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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY J. BURRIOLA,)
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 Petitioner,)
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 vs.)
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 WARDEN PALMER, *et al.*,)
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 Respondents.)
 _____)
 /

3:10-cv-0344-ECR-VPC

ORDER

Petitioner, Anthony J. Burriola, is a Nevada prisoner appearing pro se. Before the Court is respondents’ Motion to Dismiss the petition (ECF No. 10) and petitioner’s “Opposition to Motion to Dismiss/Summary Judgment of § 2254 Due to Breach of Plea Agreement - and Plaintiff’s Motion for Summary Judgment (ECF No. 13). Respondents do not reply.

I. Overview

Petitioner attacks a judgment of conviction from 1999. The petition was filed in this Court on June 9, 2010. The petition raises four grounds for relief which petitioner identifies as having been exhausted in his second state post-conviction petition. The grounds for relief allege:

- I. Denial of Due Process guaranteed by the Fourteenth Amendment where the Petitioner was coerced into pleading by a promise of a maximum sentence of (5) years, but once he appeared to plea, was coerced to plea based on time served and consideration for parole after six years. Burriola did not receive the (2) years for time served in jail; and was not considered for parole after (6) years in prison, as stipulated in the plea agreement. This breach of the plea agreement entitled the prisoner to withdraw the plea - by law, and the sentence to be vacated.

Petitioner asserts he first raised this claim in a second post-conviction action filed October

1 24, 2008 because the “violation was not manifest at the time of the first post-conviction action.”

2 Petition, p. 4.

3 II. Violation of Fourth, Fifth, and Sixth Amendment rights to be free
4 from illegal seizure, due process, right to trial in speedy fashion,
5 right to attorney at trial. The criminal complaint filed on 3.5.98 in
6 justice court, charged Burriola with (8) felony violations.
7 Information was not filed in district court until 6.9.98. The
8 prisoner was under false arrest from 3.5.98 to 6.9.98, since Nevada
9 and federal laws dictate that Information must be filed in district
10 court within (15) days after holding or waiver of preliminary
11 hearing in justice court. A structural defect.

12 Petitioner asserts he only became aware of “the illegality [sic] of this action on October 12-
13 2008.” Petition, p. 6.

14 III. Violations of the First and Fourteenth Amendment rights to access
15 to the court and due process. On 8.4.2000, an evidentiary hearing
16 was held regarding a first post conviction relief action. The judge
17 - Mosley - refused to appoint counsel for that hearing, which in
18 turn prevented proper development of record, facts, laws and
19 procedures violations which would be meritorious.

20 Petitioner contends the violation occurred at the evidentiary hearing for the first petition.

21 IV. Violation of the First and Fourteenth Amendment right to access
22 the courts and due process. The State/Defendants prevented the
23 filing of an appeal from denial of the previous petition by keeping
24 the prisoner in a disciplinary segregation cell without legal
25 research materials; access to the legal library; a pen to construct
26 and sign documents until the time to appeal had expired; or legal
27 mail. Which in turn, denied review of meritorious grounds
28 contained in that action, in the constitutionally guaranteed manner,
e.g. IAC, plea entered into unknowingly and by coercion, etc.

Petitioner asserts he did appeal to the Nevada Supreme Court but was denied proper review
because he was untimely due to the state actors preventing him from filing on time. Petition, p. 8-a.

22 II. Discussion

23 Respondents move to dismiss the petition on the basis of procedural default and failure to
24 state federally cognizable claims. In support of the argument for procedural default, respondents
25 note that the Nevada Supreme Court affirmed dismissal of the second state petition on the basis of
26 NRS 34.726(1), NRS 34.800(2) and NRS 34.810(2), citing to the third document attached to the
27 petition. In that document the Nevada Supreme Court ordered:

1 Appellant filed his petition on October 24, 2008, more than nine
2 years after the filing of the judgment of conviction on April 23, 1999.
3 Thus, appellant's petition was untimely filed. *See* NRS 34.726(1).
4 Moreover, appellant's petition was successive because he had previously
5 filed a post-conviction petition for a writ of habeas corpus on April 23,
6 2000. *See* NRS 34.810(2). Further, appellant's petition constituted an
7 abuse of the writ as he raised claims that were new and different from
8 those claims raised in his previous post-conviction petition. *See* NRS
9 34.810(2). Appellant's petition was procedurally barred absent a
10 demonstration of good cause and prejudice. Further, because the State
11 specifically pleaded laches, appellant was required to overcome the
12 presumption of prejudice to the State. *See* NRS 34.800(2).

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Petition, attachment 3.

29 The Nevada Supreme Court went on to determine that the arguments for cause and prejudice
30 presented by petitioner to overcome the procedural bar were inadequate. The court denied relief. *Id.*
31 As a result, petitioner's claims are procedurally defaulted in federal court.

32 In opposition to the motion to dismiss, petitioner fails to address the substance of the
33 arguments, suggesting instead that respondents filed an inappropriate response, failed to comply
34 with F.R.C.P. 8(b) and LR 7-2 and failed to raise any issue of material fact or defense as to the
35 merits of petitioner's claims, e.g., that there was a breach of the plea agreement. Petitioner further
36 argues the motion to dismiss must be denied because respondents did not file any declarations or
37 other sworn testimony to support the motion.

38 Petitioner's arguments are inapposite to the basis for the motion to dismiss and he offers
39 nothing by way of arguments in that brief to overcome the procedural bar imposed by the Nevada
40 Supreme Court, except to suggest the issue is null because "bar has been argued and thoroughly
41 refuted by petitioner's brief in support of petition." Opposition to Motion to Dismiss, p.2.
42 Petitioner has, however, filed a brief in support of his petition wherein he presents certain arguments
43 apropos to the instant motion. Those arguments will be considered herein.

44 A. Procedural Default

45 Under the procedural default doctrine, federal review of a habeas claim may be barred if the
46 state courts rejected the claim on an independent and adequate state law ground due to a procedural
47 default by the petitioner. Review of a defaulted claim will be barred even if the state court also

1 rejected the claim on the merits in the same decision. Federal habeas review will be barred on
2 claims rejected on an independent and adequate state law ground unless the petitioner can
3 demonstrate either: (a) cause for the procedural default and actual prejudice from the alleged
4 violation of federal law; or (b) that a fundamental miscarriage of justice will result in the absence of
5 review. *See, e.g., Bennet v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003). In this instance petitioner is
6 faced with at least three state procedural bars: NRS 34.726; NRS 34.800(2); and NRS 34.810(2).
7 Since all were applied to the petition by the Nevada Supreme Court, any one can be found to be
8 adequate to bar this Court's review.

9 Adequacy of NRS 34.726(1)

10 For application of a state procedural bar to prevent federal habeas review of a federal claim,
11 the state's procedural rule must be both independent of the federal question and adequate to support
12 the judgment. *See, e.g., Collier v. Bayer*, 408 F.3d 1279, 1283-84 (9th Cir. 2005). In order for a
13 state procedural rule to be adequate to support the state court judgment, the state rule must be clear,
14 consistently applied, and well established at the time of the petitioner's purported default. 408 F.3d
15 at 1284. A state law procedural rule is adequate if the state courts followed the rule "in the vast
16 majority of cases" during the relevant time. *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir.
17 1996).

18 Although, petitioner has not done so in his briefing, when a habeas petitioner challenges the
19 consistency of a state's application of a time bar, the court considering the challenge must look to
20 the consistency of application both at the time that the limitations period began running following
21 the denial of the direct appeal and at the time that the time bar was applied in denying post-
22 conviction relief. *See, e.g., High v. Ignacio*, 408 F.3d 585, 589 (9th Cir. 2005). In this case, the
23 Court thus looks to the consistency of the Nevada Supreme Court's application of NRS 34.726(1)
24 both at the time that petitioner's direct appeal was denied in 1999 and at the time that the time bar
25 was applied in 2008.

26 The Ninth Circuit consistently has rejected the argument that the Supreme Court of Nevada
27 inconsistently applies the one-year time bar in NRS 34.726(1) generally. *See Collier*, 408 F.3d at
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1 1285; *Loveland v. Hatcher*, 231 F.3d 640, 642-63 (2000)(as of 1993); *Moran*, 80 F.3d at 1269-70 (as
2 of 1996); *see also High*, 408 F.3d at 590 (discussing rejection of the inconsistency argument as to
3 NRS 34.726(1) in rejecting the same argument regarding an earlier Nevada provision). Thus, NRS
4 34.726(1) is an independent state law ground that has been consistently applied by the Nevada
5 courts in similar circumstances. The claims were procedurally barred in state court and this Court
6 may not review the merits of the claims absent a showing of cause and prejudice on the part of
7 petitioner.

8 As cause to overcome the timeliness bar, petitioner suggests in his brief in support of the
9 petition (although not in his opposition to the motion to dismiss) that the issue of the breach of the
10 plea agreement did not occur until April 22, 2005, when he was denied parole at a hearing held on
11 that date. Thus, he contends he was unable to raise the claim in a previous petition. However, as the
12 Nevada Supreme Court noted, this does not excuse the three year delay between the date of the
13 parole hearing in 2005 and the time he filed his second state post-conviction petition in 2008.

14 NRS 34.800 - Presumption of Prejudice

15 Petitioner also argues that the one-year limitation period and laches should not apply because
16 the state did not show that it was actually prejudiced by the delay is unavailing. It is the petitioner's
17 burden to overcome the presumption of prejudice imposed by Nevada law under NRS 34.800. He
18 did not do so to the state court's satisfaction.

19 The petition is procedurally defaulted and petitioner has not shown a cause external to the
20 defense which would excuse his failure to timely file his petition. Neither has he demonstrated
21 prejudice. *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir.1994).

22 Other Procedural Bars

23 Because the petition is defaulted on the basis of the above discussion of timeliness, it is not
24 necessary for the Court to consider the procedural bar NRS 34.810(2) - second or successive
25 petitions.

26 B. Sufficiency of Claims

27 Respondents also argue that all four claims should be dismissed because they fail to state
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1 adequate federal claims for relief.

2 Specifically, respondents argue that ground one is conclusory and fails to provide sufficient
3 facts to warrant relief. Conclusory allegations not supported by a statement of specific facts do not
4 warrant habeas corpus relief. *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995), *cert. denied*, 517
5 U.S. 1143 (1996). In his first claim for relief, petitioner alleges he was coerced into accepting the
6 plea agreement. He fails, however, to provide any facts showing who coerced him and how the
7 coercion was effected. Such bald allegations will not win relief and must be dismissed.

8 In ground two, petitioner attempts to make a federal claim out of a purported violation of
9 state law. He suggests that the delay in filing an Information in the state district court violated due
10 process as guaranteed by the Fourteenth Amendment. He admits that he was being held under a
11 criminal complaint and that he was afforded a preliminary hearing to establish the existence of
12 evidence sufficient to make him stand trial. Errors of state law will not afford relief in a federal
13 habeas action. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). And the invocation of a talismanic due
14 process violation will not morph a violation of state law into a federal habeas claim *Langford v.*
15 *Day*, 110 F.3d 1380, 1389 (9th Cir. 1996), *cert. denied*, 522 U.S. 881 (1997). Ground two must be
16 dismissed as failing to present a federal claim for relief.

17 In ground three, petitioner alleges a federal constitutional violation because the state court
18 declined to appoint him counsel to represent him in his state post-conviction proceedings. There is
19 no federal right to appointed counsel in post-conviction proceedings or other discretionary appeals.
20 *Wainwright v. Torna*, 455 U.S. 586, 587-588 (1982); *see also Ross v. Moffitt*, 417 U.S. 600 (1974).

21 Finally, in ground four, petitioner alleges he was denied due process when he was prevented
22 from filing a timely appeal and federal habeas petition first because he was placed in disciplinary
23 segregation and second because the federal court required that he pay the \$5 filing fee to pursue his
24 federal petition. Neither of these circumstances present a valid attack to his state conviction.
25 Rather, as respondents suggest, they present argument to cause to overcome the procedural bar to his
26 federal petition. Ground four must be dismissed, as it fails to state a violation of a federal law or
27 constitutional provision which would invalidate his state criminal conviction. *See*, 28 U.S.C. §

1 2254.

2 **III. Petitioner’s Motion for Summary Judgment**

3 Petitioner argues that summary judgment is appropriate because respondents have failed to
4 present any issue of fact related to the purported breach of the plea agreement. However, because
5 the merits of the claims shall not be considered given the procedural bar to such review, the motion
6 for summary judgment must be dismissed as moot.

7 **Certificate of Appealability**

8 In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28
9 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
10 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
11 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
12 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
13 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court's
14 assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484).
15 In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues
16 are debatable among jurists of reason; that a court could resolve the issues differently; or that the
17 questions are adequate to deserve encouragement to proceed further. *Id.*

18 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section
19 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the
20 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
21 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
22 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
23 issuance of a certificate of appealability, and determines that none meet that standard. The Court
24 will therefore deny petitioner a certificate of appealability.

25 **IT IS THEREFORE ORDERED** that the Motion to Dismiss (ECF No. 10) is **GRANTED**.
26 The petition is dismissed as procedurally defaulted and the claims are insufficient to support federal
27 habeas relief.

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IT IS FURTHER ORDERED that petitioner's Motion for Summary Judgment (ECF No. 13) is **DENIED**.

IT IS FURTHER ORDERED that no Certificate of Appealability is warranted and none shall issue.

The Clerk shall enter judgment accordingly.

DATED this 5th day of February, 2011.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE