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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SHELLI ROSE DEWEY,

Petitioner,

v.

DWIGHT NEVEN, *et al.*,

Respondents.

Case No. 3:13-cv-00317-LRH-WGC

ORDER

Introduction

This action is a petition for writ of habeas corpus by Nevada prisoner Shelli Rose Dewey, who was convicted in 2006, in Nevada's Fourth Judicial District Court, in Elko County, of second degree murder with use of a deadly weapon. The respondents have filed a motion to dismiss Dewey's second amended habeas petition. The Court will grant the motion to dismiss in part and deny it in part, and will dismiss certain of Dewey's claims.

Background

In its decision on Dewey's direct appeal, the Nevada Supreme Court described the factual background of this case, as follows:

In the early morning hours of September 12, 2004, Elko Police answered a hysterical "911" call from appellant Shelli Rose Dewey reporting that her husband, Steven, had been stabbed. During the call, Dewey commented three times that she did not know who stabbed Steven.

At the scene, Dewey appeared to be intoxicated and was marginally intelligible. Dewey told the police that her husband had been stabbed. The police looked inside the Deweys' pickup truck as well as the surrounding area for a weapon but could not locate one.

1           Several witnesses reported that Dewey and Steven had been  
2 drinking and creating a disturbance a few hours before the stabbing. At  
3 some point, the bartender asked the couple to leave. About thirty minutes  
4 thereafter, a witness reported seeing them arguing in the parking lot.  
5 Another witness also reported hearing a loud argument, followed by  
6 hysterical crying. This witness investigated the “ruckus” and saw Dewey  
7 draped over Steven, who was lying on his back next to or in close proximity  
8 to the couple’s truck. According to this witness, Dewey was in obvious  
9 distress, frantically saying, “Please don’t die! Please don’t die on me!”

10   \* \* \*

11           Ultimately, the State charged Dewey with open murder with the use  
12 of a deadly weapon.

13   \* \* \*

14           At trial, the jury convicted Dewey of one count of second-  
15 degree murder with the use of a deadly weapon.

16           *Dewey v. State*, 123 Nev. 483, 485-87, 169 P.3d 1149, 1150-51 (2007) (a copy of the  
17 opinion is in the record at Exhibit 72 (ECF No. 22-2)). Dewey was sentenced to two  
18 consecutive terms of life in prison with the possibility of parole after ten years. *See*  
19 Judgment of Conviction, Exhibit 67 (ECF No. 21-10).

20           The Nevada Supreme Court affirmed the judgment of conviction on November 1,  
21 2007. *See Dewey v. State, supra*. The court denied Dewey’s petition for rehearing on  
22 November 30, 2007. *See Order Denying Rehearing*, Exhibit 74 (ECF No. 22-4). The  
23 remittitur issued on December 28, 2007. *See Remittitur*, Exhibit 75 (ECF No. 22-5).

24           Dewey filed a petition for writ of habeas corpus in state court on October 18, 2008.  
25 *See Petition for Writ of Habeas Corpus (Post-Conviction)*, Exhibit 77 (ECF No. 22-7). The  
26 state district court held a six-day evidentiary hearing in December 2010 and January 2011  
27 (see Transcripts of Evidentiary Hearing, Exhibits 86-91 (ECF Nos. 22-16, 22-17, 23, 23-  
28 1, 23-2, 23-3)), and denied the petition on June 28, 2011. *See Decision*, Exhibit 97 (ECF  
No. 24-5); Notice of Entry of Order, Exhibit 98 (ECF No. 24-6). Dewey filed a motion to  
alter, amend or reconsider. *See Motion to Alter or Amend Judgment or in the Alternative*,  
Motion for Reconsideration, Exhibit 99 (ECF No. 24-7). The court ruled on that motion on  
October 17, 2011, issuing an addendum to its June 28, 2011, order, further explaining its

1 denial of certain claims. See Addendum, Exhibit 104 (ECF No. 24-12); Notice of Entry of  
2 Addendum, Exhibit 105 (ECF No. 24-13). Dewey appealed, and the Nevada Supreme  
3 Court affirmed the denial of Dewey's state habeas petition on April 10, 2013. See Order  
4 of Affirmance, Exhibit 112 (ECF No. 24-20). The Nevada Supreme Court denied Dewey's  
5 petition for rehearing on June 12, 2013. See Order Denying Rehearing, Exhibit 114 (ECF  
6 No. 24-22). The Nevada Supreme Court's remittitur issued on July 8, 2013. See  
7 Remittitur, Exhibit 115 (ECF No. 24-23).

8 Dewey filed her initial, nominally *pro se*, federal habeas corpus petition, initiating  
9 this action, on June 13, 2013 (ECF No. 1). The Court appointed counsel for Dewey (ECF  
10 No. 4), and, with counsel, Dewey filed a first amended petition on November 7, 2014 (ECF  
11 No. 16).

12 Respondents filed a motion to dismiss on May 28, 2015 (ECF No. 41), contending  
13 that certain of the claims in the first amended petition were barred by the statute of  
14 limitations, that certain of the claims were unexhausted in state court, and that certain of  
15 the claims were not cognizable in this federal habeas corpus action. The Court ruled on  
16 that motion on October 29, 2015, ruling that Claims 5A, 5B, 5C and 5D of the first  
17 amended petition were unexhausted, and directing Dewey to elect, with respect to those  
18 claims, whether to abandon them or move for a stay to allow her to exhaust them in state  
19 court. See Order entered October 29, 2015 (ECF No. 47).

20 Dewey filed a motion for stay on December 7, 2015 (ECF No. 50). The respondents  
21 did not oppose that motion (ECF No. 51), and the Court granted the motion, and stayed  
22 this action, on January 26, 2016. See Order entered January 26, 2016 (ECF No. 52).

23 The stay was lifted, upon a motion by Dewey, on July 20, 2017 (ECF No. 58).  
24 Dewey then filed a second amended petition for writ of habeas corpus (ECF No. 59) on  
25 September 18, 2017. The Court reads Dewey's second amended petition to include the  
26 following claims:

27 Ground 1: Dewey's "confession was taken in violation of her Fifth, Sixth  
28 and Fourteenth Amendment rights to silence, to the assistance of counsel,  
and to due process under the United States Constitution."

1 Ground 2A: Dewey’s federal constitutional rights were violated because her  
2 trial counsel was ineffective “for failing to present evidence from an audio  
expert as to whether [Dewey] invoked her right to counsel.”

3 Ground 2B: Dewey’s federal constitutional rights were violated because her  
4 trial counsel was ineffective for failing “to present a battered women’s  
syndrome defense to the murder charge.”

5 Ground 2C: Dewey’s federal constitutional rights were violated because  
6 her trial counsel was ineffective for failing “to investigate and present an  
expert witness on linguistics to testify that [she] had not waived her right to  
7 an attorney.”

8 Ground 2D: Dewey’s federal constitutional rights were violated because  
9 her trial counsel was ineffective “for failing to provide the defense crime  
scene analyst with all the available evidence and failing to properly question  
the analyst at trial.”

10 Ground 2E: Dewey’s federal constitutional rights were violated because her  
11 trial counsel was ineffective “for failing to seek a spoliation instruction.”

12 Ground 2F: Dewey’s federal constitutional rights were violated because her  
trial counsel was ineffective “for failing to present testimony from R. Goldie.”

13 Ground 3: Dewey’s “Fourteenth Amendment right to due process was  
14 violated when she was convicted without sufficient evidence.”

15 Ground 4A: Dewey’s federal constitutional rights were violated because  
16 “Instruction No. 13 regarding second degree murder reduced the State’s  
burden of proof of the malice element.”

17 Ground 4B: Dewey’s federal constitutional rights were violated because  
18 “Instruction 19 defining deadly weapon unconstitutionally relieved the State  
of its burden to prove an element of the deadly weapon enhancement.”

19 Ground 5A: Dewey’s federal constitutional rights were violated because her  
20 appellate counsel was ineffective for failing to raise the entire legal and  
factual basis of the claim in Ground 1.

21 Ground 5B: Dewey’s federal constitutional rights were violated because her  
22 appellate counsel was ineffective for failing to raise the entire legal and  
factual basis of the claim in Ground 3.

23 Ground 5C: Dewey’s federal constitutional rights were violated because  
24 her appellate counsel was ineffective for failing to raise the entire legal and  
factual basis of the claim in Ground 4A.

25 Ground 5D: Dewey’s federal constitutional rights were violated because  
26 her appellate counsel was ineffective for failing to raise the entire legal and  
factual basis of the claim in Ground 4B.

27 Ground 6: Dewey’s federal constitutional rights were violated because  
28 “cumulative error rendered [her] trial and verdict inherently unreliable.”

1 See Second Amended Petition for Writ of Habeas Corpus (ECF No. 59). These are the  
2 same claims, numbered in the same manner, as in Dewey's first amended petition, filed  
3 November 7, 2014 (ECF No. 16).

4 On March 9, 2018, Respondents filed a motion to dismiss Dewey's second  
5 amended petition, arguing: that Grounds 2A, 2B, 5A, 5B, 5C and 5D are barred by the  
6 statute of limitations; that part of Grounds 2B, 5A, 5B, 5C and 5D are barred by the  
7 procedural default doctrine; that Grounds 2A, 2D and 2E include allegations not  
8 exhausted in state court; and that Ground 6 is not procedurally viable for several reasons.  
9 See Motion to Dismiss (ECF No. 64). Dewey filed an opposition to the motion to dismiss  
10 on April 6, 2018 (ECF No. 65). Respondents replied on June 6, 2018 (ECF No. 68).

#### 11 Discussion

##### 12 Statute of Limitations - Grounds 2A, 2B, 5A, 5B, 5C and 5D

13 As was discussed in the Court's October 29, 2015 order, resolving respondents'  
14 motion to dismiss Dewey's first amended petition, Dewey's original petition was filed  
15 before the one-year limitations period expired, but her first amended petition – and now  
16 her second amended petition, as well – was filed after the limitations period expired. See  
17 Order entered October 29, 2015 (ECF No. 47), pp. 5-6. Therefore, the issue of the  
18 timeliness of the claims in Dewey's amended petitions turns upon whether those claims  
19 "relate back" to claims in her original petition, such that they are considered to have been  
20 first asserted on the filing date of the original petition. Claims in an amended habeas  
21 petition relate back to an earlier petition, under Federal Rule of Civil Procedure 15(c), if  
22 they arise out of "a common 'core of operative facts' uniting the original and newly  
23 asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005). "An amended habeas petition  
24 ... does not relate back ... when it asserts a new ground for relief supported by facts that  
25 differ in both time and type from those the original pleading set forth." *Id.* at 650.

26 Respondents argue in their motion to dismiss Dewey's second amended petition  
27 that Grounds 2A, 2B, 5A, 5B, 5C and 5D do not relate back to Dewey's original petition,  
28 and, therefore, are barred by the statute of limitations. See Motion to Dismiss (ECF No.

1 64), pp. 3-9. Respondents made these same arguments, regarding the same claims, in  
2 their motion to dismiss Dewey's first amended petition, and the Court rejected the  
3 arguments. See Order entered October 29, 2015 (ECF No. 47), pp. 7-9. The Court ruled  
4 that Grounds 2A, 2B, 5A, 5B, 5C and 5D relate back to Dewey's original petition, and are  
5 not barred by the statute of limitations. See *id.* Respondents do not make any showing  
6 warranting the Court's reconsideration of those rulings.

7 Respondents' motion to dismiss will be denied to the extent Respondents assert  
8 that Grounds 2A, 2B, 5A, 5B, 5C and 5D are barred by the statute of limitations.

9 Procedural Default – Grounds 2B, 5A, 5B, 5C and 5D

10 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails  
11 to comply with state-law procedural requirements in presenting his claims in state court  
12 is barred by the adequate and independent state ground doctrine from obtaining a writ of  
13 habeas corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991)  
14 (“Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas  
15 petitioner who has failed to meet the State's procedural requirements for presenting his  
16 federal claims has deprived the state courts of an opportunity to address those claims in  
17 the first instance.”). Where such a procedural default constitutes an adequate and  
18 independent state ground for denial of habeas corpus, the default may be excused only  
19 if “a constitutional violation has probably resulted in the conviction of one who is actually  
20 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting  
21 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

22 To demonstrate cause for a procedural default, the petitioner must “show that  
23 some objective factor external to the defense impeded” his efforts to comply with the state  
24 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment  
25 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499  
26 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden  
27 of showing not merely that the errors [complained of] constituted a possibility of prejudice,  
28 but that they worked to his actual and substantial disadvantage, infecting his entire

1 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603  
2 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

3 Ground 2B

4 Respondents argue in their motion to dismiss that part of Ground 2B is barred by  
5 the procedural default doctrine. See Motion to Dismiss (ECF No. 64), p. 10.

6 In the October 29, 2015 order, the Court ruled that Ground 2B was exhausted in  
7 state court in Dewey’s first state habeas action – that is, that to the extent it is presented  
8 in a different manner in this federal habeas action, the different presentation does not  
9 fundamentally alter the claim. See Order entered October 29, 2015 (ECF No. 47), p. 11;  
10 see also *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (en banc) (a claim is  
11 unexhausted if new factual allegations fundamentally alter the claim considered by the  
12 state courts). To the extent that this claim was exhausted in Dewey’s first state habeas  
13 action, it is not procedurally defaulted.

14 However, in her second state habeas action, during the stay of this federal action,  
15 the Nevada Supreme Court affirmed the denial of this claim as procedurally barred, ruling  
16 as follows:

17 Dewey first argues she has good cause to overcome the procedural  
18 bars because the legal and factual basis of her claim in Ground 2(B) was  
19 not reasonably available to counsel at the time of her first postconviction  
20 petition. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506  
21 (2003). In Ground 2(B), Dewey argues that trial counsel was ineffective for  
22 failing to investigate and present evidence at trial that she suffered from  
23 battered-woman syndrome. Dewey acknowledges that she raised this claim  
24 in her previous petition but contends that, because of the trauma she  
25 suffered, she has only recently disclosed the details of the domestic abuse  
26 that gave rise to that trauma. Dewey has failed to demonstrate good cause  
27 to overcome the procedural bars because she has not demonstrated that  
28 an impediment external to the defense prevented her from fully raising this  
claim in her earlier petition. See *id.*; *Phelps v. Dir., Nev. Dep’t of Prisons*,  
104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding organic brain  
damage and borderline mental retardation do not constitute good cause).  
We decline Dewey’s invitation to limit the holding in *Phelps*. To the extent  
she argues that the procedural bars should be excused due to the  
ineffective assistance of prior postconviction counsel, Dewey’s claim lacks  
merit. See *Brown v. McDaniel*, 130 Nev., Adv. Op. 60, 331 P.3d 867; 871-  
72 (2014) (“[T]he ineffectiveness of counsel representing a noncapital  
petitioner does not constitute good cause to excuse a state procedural  
bar.”).

1 Order of Affirmance, Exhibit 260, pp. 1-2 (ECF No. 56-15, pp. 2-3). This ruling by the  
2 Nevada Supreme Court raises a possibility that Ground 2B is, to some extent perhaps,  
3 barred by the procedural default doctrine.

4 A difference between federal and state law in this area is that, in this federal action,  
5 ineffective assistance of Dewey's first post-conviction counsel could possibly function as  
6 cause to excuse any procedural default of this claim of ineffective assistance of trial  
7 counsel. *See Martinez v. Ryan*, 566 U.S. 1 (2012). This, however, is an issue that will be  
8 better addressed in conjunction with the merits of the claim, after Respondents file an  
9 answer.

10 Therefore, the Court will deny Respondents' motion to dismiss to the extent they  
11 request dismissal of Ground 2B as procedurally defaulted. This ruling is without prejudice  
12 to Respondents asserting the procedural default defense to this claim in their answer.

#### 13 Grounds 5A, 5B, 5C and 5D

14 Respondents also argue in their motion to dismiss that Grounds 5A, 5B, 5C and  
15 5D are subject to dismissal as procedurally defaulted. *See Motion to Dismiss* (ECF No.  
16 64), p. 11. This argument is well taken.

17 In the October 29, 2015 order, the Court ruled that Grounds 5A, 5B, 5C and 5D  
18 were unexhausted in state court. *See Order entered October 29, 2015* (ECF No. 47), pp.  
19 12-13. Then, in Dewey's second state habeas action, the Nevada Supreme Court ruled  
20 that these claims were procedurally barred, as they were untimely and successive. *See*  
21 *Order of Affirmance, Exhibit 260* (ECF No. 56-15), citing NRS 34.726 and NRS 34.810.  
22 Therefore, Grounds 5A, 5B, 5C and 5D are subject to dismissal as procedurally defaulted,  
23 unless Dewey demonstrates that she can overcome the procedural default in some  
24 manner.

25 Dewey argues that she can overcome the procedural default of these claims of  
26 ineffective assistance of appellate counsel because her first post-conviction counsel, who  
27 was also her appellate counsel, was conflicted and ineffective. *See Opposition to Motion*  
28 *to Dismiss* (ECF No. 65), pp. 2-6. However, Dewey waived the conflict of interest in her



1 first state habeas action. See Petition for Writ of Habeas Corpus (Post-Conviction),  
2 Exhibit 77, p. 5 (ECF No. 22-7, p. 6). Therefore, the conflict of interest that Dewey now  
3 points to was not an “external impediment” preventing her from asserting the claim; the  
4 claim was not made as a result of her own decision to waive the conflict. See *Murray*, 477  
5 U.S. at 492 (“[C]ause for a procedural default on appeal ordinarily requires a showing of  
6 some external impediment preventing counsel from constructing or raising the claim.”).  
7 And, because Grounds 5A, 5B, 5C and 5D are claims of ineffective assistance of  
8 appellate counsel, as opposed to trial counsel, Dewey’s attempt to overcome the  
9 procedural default of those claims by a showing of ineffective assistance of her first post-  
10 conviction counsel fails. See *Davila v. Davis*, 137 S.Ct. 2058 (2017) (*Martinez* does not  
11 apply to claims of ineffective assistance of appellate counsel).

12 Dewey does not show that she can overcome the procedural default of Grounds  
13 5A, 5B, 5C and 5D. Respondents’ motion to dismiss will be granted as to those claims,  
14 on the ground that they are procedurally defaulted. Grounds 5A, 5B, 5C and 5D will be  
15 dismissed.

16 Exhaustion – Grounds 2A, 2D and 2E

17 Respondents next argue in their motion to dismiss that Grounds 2A, 2D and 2E  
18 are unexhausted in state court. See Motion to Dismiss (ECF No. 64), pp. 13-15.  
19 Respondents argue that Dewey did not assert these claims on the appeal in her second  
20 state habeas action, and they reassert their argument, first presented in their first motion  
21 to dismiss, that these claims were not exhausted in Dewey’s first state habeas action.  
22 See *id.*

23 In the October 29, 2015 order, the Court ruled that Grounds 2A, 2D and 2E were  
24 exhausted in Dewey’s first state habeas action – that, to the extent that the presentation  
25 of the claims was changed in federal court, the claims were not fundamentally altered.  
26 See Order entered October 29, 2015 (ECF No. 47), pp. 10-12; see also *Dickens*, 740  
27 F.3d at 1318. Respondents have not presented any reason why the Court should revisit  
28

1 this ruling. Respondents' motion to dismiss will be denied to the extent it asserts that  
2 Grounds 2A, 2D and 2E are unexhausted in state court.

3 Cumulative Error Claim – Ground 6

4 Respondents argue in their motion to dismiss that Ground 6, Dewey's cumulative  
5 error claim, is procedurally flawed and should be dismissed. See Motion to Dismiss (ECF  
6 No. 64), p. 15. Respondents argue that the cumulative error claim must be dismissed  
7 because it incorporates claims that are untimely, that are procedurally defaulted, and that  
8 have not been exhausted in state court. See *id.*

9 Generally, a cumulative error claim is procedurally viable to the extent it  
10 incorporates other claims that are procedurally viable. As Dewey asserts multiple  
11 procedurally viable claims, which will proceed to adjudication on their merits, her  
12 cumulative error claim is not subject to dismissal. The Court's denial of Respondents'  
13 motion to dismiss this claim, however, is without prejudice to Respondents asserting any  
14 of the same arguments regarding the claim in their answer.

15 **IT IS THEREFORE ORDERED** that Respondents' Motion to Dismiss (ECF No. 64)  
16 is **GRANTED IN PART AND DENIED IN PART**. Grounds 5A, 5B, 5C and 5D (as those  
17 subclaims are described above) are dismissed. In all other respects the motion to dismiss  
18 is denied.

19 **IT IS FURTHER ORDERED** that, within 90 days from the date of this order,  
20 Respondents shall file an answer, responding to the remaining claims in the second  
21 amended habeas petition. In all other respects, the schedule for further proceedings set  
22 forth in the order entered July 20, 2017 (ECF No. 58) remains in effect.

23 DATED this 10th day of August, 2018.

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26   
27 LARRY R. HICKS  
28 UNITED STATES DISTRICT JUDGE