pro se federal petition, but
21 argues that the claim relates back under Ross v. Williams, 950 F.3d 1160, 1170 (9th Cir. 2020),
22 because state court decisions attached to his petition demonstrate that he attempted to advance the
23 operative facts of the claim.

24 Heusner is correct that attachments to a timely petition can provide the necessary facts to
25 support relation back, but the petition itself must at least identify specific grounds for relief to
26 which the facts relate. Ross, 950 F.3d at 1167. (“If a petitioner attempts to set out habeas claims
27 by identifying specific grounds for relief in an original petition and attaching a court decision that
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1 provides greater detail about the facts supporting those claims, that petition can support an
2 amended petition's relation back.”). Even under Ross, facts contained in attachments to the initial
3 petition cannot provide the basis for relation back if they are not related to grounds for relief
4 asserted within the timely petition. Id. at 1168 (“If an exhibit to the original petition includes facts
5 unrelated to the grounds for relief asserted in that petition, those facts were not ‘attempted to be
6 set out’ in that petition and cannot form a basis for relation back.”).

7 That is the case here, as the relevant facts in the state court decisions do not relate to a
8 ground for relief within Heusner’s initial petition.³ Consequently, Ground 3 does not relate back
9 and is, therefore, time-barred.

10 **4. Ground 4**

11 In Ground 4, Heusner alleges a violation of his constitutional right to effective assistance
12 of counsel because counsel conceded that Heusner was guilty of voluntary manslaughter without
13 his consent. ECF No. 44 at 19-21. Heusner raises the same relation back argument for this claim
14 that he does for Ground 3. So, Ground 4 is also time-barred for the same reasons Ground 3 is time-
15 barred.

16 **5. Ground 5**

17 In Ground 5, Heusner alleges a violation of his constitutional right to effective assistance
18 of counsel because counsel allowed crime scene investigator Marion Brady, a lay witness, to testify
19 as a “blood spatter” expert without objection. ECF No. 44 at 21-27. Here again, Heusner raises the
20 same relation back argument for this claim that he does for Grounds 3 and 4. So, Ground 5 is also
21 time-barred for the same reasons Grounds 3 and 4 are time-barred.

22 **6. Ground 6**

23 In Ground 6, Heusner alleges that his constitutional right to secured autonomy was violated
24 when his counsel contradicted Heusner’s chosen defense and effectively conceded Heusner’s guilt

25 ³ The Court’s noncapital Section 2254 habeas petition form and the instructions direct the petitioner to
26 attach to his petition a copy of all state court written decisions regarding his conviction.
27 [https://www.nvd.uscourts.gov/wp-content/uploads/2017/08/2254-Habeas-Petition-NOT-Sentenced-to-
28 Death-Packet.pdf](https://www.nvd.uscourts.gov/wp-content/uploads/2017/08/2254-Habeas-Petition-NOT-Sentenced-to-Death-Packet.pdf).

1 in opening and closing argument. ECF No. 44 at 27-29. As mentioned above, Heusner argues
2 Ground 6 is timely because he filed his second amended petition within one year of the date of the
3 decision in McCoy, which the Supreme Court issued on May 14, 2018.

4 Under 28 U.S.C. § 2244(d)(1)(C), a claim based on a newly recognized constitutional right
5 is timely if it is filed within one year of the date the right is first recognized by the United States
6 Supreme Court and made retroactive to cases on collateral review. While the date the Supreme
7 Court announces the new rule is the operative date, a petitioner may take advantage of §
8 2244(d)(1)(C) only if the rule is made retroactive to cases on collateral review by the Supreme
9 Court. Dodd v. United States, 545 U.S. 353, 359-60 (2005). This Court is unaware of any United
10 States Supreme Court case making McCoy retroactive to cases on collateral review, and Heusner
11 has not pointed to any such authority. Accordingly, Heusner is not entitled to the later start date of
12 the statute of limitations provided by § 2244(d)(1)(C). Ground 6 is dismissed as time-barred.

13 7. Ground 7

14 In Ground 7, Heusner alleges that the cumulative effect of the errors raised in his petition
15 entitles him to habeas relief. ECF No. 44 at 29-30. Respondents argue that this claim is time-barred
16 to the extent it incorporates claims that were not timely-filed. The Court agrees and will consider
17 only timely claims in assessing the cumulative impact of any constitutional errors.

18 B. Procedural Default

19 A federal court will not review a claim for habeas corpus relief if the state court's dismissal
20 of the claim rested on a state law ground that is independent of the federal question and adequate
21 to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

22 The Coleman Court stated the effect of a procedural default as follows:

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

1 Coleman, 501 U.S. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). Before a federal
2 court finds procedural default, it must determine that the state court explicitly invoked a state
3 procedural bar as a separate basis for its decision. Id. at 729–30; McKenna v. McDaniel, 65 F.3d
4 1483, 1488 (9th Cir.1995), cert. denied, 517 U.S. 1150 (1996). The state rule cited must be “clear,
5 consistently applied, and well-established at the time of the petitioner's purported default.”
6 Calderon v. United States Dist. Court for the E. Dist. of Cal., 96 F.3d 1126, 1129 (9th Cir.1996).

7 Respondents argue that Ground 6 is barred by the procedural default doctrine because the
8 Nevada Supreme Court determined that the claim was barred as untimely under Nev. Rev. Stat.
9 § 34.726 and successive under Nev. Rev. Stat. § 34.810. Heusner does not dispute that the Nevada
10 Supreme Court dismissed the ground pursuant to an independent and adequate state procedural
11 rule. He contends, however, that he can demonstrate cause and prejudice to overcome his default.

12 As for cause, Heusner again relies on the fact the McCoy was not issued until May 2018.
13 So, according to Heusner, the claim alleged in Ground 6 was not available to him prior to that date.
14 Assuming that is the case, however, Heusner cannot meet the prejudice requirement.

15 Heusner argues he can meet the requirement because “Ground 6 is substantial enough to
16 satisfy the low threshold of prejudice under Martinez,” referring to the Supreme Court’s decision
17 in Martinez v. Ryan, 566 U.S. 1 (2012). ECF No. 74 at 14. Martinez applies when a petitioner is
18 claiming ineffective assistance of post-conviction counsel in his or her initial-review collateral
19 proceeding as the cause for a default. 566 U.S. at 14. That is not, however, what Heusner is
20 advancing as cause in this case. Indeed, Heusner could hardly argue that post-conviction counsel
21 was ineffective for not raising a claim that, according to Heusner, was not yet available.

22 Instead, Heusner must demonstrate actual prejudice to avoid the enforcement of the
23 procedural default. See Coleman, 501 U.S. at 750. That is, he “must show not merely that the
24 errors ... created a *possibility* of prejudice, but that they worked to his actual and substantial
25 disadvantage, infecting his entire trial with error of constitutional dimensions.” Murray v. Carrier,
26 477 U.S. 478, 494 (1986) (emphasis in original) (internal quotations omitted). This he cannot do.

1 The Court in McCoy held that it is a violation of a defendant's rights under the Sixth
2 Amendment when his attorney overrides his autonomy to decide the objective of the defense.
3 McCoy, 138 S. Ct. at 1508. The Court took care to distinguish, however, between cases in which
4 the defendant asserts a desired defense objective and those in which a client declines to participate
5 in his defense. Id. at 1509. In the latter circumstances, "an attorney may permissibly guide the
6 defense pursuant to the strategy she believes to be in the defendant's best interests." Id.

7 Based on Heusner's own testimony in his first state post-conviction proceeding, that is what
8 occurred in this case.⁴ In the absence of evidence that Heusner's attorneys defied his expressed
9 defense objectives, he cannot show actual prejudice resulting from his default of Ground 6.

10 Thus, in addition to being time-barred, Ground 6 is also barred by the doctrine of
11 procedural default.

12 C. Exhaustion

13 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner
14 has exhausted his available state remedies for all claims raised. Rose v. Lundy, 455 U.S. 509
15 (1982); 28 U.S.C. § 2254(b). Respondents argue that Heusner's cumulative error claim (Ground
16 7) is unexhausted to the extent it incorporates Ground 6 because Ground 6 was not included in the
17 cumulative error arguments he made in state court. Because Ground 6 is both untimely and
18 procedurally defaulted, it is excluded from any cumulative error analysis this Court might conduct.

19 III. CONCLUSION

20 **IT IS THEREFORE ORDERED** that Respondents' motion to dismiss (ECF No. 69) is
21 GRANTED in part and DENIED in part. Grounds 3, 4, 5, and 6 of Petitioner's second amended
22 habeas petition (ECF No. 44) are dismissed. Ground 7 is limited to the Court's consideration of
23 Grounds 1 and 2.
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26 ⁴ For example, the judge asked Heusner if he remembered telling his lawyers that he wanted to assert self-
27 defense as his defense. ECF No. 26-74 at 49-50. He responded in the negative and said that he trusted that
28 his attorneys were giving him the best advice and that, even after he testified at trial, he does not remember
asking them to change course. Id.

1 **IT IS FURTHER ORDERED** that Respondents have 60 days from the date of entry of
2 this order to file an answer to the remaining grounds for relief in the petition. Petitioner shall have
3 60 days from the date on which the answer is served on him to file and serve a reply.

4 Dated: January 23, 2023.

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8 RICHARD F. BOULWARE, II
9 UNITED STATES DISTRICT JUDGE
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