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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

THOMAS HARSH,

Case No. 2:17-cv-02069-MMD-NJK

Petitioner,

ORDER

v.

JO GENTRY, *et al.*,

Respondents.

I. SUMMARY

This counseled habeas petition comes before the Court on Respondents' motion to dismiss ("Motion") (ECF No. 31). Petitioner Thomas Harsh ("Petitioner" or "Harsh") has opposed (ECF Nos. 35, 36), and Respondents have replied (ECF No. 43). For the reasons stated below, the Court will grant the Motion in part and deny it in part.

II. BACKGROUND

A. Procedural History

Petitioner challenges his 2011 state court conviction, pursuant to a jury trial, of possession of a stolen vehicle and possession of burglary tools. (ECF No. 22 at 1; ECF No. 11-7.) Petitioner was adjudicated a habitual offender and sentenced on the stolen vehicle charge to life in prison with the possibility of parole after ten years. (ECF No. 11-7.) On direct appeal (ECF No. 11-9), the Nevada Supreme Court affirmed (ECF No. 11-15).

Petitioner thereafter filed a motion for new trial, which the trial court denied. (ECF Nos. 11-18, 12-5.) Petitioner appealed (ECF No. 12-8), and the Nevada Supreme Court affirmed. (ECF No. 12-11.)

Petitioner also filed a state court petition for habeas corpus relief, which was supplemented by appointed counsel. (ECF Nos. 12-4 & 12-13, 13-1). The trial court denied

1 relief. (ECF No. 13-2.) Petitioner appealed (ECF No. 13-3), and the Nevada Supreme
2 Court affirmed (ECF No. 13-8).

3 Petitioner thereafter filed the instant federal habeas petition. Respondents move to
4 dismiss the petition as partially unexhausted and/or procedurally defaulted.

5 **B. Factual Background**

6 In July 2010, Petitioner was pulled over driving a vehicle that had been reported
7 stolen. (ECF No. 23-3 (Ex. 44 (Tr. 5-9)).) When Petitioner was questioned about why he
8 was driving a stolen car, he told the officer that a “guy” let him borrow it, although he was
9 unable to identify the “guy” by name. (*Id.* at 11.) When police inventoried the vehicle, they
10 found a screwdriver, several shaved keys of different vehicle makes, and a leatherman
11 tool. (*Id.* at 11–18.)

12 Marissa Sobrejuanite testified at trial that the stolen vehicle belonged to her, having
13 been given to her by her ex-boyfriend, Pedro Co, several months prior. Despite owning
14 the vehicle, Sobrejuanite had not, at the time of the theft, titled or registered the car in her
15 name, and it was not until October 2010 that she did so. When asked why she waited to
16 title the car in her name, Marissa stated: “Because I have a file a bankruptcy and my
17 attorney said I cannot put it in my name yet until the bankruptcy is done.” (ECF No. 11-2
18 (Ex. 2 (Tr. 202-04)).)

19 **III. LEGAL STANDARD**

20 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court
21 remedies on a claim before presenting that claim to the federal courts. To satisfy this
22 exhaustion requirement, the claim must have been fairly presented to the state courts
23 completely through to the highest state court level of review available. *E.g.*, *Peterson v.*
24 *Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Vang v. Nevada*, 329 F.3d 1069,
25 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal
26 constitutional guarantee and must also state the facts that entitle the petitioner to relief on
27 the federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
28 2000). That is, fair presentation requires that the petitioner present the state courts with

1 both the operative facts and the federal legal theory upon which the claim is based. *E.g.*,
2 *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement
3 insures that the state courts, as a matter of federal state comity, will have the first
4 opportunity to pass upon and correct alleged violations of federal constitutional
5 guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

6 **IV. DISCUSSION**

7 Respondents argue that the following grounds have not been exhausted: (1)
8 Ground 2; (2) Ground 4; (3) Ground 5; (4) Ground 6-2; (5) Ground 6-3; and (6) Grounds
9 6-8 through 6-13. The Court will discuss each in turn.

10 **A. Ground 2**

11 In Ground 2, Petitioner asserts that he was denied his Fourteenth Amendment right
12 to due process when he was adjudicated a habitual criminal. Specifically, Petitioner
13 asserts that NRS § 207.010 creates a liberty interest in the sentencing procedures
14 contained therein and that by considering and relying on an unproven allegation in the
15 PSI—that a credit card scanner was found in the vehicle when Petitioner was arrested—
16 the district court violated the required procedures under § 207.010 and thus deprived
17 Petitioner of his due process rights. (ECF No. 22 at 15-17.)

18 On direct appeal, Petitioner presented two claims attacking the habitual criminal
19 adjudication: (1) he argued that it was cruel and unusual punishment in violation of the
20 Eighth Amendment (ECF No. 11-9 at 5-9), and (2) he argued that the district court abused
21 its discretion in sentencing him as a habitual criminal (*id.* at 9-11).¹ Although the first of
22 these was a federal claim, the substance of that claim was far different from the substance
23 of Ground 2. Thus, the Eighth Amendment claim in state court did not exhaust Ground 2.
24 While Petitioner did complain in state court, as he does here, that the trial court improperly
25 relied on the unproven assertion regarding the credit card scanner, that claim was raised
26 as an abuse of discretion claim, and Petitioner never asserted that § 207.010 created a
27

28 ¹Citations are to original page of document.

1 liberty interest the deprivation of which violated his federal due process rights. Nor did he
2 cite any cases, state or federal, suggesting any such claim. Thus the “abuse of discretion”
3 claim similarly failed to exhaust Ground 2.

4 Despite this, Petitioner argues that a claim can be exhausted if the substance of
5 the claim was presented to the state courts under a different legal theory. He also argues
6 that a federal claim can be exhausted by a state claim if the state claim is resolved by
7 applying a standard virtually identical to the standard for evaluating the federal claim.
8 Petitioner argues that the substance of Ground 2 was presented to the state courts through
9 the abuse of discretion claim, that raising it now as a due process claim is nothing more
10 than a label change, and that Nevada’s “abuse of discretion” standard is virtually identical
11 to the federal due process standard. Petitioner relies on several cases in support of his
12 argument, only one of which is controlling: *Sanders v. Ryder*, 342 F.3d 991 (9th Cir.
13 2003).²

14 In *Sanders*, the Ninth Circuit held that a *pro se* petitioner had exhausted a federal
15 ineffective assistance of counsel claim even though, in his brief to the state supreme court,
16 he referred only to “ineffective assistance of counsel” without specifying that he was
17 invoking the federal constitutional right. The Ninth Circuit noted that the petitioner in state
18 court was proceeding in *pro se*, which meant his pleadings were entitled to more leniency.
19 It then pointed out that, although the federal constitution was not invoked in the petitioner’s
20 initial filing with the state supreme court, it was raised in his reply and in his filings with the
21 lower appellate court. Further, the claim at issue was ineffective assistance of counsel,
22 the state courts applied the federal *Strickland* standard to their state law ineffective
23 assistance of counsel claims, and the state courts frequently discussed and resolved
24 ineffective assistance of counsel claims without specifying whether they were addressing
25 the state or federal claim. *Id.* at 999–1001.

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27 _____
28 ²The Court is not persuaded by the out-of-circuit authorities Petitioner cites, as
applied in this case.

1 *Sanders* is distinguishable in several material respects from this case, the first and
2 foremost of which is the fact that Petitioner here was represented by counsel in his state
3 proceedings. Second, the petitioner in *Sanders* had given indication in some of his papers
4 that he was raising a federal claim, while there is no indication here that Petitioner did the
5 same. Finally, the Ninth Circuit noted that the Supreme Court has not decided whether “a
6 prisoner may exhaust a federal constitutional claim by referring to a state constitutional
7 right when the contours of the federal and state constitutional rights are identical,” *id.* at
8 1000, but even assuming exhaustion can be accomplished this way, Petitioner’s claim was
9 not a constitutional claim, and even if it were, he has not shown that the standard applied
10 to resolve it was “identical” to the federal due process right.

11 At the end of the day, a federal claim is fairly presented only if the petitioner “alerted
12 the state court that his claims rested on the federal Constitution.” *Fields v. Waddington*,
13 401 F.3d 1018, 1021 (9th Cir. 2005). “In order to alert the state court, a petitioner must
14 make reference to provisions of the federal Constitution or must cite either federal or state
15 case law that engages in a federal constitutional analysis.” *Id.* “Citation of irrelevant federal
16 cases does not provide a state court with a fair opportunity to apply controlling legal
17 principles to the facts bearing upon his constitutional claim.” *Id.* at 1021–22. “Neither is the
18 exhaustion requirement satisfied by the mere circumstance that the ‘due process
19 ramifications’ of an argument might be ‘self-evident.’” *Gatlin v. Madding*, 189 F.3d 882,
20 888 (9th Cir. 1999). Here, there was simply no indication directly or indirectly that Petitioner
21 was raising a federal constitutional claim. The Court cannot conclude, therefore, that
22 Ground 2 has been exhausted.

23 **B. Ground 4**

24 In Ground 4, Petitioner asserts: “There was insufficient evidence at trial to convict
25 [petitioner] under NRS § 205.273 for possession of a stolen vehicle, and his conviction
26 thus violated his right to due process under the Fourteenth Amendment.” (ECF No. 22 at
27 19). Petitioner argues both that there was no evidence the vehicle was stolen and that
28 there was no evidence Petitioner knew or should have known that it was stolen. (*Id.* at 20.)

1 On the first point, Petitioner asserts that the state failed to prove that Petitioner did not
2 have permission to use the vehicle. Specifically, Petitioner asserts that he told officers that
3 he had permission from a “guy” to use the car, the “guy” could have been Sobrejuanite’s
4 ex-boyfriend, Pedro Co, who was the registered owner of the vehicle at the time of the
5 theft, and that by failing to call Co the state had failed to establish that Petitioner did not
6 have permission to use the car. (*Id.* at 19–22.)

7 Respondents argue that Ground 4 is unexhausted to the extent it challenges the
8 evidence on whether the vehicle was actually stolen. They assert that Petitioner presented
9 the state’s highest court only with the argument regarding Petitioner’s knowledge.
10 Petitioner argues that regardless of what Petitioner presented, the Nevada Supreme Court
11 actually decided both aspects of his claim on his direct appeal. (ECF No. 11-15 at 1–2.) It
12 held:

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14 First, appellant Thomas Harsh contends that insufficient evidence supports
15 his conviction for possession of a stolen vehicle because there was no
16 damage to the vehicle, the insurer and registrant of the vehicle did not testify,
17 and the State did not demonstrate that he knew or should have known that
18 the vehicle was stolen. We review the evidence in the light most favorable
19 to the prosecution and determine whether any rational juror could have
20 found the essential elements of the crime beyond a reasonable doubt.
21 McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Here, the jury
22 heard testimony that the victim reported the theft of her Toyota to the police.
23 The police verified the victim's ownership of the Toyota-her former boyfriend
24 had given her the Toyota and signed the motor vehicle title over to her. The
25 police subsequently spotted and stopped the Toyota, discovered that Harsh
26 was the driver, and found a shaved Hyundai key in the ignition switch. The
27 police also found other shaved keys, a flathead screwdriver, and a
28 Leatherman multi-tool in the Toyota. Harsh told the police that the car was
not his and that he "borrowed it from a guy," but he was unable to provide
the guy's name or contact information. We conclude that a rational juror
could reasonably infer from this evidence that Harsh committed the offense
of possession of a stolen vehicle. See NRS 205.273(1)(b). It is for the jury to
determine the weight and credibility to give conflicting testimony, and the
jury's verdict will not be disturbed on appeal where, as here, substantial
evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d
20, 20 (1981); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694,
705 (2003) (circumstantial evidence alone may sustain a conviction).

(*Id.*)

27 The Court agrees with Petitioner that the Nevada Supreme Court actually decided
28 the issue of whether there was sufficient evidence that the car was stolen. This is evident

1 from the discussion of the evidence that the victim reported the theft of her vehicle and
2 that she actually owned the vehicle, as these are facts that do not bear on Petitioner's
3 knowledge of whether the vehicle was actually stolen. While it is true that not all the
4 arguments advanced here were included in Petitioner's direct appeal, he did assert, when
5 arguing the sufficiency of the evidence, that Co never testified, and later argued that the
6 state should have been required to call Co to testify as to the ownership of the vehicle.
7 (ECF No. 11-9 at 14, 17–18.) Further, all the facts relevant to Petitioner's sufficiency of
8 the evidence argument were part of the trial transcript and necessarily considered by the
9 Nevada Supreme Court in deciding there was sufficient evidence that the car was stolen.
10 The Court therefore concludes that Ground 4 is exhausted in its entirety.

11 **C. Ground 5**

12 In Ground 5, Petitioner asserts that his rights to due process, fair trial, and against
13 double jeopardy were violated when the district court failed to give a lesser-included-
14 offense instruction. (ECF No. 22 at 22–26.) Respondents argue that Petitioner never
15 presented this as a federal constitutional claim in the state courts.

16 In state court, Petitioner asserted only that the trial court erred in failing to give a
17 lesser-included instruction. However, in making this claim, Petitioner relied on *Barton v.*
18 *State*, 30 P.3d 1103 (2001), which discussed United States Supreme Court law both
19 defining a lesser-included offense and relating to the federal due process implications of
20 failing to give lesser-included offense instructions. *Id.* at 1107–08. While the central
21 holding of *Barton*, and the explicit reason for its citation by Petitioner, regarded the
22 definition of lesser-included offenses, a critical part of the court's analysis in *Barton*
23 involved the federal constitutional ramifications of failing to give lesser-included
24 instructions. Given *Barton's* extensive discussion of the federal constitutional issues that
25 Petitioner raises here, the Court concludes that Ground 5 was sufficiently exhausted.

26 **D. Ground 6-2**

27 In Ground 6-2, Petitioner alleges that trial counsel was ineffective for failing to call
28 attorney Christine Owen — Sobrejuanite's bankruptcy attorney — to testify that she would

1 never advise clients to hide assets, thus proving that Sobrejuanite committed perjury when
2 she testified that she had not included the vehicle on her bankruptcy petition on advice of
3 counsel. (ECF No. 22 at 28–29.) Petitioner persuasively argues that this claim was
4 presented in his brief filed with the Nevada Supreme Court. (ECF No. 13-3 at 31–32). In
5 state court, as here, Petitioner argued that Owen should have been called to testify that
6 she would never advise her clients to hide assets, which would have shown Sobrejuanite
7 committed perjury when she testified that she did not include the vehicle in her bankruptcy
8 petition on advice of counsel. Ground 6-2 is therefore exhausted.

9 **E. Ground 6-3**

10 In Ground 6-3, Petitioner asserts that trial counsel was ineffective for failing to
11 establish the victim’s perjury through Owen’s testimony “and then moving for a mistrial or
12 new trial as a matter of Fifth and Fourteenth Amendment Due Process.” (ECF No. 22 at
13 29.) Petitioner did not present this theory to the state’s highest courts. Ground 6-3 is
14 therefore unexhausted.

15 **F. Grounds 6-8 through 6-13**

16 Petitioner concedes that these claims have not been presented to the state’s
17 highest courts but nonetheless argues the Court should apply the doctrine of anticipatory
18 procedural default and allow them to proceed.

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

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

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

19 Here, Petitioner advances only *Martinez* as a basis for excusing the anticipatory
20 default of his ineffective assistance of counsel claims. The Court thus reads Petitioner's
21 opposition as a concession that the only basis for cause as to any of the unexhausted
22 ineffective assistance of trial counsel claims would be *Martinez*, and grants Petitioner's
23 request to consider said claims technically exhausted on that basis.

24 Respondents argue that Petitioner's ineffective assistance of trial counsel claims
25 should nevertheless be dismissed because they are not *substantial* claims of ineffective
26 assistance of trial counsel and/or Petitioner has not established and cannot establish that
27 his post-conviction counsel was ineffective for failing to raise them.

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1 As these questions are inextricably intertwined the merits of the claims themselves,
2 the Court will defer a determination on both questions until the time of merits
3 determination. Accordingly, the motion to dismiss Grounds 6-3 and 6-8 through 6-12 as
4 procedurally defaulted is denied without prejudice. Respondents may renew the
5 procedural default argument as to these claims in their answer.

6 **G. Options on a Mixed Petition**

7 A federal court may not entertain a habeas petition unless the petitioner has
8 exhausted all available and adequate state court remedies for all claims in the petition.
9 *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed petition” containing both exhausted
10 and unexhausted claims is subject to dismissal. *Id.* Because Petitioner’s petition is mixed,
11 he has three options:

- 12 1. File a motion to dismiss seeking partial dismissal of only the unexhausted claims;
- 13 2. File a motion to dismiss the entire petition without prejudice in order to return to
14 state court to exhaust the unexhausted claims; and/or
- 15 3. File a motion for other appropriate relief, such as a motion for a stay and
16 abeyance asking this Court to hold his exhausted claims in abeyance while he returns to
17 state court to exhaust the unexhausted claims.

18 **V. CONCLUSION**

19 In accordance with the foregoing, it is therefore ordered that Respondents’ motion
20 to dismiss (ECF No. 31) is granted in part and denied in part as follows:

- 21 1. Grounds 4, 5 and 6-2 are exhausted in their entirety;
- 22 2. Grounds 2 is unexhausted;
- 23 3. Grounds 6-3 and 6-8 through 6-12 are technically exhausted, but
24 procedurally defaulted. The Court defers its cause and prejudice analysis until the time of
25 merits review, and Respondents may re-assert the procedural default arguments with
26 respect to these claims in their answer.

27 It is further ordered that, within 30 days of the date of this order, Petitioner must
28 either: (1) file a motion to dismiss seeking partial dismissal of only the unexhausted claim

1 (Ground 2); (2) file a motion to dismiss the entire petition without prejudice in order to
2 return to state court to dismiss the unexhausted claim (Ground 2); and/or (3) file a motion
3 for other appropriate relief, such as a motion for a stay and abeyance asking this Court to
4 hold his exhausted claims in abeyance while he returns to state court to exhaust the
5 unexhausted claims. Failure to timely comply with this order will result in the dismissal of
6 this mixed petition without further advanced notice.

7 DATED THIS 26th day of February 2019.



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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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