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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DANIEL G. SANDOVAL,

Petitioner,

v.

ROBERT LEGRAND,

Respondents.

Case No. 3:11-cv-00799-MMD-VPC

ORDER

This habeas matter comes before the Court on respondents' motion to dismiss (dkt. no. 28). Respondents contend, *inter alia*, that the second amended petition (dkt. no. 23) is a mixed petition because Ground 2 is not exhausted.

I. BACKGROUND

Petitioner Daniel Sandoval challenges his 2006 Nevada state conviction, pursuant to a guilty plea, of battery with intent to commit sexual assault on a child under fourteen and willfully endangering a child as a result of child abuse. He challenged his conviction in the state courts both on direct appeal and in a post-conviction petition.

In Ground 2, petitioner alleges that he was denied due process of law in violation of the Fifth and Fourteenth Amendments because the state statute of limitations allegedly had run on the charges brought against him.

It is undisputed that petitioner presented a claim on direct appeal only of alleged state law error, contending that the state district court erred in denying his motion to dismiss the charges based on the statute of limitations. Petitioner presents no argument to the contrary.

1 Petitioner contends, however, that Ground 2 is technically exhausted because
2 the claim would be procedurally defaulted in the state courts, such that there allegedly is
3 not an available remedy in the state courts. In particular, petitioner contends that “there
4 is no question a second successive [state] petition would be procedurally barred,” “[n]o
5 credible claim can be made that Sandoval has any available remedies left in state
6 court,” and “there is no reasonable probability that state relief remains available to”
7 him.¹ However, petitioner also contends that “he can demonstrate good cause and
8 prejudice to overcome any procedural defaults.” Petitioner does not specify how he
9 could do so but instead “requests an opportunity to fully brief this issue upon this Court’s
10 order.”²

11 Petitioner thus urges, on the one hand, that he has no remedy in the state courts
12 because his claims would be procedurally defaulted but, on the other, that he can
13 overcome a procedural default on a showing of cause and prejudice.

14 **II. DISCUSSION**

15 Petitioner does not present argument seeking to establish that he fairly presented
16 the federal claim in Ground 2 to the state courts. The Court therefore does not tarry
17 over an articulated application of the well-established law in this regard.³

18 ¹Dkt. no. 30, at 3-4.

19 ²*Id.*, at 3 n.1. Nothing in the prior order (dkt. no. 27) deferred briefing on any
20 issues raised in responding to a motion to dismiss. Petitioner may not unilaterally defer
21 briefing.

22 ³Under Local Rule LR 7-2(d), the failure to file points and authorities in response
23 to a motion in full or in part constitutes a consent to the granting of the motion to the
24 extent to which no response is made. *E.g.*, *Joseph v. Las Vegas Metropolitan Police*
25 *Dept.*, 2010 WL 3238992, slip op. at *5 (D. Nev., Aug. 13, 2010).

26 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state
27 court remedies on a claim before presenting that claim to the federal courts. To satisfy
28 this exhaustion requirement, the claim must have been fairly presented to the state
courts completely through to the highest court available, in this case the Supreme Court
of Nevada. *E.g.*, *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (*en banc*);
Vang v. Nevada, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner
must refer to the specific federal constitutional guarantee and must also state the facts
that entitle the petitioner to relief on the federal constitutional claim. *E.g.*, *Shumway v.*
Payne, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the
petitioner present the state courts with both the operative facts and the federal legal
theory upon which his claim is based. *E.g.*, *Castillo v. McFadden*, 399 F.3d 993, 999
(*fn. cont...*)

1 Petitioner's contention that he can establish cause and prejudice to overcome a
2 procedural default wholly undercuts his contention that he has no available remedy in
3 the state courts because his claim would be procedurally defaulted.

4 As the Court has noted in multiple prior cases, the standards for excusing a
5 procedural default are substantially the same in Nevada state court as they are in
6 federal court. Accordingly, the Court will not hold claims to be exhausted on the
7 premise that the petitioner's claims would be procedurally defaulted in state court
8 absent an unequivocal stipulation by the petitioner that the unexhausted claims in fact
9 would be denied on state procedural grounds if he returned to state court to present the
10 claims.⁴

11 Such an unequivocal stipulation, to in truth be unequivocal in light of the
12 application of the procedural default rules under Nevada state post-conviction
13 procedure, must include concessions that: (1) petitioner cannot avoid dismissal of the
14 claims in the state courts because he cannot demonstrate cause and prejudice in the
15 state courts to overcome the state procedural bars;⁵ (2) petitioner cannot avoid

16 (... *fn. cont.*)
17 (9th Cir. 2005). The exhaustion requirement ensures that the state courts, as a matter of
18 federal-state comity, will have the first opportunity to pass upon and correct alleged
19 violations of federal constitutional guarantees. See, e.g., *Coleman v. Thompson*, 501
20 U.S. 722, 731 (1991). Under *Rose v. Lundy*, 455 U.S. 509 (1982), a petition presenting
21 both exhausted and unexhausted claims must be dismissed without prejudice unless
22 the petitioner dismisses the unexhausted claims or seeks other appropriate relief.

23 ⁴See, e.g., *Johnson v. Neven*, No. 2:08-cv-01363-JCM-RJJ, dkt. no. 70, at 13-15
24 (D.Nev. July 26, 2012) (declining to find exhaustion on the basis of procedural default
25 absent an unequivocal stipulation, *inter alia*, that petitioner could not overcome the
26 procedural bars under the substantially similar standards for overcoming the bars in
27 state court); *Gaines v. Neven*, No. 2:10-cv-01367-RLH-NJK, dkt. no. 20, at 6-7 (D. Nev.
28 April 10, 2012); see also *Wheeler v. Cox*, No. 3:12-cv-00469-MMD-WGC, dkt. no. 27, at
18-19 & n.37 (D. Nev. May 29, 2013) (referring to the same background principles in
granting a motion for a stay to exhaust); accord *Jones v. McDaniel*, 2009 WL 890915
(9th Cir., Apr. 2, 2009) (in an unpublished disposition, holding that the petitioner had not
established that exhaustion would be futile, given the substantial similarity of Nevada
state and federal standards to overcome a procedural bar).

⁵See, e.g., *Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006) ("A petitioner can
overcome the bar to an untimely or successive petition by showing good cause and
prejudice."); see also *Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9th Cir. 2004)
(recognizing that Nevada's cause and prejudice analysis and the federal cause and
prejudice analysis are nearly identical).

1 dismissal of the claims in the state courts because he cannot demonstrate in the state
2 courts that the alleged constitutional violation has probably resulted in the conviction of
3 one who is actually innocent and cannot thereby overcome the procedural bars;⁶ and
4 (3) the procedural bars otherwise are now consistently applied by the Nevada state
5 courts, such that it is not possible that the state courts, as a discretionary matter, would
6 consider the claims despite the procedural default and despite a failure to demonstrate
7 either cause and prejudice or actual innocence. Petitioner has not made these
8 stipulations here.

9 In the absence of such concessions, the Court will not hold that there is no
10 possibility that the unexhausted claims would be considered by the state courts. Given
11 the similar standards, substantially any argument that a petitioner might present in
12 federal court to overcome a procedural default can be presented to the state courts in
13 the first instance. The Court thus repeatedly has rejected the proposition that claims that
14 a petitioner thereafter might pursue in a second state petition are technically exhausted
15 by virtue of being procedurally defaulted, given that the Nevada state courts apply
16 substantially the same standards as do the federal courts for overcoming a procedural
17 bar. It generally is more appropriate for the state courts to have the opportunity in the
18 first instance to consider the application of conclusive procedural bars. *Cf. Gonzalez v.*
19 *Wong*, 667 F.3d 965, 980 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 155 (2012) (noting
20 that, in the circumstances presented, a stay was appropriate because it provided the
21 state courts with the first opportunity to resolve the claim).

22 The Court accordingly is not persuaded on the showing made that Ground 2 is
23 exhausted on the premise that Ground 2 is procedurally defaulted. The Court therefore

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26 ⁶See, e.g., *Mitchell*, 149 P.3d at 36 (“Even when a petitioner cannot show good
27 cause sufficient to overcome the bars to an untimely or successive petition, habeas
28 relief may still be granted if the petitioner can demonstrate that ‘a constitutional violation
has probably resulted in the conviction of one who is actually innocent,’ *citing Murray v.*
Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).


1 holds that Ground 2 is not exhausted. The Court thus need not reach the remaining
2 arguments directed to whether Ground 2 presents a viable federal habeas claim.

3 **III. CONCLUSION**

4 It is therefore ordered that respondents' motion to dismiss (dkt. no. 28) is granted
5 in part, such that the Court holds that Ground 2 is not exhausted.

6 It is further ordered that petitioner shall have thirty (30) days from entry of this
7 order within which to file a motion for dismissal without prejudice of the entire petition,
8 for a partial dismissal only of the unexhausted Ground 2, and/or for other appropriate
9 relief. Any motion filed must contain or be accompanied by, either contemporaneously
10 or via a document filed within ten (10) days thereafter, a signed declaration by petitioner
11 under penalty of perjury pursuant to 28 U.S.C. § 1746 that he has conferred with his
12 counsel in this matter regarding his options, that he has read the motion, and that he
13 has authorized that the relief sought therein be requested from the Court. The entire
14 petition will be dismissed without prejudice for lack of complete exhaustion if a motion
15 and/or the verification is not timely filed.

16 DATED THIS 24th day of September 2013.

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21 MIRANDA M. DU
22 UNITED STATES DISTRICT JUDGE
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