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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JEFFREY S. STEVENS,
Petitioner,
v.
JERRY HOWELL, *et al.*,
Respondents.

Case No. 2:19-cv-00949-KJD-VCF
ORDER

This action is a pro se petition for writ of habeas corpus, under 28 U.S.C. § 2254, by Jeffrey S. Stevens, an individual incarcerated at Nevada’s Southern Desert Correctional Center. Stevens challenges convictions, upon guilty pleas, of aggravated stalking, resisting a public officer with use of a firearm in violation of protection order, and unlawful use of a controlled substance. Following the Court’s denial of Respondents’ motion to dismiss, Respondents filed an answer, and Stevens filed a reply. The case is now before the Court for adjudication of Stevens’ petition. The Court will deny the petition, deny Stevens a certificate of appealability, and direct the Clerk of the Court to enter judgment accordingly.

Background

On December 23, 2015, Stevens was charged in Justice Court in Pahrump, Nevada, with aggravated stalking, battery upon a peace officer, battery with intent to commit robbery in violation of protection order, attempted robbery in violation of protection order, resisting public officer with use of a firearm in violation of protection order, battery upon a peace officer, battery with intent to commit robbery, attempted robbery, resisting public officer with use of a firearm, and prohibited person in possession of firearm. See Criminal Complaint, Exh. 7 (ECF No. 12-7); see also

1 Amended Criminal Complaint, Exh. 10 (ECF No. 12-10); Second Amended Criminal
2 Complaint, Exh. 11 (ECF No. 12-11). Stevens waived his preliminary hearing and was
3 bound over to Nevada's Fifth Judicial District Court. See Waiver of Preliminary Hearing,
4 Exh. 12 (ECF No. 12-12); Bindover Order, Exh. 13 (ECF No. 12-13). The State then
5 filed an information charging Stevens with aggravated stalking and resisting public
6 officer with use of a firearm in violation of protection order. See Information, Exh. 15
7 (ECF No. 12-15).

8 On February 8, 2016, Stevens pled guilty to both charges under a plea
9 agreement. See Transcript of Proceedings, February 8, 2016, Exh. 16 (ECF No. 12-16);
10 Guilty Plea Agreement, Exh. 17 (ECF No. 12-17). Under the same plea agreement,
11 Stevens also pled guilty to unlawful use of a controlled substance, a charge against him
12 in a separate case. See Guilty Plea Agreement, Exh. 17 (ECF No. 12-17). Stevens was
13 sentenced for the aggravated stalking to a maximum prison term of fifteen years with
14 parole eligibility after six years, and for resisting public officer with use of a firearm in
15 violation of protection order to two prison terms of five years with parole eligibility on
16 each after two years, all three prison terms to run consecutively. See Transcript of
17 Sentencing, Exh. 18 (ECF No. 12-18). The judgment of conviction was entered on April
18 12, 2016. See Judgment of Conviction, Exh. 19 (ECF No. 12-19); see *also* Amended
19 Judgment of Conviction, Exh. 38 (ECF No. 12-38).

20 Stevens appealed. See Notice of Appeal, Exh. 21 (ECF No. 12-21); Fast Track
21 Statement, Exh. 33. The Nevada Court of Appeals affirmed on November 18, 2016. See
22 Order of Affirmance, Exh. 44 (ECF No. 13-4).

23 Stevens filed a petition for writ of habeas corpus in the state district court on
24 March 28, 2017. See Petition for Writ of Habeas Corpus, Exh. 48 (ECF No. 13-8).
25 The court held an evidentiary hearing on October 2, 2017. See Transcript of
26 Proceedings, October 2, 2017, Exh. 58 (ECF No. 13-18). The court dismissed Stevens'
27 petition in a written order filed on October 24, 2017. See Order Dismissing Post-
28

1 Conviction Writ after Evidentiary Hearing, Exh. 64 (ECF No. 13-24). Stevens appealed.
2 See Notice of Appeal, Exh. 59 (ECF No. 13-19); Notice of Appeal, Exh. 61 (ECF No.
3 13-21); Appellant's Opening Brief, Exh. 73, pp. 12–14 (ECF No. 13-33, pp. 13–15).
4 The Nevada Court of Appeals affirmed on December 6, 2018. See Order of Affirmance,
5 Exh. 81 (ECF No. 14-1).

6 Stevens initiated a second state habeas action on July 23, 2019. See Petition for
7 Writ of Habeas Corpus, Exh. 85 (ECR No. 14-5). The state district court ruled that
8 petition procedurally barred and dismissed it on July 26, 2019. See Court Order, Exh.
9 86 (ECF No. 14-6). Stevens appealed. See Notice of Appeal, Exh. 87 (ECF No. 14-7).
10 The Nevada Court of Appeals affirmed on May 15, 2020. See Order of Affirmance, Exh.
11 97 (ECF No. 26-4).

12 This Court received Stevens' *pro se* habeas petition, initiating this action, on
13 June 3, 2019. See Petition for Writ of Habeas Corpus (ECF No. 7). Stevens' petition
14 sets forth two grounds for relief, which the Court reads to assert the following claims:

15 Ground 1A: Stevens' federal constitutional rights were violated
16 because his plea of guilty to the crime of aggravated stalking was
17 involuntary and unknowing, as a result of an inadequate canvass by the
court, wherein Stevens did not admit to committing the crime.

18 Ground 1B: Stevens' federal constitutional rights were violated as a
19 result of ineffective assistance of counsel, because of his trial and
appellate counsel's failures with respect to the claim in Ground 1A.

20 Ground 2: Stevens' federal constitutional rights were violated
21 because there were inaccuracies in the presentence investigation report,
22 because his trial counsel was ineffective for not doing sufficient
investigation and raising this issue in the trial court, and because his
appellate counsel was ineffective for not raising this issue on his direct
appeal.

23 *See id.*

24 On October 30, 2019, Respondents filed a motion to dismiss (ECF No. 11)
25 contending that Stevens' claims are, in whole or in part, unexhausted in state court. The
26 Court denied that motion on April 22, 2020. See Order entered April 22, 2020 (ECF No.
27 21). In that order, the Court ruled that Ground 1A has been exhausted in state court and
28 denied the motion to dismiss with respect to that claim. *See id.* at 4. The Court ruled

1 Grounds 1B and 2 technically exhausted in state court, but potentially barred in this
2 action by the procedural default doctrine; however, determining that Stevens could
3 possibly overcome the procedural defaults by a showing of ineffective assistance of
4 counsel in his first state habeas action, under *Martinez v. Ryan*, 566 U.S. 1 (2012), and
5 determining that the procedural default issues are intertwined with the merits of
6 Grounds 1A and 1B, the Court denied the motion to dismiss with respect to Grounds 1A
7 and 1B, without prejudice to Respondents asserting the procedural default defense to
8 those claim in their answer, along with their briefing of the merits of the claim.

9 Respondents filed an answer on September 21, 2020 (ECF No. 25), and Stevens
10 filed a reply on October 13, 2020 (ECF No. 27).

11 Discussion

12 Ground 1A

13 In Ground 1A, Stevens claims that his federal constitutional rights were violated
14 because his plea of guilty to the crime of aggravated stalking was involuntary and
15 unknowing, as a result of an inadequate canvass by the court, wherein Stevens did not
16 admit to committing the crime. See Petition for Writ of Habeas Corpus (ECF No. 7), pp.
17 3–3B.

18 Stevens raised this claim on the appeal in his first state habeas action (see
19 Appellant’s Opening Brief, Exh. 73, pp. 12–14 (ECF No. 13-33, pp. 19–21)), and the
20 Nevada Court of Appeals ruled as follows:

21 Stevens claims the district court erred by denying his claims his
22 plea was not knowingly and voluntarily entered. After conviction, a
23 district court may permit a petitioner to withdraw a guilty plea where
24 necessary “to correct a manifest injustice.” NRS 176.165. A guilty plea is
25 presumptively valid, and a petitioner carries the burden of establishing that
26 the plea was not entered knowingly and intelligently. *Bryant v. State*, 102
27 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also *Hubbard v. State*, 110
28 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not
reverse a district court’s determination concerning the validity of a plea
absent a clear abuse of discretion. *Hubbard*, 110 Nev. at 675, 877 P.2d at
521. In determining the validity of a guilty plea, this court looks to the
totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13
P.3d 442, 448 (2000); *Bryant*, 102 Nev. at 271, 721 P.2d at 367.

1 First, Stevens claimed he did not make a verbal response to the
2 district court's question regarding whether he was guilty of aggravated
3 stalking which also included the facts and elements of aggravated
4 stalking. Therefore, he claims the record does not demonstrate he
5 admitted to the facts underpinning his conviction or that he understood the
6 elements of the crime.

7 The district court conducted an evidentiary hearing, and based on
8 the totality of the circumstances, concluded Stevens failed to demonstrate
9 his plea was invalid. Despite his claims to the contrary at the evidentiary
10 hearing, Stevens stated at the change of plea hearing that he read the
11 plea agreement and his counsel went through the plea agreement page by
12 page with him. The plea agreement set forth the elements and factual
13 bases for the crimes Stevens pleaded guilty to. Further, while the record
14 shows Stevens did not make an audible answer to the district court's
15 question regarding aggravated stalking, Stevens failed to demonstrate he
16 made no response to the district court's question. Moreover, earlier in the
17 hearing, Stevens indicated he was pleading guilty to all of the charges.
18 Finally, Stevens did not specifically plead he did not understand the
19 elements or the facts regarding the aggravated stalking charge. We
20 conclude the district court did not abuse its discretion by denying this
21 claim.

22 Order of Affirmance, Exh. 81, pp. 1–2 (ECF No. 14-1, pp. 2–3) (footnote omitted).

23 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a
24 federal court may not grant a petition for a writ of habeas corpus on any claim that was
25 adjudicated on its merits in state court unless the state court decision was contrary to,
26 or involved an unreasonable application of, clearly established federal law as
27 determined by United States Supreme Court precedent, or was based on an
28 unreasonable determination of the facts in light of the evidence presented in the state-
court proceeding. See 28 U.S.C. § 2254(d). A state-court ruling is “contrary to” clearly
established federal law if it either applies a rule that contradicts governing Supreme
Court law or reaches a result that differs from the result the Supreme Court reached on
“materially indistinguishable” facts. See *Early v. Packer*, 537 U.S. 3, 8 (2002) (per
curiam). A state-court ruling is “an unreasonable application” of clearly established
federal law under section 2254(d) if it correctly identifies the governing legal rule but
unreasonably applies the rule to the facts of the case. See *Williams v. Taylor*, 529 U.S.
362, 407–08 (2000). To obtain federal habeas relief for such an “unreasonable
application,” however, a petitioner must show that the state court’s application of
Supreme Court precedent was “objectively unreasonable.” *Id.* at 409–10; see also

1 *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003). Or, in other words, habeas relief is
2 warranted, under the “unreasonable application” clause of section 2254(d), only if the
3 state court’s ruling was “so lacking in justification that there was an error well
4 understood and comprehended in existing law beyond any possibility for fairminded
5 disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

6 The Nevada Court of Appeals affirmed the denial of all Stevens’ claims, but, with
7 respect to the validity of Stevens’ plea of guilty to the crime of aggravated stalking, the
8 court discussed only Stevens’ state-law claims; the court did not discuss the federal-law
9 claim that is Ground 1A in this case. Where the state court has summarily denied a
10 claim, without analysis, a presumption exists that the state court adjudicated the claim
11 on the merits, unless “there is reason to think some other explanation for the state
12 court’s decision is more likely.” *Richter*, 562 U.S. at 99–100. With respect to such a
13 summary denial of a claim, the reviewing federal habeas court “must determine what
14 arguments or theories supported or ... could have supported, the state court’s decision;
15 and then it must ask whether it is possible fairminded jurists could disagree that those
16 arguments or theories are inconsistent with the holding in a prior decision of [the
17 Supreme] Court.” *Id.* at 102.

18 “It is well established that a plea of guilty cannot be voluntary in the sense that it
19 constitutes an intelligent admission that the accused committed the offense unless the
20 accused has received ‘real notice of the true nature of the charge against him, the first
21 and most universally recognized requirement of due process.’” *Marshall v. Lonberger*,
22 459 U.S. 422, 436 (1983) (quoting *Smith v. O’Grady*, 312 U.S. 329, 334 (1941));
23 *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). The Supreme Court has instructed:

24 Normally the record contains either an explanation of the charge by the
25 trial judge, or at least a representation by defense counsel that the nature
26 of the offense has been explained to the accused. Moreover, even without
27 such an express representation, it may be appropriate to presume that in
most cases defense counsel routinely explain the nature of the offense in
sufficient detail to give the accused notice of what he is being asked to
admit.

28 *Lonberger*, 459 U.S. at 436 (quoting *Henderson*, 426 U.S. at 647).

1 Here, affording the Nevada Court of Appeals' ruling the deference mandated by
2 28 U.S.C. § 2254(d), this Court determines that it was not unreasonable to conclude
3 that Stevens knew he was pleading guilty to aggravated stalking, was informed of the
4 elements of that crime, and knowingly and intelligently pled guilty.

5 The written plea agreement that Stevens signed stated that Stevens agreed to
6 plead guilty to aggravating stalking, and it stated: "I have discussed the elements of all
7 the original charges against me with my attorney and understand the nature of these
8 charges." Guilty Plea Agreement, Exh. 17, pp. 1, 2, 6 (ECF No. 12-17, pp. 2, 3, 7).
9 Attached to the plea agreement was a certificate of Stevens' trial counsel, in which
10 counsel stated that he "fully explained to the defendant the allegations contained in the
11 charge(s) to which the guilty plea(s) is/are being entered." *Id.* at 8 (ECF No. 12-17, p. 9).
12 Also attached to the plea agreement was a copy of the Information, which included, as
13 Count I, the charge of aggravated stalking, as follows:

14 AGGRAVATED STALKING, in violation of NRS 200.575(2), A
15 CATEGORY 'B' FELONY, committed in the following manner, to wit: That
16 ON, ABOUT OR BETWEEN AUGUST 24, 2013 AND JANUARY 6, 2015,
17 in Pahrump Township, Nye County, Nevada, said Defendant did without
18 lawful authority, willfully or maliciously engage in a course of conduct that
19 would cause a reasonable person to feel terrorized, frightened,
20 intimidated, or harassed, with the intent to cause [the victim] to be in fear
21 of death or substantial bodily harm[.]

19 *Id.* (ECF No. 12-17, p. 12).

20 At the arraignment hearing, at which Stevens pled guilty, just before Stevens was
21 canvassed by the judge, Stevens' attorney stated: "... he will be pleading guilty to
22 Aggravated Stalking..." Transcript of Arraignment, Exh. 16, p. 2 (ECF No. 12-16, p. 3).
23 Then, in the canvass of Stevens, Stevens answered "yes," when the judge asked if he
24 read through the plea agreement with his attorney. *Id.* at 4 (ECF No. 12-16, p. 5).
25 Stevens also answered "yes" when asked if his attorney answered his questions page
26 by page. *Id.* The judge then stated, "[i]t indicates you're going to be pleading guilty to
27 Aggravated Stalking..." and Stevens answered "Yes, sir." *Id.* at 4–5 (ECF No. 12-16,
28 pp. 5–6).

1 At the evidentiary hearing in the state habeas action, Stevens' trial counsel
2 testified that it was his practice to go through the guilty plea agreement with any client
3 pleading guilty. See Transcript of Evidentiary Hearing, Exh. 58, pp. 11–12 (ECF No. 13-
4 18, pp. 12–13). At that evidentiary hearing, Stevens testified that he was not a stranger
5 to the criminal justice system, as he had faced criminal charges before, and had
6 previously pled guilty under plea agreements on more than one occasion. See *id.* at 27–
7 30 (ECF No. 13-18, pp. 28–31). In addition, at the evidentiary hearing, Stevens
8 confirmed that, during the plea canvass, he did not inform his attorney or the court that
9 he did not understand what was happening or that he did not want to go through with
10 his guilty plea. *Id.* at 34–35 (ECF No. 13-18, pp. 35–36).

11 So, despite the fact that the transcript of the arraignment reflects that there was
12 “[n]o audible response” by Stevens, when the judge asked Stevens if he was pleading
13 guilty because he had stalked the victim (see Transcript of Arraignment, Exh. 16, p. 7
14 (ECF No. 12-16, p. 8)), there is substantial evidence in the record demonstrating that
15 Stevens knew the elements of aggravated stalking, knew that he was pleading guilty to
16 that crime, and voluntarily and knowingly entered that guilty plea.

17 The ruling of the Nevada Court of Appeals was not contrary to, or an
18 unreasonable application of, *Lonberger*, *Henderson*, or any other United States
19 Supreme Court precedent. The Court will deny Stevens habeas relief on Ground 1A.

20 Ground 1B

21 In Ground 1B, Stevens claims that his federal constitutional rights were violated
22 as a result of ineffective assistance of counsel, because of his trial and appellate
23 counsel's failures with respect to the claim in Ground 1A. See Petition for Writ of
24 Habeas Corpus (ECF No. 7), pp. 3–3B.

25 In the order entered April 22, 2020, denying Respondents' motion to dismiss, this
26 Court ruled:

27 This claim was not presented on Stevens' direct appeal, on his appeal in
28 his first state habeas action, or in his petition in his second state habeas
action. See Fast Track Statement, Exh. 33 [ECF No. 12-33]; Appellant's

1 Opening Brief, Exh. 73 (ECF No. 13-33); Petition for Writ of Habeas
2 Corpus, Exh. 85 (ECR No. 14-5). As it is clear to the Court that this claim
3 would be procedurally barred if presented now in state court, the Court
4 determines it is subject to application of the procedural default doctrine.

5 Order entered April 22, 2020 (ECF No. 22), p. 4. The Court went on to rule:

6 Because it is possible that Stevens may be able to overcome the
7 procedural default of all or part of Ground 1B, perhaps by a showing of
8 ineffective assistance of counsel in his first state habeas action, under
9 *Martinez*, and because this issue is intertwined with the merits of Grounds
10 1A and 1B, the Court determines that it will be best addressed after
11 Respondents file an answer, and Stevens files a reply. The Court will,
12 therefore, deny the motion to dismiss with respect to Ground 1B, without
13 prejudice to Respondents asserting a procedural default defense to the
14 claim in their answer, along with their briefing of the merits of the claim.

15 *Id.* at 5–6.

16 In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that a
17 state prisoner who fails to comply with the state’s procedural requirements in presenting
18 claims is barred by the adequate and independent state ground doctrine from obtaining
19 a writ of habeas corpus in federal court. *Coleman*, 501 U.S. at 731-32 (“Just as in those
20 cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who
21 has failed to meet the State’s procedural requirements for presenting his federal claims
22 has deprived the state courts of an opportunity to address those claims in the first
23 instance.”). Where such a procedural default constitutes an adequate and independent
24 state ground for denial of habeas corpus, the default may be excused only if “a
25 constitutional violation has probably resulted in the conviction of one who is actually
26 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting
27 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To demonstrate cause for a
28 procedural default, the petitioner must “show that some objective factor external to the
defense impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S.
at 488. For cause to exist, the external impediment must have prevented the petitioner
from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect
to the question of prejudice, the petitioner bears “the burden of showing not merely that
the errors [complained of] constituted a possibility of prejudice, but that they worked to
his actual and substantial disadvantage, infecting his entire [proceeding] with errors of

1 constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing
2 *United States v. Frady*, 456 U.S. 152, 170 (1982). “An unexhausted claim will be
3 procedurally defaulted, if state procedural rules would now bar the petitioner from
4 bringing the claim in state court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014)
5 (citing *Coleman*, 501 U.S. at 731)).

6 In *Martinez*, the Supreme Court ruled that ineffective assistance of post-
7 conviction counsel may serve as cause to overcome the procedural default of a claim of
8 ineffective assistance of trial counsel. The *Coleman* Court had held that the absence or
9 ineffective assistance of state post-conviction counsel generally could not establish
10 cause to excuse a procedural default because there is no constitutional right to counsel
11 in state post-conviction proceedings. See *Coleman*, 501 U.S. at 752–54. In *Martinez*,
12 however, the Supreme Court established an equitable exception to that rule, holding
13 that the absence or ineffective assistance of counsel at an initial-review collateral
14 proceeding may establish cause to excuse a petitioner's procedural default of
15 substantial claims of ineffective assistance of trial counsel. See *Martinez*, 566 U.S. at 9.

16 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court
17 propounded a two-part test for analysis of claims of ineffective assistance of counsel:
18 the petitioner must demonstrate (1) that the attorney’s representation “fell below an
19 objective standard of reasonableness,” and (2) that the attorney’s deficient performance
20 prejudiced the defendant such that “there is a reasonable probability that, but for
21 counsel’s unprofessional errors, the result of the proceeding would have been different.”
22 *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of
23 counsel must apply a “strong presumption” that counsel’s representation was within the
24 “wide range” of reasonable professional assistance. *Id.* at 689. The petitioner’s burden
25 is to show “that counsel made errors so serious that counsel was not functioning as the
26 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To establish
27 prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the
28 errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693.

1 Rather, the errors must be “so serious as to deprive the defendant of a fair trial, a trial
2 whose result is reliable.” *Id.* at 687.

3 Regarding the claim of ineffective assistance of appellate counsel in Ground 1B,
4 *Martinez* does not provide a means for Stevens to overcome the procedural default.
5 See *Davila v. Davis*, 137 S. Ct. 2058, 2062–63 (2017) (*Martinez* does not apply to
6 procedurally defaulted claims of ineffective assistance of appellate counsel).

7 Regarding the claim of ineffective assistance of trial counsel in Ground 1B, the
8 Court determines that Stevens does not show cause under *Martinez*. As is discussed
9 above, the record reflects that Stevens knew he was pleading guilty to aggravated
10 assault and that he was informed of the elements of that crime. There is no showing
11 that Stevens’ trial counsel had any reason to believe otherwise, or that he should have
12 taken some action to prevent Stevens from entering his guilty plea or to attempt to
13 withdraw the guilty plea after Stevens entered it. This claim of ineffective assistance of
14 trial counsel is not substantial within the meaning of *Martinez*, and there is no showing
15 that Stevens’ counsel in his first state habeas action was ineffective for not asserting
16 this claim. The Court will deny the claim in Ground 1B as procedurally defaulted.

17 Ground 2

18 In Ground 2, Stevens claims that his federal constitutional rights were violated
19 because there were inaccuracies in the presentence investigation report, because his
20 trial counsel was ineffective for not doing sufficient investigation and raising this issue in
21 the trial court, and because his appellate counsel was ineffective for not raising this
22 issue on his direct appeal. See Petition for Writ of Habeas Corpus (ECF No. 7), pp. 5–
23 5B.

24 In the April 22, 2020, order, this Court ruled:

25 These claims were not presented on Stevens’ direct appeal, on his
26 appeal in his first state habeas action, or in his petition in his second state
27 habeas action. See Fast Track Statement, Exh. 33 [ECF No. 12-33];
28 Appellant’s Opening Brief, Exh. 73 (ECF No. 13-33); Petition for Writ of
Habeas Corpus, Exh. 85 (ECR No. 14-5). As it is clear to the Court that
these claims would be procedurally barred if presented now in state court,
the Court determines they are subject to application of the procedural

1 default doctrine. As with Ground 1B, the Court will deny Respondents'
2 motion to dismiss with respect to Ground 2, without prejudice to
3 Respondents asserting a procedural default defense in their answer, along
4 with their briefing of the merits of the claims.

5 Order entered April 22, 2020 (ECF No. 22), p. 6.

6 As the Court understands Stevens' claims in Ground 2, they are all ultimately
7 based on his allegations that there were errors in the presentence investigation report
8 (PSI): that the PSI stated certain charges against him in a 2013 case were dismissed
9 pursuant to a plea agreement, when, in fact, those charges were dismissed "in open
10 court," and that the PSI listed certain prior charges that were "stacked and/or duplicate
11 charges stemming from a single act, requiring the exact same proof." See Petition for
12 Writ of Habeas Corpus (ECF No. 7), pp. 5–5B; see *also* PSI, Exh. 93, pp. 4–7 (ECF No.
13 16-2, pp. 5–8) (filed under seal). This Court determines, however, that these alleged
14 errors in the PSI—assuming here, for purposes of analysis only, that they were errors—
15 were minor and had no impact on Stevens' sentencing. There is no indication in the
16 record that, in sentencing Stevens, the sentencing judge relied to any extent
17 whatsoever on either the nature of dismissal of the charges in the 2013 case or the
18 number of separate charges against Stevens in this other case.

19 The Court, then, finds insubstantial the claim of ineffective assistance of trial
20 counsel in Ground 2. Stevens' trial counsel did not perform unreasonably in not
21 attempting to correct the alleged errors in the PSI, and Stevens was not prejudiced by
22 his counsel not doing so. Stevens' counsel in his state habeas action was not ineffective
23 for failing to assert this claim of ineffective assistance of trial counsel. Stevens does not
24 show cause, under *Martinez*, to overcome the procedural default of this claim.

25 *Martinez* does not apply to the substantive claim in Ground 2—that Stevens'
26 federal constitutional rights were violated as a result of the alleged errors in the PSI—
27 because it is not a claim of ineffective assistance of trial counsel; Stevens does not
28 make any viable argument that there was cause for the procedural default of the
substantive claim. Nor does Stevens make a viable argument that there was cause

1 relative to the procedural default of the claim of ineffective assistance of appellate
2 counsel in Ground 2. See *Davila*, 137 S. Ct. at 2062–63.

3 The Court will deny all the claims in Ground 2 as procedurally defaulted.

4 Certificate of Appealability

5 The standard for the issuance of a certificate of appealability requires a
6 “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c). The
7 Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

8 Where a district court has rejected the constitutional claims on the
9 merits, the showing required to satisfy § 2253(c) is straightforward: The
10 petitioner must demonstrate that reasonable jurists would find the district
11 court’s assessment of the constitutional claims debatable or wrong. The
12 issue becomes somewhat more complicated where, as here, the district
13 court dismisses the petition based on procedural grounds. We hold as
14 follows: When the district court denies a habeas petition on procedural
15 grounds without reaching the prisoner’s underlying constitutional claim, a
16 COA should issue when the prisoner shows, at least, that jurists of reason
17 would find it debatable whether the petition states a valid claim of the
18 denial of a constitutional right and that jurists of reason would find it
19 debatable whether the district court was correct in its procedural ruling.

15 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
16 1077–79 (9th Cir. 2000). Applying the standard articulated in *Slack*, the Court finds that
17 a certificate of appealability is unwarranted.

18 The denial of a certificate of appealability by this Court does not preclude
19 Stevens from appealing and seeking a certificate of appealability from the Court of
20 Appeals. To appeal, Stevens must file a timely notice of appeal in this Court.

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1 **IT IS THEREFORE ORDERED** that the Petition for Writ of Habeas Corpus (ECF
2 No. 7) is **DENIED**.

3 **IT IS FURTHER ORDERED** that Petitioner is denied a certificate of appealability.

4 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter
5 judgment accordingly.

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7 Dated this 22 day of April, 2021.

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10 _____
11 KENT J. DAWSON,
12 UNITED STATES DISTRICT JUDGE