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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

On September 22, 2015, this Court entered an order directing petitioner Chavez to show cause why Ground 2 of his first amended petition (dkt. no. 22) should not be dismissed as procedurally barred. (Dkt. no. 46.) Chavez has filed his response to that order. (Dkt. no. 47.) Respondents have filed a response to the petitioner's response. (Dkt. no. 48.) For reasons that follow, Ground 2 will be dismissed.

**I. BACKGROUND**

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

Chavez has not presented this claim to the Nevada Supreme Court, but because the Nevada courts would now dismiss it on state law procedural grounds, the claim is technically exhausted, but procedurally barred. *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006). Thus, the issue before the Court is whether Chavez can show cause and

1 prejudice sufficient to permit this Court to excuse the procedural defaults. See  
2 *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

## 3 **II. DISCUSSION**

4 As a general matter, a habeas petitioner seeking to demonstrate good cause to  
5 excuse a procedural default must show that some “objective factor external to the  
6 defense” impeded his attempts to comply with the state procedural rule. *Murray v.*  
7 *Carrier*, 477 U.S. 478, 488 (1986). Further, this objective impediment must have actually  
8 prevented him from raising the claim. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). If  
9 he can establish cause, a petitioner must then show “prejudice;” i.e., that there was  
10 actual prejudice amounting to a substantial disadvantage, and which resulted in a trial  
11 infected with constitutional error. *United States v. Frady*, 456 U.S. 152, 170 (1982).

12 In addition, the Supreme Court has held that, in collateral proceedings that  
13 provide the first occasion to raise a claim of ineffective assistance at trial, ineffective  
14 assistance of post-conviction counsel in that proceeding may establish cause for a  
15 prisoner's procedural default of such a claim. *Martinez v. Ryan*, 132 S.Ct. 1308, 1315  
16 (2012). The Court stressed that its holding was a “narrow exception” to the rule in  
17 *Coleman v. Thompson*, 501 U.S. 722 (1991), that “an attorney's ignorance or  
18 inadvertence in a postconviction proceeding does not qualify as cause to excuse a  
19 procedural default.” *Id.*

20 In *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013), the Ninth Circuit  
21 expanded *Martinez* to allow ineffective assistance of post-conviction counsel to be used  
22 as a means to excuse the default of claims of ineffective assistance of appellate  
23 counsel. *Nguyen*, 736 F.3d at 1295. Then, in *Dickens v. Ryan*, 740 F.3d 1302 (9<sup>th</sup> Cir.  
24 2014), the court indicated in a footnote that, unlike a claim of ineffective assistance of  
25 appellate counsel as cause for failing to bring a claim on direct appeal, a claim of  
26 ineffective assistance of post-conviction relief counsel as cause for failing to assert a  
27 claim of ineffective assistance of trial counsel need not be first exhausted. *Dickens*, 740  
28 F.3d at 1322, n.17.

1 Here, Chavez claims that ineffective assistance of direct appeal counsel (IADAC)  
2 provides good cause to overcome the procedural default of Ground 2. As noted in this  
3 Court's September 22, 2015, order, a claim of ineffective assistance of counsel showing  
4 "cause" is itself subject to the exhaustion requirements and the procedural default  
5 doctrine. *Carrier*, 477 U.S. at 492; *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).  
6 Chavez concedes that he has not presented to the Nevada Supreme Court an IADAC  
7 claim based on appellate counsel's failure to raise Ground 2, but argues that that  
8 omission can be excused under the *Martinez/Hguyen* exception due to post-conviction  
9 counsel's ineffectiveness.

10 The court in *Edwards* specified that, when using counsel's failure to preserve a  
11 claim for review in state court as cause to excuse a procedural default, "[n]ot just any  
12 deficiency in counsel's performance will do, . . . the assistance must have been so  
13 ineffective as to violate the Federal Constitution." *Edwards*, 529 U.S. at 451. Post-  
14 conviction counsel ineffectiveness cannot amount to a constitutional violation, but  
15 *Martinez* permits it to serve as cause to excuse the default of an ineffective assistance  
16 of counsel claim when state law provides that such a claim be brought in the initial state  
17 collateral proceeding. *Martinez*, 132 S.Ct. at 1316; *Trevino v. Thaler*, 133 S.Ct. 1911,  
18 1921 (2013).

19 No controlling authority permits a petitioner to show cause for the default of his  
20 secondary IADAC claim by showing that his post-conviction counsel was ineffective for  
21 failing to bring that claim. Indeed, it is only because of *Nguyen*, a Ninth Circuit panel  
22 decision, that the default of primary IADAC claims falls within *Martinez*. In the absence  
23 of direction from a higher court, this Court declines to further extend the *Martinez*  
24 exception in the manner petitioner suggests.

25 It is therefore ordered that Ground 2 is dismissed as procedurally barred.

26 It is further ordered that respondents will have thirty (30) days from the date this  
27 order is entered within which to file an answer to petitioner's remaining grounds for

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1 relief. Petitioner will have thirty (30) days following service of respondents' answer within  
2 which to file a reply.

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4 DATED THIS 26<sup>th</sup> day of April 2016

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8 MIRANDA M. DU  
9 UNITED STATES DISTRICT JUDGE  
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