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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JAMES CHAVEZ,

Petitioner,

v.

LeGRAND, WARDEN, et al.,

Respondents.

Case No. 3:13-cv-00548-MMD-WGC

ORDER

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by James Chavez. On September 14, 2014, respondents filed a motion to dismiss arguing that Ground 2 of Chavez's petition is unexhausted.<sup>1</sup> (Dkt. no. 26.) Having been fully briefed, the motion is now before the Court for decision.

**I. BACKGROUND<sup>2</sup>**

In November 2006, a jury in the Second Judicial District Court for Nevada found Chavez guilty of four counts of sexual assault on a child. The state district court sentenced him to four consecutive terms of life in prison with minimum parole eligibility after twenty years on each count. Chavez appealed.

On direct appeal, Chavez raised claims asserting violations of the Confrontation Clause of the Sixth Amendment, violations of Nevada's rules of evidence, a claim of

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<sup>1</sup>Respondents also argued that the petition is not properly verified, however, that issue was resolved by the subsequent filing of a proper verification. (Dkt. no. 30.)

<sup>2</sup>Unless otherwise noted, the background information for this case was taken from the exhibits filed at docket numbers 16 through 21.

1 juror misconduct, and a violation of the Eighth Amendment's prohibition against cruel  
2 and unusual punishment. The Nevada Supreme Court affirmed Chavez's conviction and  
3 sentence.

4 Chavez subsequently filed a proper person petition for writ of habeas corpus.  
5 After appointment of counsel, Chavez filed a supplemental petition. The state court held  
6 an evidentiary hearing, and then entered an order denying the state petition. Chavez  
7 appealed.

8 On appeal, Chavez raised various claims of ineffective assistance of counsel,  
9 and asserted a claim of cumulative error. The Nevada Supreme Court affirmed the state  
10 district court's order denying the state petition.

11 On October 2, 2013, this Court received a federal habeas petition from Chavez  
12 initiating this proceeding. On December 23, 2013, Chavez filed the amended petition  
13 (dkt. no. 22) that is the subject of respondents' motion to dismiss.

## 14 **II. EXHAUSTION**

15 A federal court will not grant a state prisoner's petition for habeas relief until the  
16 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*  
17 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). To exhaust a ground for relief, a  
18 petitioner must fairly present that ground for relief to the state's highest court, and must  
19 give that court the opportunity to address and resolve it. *Duncan v. Henry*, 513 U.S.  
20 364, 365 (1995); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair  
21 presentation" requirement is satisfied when the claim has been presented to the highest  
22 state court by describing the operative facts and the legal theory upon which the federal  
23 claim is based. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d  
24 859, 862 (9<sup>th</sup> Cir. 1982).

25 To fairly present a federal claim to the state court, the petitioner must alert the  
26 court to the fact that he asserts a claim under the United States Constitution. *Hiivala v.*  
27 *Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999) (citing *Duncan*, 513 U.S. at 365-66). The  
28 mere similarity of claims of state and federal error is insufficient to establish exhaustion.

1 *Hiivala*, 195 F.3d at 1106, (citing *Duncan*, 513 U.S. at 366); *see also Lyons v. Crawford*,  
2 232 F.3d 666, 668-69 (9th Cir. 2000), *as modified by*, 247 F.3d 904 (9<sup>th</sup> Cir. 2001);  
3 *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). The petitioner must have  
4 "characterized the claims he raised in state proceedings specifically as federal claims."  
5 *Lyons*, 232 F.3d at 670. This is accomplished either by referencing a specific provisions  
6 of the federal constitution or by citing to either a federal or state case involving the legal  
7 standard for a federal constitutional violation. *Id.*; *Peterson v. Lampert*, 319 F.3d 1153,  
8 1158 (9<sup>th</sup> Cir. 2003) (en banc). "[G]eneral appeals to broad constitutional principles,  
9 such as due process, equal protection, and the right to a fair trial, are insufficient to  
10 establish exhaustion." *Hiivala*, 195 F.3d at 1106, (citing *Gray v. Netherland*, 518 U.S.  
11 152, 162-63 (1996); *see also Shumway*, 223 F.3d at 987.

12 In Ground 2 of his petition, Chavez alleges that juror misconduct and erroneous  
13 evidentiary rulings were so pervasive in his trial that they resulted in a violation of his  
14 constitutional right to due process. The two primary errors Chavez identifies in Ground 2  
15 are (1) the admission of evidence regarding the victim's death and (2) juror disregard for  
16 the court's instructions not to deliberate on guilt prior to the completion of the case.

17 Respondents argue that Ground 2 is unexhausted because Chavez failed to  
18 present these issues to the state court as federal claims for relief. With respect to  
19 erroneous evidentiary rulings, respondents point to Chavez's brief on direct appeal, in  
20 which Chavez argued that the trial court erred by: (1) instructing the jury that the victim  
21 was deceased, rather than informing the jury that she was merely unavailable for the  
22 purposes of NRS § 51.055; (2) not granting a mistrial after testimony from the victim's  
23 brother suggesting that Chavez was to blame for the victim's death even though the  
24 court earlier ruled that the circumstances of the death were not to be disclosed to the  
25 jury; and (3) admitting autopsy photos of the victim into evidence in violation of NRS §  
26 48.035(2). (Dkt. no. 19-7 at 34-38, 42-43.) In making these arguments, Chavez made  
27 no specific reference to federal law. Likewise, respondents note that Chavez's argument

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1 on direct appeal regarding juror misconduct relied entirely on state case law. (*Id.* at 38-  
2 39.)

3 Chavez concedes that his opening brief on direct appeal “is bereft of adequate  
4 citation to the United States Constitution or federal precedent.” (Dkt. no. 31 at 3.) Even  
5 so, he argues that this Court’s focus at this point should be on the likelihood that the  
6 Nevada courts will consider the merits of the claim if he were to return to state court.  
7 According to Chavez, the near certainty that the state court will apply state procedural  
8 defaults to the claim requires this Court to find Ground 2 technically exhausted, but  
9 subject to procedural default.

10 Alternatively, Chavez argues that Ground 2 was exhausted by methods other  
11 than specific reference to the federal constitution or citation to a case involving the legal  
12 standard for a federal constitutional violation. In this regard, he claims that factual  
13 allegations contained in his direct appeal arguments combined with his ineffective  
14 assistance of counsel and cumulative error claims in his state post-conviction  
15 proceeding adequately apprised the Nevada Supreme Court of the federal nature of the  
16 claim. He further argues that the Nevada Supreme Court applied federal law to his  
17 allegations that the trial court erred by informing the jury that the victim was deceased  
18 and by admitting the autopsy photos into evidence, thereby effectuating exhaustion of  
19 those portions of the claim. Lastly, he contends that the Nevada Supreme Court’s  
20 reliance on a Nevada case, *Valdez v. State*, 196 P.3d 465 (Nev. 2008), to deny his juror  
21 misconduct claim was sufficient to exhaust that portion of Ground 2 because the court in  
22 that case found a constitutional violation arising from juror misconduct.

23 None of these alternative arguments is convincing. Exhaustion requires the  
24 presentation of the claim as a cohesive whole. *See Baldwin v. Reese*, 541 U.S. 27, 32  
25 (2004) (“We consequently hold that ordinarily a state prisoner does not “fairly present” a  
26 claim to a state court if that court must read beyond a petition or a brief (or a similar  
27 document) that does not alert it to the presence of a federal claim in order to find  
28 material, such as a lower court opinion in the case, that does so.”).

1           The citation to federal law that Chavez relies upon to assert the exhaustion of  
2 part of Ground 2 is a citation to a holding in a federal criminal case (*U.S. v. Acceturro*,  
3 966 F.2d 631, 637 (11<sup>th</sup> Cir. 1992)) involving the court's review of alleged trial court  
4 error. See *Chavez v. State*, 213 P.3d 476, 488 n.5 (Nev. 2009). It was not a citation that  
5 addressed the legal standard for a federal constitutional violation. Likewise, the Nevada  
6 Supreme Court did not specify that it was relying upon *Valdez* for its application of  
7 federal law, as opposed to state law. *Id.* at 489. Thus, the citation to *Valdez* did not  
8 effect exhaustion. See *Casey v. Moore*, 386 F.3d 896, 912 (9<sup>th</sup> Cir. 2004) ("Casey's  
9 citing to a state case discussing both state and federal claims, with no textual mention  
10 of a federal claim in Casey's brief on this issue, did not fairly present to the state court of  
11 appeals the federal claim now asserted in federal habeas proceedings.").

12           With regard to applying the procedural default doctrine to Ground 2, the Supreme  
13 Court has stated as follows:

14           [If state-court remedies are no longer available because the prisoner  
15 failed to comply with the deadline for seeking state-court review or for  
16 taking an appeal, those remedies are technically exhausted, . . . but  
17 exhaustion in this sense does not automatically entitle the habeas  
petitioner to litigate his or her claims in federal court. Instead, if the  
petitioner procedurally defaulted those claims, the prisoner generally is  
barred from asserting those claims in a federal habeas proceeding.

18           *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (citing *Coleman v. Thompson*, 501 U.S. 722,  
19 744-51 (1991) and *Gray*, 518 U.S. at 162). As Chavez points out, the Nevada courts are  
20 almost certain to apply a timeliness bar and/or a successive petition bar to any  
21 forthcoming attempt to present Ground 2. See NRS §§ 34.726 and 34.810. It is well  
22 established that these bars are adequate and independent state law grounds that serve  
23 to bar federal court review of claims to which they are applied, unless petitioner can  
24 demonstrate cause and prejudice to excuse the default. See *Moran v. McDaniel*, 80  
25 F.3d 1261, 1268-70 (9<sup>th</sup> Cir.1996); *Valerio v. Crawford*, 306 F.3d 742, 778 (9<sup>th</sup> Cir.  
26 2002); *Ybarra v. McDaniel*, 656 F.3d 984, 990 (9<sup>th</sup> Cir. 2011); *Loveland v. Hatcher*, 231  
27 F.3d 640, 643 (9<sup>th</sup> Cir. 2000). And, while he does not explicitly state that there is no

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1 chance that the Nevada court will excuse the defaults,<sup>3</sup> Chavez’s insistence that this  
2 Court find the claim procedurally defaulted for the purposes federal review stands as a  
3 concession that he is not able to make the showing necessary to obtain a hearing in  
4 state court on the merits of Ground 2. Thus, Ground 2 is technically exhausted, but  
5 procedurally defaulted.

6 The question then becomes whether Chavez can show cause and prejudice  
7 sufficient to permit this Court to excuse the procedural defaults. *See Wainwright v.*  
8 *Sykes*, 433 U.S. 72, 87 (1977). That is, he must show that some “objective factor  
9 external to the defense” impeded his attempts to comply with the state procedural rule.  
10 *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Further, this objective impediment must  
11 have actually prevented him from raising the claim. *McCleskey v. Zant*, 499 U.S. 467,  
12 497 (1991). If he can establish cause, Chavez must then show “prejudice;” i.e., that  
13 there was *actual* prejudice amounting to a substantial disadvantage, and which resulted  
14 in a trial infected with constitutional error. *United States v. Frady*, 456 U.S. 152, 170  
15 (1982).

16 In his sur-reply to the motion to dismiss, Chavez submits that the issue of cause  
17 and prejudice is to be litigated if and when this Court decides that the procedural default  
18 analysis applies to Ground 2. Even so, he proffers what he terms as “one possible angle  
19 for demonstrating cause and prejudice.” (Dkt. no. 36 at 6.) Specifically, he argues that  
20 *Martinez v. Ryan*, 132 S.Ct. 1308 (2012), provides him a viable claim of cause and  
21 prejudice.

22 In *Martinez*, the Supreme Court held that, in collateral proceedings that provide  
23 the first occasion to raise a claim of ineffective assistance at trial, ineffective assistance  
24 of post-conviction counsel in that proceeding may establish cause for a prisoner’s  
25 procedural default of such a claim. *Martinez*, 132 S. Ct. at 1315. The Court stressed that  
26 its holding was a “narrow exception” to the rule in *Coleman* that “an attorney’s ignorance

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28 <sup>3</sup>He does note, however, that the “universe of Nevada grounds for cause to  
excuse a procedural default are quite limited.” (Dkt. no. 31 at 8 n. 5.)

1 or inadvertence in a postconviction proceeding does not qualify as cause to excuse a  
2 procedural default.” *Id.*

3 In *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013), the Ninth Circuit  
4 expanded *Martinez* to allow ineffective assistance of post-conviction counsel to be used  
5 as a means to excuse the default of claims of ineffective assistance of appellate  
6 counsel. *Nguyen*, 736 F.3d at 1295. Then, in *Dickens v. Ryan*, 740 F.3d 1320 (9<sup>th</sup> Cir.  
7 2014), the court indicated in a footnote that, unlike a claim of ineffective assistance of  
8 appellate counsel as cause for failing to bring a claim on direct appeal, a claim of  
9 ineffective assistance of PCR counsel as cause for failing to assert a claim of ineffective  
10 assistance of trial counsel need not be first exhausted. *Dickens*, 740 F.3d at 1322, n.17.

11 Chavez suggests that, read together, these cases allow him to assert ineffective  
12 assistance of direct appeal counsel as “cause to allow this Court to hear the substance  
13 of [Ground 2] despite Chavez’s anticipatory default of that claim.” (Dkt. no. 36 at 9.) This  
14 Court does not agree. The Supreme Court precedent remains that a claim of ineffective  
15 assistance of counsel showing “cause” is itself subject to the exhaustion requirements.  
16 *Murray*, 477 U.S. at 492; *Edwards v. Carpenter*, 529 U.S. 446 (2000). Because it is not  
17 disputed that Chavez has not exhausted any claim that appellate counsel was  
18 ineffective by not presenting Ground 2 to the state court, such a claim cannot serve as  
19 cause in this Court to excuse the default of Ground 2.

20 As general matter, this Court is not inclined to extend the limits of *Martinez*  
21 without clear direction from a higher court. See *Hunton v. Sinclair*, 732 F.3d 1124,  
22 1126–27 (9<sup>th</sup> Cir. 2013) (declining to extend *Martinez* to underlying *Brady* claims), *cert.*  
23 *denied*, 134 S.Ct. 1771 (2014); see also *Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9<sup>th</sup>  
24 Cir. 2015) (declining to extend *Martinez* to cover claims other than ineffective assistance  
25 of trial or appellate counsel). Nonetheless, Chavez will be allowed an opportunity to  
26 present argument on the issue of whether his procedural default of Ground 2 should be  
27 excused. Because he has already been provided at least one opportunity to raise such  
28 argument, the time permitted will be limited.


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It is therefore ordered that respondents' motion to dismiss for lack of exhaustion (dkt. no. 26) is denied.

It is further ordered that petitioner will have twenty (20) days from the date this order is entered within which to show why, in light of the discussion above, Ground 2 should not be dismissed as procedurally barred. Respondents will thereafter have twenty (20) days to file a response. The matter will, at that point, be deemed submitted to the Court for decision.

It is further ordered that respondents' motions to extend time (dkt. nos. 43 and 44) are granted *nunc pro tunc* as of the date of their respective filing.

DATED THIS 22<sup>nd</sup> day of September 2015.

  
MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE