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28UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CHRISTOPHER O'NEILL,

Case No. 3:11-cv-00901-MMD-VPC

Petitioner,

ORDER

v.

RENEE BAKER, *et al.*,

Respondents.

This action is a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the Court is respondents' second motion to dismiss certain grounds in the first-amended petition. (ECF No. 68.) Petitioner Christopher O'Neill opposed, and respondents replied. (ECF Nos. 69, 72.)

I. PROCEDURAL HISTORY & BACKGROUND

On June 7, 2005, O'Neill was convicted pursuant to jury verdicts of three counts of possession of a forged instrument, felonies in violation of NRS § 205.110. (Exhs. 24, 25, 26, 30).¹ On August 25, 2005, O'Neill was adjudicated a habitual criminal, sentenced to life with the possibility of parole, with a minimum parole eligibility of ten years on all three counts, to be served concurrently, and the judgment of conviction was entered. (Exhs. 29, 30.) Petitioner was not given credit for time served. (Exh. 30.) An amended judgment of conviction was filed on April 5, 2007. (Exh. 52.)

¹Exhibits referenced in this order are exhibits to petitioner's first-amended petition, ECF No. 13, and are found at ECF Nos. 14-23, 64.

1 O'Neill appealed, and the Nevada Supreme Court affirmed his convictions and
2 sentence on March 8, 2007. (Exh. 50); *O'Neill v. State*, 153 P.3d 38, 45 (Nev. 2007).²
3 Remittitur issued on April 3, 2007. (Exh. 51.)

4 On April 30, 2007, O'Neill filed his first state postconviction petition for writ of
5 habeas corpus. (Exh. 53.) Following an evidentiary hearing, the state district court denied
6 the petition on July 21, 2010. (Exhs. 74, 82, 94, 102, 104, 108.) The Nevada Supreme
7 Court affirmed the denial of the petition on November 17, 2011, and remittitur issued on
8 December 13, 2011. (Exhs. 179, 181.)

9 On June 6, 2007, O'Neill filed a motion for a new trial, which the state district court
10 denied on July 24, 2007. (Exhs. 57, 60.) On November 19, 2008, the Nevada Supreme
11 Court affirmed the denial of the motion for new trial, and remittitur issued on December
12 16, 2008. (Exhs. 215, 216.)

13 On July 25, 2010, O'Neill filed a motion to correct or modify his sentence, which
14 the state district court denied on September 1, 2010. (Exhs. 105, 123.) The Nevada
15 Supreme Court affirmed the denial of the motion on February 9, 2011, and remittitur
16 issued on March 7, 2011. (Exhs. 154, 159.)

17 On August 24, 2010, O'Neill filed his second state postconviction habeas petition.
18 (Exh. 119.) The state district court dismissed the petition on October 19, 2011. (Exh. 173.
19 The Nevada Supreme Court affirmed the dismissal of the petition on June 13, 2012, and
20 remittitur issued on July 10, 2012. (Exhs. 210, 211.)

21 O'Neill dispatched this federal petition for writ of habeas corpus on December 8,
22 2011. (ECF No. 4.) Through counsel, petitioner filed an amended petition on November
23 21, 2012. (ECF No. 13.)

24 O'Neill filed a third state postconviction petition in May 2015, and in June 2015,
25 this Court granted a stay and administratively closed this case pending the completion of
26 the state-court litigation. (ECF No. 62.) On December 21, 2016, the Court granted

27 ²The Nevada Supreme Court remanded for an amended judgment of conviction
28 vacating the special sentence of lifetime supervision because it concluded that O'Neill
was not convicted of a crime warranting that sentence.

1 O'Neill's motion to reopen the case. (ECF No. 66.) Respondents now move to dismiss
2 several grounds in the first-amended petition as procedurally barred or unexhausted.
3 (ECF No. 68.)

4 **II. LEGAL STANDARDS**

5 **A. Exhaustion**

6 State prisoners seeking federal habeas relief must comply with the exhaustion rule
7 codified in § 2254(b)(1):

8 An application for a writ of habeas corpus on behalf of a person in custody
9 pursuant to the judgment of a State court shall not be granted unless it
appears that —

10 (A) The applicant has exhausted the remedies available in the
11 court so the State; or

12 (B) (i) there is an absence of available State corrective
13 process; or (ii) circumstances exist that render such
process ineffective to protect the rights of the applicant.

14 28 U.S.C. § 2254(b)(1). The purpose of the exhaustion rule is to give the state courts a
15 full and fair opportunity to resolve federal constitutional claims before those claims are
16 presented to the federal court, and to “protect the state courts’ role in the enforcement of
17 federal law.” *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *O’Sullivan v. Boerckel*, 526 U.S.
18 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
19 unexhausted until the petitioner has given the highest available state court the opportunity
20 to consider the claim through direct appeal or state collateral review proceedings. *See*
21 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374,
22 376 (9th Cir. 1981).

23 A habeas petitioner must “present the state courts with the same claim he urges
24 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
25 constitutional implications of a claim, not just issues of state law, must have been raised
26 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.
27 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must
28 be “alerted to the fact that the prisoner [is] asserting claims under the United States

1 Constitution” and given the opportunity to correct alleged violations of the prisoner’s
2 federal rights. *Duncan*, 513 U.S. at 365; see *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th
3 Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear
4 instruction to potential litigants: before you bring any claims to federal court, be sure that
5 you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.
6 2001) (quoting *Rose*, 455 U.S. at 520). “[G]eneral appeals to broad constitutional
7 principles, such as due process, equal protection, and the right to a fair trial, are
8 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106 (citations omitted).
9 However, citation to state caselaw that applies federal constitutional principles will suffice.
10 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

11 A claim is not exhausted unless the petitioner has presented to the state court the
12 same operative facts and legal theory upon which his federal habeas claim is based.
13 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
14 exhaustion requirement is not met when the petitioner presents to the federal court facts
15 or evidence which place the claim in a significantly different posture than it was in the
16 state courts, or where different facts are presented at the federal level to support the same
17 theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
18 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458
19 (D. Nev. 1984).

20 **B. Procedural Default**

21 28 U.S.C. § 2254(d) provides that this court may grant habeas relief if the relevant
22 state court decision was either: (1) contrary to clearly established federal law, as
23 determined by the Supreme Court; or (2) involved an unreasonable application of clearly
24 established federal law as determined by the Supreme Court.

25 “Procedural default” refers to the situation where a petitioner in fact presented a
26 claim to the state courts but the state courts disposed of the claim on procedural grounds,
27 instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A federal
28 court will not review a claim for habeas corpus relief if the decision of the state court

1 regarding that claim rested on a state law ground that is independent of the federal
2 question and adequate to support the judgment. *Id.*

3 The *Coleman* court explained the effect of a procedural default:

4 In all cases in which a state prisoner has defaulted his federal claims
5 in state court pursuant to an independent and adequate state procedural
6 rule, federal habeas review of the claims is barred unless the prisoner can
7 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.

8 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The
9 procedural default doctrine ensures that the state's interest in correcting its own mistakes
10 is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d 1039, 1046
11 (9th Cir. 2003).

12 To demonstrate cause for a procedural default, the petitioner must be able to
13 "show that some objective factor external to the defense impeded" his efforts to comply
14 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to
15 exist, the external impediment must have prevented the petitioner from raising the claim.
16 See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

17 To demonstrate a fundamental miscarriage of justice, a petitioner must show the
18 constitutional error complained of probably resulted in the conviction of an actually
19 innocent person. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). "[A]ctual
20 innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United*
21 *States*, 523 U.S. 614, 623 (1998). This is a narrow exception, and it is reserved for
22 extraordinary cases only. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Bare allegations
23 unsupplemented by evidence do not tend to establish actual innocence sufficient to
24 overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th Cir. 1992).

25 **III. DISCUSSION**

26 **A. Grounds 1(B), 5(A) and 5(B)**

27 Respondents argue that these three grounds are procedurally defaulted. (ECF No.
28 68 at 2-4.) In ground 1(B), O'Neill asserts that his Sixth and Fourteenth Amendment rights

1 to effective assistance of counsel were violated when trial counsel failed to challenge the
2 handwriting expert's testimony on authentication grounds. (ECF No. 13 at 26-29.) In
3 ground 5(A), O'Neill argues that his Fifth, Sixth and Fourteenth Amendment rights to
4 effective assistance of appellate counsel were violated when appellate counsel failed to
5 raise on appeal the claim that the trial court erred in denying the mistrial application after
6 an officer mentioned the parole violation report prepared in this case. (*Id.* at 43-47.) And
7 in ground 5(B), O'Neill argues that his Fifth, Sixth and Fourteenth Amendment rights to
8 effective assistance of appellate counsel were violated when appellate counsel failed to
9 raise on appeal the claim that the prosecution did not properly authenticate the
10 handwriting exemplar that the handwriting expert used for his comparison and thus it was
11 inadmissible. (*Id.* at 47.)

12 O'Neill presented these claims to the Nevada Court of Appeals in his appeal of the
13 denial of his third state postconviction petition. (Exhs. 221, 229.) The Nevada Court of
14 Appeals affirmed the denial of the petition as procedurally barred because it was untimely,
15 successive and an abuse of the writ. (Exh. 236); NRS § 34.810(1)(b)(2); NRS § 34.810(2).
16 The Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application
17 of the procedural bar at issue in this case — NRS § 34.810 — is an independent and
18 adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see*
19 *also Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999). Therefore, the Nevada
20 Court of Appeal's determination that federal grounds 1(B), 5(A) and 5(B) were
21 procedurally barred under NRS § 34.810(1)(b) was an independent and adequate ground
22 to affirm the denial of the claims in the state petition.

23 O'Neill bears the burden of proving good cause for his failure to present the claim
24 and actual prejudice. *Coleman*, 501 U.S. at 750; *see also Murray*, 477 U.S. at 485. O'Neill
25 contends that he can demonstrate cause and prejudice to excuse the default of grounds
26 1(B), 5(A) and 5(B) pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), because he received
27 ineffective assistance of state postconviction counsel.

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1 The court in *Coleman* held that ineffective assistance of counsel in postconviction
2 proceedings does not establish cause for the procedural default of a claim. *Coleman*, 501
3 U.S. at 750. In *Martinez*, the court established a “narrow exception” to that rule. The court
4 explained that,

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

9 566 U.S. at 17.

10 The Ninth Circuit has provided guidelines for applying *Martinez*, summarizing the
11 analysis as follows:

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

19 *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (citations omitted).

20 Here, grounds 5(A) and 5(B) are claims of ineffective assistance of appellate
21 counsel. However, in *Davila v. Davis*, the United States Supreme Court declined to
22 expand the “narrow” *Martinez* exception to claims of ineffective assistance of appellate
23 counsel. 137 S.Ct. 2058, 2065 (June 26, 2017). Accordingly, O’Neill cannot demonstrate
24 cause and prejudice under *Martinez* to overcome default of these grounds. Grounds 5(A)
25 and 5(B) are dismissed as procedurally barred.

26 In ground 1(B), O’Neill asserts that his Sixth and Fourteenth Amendment rights to
27 effective assistance of counsel were violated when trial counsel failed to challenge the
28 handwriting expert’s testimony on authentication grounds (ECF No. 13 at 26-29). The

1 *Martinez* analysis with respect to this claim is intertwined, to a large extent, with the
2 analysis of the underlying merit of the claim. As such, the Court will defer ruling on the
3 *Martinez* issue until the merit of the ground is briefed in respondents' answer and O'Neill's
4 reply brief.

5 **B. Ground 6(A)³**

6 O'Neill contends that his sentencing as a habitual criminal violated his Fifth and
7 Fourteenth Amendment due process rights because the six prior felony convictions that
8 the court considered should have been viewed as two sets of three related convictions
9 (thereby making O'Neill eligible for sentencing as a small, rather than large, habitual
10 criminal) ("6(A)"). (ECF No. 13 at 47-50.) He also argues that Nevada's habitual criminal
11 scheme violates the federal constitutional rights set forth in *Apprendi v. New Jersey*, 530
12 U.S. 466 (2000) requiring that facts for a sentence enhancement be found by a jury (6(B)).
13 *Id.*

14 Respondents argue that ground 6(A) is unexhausted. (ECF No. 68 at 4-7.) O'Neill
15 presented this claim in his first state postconviction proceedings. (Exh. 53 at 7.) However,
16 the state district court concluded that the claim was procedurally barred because it could
17 have been raised on direct appeal. (Exh. 61); NRS § 34.810(1)(b)(2). O'Neill did not raise
18 this claim to the Nevada Supreme Court in his appeal of the denial of the first state
19 postconviction petition. (See Exh. 42.)

20 In the meantime, however, O'Neill also raised this claim in his motion to
21 modify/correct an illegal sentence. In denying the motion, the state district court
22 specifically stated (incorrectly) that the claim had already been raised and rejected on the
23 merits. (Exh. 123.) O'Neill filed a notice of appeal. The Nevada Supreme Court addressed
24 the issue without briefing and concluded that the district court did not err in denying the
25 claim. (Exh. 154.) This Court agrees with O'Neill that under these circumstances he fairly
26 presented federal ground 6(A) to the state courts. The Court declines to find that this
27 ground is unexhausted.

28 ³This Court divides ground 6 into grounds 6(A) and 6(B).

1 **IV. CONCLUSION**

2 It is therefore ordered that respondents' second motion to dismiss (ECF No. 68) is
3 granted in part as follows: (1) grounds 5(A) and 5(B) are dismissed as procedurally
4 barred; (2) a decision on ground 1(B) is deferred; and (3) ground 6(A) is exhausted.

5 It is further ordered that respondents will have sixty (60) days from the date this
6 order is entered within which to file an answer to the remaining claims in the first-amended
7 petition.

8 It is further ordered that petitioner will have forty-five (45) days following service of
9 respondents' answer in which to file a reply.

10 DATED THIS 30th day of January 2018.

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14 MIRANDA DU
15 UNITED STATES DISTRICT JUDGE
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