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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JOSHUA CARY MYERS,

Case No. 3:14-cv-00082-MMD-VPC

Petitioner,

v.

ORDER

TIMOTHY FILSON, *et al.*,

Respondents.

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion to dismiss. (ECF No. 49.) Respondents contend that Grounds 1(A), 2(B) and 3 are unexhausted. The parties further have provided preliminary argument as to the handling of procedural default issues in the event that the Court finds that the amended petition includes one or more unexhausted claims.

**I. BACKGROUND**

Petitioner Joshua Myers challenges his Nevada state conviction, pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon. He moved to withdraw his plea prior to sentencing. The state district court denied the motion, and the court thereafter sentenced petitioner to life without the possibility of parole and a consecutive sentence of 96 to 240 months. Petitioner challenged the conviction on direct appeal and in a state post-conviction petition. Petitioner was represented by appointed counsel during the state post-conviction proceedings, including the post-conviction appeal.

1 **II. DISCUSSION**

2 **A. Exhaustion**

3 **1. Governing Law**

4 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court  
5 remedies on a claim before presenting that claim to the federal courts. To satisfy this  
6 exhaustion requirement, the claim must have been fairly presented to the state courts  
7 completely through to the highest state court level of review available. *Peterson v.*  
8 *Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (*en banc*); *Vang v. Nevada*, 329 F.3d 1069,  
9 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal  
10 constitutional guarantee upon which he relies and must also state the facts that entitle  
11 him to relief on that federal claim. *See Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.  
12 2000). That is, fair presentation requires that the petitioner present the state courts with  
13 both the operative facts and the federal legal theory upon which the claim is based. *See*  
14 *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement  
15 insures that the state courts, as a matter of federal-state comity, will have the first  
16 opportunity to pass upon and correct alleged violations of federal constitutional  
17 guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

18 Under *Rose v. Lundy*, 455 U.S. 509 (1982), a mixed petition presenting  
19 unexhausted claims must be dismissed unless the petitioner dismisses the unexhausted  
20 claims and/or seeks other appropriate relief, such as a stay to return to the state courts  
21 to exhaust the claims.

22 **2. Ground 1(A)**

23 In Ground 1(A), petitioner alleges that his guilty plea was not entered voluntarily,  
24 intelligently, or knowingly, in violation of the Fifth, Sixth and Fourteenth Amendments,  
25 because initial trial counsel Roger Whomes intimidated and bullied Myers into pleading  
26 guilty. (ECF No. 38 at 10-13.)<sup>1</sup>

27 \_\_\_\_\_  
28 <sup>1</sup>All page citations herein are to the page number in the electronic header  
generated by CM/ECF rather than to any internal page numbering in the original  
document.

1           The Court is not persuaded that Ground 1(A) is unexhausted. On direct appeal,  
2 the Supreme Court of Nevada expressly addressed a claim that petitioner’s “guilty plea  
3 was involuntary . . . [because] counsel intimidated and bullied him into pleading guilty.”  
4 (ECF No. 40-20, at 2.)<sup>2</sup> A state supreme court decision on the merits of a claim of course  
5 exhausts the claim. *See Comstock v. Humphries*, 786 F.3d 701, 707 (9<sup>th</sup> Cir. 2015).  
6 Nuances such as petitioner referencing counsel’s size in a footnote in his direct appeal  
7 brief rather than in the discussion in the text of the brief do not render Ground 1(A)  
8 unexhausted. Nothing in federal Ground 1(A) fundamentally alters the exhausted claim  
9 or places it in a different and significantly stronger evidentiary posture than when it was  
10 presented to the state courts. (*Compare* ECF No. 38 at 10-13 *with* ECF No. 40-16 at 16-  
11 18.) *See generally Dickens v. Ryan*, 740 F.3d 1302, 1318 (9<sup>th</sup> Cir. 2014) (*en banc*)  
12 (allegedly new factual allegations do not render a claim unexhausted if the allegations do  
13 not fundamentally alter the legal claim considered by the state courts or place the case in  
14 a significantly different and stronger evidentiary posture than when the state courts  
15 considered the claim).

16           Ground 1(A) is exhausted.

17                       **3.     Ground 2(B)**

18           In Ground 2(B), petitioner alleges that he was denied effective assistance of  
19 counsel in violation of the Sixth and Fourteenth Amendments when he functionally was  
20 denied the assistance of counsel on his *pro se* pre-sentencing motion to withdraw guilty  
21 plea and at the evidentiary hearing on the motion, given that the attorney appointed in  
22 that regard took the position that he could not ethically assist in the preparation or  
23 presentation of the motion. (*See* ECF No. 38 at 16-18.)

24           Petitioner concedes that Ground 2(B) was not actually exhausted in the state  
25 courts. He further maintains that the claim is procedurally defaulted but seeks to present

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28 <sup>2</sup>*See also* ECF No. 40-20 at 3 (discussing the specifics of the claim, including as  
to counsel pounding the table and yelling at petitioner).

1 argument, in supplemental briefing, as to cause and prejudice to overcome the procedural  
2 default. The Court discusses the disposition of the unexhausted claims *infra*.

3 **4. Ground 3**

4 In Ground 3, petitioner alleges that the cumulative effect of the alleged  
5 constitutional errors deprived him of due process in violation of the Fifth and Fourteenth  
6 Amendments.

7 Petitioner maintains that a claim of cumulative error does not need to be exhausted  
8 under Ninth Circuit authority because a cumulative error analysis must be conducted  
9 regarding every properly presented claim on federal habeas review. None of the cases  
10 cited by petitioner in support of this assertion actually address exhaustion of a cumulative-  
11 error claim, and thus none of the cases hold that cumulative-error claims are exempted  
12 from the statutory exhaustion requirement in § 2254(b)(1)(A). (See cases cited in ECF  
13 No. 38 at 18-19.) Ninth Circuit case law instead clearly holds that such claims must be  
14 exhausted. *See, e.g., Wooten v. Kirkland*, 540 F.3d 1019, 1025-26 (9<sup>th</sup> Cir. 2008).

15 Ground 3 is unexhausted.

16 In the event that the Court finds the claim to be exhausted, petitioner seeks to  
17 present argument in supplemental briefing as to cause and prejudice to overcome a  
18 procedural default. The Court discusses that request *infra*.

19 **B. “Anticipatory Default” Determination**

20 Petitioner requests that the Court entertain supplemental briefing directed to  
21 whether he can demonstrate cause and prejudice to overcome a procedural default of the  
22 unexhausted claims.<sup>3</sup>

23 Such a determination generally is not the next required step in a habeas case after  
24 it is determined that the petition contains unexhausted claims. Rather, generally, following

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26 <sup>3</sup>While reported cases discuss the relationship between procedural default and  
27 exhaustion, the phrase “anticipatory default” does not appear in either Supreme Court or  
28 Ninth Circuit jurisprudence. The phrase appears in online legal research instead only in  
unreported cases from this District primarily addressing argument by the Federal Public  
Defender utilizing that terminology.

1 a holding that the petition contains unexhausted claims, the petition must be dismissed  
2 unless the petitioner either dismisses the unexhausted claims and/or obtains a stay to  
3 exhaust the claims, under *Rose v. Lundy*, *supra*, and following cases. See *Rhines v.*  
4 *Weber*, 544 U.S. 269 (2005) (requirements for a stay); *King v. Ryan*, 564 F.3d 1133 (9<sup>th</sup>  
5 Cir. 2009) (alternative stay procedure available under Ninth Circuit precedent).

6 As petitioner notes, a claim is technically exhausted if it is procedurally defaulted.  
7 See, e.g., *Nguyen v. Curry*, 736 F.3d 1287, 1292 (9<sup>th</sup> Cir. 2013). That does signify,  
8 however, that a claim is technically exhausted merely because a procedural defense  
9 would be *raised* by the respondents if petitioner returned to state court to exhaust a claim.  
10 The record instead must reflect that “it is clear that the state court would *hold* the claim  
11 procedurally barred.” *Sandgathe v. Maass*, 314 F.3d 371, 376 (9<sup>th</sup> Cir. 2002) (emphasis  
12 added; prior case citations and quotation marks omitted).

13 In federal habeas cases arising out of Nevada, the state courts, generally, apply  
14 substantially the same standards as do the federal courts in determining whether a  
15 petitioner can demonstrate either cause or actual innocence in order to overcome a  
16 claimed procedural default.<sup>4</sup>

17 In past cases, this Court thus has rejected efforts by habeas petitioners to claim  
18 technical exhaustion by procedural default while at the same time arguing that they  
19 nonetheless can establish cause and prejudice or actual innocence to overcome that  
20 procedural default. Quite simply, if the petitioner has a potentially viable cause-and-  
21 prejudice or actual-innocence argument under the generally substantially similar federal

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22 <sup>4</sup>Under state practice, “[a] petitioner can overcome the bar to an untimely or  
23 successive petition by showing good cause and prejudice.” E.g., *Mitchell v. State*, 149  
24 P.3d 33, 36 (Nev. 2006). In *Robinson v. Ignacio*, 360 F.3d 1044 (9<sup>th</sup> Cir. 2004), the court  
25 of appeals recognized that “Nevada’s ‘cause and prejudice’ analysis and the federal  
26 ‘cause and prejudice analysis’ are nearly identical, as both require ‘cause for the default  
27 and actual prejudice as a result.” 360 F.3d at 1052 n.3. Moreover, the Nevada state  
28 courts also recognize the same exception for a fundamental miscarriage of justice, such  
that “[e]ven when a petitioner cannot show good cause sufficient to overcome the bars to  
an untimely or successive petition, habeas 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.’” *Mitchell*, 149 P.3d at 36 (quoting *Murray v. Carrier*, 477 U.S.  
478, 496 (1986)).

1 and state standards, then petitioner cannot establish that “it is clear that the state court  
2 would *hold* the claim procedurally barred.” *Sandgathe, supra*. On the other hand, if the  
3 petitioner has no such potentially viable arguments, then the claim indeed is technically  
4 exhausted; but it also is subject to immediate dismissal with prejudice as procedurally  
5 defaulted.

6 Neither alternative involves a federal court consideration of cause-and-prejudice  
7 or actual-innocence arguments. In the first alternative, the claim remains unexhausted;  
8 and petitioner either must dismiss the unexhausted claim or obtain a stay to exhaust. In  
9 the second alternative, the concession that the petitioner has no viable arguments  
10 renders the claim technically exhausted but also renders the claim subject to immediate  
11 dismissal because there are no potentially viable cause-and-prejudice or actual-  
12 innocence arguments for the federal court to consider.

13 Accordingly, the Court, generally, does not proceed to a cause-and-prejudice  
14 analysis as a matter of course following a holding that a claim is unexhausted.

15 A different situation is presented, however, where the Nevada state courts do not  
16 recognize a potential basis to overcome the procedural default arising from the violation  
17 of a state procedural rule that is recognized under federal law. In *Martinez v. Ryan*, 566  
18 U.S. 1 (2012), the Supreme Court held that the absence or inadequate assistance of  
19 counsel in an initial-review collateral proceeding may be relied upon to establish cause  
20 excusing the procedural default of a claim of ineffective assistance of trial counsel. The  
21 Supreme Court of Nevada has declined to recognize cause under *Martinez* as cause to  
22 overcome a state procedural bar under Nevada state law. *Brown v. McDaniel*, 331 P.3d  
23 867 (Nev. 2014).

24 Accordingly, a Nevada habeas petitioner who can rely upon *Martinez*, and only  
25 *Martinez*, as a basis for overcoming a state procedural bar on an unexhausted claim  
26 successfully can argue that the state courts would hold the claim procedurally barred but  
27 that he nonetheless has a potentially viable cause-and-prejudice argument under federal

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1 law that would not be recognized by the state courts when applying the state procedural  
2 bars.

3 In the present case, petitioner relies upon *Martinez* to overcome a procedural  
4 default of the unexhausted claims. It does not appear from the current briefing that  
5 petitioner has other potentially viable bases for demonstrating cause-and-prejudice that  
6 might be recognized by the state courts and that thus would preclude a finding of technical  
7 exhaustion by procedural default as to the unexhausted claims. Respondents contend,  
8 however, that the unexhausted claims are substantive claims rather than claims of  
9 ineffective assistance of trial counsel and therefore are not subject to the rule in *Martinez*.  
10 (ECF No. 56, at 4 n.6.) The Court is not persuaded.

11 In Ground 2(B), as noted previously, petitioner alleges that he was denied effective  
12 assistance of counsel when he functionally was denied the assistance of counsel on his  
13 *pro se* pre-sentencing motion to withdraw guilty plea and at the evidentiary hearing on the  
14 motion. In *Davila v. Davis*, 137 S.Ct. 2058 (2017), the Supreme Court emphasized that  
15 the *Martinez* rule is limited to claims of ineffective assistance of trial counsel, given, *inter*  
16 *alia*, “the unique importance of protecting a defendant’s trial rights, particularly the right  
17 to effective assistance of trial counsel.” 137 S.Ct. at 2066. At the outset, an attorney  
18 representing a defendant in connection with a pre-sentence motion to withdraw a guilty  
19 plea is serving in a role nominally designated as trial counsel with regard to classifying  
20 claims of ineffective assistance of counsel. Moreover, nothing could be more important to  
21 protecting a defendant’s trial rights than insuring that those rights are waived only  
22 knowingly, intelligently and voluntarily, including with regard to a pre-judgment challenge  
23 to the knowing, intelligent, and voluntary nature of the waiver. The Court accordingly  
24 concludes that Ground 2(B) constitutes a claim of ineffective assistance of trial counsel  
25 for purposes of *Martinez*.

26 The claim of cumulative error in Ground 3 in this action further is based exclusively  
27 on the claims of ineffective assistance of trial counsel asserted herein. The Ninth Circuit  
28 has treated claims of cumulative error based exclusively on claims of ineffective

1 assistance of trial counsel as claims of ineffective assistance of trial counsel for purposes  
2 of *Martinez*. See *Runningeagle v. Ryan*, 825 F.3d 970, 990 n.21 (9<sup>th</sup> Cir. 2016); *Detrich*  
3 *v. Ryan*, 740 F.3d 1237, 1266-67 & 1273 (9<sup>th</sup> Cir. 2013) (*en banc*). The Court accordingly  
4 concludes that Ground 3 also is subject to *Martinez*.

5 The Court therefore is persuaded that it should analyze cause and prejudice under  
6 *Martinez* as to the unexhausted claims in this case rather than direct petitioner under  
7 *Rose v. Lundy* to either dismiss the claims or seek other appropriate relief, such as a stay.

8 The Court is not inclined, however, either generally or in this nearly four-year-old  
9 case in particular, to undertake that analysis on supplemental briefing not connected with  
10 any pending motion. Such an approach does not always lead to the most efficient and  
11 expedient resolution of cases. Rather, the Court would prefer to address the matter in the  
12 same manner that it often does when a claim of cause and prejudice is based upon an  
13 independent claim of constitutionally ineffective assistance of either trial or appellate  
14 counsel. In such circumstances, the Court often defers a resolution of the cause-and-  
15 prejudice analysis until after the filing of an answer and reply contingently addressing the  
16 claims also on the merits, so that the Court may have the benefit in its analysis of a full  
17 factual and legal presentation as to all relevant claims. That is the procedure that the  
18 Court will follow herein.<sup>5</sup>

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21 <sup>5</sup>The Court emphasizes that the action taken herein is premised upon petitioner  
22 having a potentially viable cause-and-prejudice argument based upon *Martinez*, and only  
23 *Martinez*, as opposed to having also potentially viable cause-and-prejudice arguments  
24 based upon grounds that the state courts would recognize. If petitioner begins arguing  
25 any such additional cause-and-prejudice arguments herein, that immediately will “kick”  
26 this case back into a procedural posture where the next step instead is dictated by *Rose*  
27 *v. Lundy* and its progeny. That is, the Court’s action is taken on the premise that the  
28 unexhausted claims are technically exhausted by procedural default because petitioner  
has no potentially viable cause-and-prejudice (or actual-innocence) arguments that the  
state courts would recognize as a basis for overcoming the state procedural bars.

The Court further expresses no opinion as to the application of *Martinez* to claims  
of cumulative error that are not based exclusively on claims of ineffective assistance of  
trial counsel.

1 **III. CONCLUSION**

2 It is therefore ordered that respondents' motion (ECF No. 49) is granted in part and  
3 denied in part, with the Court holding, on the showing made, that Grounds 2(B) and 3 are  
4 actually unexhausted but are technically exhausted because they would be procedurally  
5 barred by the state courts.

6 It is further ordered that the Court defers consideration of whether petitioner can  
7 demonstrate cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), to  
8 overcome the procedural default of Grounds 2(B) and 3 until after the filing of an answer  
9 and reply in this action.

10 It is further ordered that, within forty-five (45) days of entry of this order,  
11 respondents must file an answer addressing all claims in the amended petition on the  
12 merits, under a *de novo* standard of review as to Grounds 2(B) and 3, and also addressing  
13 whether Grounds 2(B) and 3 are barred by procedural default under federal law.

14 It is further ordered that petitioner will have forty-five (45) days from service of the  
15 answer within which to file a reply.

16 The Court is endeavoring to posture this matter for resolution in advance of March  
17 31, 2018, to the extent possible with its habeas docket. Requests for extension based on  
18 scheduling conflicts between this action and other actions in this Court should be sought  
19 in the later-filed case.

20 DATED THIS 17<sup>th</sup> day of November 2017.

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MIRANDA M. DU  
25 UNITED STATES DISTRICT JUDGE  
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