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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JEREMY DALE MCCASKILL,

Petitioner,

vs.

MICHAEL BUDGE, *et al.*,

Respondents.

3:08-cv-00687-ECR-WGC

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' (#74) to dismiss. Respondents contend that: (a) Grounds 2 and 7 through 11 are not exhausted; (b) Grounds 7 and 11 do not relate back to a timely-filed claim and therefore further are untimely; and (c) Ground 5(e) is procedurally defaulted.

Background

Petitioner Jeremy Dale McCaskill challenges his Nevada judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. He is serving two consecutive life sentences with the possibility of parole after ten years on each sentence. Petitioner challenged his conviction on direct appeal and state post-conviction review.

Exhaustion

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts

1 completely through to the highest court available, in this case the Supreme Court of Nevada.
2 *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*,
3 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the
4 specific federal constitutional guarantee and must also state the facts that entitle the petitioner
5 to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th
6 Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with
7 both the operative facts and the federal legal theory upon which the claim is based. *E.g.,*
8 *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures
9 that the state courts, as a matter of federal-state comity, will have the first opportunity to pass
10 upon and correct alleged violations of federal constitutional guarantees. *See, e.g., Coleman*
11 *v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

12 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed
13 petition presenting both exhausted and unexhausted claims must be dismissed without
14 prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate
15 relief.

16 **Ground 2**

17 In Ground 2, petitioner alleges that he was denied rights to due process and a fair trial
18 under the Fifth, Sixth, and Fourteenth Amendments when the state trial court declined to give
19 the following instruction proffered by the defense:

20
21 If evidence in this case is susceptible of two reasonable
22 interpretations, one of which would point to the defendant's guilt
23 and the other would admit of his innocence, then it is your duty in
24 considering such evidence to adopt that interpretation which will
25 admit of defendant's innocence and reject that which would point
26 to guilt.

27 #54, at 10; #66, Ex. 72.

28 Respondents contend that Ground 2 is not exhausted because petitioner presented
only a state law claim of error on direct appeal.

Petitioner contends that his citation on direct appeal to *Bails v. State*, 92 Nev. 95, 545
P.2d 1155 (1976), which in turn discussed *Holland v. United States*, 348 U.S. 121, 75 S.Ct.

1 127, 99 L.Ed. 150 (1955), fairly alerted the Supreme Court of Nevada that he was relying
2 upon “federal law.” He urges that, accordingly, “a federal issue is in play in this Court.”

3 The *Bails* court cited *Holland* for the following:

4 It is the appellant's contention that when all of the evidence
5 is circumstantial in character, the court is compelled to give the
6 instruction in order to insure fair jury consideration of the case.
7 We do not agree. The leading case on this precise point is
8 *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.
9 150 (1955), which we have cited with approval on at least three
10 occasions. See: *Vincze v. State, supra*; *Kovack v. State, supra*;
11 *Hall v. State, supra*. In *Holland*, a wholly circumstantial evidence
12 case, the court wrote:

9 “The petitioners assail the refusal of the trial judge
10 to instruct that where the Government's evidence is
11 circumstantial it must be such as to exclude every
12 reasonable hypothesis other than that of guilt.
13 There is some support for this type of instruction in
14 the lower court decisions (citations), but the better
15 rule is that where the jury is properly instructed on
16 the standards for reasonable doubt, such an
17 additional instruction on circumstantial evidence is
18 confusing and incorrect (citations).”

15 “Circumstantial evidence in this respect is
16 intrinsically no different from testimonial evidence.
17 Admittedly, circumstantial evidence may in some
18 cases point to a wholly incorrect result. Yet this is
19 equally true of testimonial evidence. In both
20 instances, a jury is asked to weigh the chances that
21 the evidence correctly points to guilt against the
22 possibility of inaccuracy or ambiguous inference. In
23 both, the jury must use its experience with people
24 and events in weighing the probabilities. If the jury
25 is convinced beyond a reasonable doubt, we can
26 require no more.”

21 In the case before us the jury was properly instructed on
22 the standards for reasonable doubt. In line with *Holland*, we hold
23 that it was not error to refuse the requested instruction.

23 92 Nev. at 97-98, 545 P.2d at 1156.

24 In *Holland*, the Supreme Court addressed a claim of trial error in a federal criminal
25 case. The Supreme Court did not make any federal constitutional holdings in *Holland*.
26 Indeed, neither the words “due process” or “fair trial” nor any derivation of the word
27 “constitutional” even appear in *Holland*. To exhaust a *federal constitutional claim*, the
28 petitioner must not merely cite directly or indirectly in the state courts to “federal cases”

1 applying “federal law.” He instead must cite to decisions that considered the same federal
2 *constitutional* claim that he is seeking to pursue in federal court. *See, e.g., Shumway*, 223
3 F.3d at 988. In the present case, citation to a state court decision that cited to a federal court
4 decision that did not discuss *any* constitutional claims clearly did not exhaust the federal
5 constitutional claims in Ground 2.

6 Ground 2 therefore is not exhausted.

7 **Ground 7**

8 In Ground 7, petitioner alleges that he was denied rights to due process and a fair trial
9 under the Fifth, Sixth and Fourteenth Amendments when the state district court gave the
10 following jury instruction on self-defense:

11 The defense of self-defense is not available to a defendant
12 who is at fault in provoking the confrontation that resulted in
death.

13 #54, at 40; #66, Ex. 74, Jury Instruction No. 28. Petitioner contends that the instruction given
14 is inconsistent with N.R.S. 200.200 and further that there was no evidence that he provoked
15 the confrontation.

16 Petitioner acknowledged in the amended petition that Ground 7 was not presented to
17 the state courts, but he urges that the claim nonetheless is exhausted. He contends that
18 Ground 7 is exhausted because it was “intertwined with” and “sufficiently related” to allegedly
19 exhausted claims in Grounds 2 and 3. Of course, given that the Court has held that there are
20 no exhausted federal constitutional claims in Ground 2, petitioner’s argument thus necessarily
21 can rely upon Ground 7 being “intertwined” only with Ground 3.

22 In Ground 3, petitioner alleges that he was denied his right to due process under the
23 Fifth and Fourteenth Amendments when the state district court gave an allegedly erroneous
24 “transition instruction” in Jury Instruction No. 15 regarding consideration of lesser included
25 offenses, guiding the jury’s consideration from first-degree murder to second-degree murder
26 to voluntary manslaughter to involuntary manslaughter. *See* #54, at 12-13; #66, Ex. 74.

27 Petitioner relies upon *Wooten v. Kirkland*, 540 F.3d 1019 (9th Cir. 2008), for the
28 proposition that “a petitioner has ‘fairly presented’ a claim not named in a petition if it is

1 'sufficiently related' to an exhausted claim." 540 F.3d at 1025. Under the rule discussed
2 therein, "[c]laims are 'sufficiently related' or 'intertwined' for exhaustion purposes when, by
3 raising one claim, the petition clearly implies another error." *Id.*

4 The *Wooten* panel did not find that the cumulative error claim at issue in that case was
5 "sufficiently related" to or "intertwined" with any exhausted claim in that case. The principal
6 case cited for the rule stated in *Wooten* was *Lounsbury v. Thompson*, 374 F.3d 785, 787 (9th
7 Cir. 2004). In *Lounsbury*, the Ninth Circuit held that a substantive due process claim based
8 upon the petitioner allegedly being erroneously found competent to stand trial was sufficiently
9 related to and intertwined with a procedural due process claim regarding the competency
10 determination because "the clear implication of [the] exhausted claim was that by following
11 a constitutionally defective procedure, the state court erred in finding [the petitioner]
12 competent." 374 F.3d at 788.

13 Perhaps not insignificantly, the Court has been unable to find another published Ninth
14 Circuit decision following *Lounsbury* that finds that other types of claims – such as different
15 claims of jury charge error – are sufficiently related and intertwined so as to premise the
16 exhaustion of one upon the exhaustion of the other. As noted, the *Wooten* panel did not find
17 the cumulative error claim at issue in that case to be exhausted on this basis.

18 In the present case, considering a constitutional claim based upon an allegedly
19 erroneous transition instruction in Instruction No. 15 did not automatically require the state
20 supreme court to consider whether the self-defense instruction in Instruction No. 28 gave rise
21 to constitutional error. *Cf. Wooten*, 540 F.3d at 1025 ("Briefing a number of isolated errors
22 that turn out to be insufficient to warrant reversal does not automatically require the court to
23 consider whether the cumulative effect of the alleged errors prejudiced petitioner.").
24 Petitioner's argument to the contrary is unpersuasive. Ground 3 and Ground 7 simply
25 constitute distinct claims of alleged constitutional jury instruction error. Merely because both
26 instructions allegedly contained "an incorrect statement of Nevada law" does not make the
27 claims intertwined for purposes of exhaustion. Claiming one alleged error in a set of jury
28 instructions neither implies other errors in the instructions nor inherently sends a reviewing

1 court trolling through the instructions *sua sponte* looking for other wholly distinct errors in
2 other parts of the instructions on other issues. The claims are not “sufficiently related” to or
3 “intertwined” with one another for purposes of the exhaustion doctrine.

4 Ground 7 therefore is not exhausted.¹

5 **Ground 8**

6 In Ground 8, petitioner alleges that he was denied effective assistance of counsel when
7 trial counsel failed to offer what are generically referred to in the federal petition but otherwise
8 are unspecified jury instructions “highlighting [his] state of mind before and during the
9 altercation with [the victim].” #54, at 42.

11 ¹The Court further notes that the substantive claim of jury instruction error in Ground 3 – to the extent
12 that the claim *arguendo* is exhausted in the first instance – was raised not on direct appeal but instead on
13 post-conviction review. The Supreme Court of Nevada apparently construed the claim of error presented to
14 that court as consisting only of claims of ineffective assistance of trial and appellate counsel for failing to
15 object to the transition instruction in Instruction No. 15. See #71, Ex. 144, at 3-4. The state high court does
16 not consider substantive claims raised for the first time on state post-conviction review in conjunction with
17 ineffective assistance claims. Cf. *id.*, at 5 n.15 (expressly rejecting substantive claim presented with claim of
18 ineffective assistance as procedurally barred because the substantive claim should have been raised on
19 direct appeal). It is easy to see from the post-conviction appeal briefing how the state supreme court could
20 construe the claim of error regarding the transition jury instruction as presenting claims only of ineffective
21 assistance of trial and appellate counsel. The subject heading for the relevant argument does refer to a due
22 process claim from trial court error as well as to claims of ineffective assistance of counsel. But the body of
23 the argument arguably reads as an argument in support of claims of ineffective assistance of counsel rather
24 than an independent substantive claim of jury instruction error. See #71, Ex. 140, at 10-15; *id.*, Ex. 142, at 2-
25 4.

20 In all events, the Court notes that Ground 3 was raised on state post-conviction review rather than
21 direct appeal because that procedural posture makes it all the more highly improbable that any *arguendo*
22 assertion of the substantive claim in Ground 3 on state post-conviction review would have clearly implied
23 other substantive claims of jury instruction error on post-conviction review. Under Nevada state procedural
24 law, the Supreme Court of Nevada simply would not be looking to address independent substantive claims of
25 jury charge error on state post-conviction review, whether directly expressed or instead *arguendo* “implied.”
26 The exhaustion of Ground 3 itself has not been challenged, and the Court has assumed *arguendo* that the
27 claim is exhausted. The salient point with regard to Ground 7, however, is that the *arguendo* presentation of
28 Ground 3 on state post-conviction review rather than on direct appeal cuts sharply against any argument that
the claim “clearly implied” other substantive claims of jury instruction error when raised in that procedural
posture. Independent substantive claims of jury instruction error simply would not be considered in that
procedural posture separate and apart from claims of ineffective assistance of counsel.

For the reasons discussed in the text, however, the Court would not conclude that Ground 3 “clearly
implied” and exhausted Ground 7 even if Ground 3 had been presented on direct appeal rather than on state
post-conviction review. The claims in Ground 3 and Ground 7 – in whatever procedural posture raised – are
not “sufficiently related” and “intertwined” such that the presentation of one exhausts the other.

1 Here as well petitioner contends that the claim of ineffective assistance of counsel in
2 Ground 8 was “sufficiently intertwined” with the allegedly exhausted Grounds 2 and 3 that the
3 presentation of those substantive claims on direct appeal exhausted the claim of ineffective
4 assistance of trial counsel in Ground 8.

5 The Court incorporates its background discussion of this claimed basis for exhaustion
6 as to Ground 7, *supra*.

7 Given the Court’s holding that Ground 2 is not exhausted, alleged exhaustion of
8 Ground 2 cannot serve as a basis for exhaustion of Ground 8.

9 Presentation of a substantive constitutional claim based upon an allegedly erroneous
10 transition instruction given by the state trial court did not clearly imply a claim of alleged
11 ineffective assistance of trial counsel in failing to offer other, still-as-yet largely unspecified
12 jury instructions regarding state of mind. Petitioner’s argument that the issue of his intent was
13 “intertwined” with the “type of crime proved in Ground Three” does not persuade the Court
14 that the *arguendo* assertion of Ground 3 on state post-conviction review exhausted Ground
15 8 as well.

16 Ground 8 is not exhausted.

17 **Grounds 9 and 10**

18 In Ground 9, petitioner alleges that he was denied effective assistance of counsel when
19 trial counsel failed to call an expert witness to testify about the trajectory of the victim’s stab
20 wounds to show that petitioner allegedly was on his back when he stabbed the victim.

21 In Ground 10, petitioner alleges that he was denied, *inter alia*, effective assistance of
22 counsel when trial counsel allegedly failed to adequately prepare him for his trial testimony.

23 Petitioner concedes that neither one of these claims was fairly presented to the
24 Supreme Court of Nevada on state post-conviction review.

25 Petitioner urges, however, that the lack of exhaustion of these claims should be
26 excused under 28 U.S.C. § 2254(b)(1)(B)(ii) because of the existence of circumstances that
27 rendered state corrective process ineffective to protect his rights. He contends that the
28 alleged failure of his state post-conviction counsel to communicate with him regarding the

1 issues to be presented on state post-conviction review through to the Supreme Court of
2 Nevada constitute circumstances that rendered the state corrective process ineffective.²

3 Petitioner cites no authority in support of the proposition that an alleged failure of state
4 post-conviction counsel to pursue issues that the petitioner wishes to pursue renders state
5 corrective process ineffective for purposes of § 2254(b)(1)(B)(ii). The Court is persuaded by
6 the Fifth Circuit decisions rejecting this argument. *See Ruiz v. Quarterman*, 460 F.3d 638,
7 634-35 (5th Cir. 2006); *Martinez v. Johnson*, 255 F.3d 229, 238 n.10 (5th Cir. 2001). It is
8 established law that alleged ineffective assistance of post-conviction counsel does not
9 constitute cause to overcome a procedural default because a petitioner does not have a
10 constitutional right to counsel in post-conviction proceedings. *Id.* It would be an anomalous
11 rule indeed under which an alleged failure of post-conviction counsel to raise an issue would
12 not excuse the procedural default of a claim that actually was later presented to the state
13 courts but nonetheless would excuse the failure to ever raise the claim in the state courts in
14 the first instance. No authority supports the proposition that counsel's actions or inactions
15 may excuse a failure to exhaust a claim and thereby deprive the state courts of the first
16 opportunity required by comity to consider a claim of constitutional error.³

17 Grounds 9 and 10 are not exhausted.

18 **Ground 11**

19 In Ground 11, petitioner alleges that he was denied a right to a fair trial under the Fifth
20 and Sixth Amendments due to the cumulative effect of the alleged errors raised.

21 Petitioner concedes that he did not present such a cumulative error claim to the
22 Supreme Court of Nevada, either on direct appeal or post-conviction review.

24 ²See ##54, at 39; #76, at 4.

25 ³It further is established law that – even on direct appeal – a defendant has no constitutional right to
26 compel appointed counsel to raise every non-frivolous ground that the defendant wishes to raise. *See Jones*
27 *v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel instead is expected to
28 exercise independent professional judgement in selecting the issues to pursue on appeal. *Id.* There simply
is no constitutional underpinning for a rule that state corrective process is effective vis-à-vis an appellate
proceeding only if counsel presents all claims that the petitioner wishes to pursue.

1 Petitioner contends, however, that the cumulative error claim in Ground 11 is
2 exhausted because it is “intertwined” with the exhausted claims.

3 In *Wooten*, the Ninth Circuit rejected the argument that the cumulative error claim
4 presented on federal habeas review in that case was intertwined with the claims exhausted
5 in the state courts:

6 Cumulative error comes into play when no single trial error
7 is, on its own, sufficiently prejudicial to warrant reversal.
8 Briefing a number of isolated errors that turn out to be insufficient
9 to warrant reversal does not automatically require the court to
consider whether the cumulative effect of the alleged errors
prejudiced the petitioner.

10 Wooten recited three out of the four alleged substantive
11 errors in his brief to the California Supreme Court without
developing any argument on those errors. Indeed, Wooten
12 specified that he included those errors in order to exhaust them
for the purpose of bringing a federal habeas petition. That
13 Wooten specifically noted that he was listing a number of errors
for exhaustion purposes but omitted the cumulative error claim
confirms that the California Supreme Court had no reason to
14 conclude that Wooten also believed that there was cumulative
error. *Cf. Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th
15 Cir.2003)(en banc)(“Especially here, where a counseled petitioner
raised both the state and federal issues in his briefing before the
16 court of appeals, but then omitted the federal issue before the
Oregon Supreme Court, there is reason to conclude that such
omission may be a strategic choice by counsel....”).

17 Finally, our decision in *Solis v. Garcia*, 219 F.3d 922 (9th
18 Cir.2000), suggests that a cumulative error claim must be clearly
identified in a petitioner's brief before a state court to be
19 exhausted. Unlike Wooten, the petitioner in *Solis* explicitly
mentioned his cumulative error claim in the conclusion of his brief
20 to the California Supreme Court. *Id.* at 930. We nevertheless
concluded that the isolated reference to cumulative error was not
21 sufficient to exhaust the claim. *Id.* We noted that the cumulative
error was not labeled as an issue in the brief's table of contents
22 and the petitioner did not argue cumulative error or cite any
authority on cumulative error, “leaving the California Supreme
23 Court with no argument on the issue from either side.” *Id.* The
same can be said of Wooten's petition before the California
24 Supreme Court.

25 540 F.3d at 1025-26.

26 Petitioner acknowledges that *Wooten* concluded that the cumulative error claim in that
27 case was not exhausted. He seeks to distinguish the *Wooten* decision on the following basis,
28 however:

1 Ground Eleven names all of the grounds presented in the
2 Amended Petition as the basis for the cumulative error allegation.
3 See Amended Petition at 51-52. The exhausted claims are
4 developed arguments, and these are sufficient to keep the
5 cumulative error allegation in front of the Court. In *Wooten*, the
6 court disapproved when the petitioner listed errors as cumulative
7 without developing any argument on them. See 540 F.3d at 1026.
8 Unlike *Wooten*, here the Nevada Supreme Court considered
9 Grounds One through Six and passed on them. Thus, in hearing
10 Ground Eleven this Court is not usurping the Nevada high court's
11 right to hear a case prior to it entering the federal system.

12 #76, at 4.⁴

13 Petitioner misapprehends the basis for the *Wooten* holding.

14 *Wooten* did not hold that the cumulative error claim was unexhausted because the
15 petitioner there failed to develop argument on three of the four alleged substantive errors
16 before the California Supreme Court.

17 Rather, the *Wooten* court held that the cumulative error claim was not exhausted in
18 that case: (a) because “[b]riefing a number of isolated errors that turn out to be insufficient to
19 warrant reversal does not automatically require the court to consider whether the cumulative
20 effect of the alleged errors prejudiced the petitioner;” (b) because “*Wooten* specifically noted
21 that he was listing a number of errors for exhaustion purposes *but omitted the cumulative*
22 *error claim;*” and (c) because the prior binding precedent in *Solis* “suggests that a cumulative
23 error claim must be clearly identified in a petitioner's brief before a state court to be
24 exhausted.” 540 F.3d at 1025-26 (emphasis added).

25 Here, too, briefing a number of isolated errors – on direct appeal and then separately
26 on post-conviction review – did not automatically require the Supreme Court of Nevada to
27 consider whether the cumulative effect of the alleged errors – particularly across both
28 proceedings – prejudiced petitioner. Here, too, petitioner did not include any cumulative error
claim – either on direct appeal or on the state post-conviction appeal. Here, too, petitioner

⁴The Court notes that Ground 11 is not restricted to only Grounds 1 through 6 but instead, as petitioner states at the beginning of the paragraph, extends to “all of the grounds presented in the Amended Petition.” Grounds 2 and 7 through 10 of the amended petition are not exhausted as a predicate for Ground 11, even if a claim of cumulative error itself otherwise were exhausted.

1 never clearly identified a cumulative error claim in any of his briefing in the state supreme
2 court.

3 Ground 11 therefore is not exhausted.

4 ***Remaining Issues***

5 The Court defers possible consideration of any remaining issues raised on the motion
6 to dismiss pending completion of proceedings regarding the relief to be requested by
7 petitioner pursuant to *Rose v. Lundy, supra*. Such proceedings will be conducted on the
8 expedited schedule established herein.

9 IT THEREFORE IS ORDERED that respondents' motion (#74) to dismiss is GRANTED
10 IN PART, such that the Court holds that Grounds 2 and 7 through 11 are not exhausted.

11 IT FURTHER IS ORDERED that petitioner shall have until **March 21, 2012**, to file a
12 motion for dismissal without prejudice of the entire petition, for partial dismissal only of the
13 unexhausted claims, and/or for other appropriate relief.

14 IT FURTHER IS ORDERED that respondents shall have until **March 26, 2012**, to file
15 a response and petitioner shall have until **March 28, 2012**, to file a reply.

16 IT FURTHER IS ORDERED that respondents' reply deadline with regard to the
17 remaining issues on the motion to dismiss is CONTINUED WITHOUT DATE. The Court
18 defers further briefing and consideration of the remaining issues on the motion to dismiss
19 pending completion of proceedings on the relief requested by petitioner with regard to the
20 unexhausted claims.

21 The entire petition, as amended, will be dismissed without prejudice for lack of
22 complete exhaustion if a motion is not timely filed.

23 **No extension of the deadlines established herein will be granted except in the**
24 **most compelling of circumstances.**

25 DATED: March 12, 2012.

26 

27 EDWARD C. REED
28 United States District Judge