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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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TERRANCE L. LAVOLL,

Case No. 2:19-cv-02249-GMN-EJY

10

Petitioner,

ORDER

11

v.

12

JERRY HOWELL, et al.,

13

Respondents.

14

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Before the court is respondents' motion to dismiss Terrance L. Lavoll's 28 U.S.C. § 2254 habeas corpus petition as untimely (ECF No. 19). They also argue that certain grounds are exhausted and/or procedurally defaulted. As discussed below, the motion is granted in part.

19

I. Background & Procedural History

20

In October 1997, a jury convicted Lavoll of count 1: sexual assault of a minor under 16; counts 2 and 3: sexual assault of a minor under 16 with a deadly weapon; and count 4: solicitation of minor to engage in acts constituting crimes against nature (exhibit 16).¹ The state district court sentenced Lavoll under count 1 to a term of life, under count two to a term of life with an equal and consecutive term of life to run consecutive to count one. Exh. 21. The remaining sentences ran concurrent to these sentences. Judgment of conviction was entered on January 6, 1998. *Id.*

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¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 19, and are found at ECF Nos. 20-22.

1 The Nevada Supreme Court affirmed Lavoll's convictions in April 2000 and
2 affirmed the denial of his state postconviction habeas corpus petition in November
3 2007. Exhs. 52, 99. In November 2010, this court denied Lavoll's first federal habeas
4 petition on the merits. Case No. 2:08-cv-00011-PMP, ECF No. 42.

5 In July 2012, an amended judgment of conviction was entered that added a
6 special sentence of lifetime supervision to commence upon release from any term of
7 imprisonment, probation or parole. Exh. 101.

8 On March 13, 2018, Lavoll filed a second state postconviction petition. Exh. 103.

9 Lavoll dispatched his federal habeas corpus petition for filing on November 26,
10 2019 (ECF No. 1). This court granted his motion for appointment of counsel, and he
11 filed an amended petition through counsel (ECF Nos.12, 17). Respondents now move
12 to dismiss the petition as untimely. They argue alternatively that several claims are
13 unexhausted and/or procedurally defaulted (ECF No. 19). Lavoll opposed, respondents
14 replied, and petitioner filed a surreply (ECF Nos. 25, 31, 32-1). The court has
15 considered all briefing.

16 **II. Legal Standards & Analysis - Timeliness**
17 **AEDPA Statute of Limitations and Equitable Tolling**

18 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year
19 statute of limitations on the filing of federal habeas corpus petitions. 28 U.S.C. §
20 2244(d). The one-year time limitation can run from the date on which a petitioner's
21 judgment became final by conclusion of direct review, or the expiration of the time for
22 seeking direct review. 28 U.S.C. § 2244(d)(1)(A). Further, a properly filed petition for
23 state postconviction relief can toll the period of limitations. 28 U.S.C. § 2244(d)(2).

24 A petitioner may be entitled to equitable tolling if he can show "(1) that he has
25 been pursuing his right diligently, and that (2) some extraordinary circumstance stood in
26 his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649
27 (2009)(quoting prior authority). Equitable tolling is "unavailable in most cases," *Miles v.*
28 *Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) and "the threshold necessary to trigger

1 equitable tolling is very high, lest the exceptions swallow the rule,” *Miranda v. Castro*,
2 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005,
3 1010 (7th Cir. 2000)). The petitioner ultimately has the burden of proof on this
4 “extraordinary exclusion.” 292 F.3d at 1065. He accordingly must demonstrate a
5 causal relationship between the extraordinary circumstance and the lateness of his
6 filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). To warrant equitable
7 tolling, a petitioner need not show that it was “impossible” to file a petition on time, but
8 instead that some extraordinary circumstances stood in his way. *See Pace v.*
9 *DiGuglielmo*, 544 U.S. 408, 418 (2005).

10 Recently, in *Smith v. Davis*, the Ninth Circuit held that “it is only when an
11 extraordinary circumstance prevented a petitioner acting with reasonable diligence from
12 making a timely filing that equitable tolling may be the proper remedy.” 953 F.3d 582,
13 600 (9th Cir. 2020) (en banc). The court stated that “this rule does not impose a rigid
14 ‘impossibility’ standard on litigants, and especially not on ‘pro se prisoner litigants—who
15 have already faced an unusual obstacle beyond their control during the AEDPA
16 limitation period.” *Id.* (citing *Fue v. Biter*, 842 F.3d 650, 657 (9th Cir. 2016)). The Ninth
17 Circuit also held in *Smith* that to demonstrate diligence, a petitioner “must show that he
18 has been reasonably diligent in pursuing his rights not only while an impediment to filing
19 caused by an extraordinary circumstance existed, but before and after as well, up to the
20 time for filing his claim in federal court.” *Id.* at 598–99. The court explained, “it is not
21 enough for a petitioner seeking an exercise of equitable tolling to attempt diligently to
22 remedy his extraordinary circumstances; when free from the extraordinary
23 circumstance, he must also be diligent in actively pursuing his rights.” *Id.* at 599.

24 Ignorance of the one-year statute of limitations does not constitute an
25 extraordinary circumstance that prevents a prisoner from making a timely filing. *See*
26 *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se petitioner’s lack of
27 legal sophistication is not, by itself, an extraordinary circumstance warranting equitable
28 tolling”).

1 Here, the amended judgment of conviction was filed on July 6, 2012. For a
2 person convicted of a sexual offense, Nevada law requires “the court [to] include in
3 sentencing, in addition to any other penalties provided by law, a special sentence of
4 lifetime supervision.” NRS 176.0931. Nevada law also requires such a person to
5 register as a sex offender upon release from incarceration. NRS 179D.460. The original
6 judgment of conviction did not impose the special sentence of lifetime supervision, nor
7 did it inform Lavoll of the requirement to register as a sex offender. Exh. 21. The
8 amended judgment of conviction imposed the special sentence of lifetime supervision
9 and the registration requirement. The amended judgment here increased Lavoll’s
10 sentence and is a substantive new judgment for the purposes of § 2244(d)(1)(A). Thus,
11 the amended judgment started a new one-year time period under AEDPA.

12 In May 2012, the Nevada Department of Corrections sent a letter to the Eighth
13 Judicial District Court (“8JDC”) clerk’s office stating that Lavoll’s judgment of conviction
14 did not have a special sentence of lifetime supervision. Petitioner’s Exh. 1, at ECF No.
15 18-1. The letter does not indicate a copy was sent to Lavoll. On June 18, 2012, the state
16 district court imposed a special sentence of lifetime supervision and the sexual offender
17 registration requirement. Exh. 101, pp. 3-4. The amended judgment indicates that Lavoll
18 was not present at the proceeding. *Id.* at 3. The amended judgment was filed on July 6,
19 2012. *Id.* at 2. No evidence that Lavoll was served with a copy of the amended
20 judgment has been presented.

21 Lavoll dispatched a second state postconviction petition for filing on March 5,
22 2018. He argued that the judgment was illegal because it did not list a minimum term for
23 the counts on which he was sentenced to “life.” In connection with that petition, Lavoll
24 sent a letter to the state district court clerk requesting the court minutes for his criminal
25 case. He received a copy of the entire docket for his criminal case that was printed on
26 May 30, 2018. The docket lists the amended judgment as filed on July 6, 2012. Lavoll
27 received the docket in late May or early June 2018. Lavoll’s state postconviction
28 litigation concluded in June 2019.

1 On November 26, 2019, Lavoll filed an application with this court for leave to file
2 a second or successive petition along with the petition (ECF No. 1). On December 13,
3 2019, he filed the same application with the Ninth Circuit. On January 20, 2020, the
4 Ninth Circuit ordered that authorization was not required because this was the first
5 petition challenging the amended judgment of conviction.

6 Lavoll was not present when the amended judgment was entered in July 2012.
7 There is no evidence that he was aware of the amended judgment until about June
8 2018. This court concludes that this constitutes an extraordinary circumstance. Once
9 Lavoll learned of the amended judgment, he timely and diligently pursued state court
10 and federal habeas litigation. Equitable tolling is warranted, and Lavoll's petition is
11 deemed timely.

12 **III. Legal Standards & Analysis – Exhaustion and**
13 **Procedural Default**

14 Respondents next argue that the four grounds in the amended petition are all
15 unexhausted and/or procedurally defaulted (ECF No. 19, pp. 7-8; ECF No. 31, pp. 10-
16 16).

17 **a. Exhaustion**

18 A federal court will not grant a state prisoner's petition for habeas relief until the
19 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*
20 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
21 courts a fair opportunity to act on each of his claims before he presents those claims in
22 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*
23 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
24 petitioner has given the highest available state court the opportunity to consider the
25 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
26 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir.
27 1981).

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b. Procedural Default

28 U.S.C. § 2254(d) provides that this court may grant habeas relief if the relevant state court decision was either: (1) contrary to clearly established federal law, as determined by the Supreme Court; or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court.

“Procedural default” refers to the situation where a petitioner in fact presented a claim to the state courts, but the state courts disposed of the claim on procedural grounds, instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A federal court will not review a claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Id.*

The *Coleman* Court explained the effect of a procedural default:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review 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.

Coleman, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural default doctrine ensures that the state’s interest in correcting its own mistakes is respected in all federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

To demonstrate cause for a procedural default, the petitioner must be able to “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 (emphasis added). 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).

Ground 1

Lavoll contends that he was denied the right to choose whether to concede guilt at trial in violation of his right to choose the objective of the defense under the Sixth and

1 Fourteenth Amendments (ECF No. 17, pp. 7-10). He relies on *McCoy v. Louisiana*,
2 wherein the United States Supreme Court held that defense counsel's concession of
3 guilt, when the accused wished to maintain his innocence, violated the accused's Sixth
4 Amendment right to choose the objective of the defense. 138 S.Ct. 1500 (2018). In
5 *McCoy* the Court explained that "[b]ecause a client's autonomy, not counsel's
6 competence, is in issue, we do not apply our ineffective-assistance-of-counsel
7 jurisprudence, *Strickland v. Washington*, 466 U.S. 668 (1984), or *United States v.*
8 *Chronic*, 466 U.S. 648 (1984) . . ." *Id.* at 1510-1511. In *Strickland*, the Supreme Court
9 held that a petitioner claiming ineffective assistance of counsel has the burden of
10 demonstrating that (1) the attorney made errors so serious that he or she was not
11 functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the
12 deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

13 Lavoll insists that he exhausted this federal ground 1 in his second state
14 postconviction petition. But there he presented the claim that his counsel rendered
15 ineffective assistance in violation of his Sixth Amendment rights. He explicitly relied on
16 *Strickland* and *Chronic*. In fact, Lavoll filed that state petition in March 2018, but as he
17 acknowledges, the Court did not decide *McCoy* until May 2018. He also states in his
18 federal petition that ground 1 is not subject to a prejudice inquiry; his state claim relied
19 on *Strickland*, which requires a showing of deficiency of counsel and resulting prejudice.
20 The court concludes that Lavoll did not fairly present federal ground 1 to the highest
21 state court. Ground 1, therefore, is unexhausted.

22 **Ground 3**

23 Lavoll asserts that his rights to due process under the Fifth and Fourteenth
24 Amendments have been violated because the judgment does not indicate the minimum
25 term of his sentence (ECF No. 17, pp. 13-15).

26 Lavoll acknowledges that this ground was procedurally defaulted in state court
27 (ECF No. 25, pp. 29-32; see exh. 123). Petitioner bears the burden of proving good
28 cause for his failure to present the claim and actual prejudice. NRS 34.810(3). The

1 Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application of
2 the procedural bars at issue in this case are independent and adequate state grounds.
3 *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see also Bargas v. Burns*, 179
4 F.3d 1207, 1210-12 (9th Cir. 1999). Therefore, the Nevada Court of Appeal's
5 determination that federal ground 3 was procedurally barred under NRS 34.726(1),
6 34.810(1)(b)(2) and 34.810(2) were independent and adequate grounds to affirm the
7 denial of the claims in the state petition.

8 Lavoll argues that he can demonstrate cause and prejudice to excuse the
9 default. First, he points out that the state district court never notified him of the amended
10 judgment of conviction. He argues that this establishes cause. Second, he contends
11 that this claim has merit. Under NRS 176.105(1)(c), a judgment of conviction must set
12 forth "[t]he adjudication and sentence, including . . . any term of imprisonment . . . and, if
13 necessary to determine eligibility for parole, the applicable provision of the statute."
14 Under NRS 176.033(1)(b), if a sentence of imprisonment is required by statute, "the
15 court shall . . . [i]f sentencing the person who has been found guilty of a felony,
16 sentence the person to a minimum term and a maximum term of imprisonment, unless a
17 definite term of imprisonment is required by statute." Lavoll argues that these two
18 provisions together establish that the judgment of conviction must include both a
19 minimum and maximum term of imprisonment for indefinite sentences.

20 Originally, on count 1 Lavoll was sentenced to "Life." On counts 2 and 3, he was
21 sentenced to "Life" with an equal and consecutive term of "Life." Exh. 21. The sentences
22 on counts 1 and 2 were run consecutively, while the sentence on count 3 was run
23 concurrently to count 2. *Id.*

24 On July 6, 2012, the amended judgment was entered. Exh. 101. The new
25 judgment indicates that a court proceeding was held on June 18, 2012, at which "the
26 defendant [was] NOT present." *Id.* The amended judgment reimposes the original
27 sentences as set forth above. The amended judgment provides that for counts 1, 2, and
28 3 he was convicted of sexual assault in violation of NRS 200.366. Specifically,

1 As to COUNT 1 - LIFE, as to COUNT 2 - LIFE plus an EQUAL and
2 CONSECUTIVE LIFE sentence for Use of a Deadly Weapon, Count 2 to
3 run CONSECUTIVE to Count 1, as to COUNT 3 - LIFE plus an EQUAL and
4 CONSECUTIVE LIFE sentence for Use of A Deadly Weapon, Count 3 to
5 run CONCURRENT with Count 2; and as to COUNT 4 - TWELVE (12)
6 MONTHS in the Clark County Detention Center, Count 4 to run
7 CONCURRENT with Count 3.

8 *Id.* The amended judgment further states a special sentence of lifetime supervision
9 had been added to the judgment. *Id.* The amended judgment also provides:

10 [B]efore the Defendant is eligible for parole, a panel consisting of the
11 Administrator of the Mental Health and Development Services of the
12 Department of Human Resources or his designee; the Director of the
13 Department of Corrections or his designee; and a psychologist licensed to
14 practice in this state; or a psychiatrist licensed to practice medicine in
15 Nevada must certify that the Defendant does not represent a high risk to re-
16 offend based on current accepted standards of assessment.

17 *Id.* Finally, the amended judgment ordered Lavoll to register as a sexual offender
18 within 48 hours of any release from custody. *Id.*

19 Lavoll argues that he has a liberty interest in the judgment setting forth his
20 sentence, including both the minimum and maximum term. Thus, he asserts that the
21 sentence in the amended judgment violates his due process rights.

22 Lavoll has not demonstrated that this claim has merit and thus cannot show
23 prejudice. First, the relevant version of NRS 200.366 provided that a person who
24 commits sexual assault on a child under 16 that does not result in substantial bodily
25 harm be sentenced to life with the possibility of parole after 20 years.² Second, in
26 affirming the denial of his second state postconviction petition, the Nevada Court of
27 Appeals held that Lavoll's judgment of conviction contained all the elements required by
28 NRS 176.105 as it existed at the time of his crime and sentencing. It is up to a state
court to interpret its state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“[A]

² The court also notes that in 2017, after serving 20 years, the parole board paroled him to his next sentence, which belies his claim that unless his judgment is amended again to include his parole eligibility, he could be forced to serve the maximum term without ever becoming eligible for parole (see ECF No. 25, pp. 11-12).

1 state court's interpretation of state law . . . binds a federal court sitting in habeas
2 corpus.").

3 Finally, the claim that the judgment should set forth the minimum term before
4 parole eligibility is not cognizable in federal habeas corpus because success on such a
5 claim would not necessarily lead to speedier release. *See Nettles v. Grounds*, 830 F.3d
6 922 (9th Cir. 2016) (because success on [petitioner's] claims would not necessarily lead
7 to his immediate or earlier release from confinement, [they] are not cognizable in
8 habeas). *Id.* at 935.³

9 Accordingly, ground 3 is dismissed as procedurally barred from federal habeas
10 review.

11 **Ground 4**

12 Lavoll argues that his right to be present under the Fifth, Sixth, and Fourteenth
13 Amendments were violated when the court imposed the amended sentence in his
14 absence (ECF No. 17, pp. 16-17).

15 Lavoll did not raise this claim to the Nevada state courts. *See* exhs. 103, 104,
16 121, 123. He again urges this court to deem the claim technically
17 exhausted/procedurally defaulted because he no longer has any remedies in state
18 court. He acknowledges that if he attempted to raise this claim now in a state
19 postconviction petition, the state court would find it procedurally barred as untimely and
20 successive. In addition, the claim would be barred because it is a substantive
21 constitutional claim that should have been raised on direct appeal from the amended
22 judgment of conviction. *See* NRS 34.810(1)(b)(2).

23 As with ground 3, Lavoll argues that the fact that the state court never informed
24 him about the amended judgment establishes cause for the procedural default. Notably,

25
26 ³ Lavoll also claims that he did not learn that he was eligible for parole until he was given notice
27 of his parole hearing in 2017 (*see* ECF No. 25, p. 11). This is false. In his February 2001 pro se
28 state postconviction habeas petition, Lavoll indicated that he was sentenced to multiple sentences
of life with the possibility of parole. Exh. 55, pp. 3-4. In his first federal habeas petition, filed in
January 2008, he indicated that his first parole eligibility would be in 2017. 2:08-cv-00011-PMP,
ECF No. 7, p. 2.

1 he admits that he cannot timely present this as good cause in state court because it is
2 outside of one year from the time that he first became aware of the amended judgment
3 in late May or early June 2018. He offers no explanation as to why he did not file a
4 direct appeal of the amended judgment of conviction when he learned of the
5 amendment.

6 In any event, Lavoll has not shown that this claim has merit and thus cannot
7 show prejudice. He does not contend that the registration and supervision requirements
8 were improperly added. He was required to register as a sex offender and have lifetime
9 supervision at the time of his original sentencing.⁴ Similarly to ground 3, the claim that
10 the trial court improperly amended the judgment without his presence is not cognizable
11 in federal habeas corpus because success on such a claim would not necessarily lead
12 to speedier release. *See Nettles v. Grounds*, 830 F.3d at 927.

13 Ground 4, therefore, is dismissed as procedurally barred.

14 **Ground 2**

15 Lavoll argues that his trial counsel was ineffective for failing to object to
16 inflammatory statements from the prosecution in closing in violation of his Sixth and
17 Fourteenth Amendment rights (ECF No. 17, pp. 11-13).

18 Lavoll acknowledges in his opposition to the motion to dismiss that ground 2 is
19 unexhausted (ECF No. 25, pp. 20-16). He also agrees that if he were to return to state
20 court to raise this claim in a second state postconviction petition, the state courts would
21 find the claim procedurally defaulted as untimely and successive (*id.* at 20; *see* NRS
22 34.726, 34.810). He acknowledges, therefore, that the claim would also be procedurally
23 barred from federal review but argues that he can demonstrate cause and prejudice to
24 excuse that default based on ineffective assistance of state postconviction counsel.

25 The Court in *Coleman* held that ineffective assistance of counsel in postconviction
26 proceedings does not establish cause for the procedural default of a claim. 501 U.S. at

27 _____
28 ⁴ Lavoll was informed of these requirements in his companion case as they applied to that conviction. Exh. 126.

1 750. However, in *Martinez v. Ryan*, the Court subsequently held that the failure of a
2 court to appoint counsel, or the ineffective assistance of counsel in a state
3 postconviction proceeding, may establish cause to overcome a procedural default in
4 specific, narrowly-defined circumstances. 566 U.S. 1 (2012). The Court explained that
5 *Martinez* established a “narrow exception” to the *Coleman* rule:

6 Where, under state law, claims of ineffective assistance of trial counsel
7 must be raised in an initial-review collateral proceeding, a procedural
8 default will not bar a federal habeas court from hearing a substantial claim
9 of ineffective assistance at trial if, in the initial-review collateral proceeding,
10 there was no counsel or counsel in that proceeding was ineffective.

11 566 U.S. at 17.

12 In *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), the Ninth Circuit provided
13 guidelines for applying *Martinez*, summarizing the analysis as follows:

14 To demonstrate cause and prejudice sufficient to excuse the
15 procedural default, therefore, *Martinez* . . . require[s] that Clabourne make
16 two showings. First, to establish “cause,” he must establish that his
17 counsel in the state postconviction proceeding was ineffective under the
18 standards of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]. *Strickland*,
19 in turn, requires him to establish that both (a) post-conviction counsel's
20 performance was deficient, and (b) there was a reasonable probability
21 that, absent the deficient performance, the result of the post-conviction
22 proceedings would have been different. Second, to establish “prejudice,”
23 he must establish that his “underlying ineffective-assistance-of-trial-
24 counsel claim is a substantial one, which is to say that the prisoner must
25 demonstrate that the claim has some merit.”

26 *Clabourne*, 745 F.3d at 377 (citations omitted).

27 Here, Lavoll argues that he can establish cause and prejudice under *Martinez* to
28 excuse the default of this claim and to demonstrate that this court should review the
claim on the merits (ECF No. 25, pp. 20-26). Respondents contend that neither Lavoll's
trial counsel or postconviction counsel were ineffective, and therefore, ground 2 is not a
substantial claim (ECF No. 31, pp. 11-14). However, the court will defer a resolution of
this claim to the adjudication of the petition on the merits because the claim is
intrinsically linked to the merits analysis. The court declines to dismiss ground 2 at this

1 time. A decision on whether ground 2 is procedurally barred from federal review is
2 deferred.

3 IV. Petitioner's Options Regarding Unexhausted Claim

4 A federal court may not entertain a habeas petition unless the petitioner has
5 exhausted available and adequate state court remedies with respect to all claims in the
6 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition containing both
7 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the
8 court finds that ground 1 is unexhausted. Because the court finds that the petition
9 contains an unexhausted claim, petitioner has these options:

10
11 1. He may submit a sworn declaration voluntarily abandoning
12 the unexhausted claim in his federal habeas petition, and proceed only on
13 the exhausted claim;

14 2. He may return to state court to exhaust his unexhausted
15 claim in which case his federal habeas petition will be denied without
16 prejudice; or

17 3. He may file a motion asking this court to stay and abey his
18 exhausted federal habeas claim while he returns to state court to exhaust
19 his unexhausted claim.

20 With respect to the third option, a district court has discretion to stay a petition
21 that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005).

22 The *Rhines* Court stated:

23 [S]tay and abeyance should be available only in limited circumstances.
24 Because granting a stay effectively excuses a petitioner's failure to
25 present his claims first to the state courts, stay and abeyance is only
26 appropriate when the district court determines there was good cause for
27 the petitioner's failure to exhaust his claims first in state court. Moreover,
28 even if a petitioner had good cause for that failure, the district court would
abuse its discretion if it were to grant him a stay when his unexhausted
claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application
for a writ of habeas corpus may be denied on the merits, notwithstanding
the failure of the applicant to exhaust the remedies available in the courts
of the State").

Rhines, 544 U.S. at 277.

1 If petitioner wishes to ask for a stay, he must file a motion for stay and abeyance
2 in which he demonstrates good cause for his failure to exhaust his unexhausted claim in
3 state court and presents argument regarding the question of whether his unexhausted
4 claim is plainly meritless. Respondents would then be granted an opportunity to
5 respond, and petitioner to reply. Or petitioner may file a declaration voluntarily
6 abandoning his unexhausted claim, as described above.

7 Petitioner's failure to choose any of the three options listed above, or seek other
8 appropriate relief from this court, will result in his federal habeas petition being
9 dismissed.

10 **V. Conclusion**

11 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 19)
12 is **GRANTED** as follows:

13 Ground 1 is **UNEXHAUSTED**.

14 Grounds 3 and 4 are **DISMISSED** as procedurally barred.

15 A decision on ground 2 is deferred.

16 **IT IS FURTHER ORDERED** that petitioner has **30 days** to either: (1) inform this
17 court in a sworn declaration that he wishes to formally and forever abandon the
18 unexhausted ground for relief in his federal habeas petition and proceed on the
19 exhausted ground; OR (2) inform this court in a sworn declaration that he wishes to
20 dismiss this petition without prejudice in order to return to state court to exhaust his
21 unexhausted claim; OR (3) file a motion for a stay and abeyance, asking this court to
22 hold his exhausted claim in abeyance while he returns to state court to exhaust his
23 unexhausted claim. If petitioner chooses to file a motion for a stay and abeyance, or
24 seek other appropriate relief, respondents may respond to such motion as provided in
25 Local Rule 7-2.

26 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted
27 ground, respondents have **30 days** from the date petitioner serves his declaration of
28 abandonment in which to file an answer to ground 2. The answer should contain all

1 substantive and procedural arguments (including the issue of Martinez and procedural
2 default) and comply with Rule 5 of the Rules Governing Proceedings in the United
3 States District Courts under 28 U.S.C. §2254.

4 **IT IS FURTHER ORDERED** that petitioner has **30 days** following service of
5 respondents' answer in which to file a reply.

6 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within
7 the time permitted, this case may be dismissed.

8 **IT IS FURTHER ORDERED** that respondents' motion to extend time to file a
9 reply in support of the motion to dismiss (ECF No. 30) is **GRANTED** *nunc pro tunc*.

10 **IT IS FURTHER ORDERED** that petitioner's motion for leave to file surreply
11 (ECF No. 32) is **GRANTED**. The Clerk is directed to **DETACH** and **FILE** the surreply at
12 ECF No. 32-1.

13
14 DATED: 19 January 2022.

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17 _____
18 GLORIA M. NAVARRO
19 UNITED STATES DISTRICT JUDGE
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