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3 **UNITED STATES DISTRICT COURT**  
4 **DISTRICT OF NEVADA**

5 BRENT MORRIS,

Case No. 3:14-cv-00372-LRH-WGC

6 Petitioner,

7 v.

**ORDER**

8 RENEE BAKER, et al.,

9 Respondents.

10 This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by *pro se* Petitioner  
11 Brent Morris. Currently before the Court is Respondents' Amended Motion to Dismiss (ECF  
12 No. 73) ("Motion") Morris's First Amended Petition for Writ of Habeas Corpus (ECF No. 25)  
13 ("Amended Petition"). Morris has opposed (ECF No. 75) the Motion, and Respondents have  
14 replied (ECF No. 76). For the reasons discussed below, the Motion is granted in part and denied  
15 in part.

16 **I. BACKGROUND**

17 **A. State Criminal Proceeding**

18 Morris's Amended Petition challenges a conviction and sentence imposed by the Eighth  
19 Judicial District Court for Clark County ("state court") in *State v. Morris*, Case No. C269265-1.  
20 Following trial, Morris was found guilty of two felony counts of commission of a fraudulent act  
21 in a gaming establishment and four gross misdemeanor counts of entry into a gaming establishment  
22 by an excluded person. (Ex. 60, ECF No. 14-10.) On July 7, 2011, the state court entered a  
23 judgment of conviction sentencing Morris for the gross misdemeanor counts to four concurrent  
24 terms of 12 months in the Clark County Detention Center. (*Id.*) For the felony counts, Morris was  
25 adjudicated as a habitual criminal and sentenced to two concurrent terms of 8–20 years'  
26 incarceration to run concurrent with his gross misdemeanor sentences. (*Id.*)

27 **B. Direct Appeal**

28 Morris appealed, arguing that he was not provided the required notice for placement on the

1 Nevada Gaming Commission’s so-called “Black List” and there was insufficient evidence to  
2 support his convictions for the misdemeanor counts because the State did not prove he had actual  
3 knowledge that his name was placed on the list. (Ex. 80, ECF No. 15-5.) The Nevada Supreme  
4 Court affirmed his conviction. (Ex. 84, ECF No. 15-9.)

### 5 **C. State Post-Conviction Proceedings**

6 Morris filed his first state petition for writ of habeas corpus (“first state petition”) on  
7 September 13, 2012, seeking post-conviction relief. (Ex. 87, ECF No. 15-2.) Following a  
8 counseled supplement and an evidentiary hearing, the state petition was denied. (Exs. 94, 99, 107,  
9 ECF Nos. 15-24, 16-7.) Morris filed a post-conviction appeal raising six claims of ineffective  
10 assistance of counsel (“IAC”). The Nevada Supreme Court affirmed the denial of relief, and a  
11 remittitur issued on July 6, 2015. (Exs. 126–127, ECF Nos. 28-1, 28-2.)

12 On August 4, 2015, Morris moved to modify his sentence. He argued that his sentence  
13 was illegal because (1) the state court improperly considered a 2001 Michigan conviction that was  
14 later vacated when it adjudicated him as a habitual criminal; (2) his convictions were too remote,  
15 stale, and trivial to support habitualization; and (3) the state court improperly failed to determine  
16 that habitualization was “just and proper.” (Ex. 128, ECF No. 62-1.) The motion was denied, and  
17 Morris appealed. The Nevada Supreme Court affirmed. (Ex. 143, ECF No. 62-16.) The record  
18 showed that Morris had over three felony convictions when he was sentenced as a habitual  
19 criminal; thus, the Nevada Supreme Court concluded:

20 the sentence was not facially illegal, as Morris’s criminal record met the statutory  
21 guidelines for habitual criminal adjudication. *See* NRS 207.010(1)(a). Even if the  
22 Michigan conviction had been invalid when the sentence was imposed, Morris’s  
other convictions would suffice for habitual criminal adjudication. *See id.*

23 (*Id.*) The Nevada Supreme Court summarily denied the two remaining contentions as they  
24 exceeded the narrow scope of correcting an illegal sentence or modifying a sentence. (*Id.*)

### 25 **D. Federal Habeas Action**

26 Morris initiated this federal habeas corpus action in July 2014. His original petition raised  
27 one claim regarding the sufficiency of the evidence. (ECF No. 2.) Respondents answered his  
28 claim. (ECF No. 11.) Instead of a reply, Morris filed the 86-page Amended Petition raising 11

1 total grounds for relief: 10 substantive claims of trial and sentencing error and one IAC claim with  
2 two subclaims against trial counsel and eight subclaims against appellate counsel. (ECF No. 25.)

3 Respondents moved to dismiss the Amended Petition in part based on Morris's failure to  
4 exhaust certain new claims. (ECF No. 37.) The Court granted in part and denied in part their  
5 motion (ECF No. 42), finding that the following claims were unexhausted:

- 6 • Grounds 2 and 3: There was insufficient evidence to support his two convictions for  
7 commission of fraudulent acts at the Gold Coast Casino and the Excalibur Casino. (ECF  
8 No. 25 at 12–23.)
- 9 • Ground 4: The state court abused its discretion by admitting evidence of uncharged bad  
10 acts involving past posting bets at the Orleans Casino and Caesar's Palace. (*Id.* at 24–33.)
- 11 • Ground 5: The state court erred by admitting slowed-down composite videotapes of the  
12 past posting incidents at the Orleans Casino and Gold Coast Casino, and the State  
13 committed a *Brady* violation by failing to timely disclose the videotapes. (*Id.* at 34–38.)
- 14 • Ground 6: The state court interfered with Morris's right to testify at trial.<sup>1</sup> (*Id.* at 39–48.)
- 15 • Ground 7: The state court erred by giving a “flight instruction” at trial over defense  
16 counsel's objection. (*Id.* at 53–57.)
- 17 • Ground 8: unexhausted to the extent it asserts the state court erred in adjudicating him as  
18 a habitual criminal when it used prior convictions that were stale, trivial, and remote and  
19 failed to make a finding that habitual criminal status was fair and just.<sup>2</sup> (*Id.* at 58– 68.)
- 20 • Ground 9: The state court erred by giving an inaccurate and unconstitutional jury  
21 instruction on cheating at trial. (*Id.* at 69–72.)
- 22 • Ground 10(A)(1): trial counsel failed to object to a defective jury instruction on cheating.  
23 (*Id.* at 74.)
- 24 • Ground 10(B)(2): appellate counsel was ineffective for failing to challenge on appeal the  
25 evidence of prior bad acts of alleged past-posting bets at the Orleans Casino and Caesar's  
26 Palace. (*Id.* at 79.)
- 27 • Ground 10(B)(3): appellate counsel was ineffective for failing to challenge the admission  
28 of the slowed down videotapes on appeal. (*Id.*)
- Ground 10(B)(6) in part: unexhausted to the extent it asserts appellate counsel was  
ineffective for failing to challenge the habitual criminal adjudication on the grounds that  
(i) Morris's prior convictions were stale, remote and trivial, and (ii) the state court did not

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1 Part of Ground 6 was dismissed as duplicative of Ground 10(A)(2), to the extent it asserted that trial  
counsel interfered with Morris's right to testify at trial. (ECF No. 42 at 7, 12.)

2 On reconsideration, the Court later clarified that Ground 8 is exhausted to the limited extent it claims  
Morris's habitual criminal adjudication was improper insofar as it was based on an overturned conviction  
out of Michigan. (ECF No. 48.)

1 find such adjudication was “just and proper.” (*Id.* at 80.)

- 2 • Ground 10(B)(7): appellate counsel was ineffective for failing to challenge the cheating instruction on appeal. (*Id.*)

3 The Court further noted that merits review of cumulative error would be limited to claims Morris  
4 “presented to, and therefore exhausted before, the Nevada Supreme Court.” (ECF No. 42 at 10.)  
5 Morris was given multiple options on how to proceed, including the option to seek a stay and  
6 abeyance of his Amended Petition to return to state court to exhaust his claims. (*Id.* at 12.) He  
7 chose that option and the Court granted his request. (ECF No. 61.)

### 8 **E. Second State Petition**

9 In May 2018, Morris filed a second state petition in the state court to exhaust his federal  
10 claims. (Ex. 148, ECF No. 62-21.) He argued he could demonstrate cause and prejudice under  
11 NRS 34.726(1) and overcome the procedural bars. (*Id.* at 10.) The state court found that Morris  
12 failed to establish good cause and denied the second state petition as time-barred and successive  
13 based on the State specifically pleading laches. (Ex. 158, ECF No. 77-4.) Morris appealed, raising  
14 Grounds 2–9, 10(A)(1), 10(B)(2), 10(B)(3), 10(B)(6) in part, 10(B)(7), and 11 of his Amended  
15 Petition.<sup>3</sup> (Ex. 162, ECF No. 77-8.) The Nevada Supreme Court affirmed the dismissal of his  
16 second state petition as untimely and successive and lacking good cause to overcome the  
17 procedural bars. (Ex. 166, ECF No. 77-12.)

### 18 **F. Reopened Federal Habeas Action**

19 The following month, the Court reopened this case on Morris’s request. (ECF Nos. 67,  
20 69.) The Court instructed Respondents “to answer, or otherwise respond to,” the Amended  
21 Petition. (ECF No. 69 at 1.) Respondents have now moved to dismiss substantive Grounds 2–9  
22 of the Amended Petition as procedurally barred.<sup>4</sup>

23 \_\_\_\_\_  
24 <sup>3</sup> Morris raised Ground 10(B)(1) in his informal brief stating that it appeared unexhausted, although this  
25 Court did not address it in the December 2017 Order. (Ex. ECF No. 77-8 at 21.) Petitioner is correct that  
26 the order did not address Ground 10(B)(1). This was because Respondents’ Motion to Dismiss (ECF  
27 No. 37) did argue that such claim was unexhausted.

28 <sup>4</sup> Respondents’ Motion does not seek dismissal of any IAC claim as procedurally barred, although the Court  
previously found certain IAC claims unexhausted (ECF No. 42). Some of Morris’s appellate IAC claims  
are relevant to his opposition. In addition to his unexhausted claims identified above, Morris’s relevant  
*exhausted* appellate IAC claims are summarized as follows:

- Ground 10(B)(1): appellate counsel was ineffective for failing to challenge the sufficiency of the

1 **II. PROCEDURAL DEFAULT**

2 **A. Governing Law**

3 Federal courts are barred from considering a state prisoner’s habeas claim if the state courts  
4 denied his claim pursuant to an independent and adequate state procedural rule. *Edwards v.*  
5 *Carpenter*, 529 U.S. 446, 454–55 (2000). Nevada’s one-year statute of limitation for post-  
6 conviction petitions, NRS § 34.726, and prohibition on second or successive post-conviction  
7 petitions, NRS § 34.810, are independent and adequate state procedural rules. *E.g.*, *Williams v.*  
8 *Filson*, 908 F.3d 546 (9th Cir. 2018); *Ybarra v. McDaniel*, 656 F.3d 984, 990 (9th Cir. 2011).

9 When a prisoner “procedurally defaults” a federal claim, judicial review is barred unless  
10 he can show either: (1) “cause for the default and actual prejudice as a result of the alleged violation  
11 of federal law,” or (2) “that failure to consider the claims will result in a fundamental miscarriage  
12 of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *McQuiggin v. Perkins*, 569 U.S.  
13 383, 386 (2013) (the miscarriage of justice exception ensures “that federal constitutional errors do  
14 not result in the incarceration of innocent persons”). To demonstrate cause, a petitioner must show  
15 that some external and objective factor impeded his efforts to comply with the state’s procedural  
16 rule. *Maples v. Thomas*, 565 U.S. 266, 280–81 (2012). Ignorance or inadvertence does not  
17 constitute cause. *Murray v. Carrier*, 477 U.S. 478, 486–87 (1986). To show prejudice, a petitioner  
18 bears the burden of showing not merely that the error created a possibility of prejudice, but that  
19 the error worked to his actual and substantial disadvantage, infecting the entire proceeding with  
20 constitutional error. *Id.* at 494; *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019).

21 **B. The Parties’ Positions**

22 Respondents contend that the Nevada Supreme Court expressly invoked NRS 34.726 and  
23 NRS 34.810 to procedurally default Grounds 2, 3, 4, 5, 6, 7, 8, and 9; thus, barring federal review.  
24 (ECF No. 73.) Because the Nevada Supreme Court expressly relied upon independent and

25 \_\_\_\_\_  
evidence. (ECF No. 25 at 76–79.)

- 26 • Ground 10(B)(4): appellate counsel was ineffective for failing to challenge the deprivation of  
27 Morris’s right to testify at trial. (*Id.* at 79.)  
28 • Ground 10(B)(5): appellate counsel was ineffective for failing to challenge the flight instruction.  
(*Id.* at 79–80.)

1 adequate state procedural bars, this Court should dismiss Grounds 2–9.

2 Morris argues the Motion should be denied because he presented his claims to the Nevada  
3 courts in his second state petition and informal appellate brief, and the Nevada Supreme Court  
4 “denied the legal merits” of his claims. (ECF No. 75 at 5.) He maintains that his claims are now  
5 fully exhausted and ripe for federal review. Additionally, Morris argues there is cause and  
6 prejudice to excuse the default based on the ineffective assistance of appellate counsel, Howard  
7 Brooks. He contends that Brooks failed to raise the contested grounds on appeal and admitted as  
8 much during the evidentiary hearing on his first state petition. (*Id.* at 4–5.)

9 In their reply, Respondents point out that many of the appellate IAC claims Morris argues  
10 as cause to overcome the default of his substantive claims are themselves procedurally defaulted  
11 and are therefore precluded from establishing cause. (ECF No. 76.) Additionally, for the  
12 exhausted IAC claims, they assert that Morris fails to refute Brooks’ strategic reasons for not  
13 raising those issues on appeal, and Morris has not shown a probability of success on appeal. Thus,  
14 Respondents maintain that Morris has not shown cause and prejudice, and Grounds 2–9 are  
15 procedurally barred.

16 The Court notes that the parties’ arguments do not distinguish between the exhausted and  
17 unexhausted portions of Ground 8. The Nevada Supreme Court’s ruling on Morris’ second state  
18 petition could not procedurally bar any claim this Court previously found exhausted in Morris’  
19 earlier post-conviction proceedings. On its face, such an outcome runs counter to the purposes of  
20 a stay and abeyance of federal habeas proceedings. Here, the Court determined on reconsideration  
21 that part of Ground 8 is exhausted. (*See* ECF No. 48 at 2–3.) Thus, Ground 8 cannot be subject  
22 to dismissal in its entirety as procedurally barred, and the analysis in this order is limited to the  
23 unexhausted portion of Ground 8.

### 24 **C. Grounds 4, 5, 9, and 8 in part**

25 In certain circumstances, counsel’s ineffectiveness in failing properly to preserve a habeas  
26 claim for review in state court will suffice to show cause. *Edwards v. Carpenter*, 529 U.S. 446,  
27 451 (2000) (citing *Murray v. Carrier*, 477 U.S. 478, 488–89 (1986)). As relevant to Morris’s  
28 argument, the ineffective assistance of appellate counsel in failing to raise a claim on direct appeal

1 in the state criminal proceedings may potentially establish cause and prejudice. *Cockett v. Ray*,  
2 333 F.3d 938, 943–44 (9th Cir. 2003). “But to assert such an excuse in a federal habeas petition,  
3 a state prisoner must first exhaust in state court the claim that his appellate counsel was  
4 constitutionally inadequate.” *Arrendondo v. Neven*, 763 F.3d 1122, 1140 (9th Cir. 2014) (citing  
5 *Cockett*, 333 F.3d at 943; *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988)).

6 Morris seeks to excuse the procedural default of his claims based on Brooks’ alleged  
7 constitutional violations. However, as to substantive Grounds 4, 5, 9 and the unexhausted portion  
8 of Ground 8, he failed to present the corresponding appellate IAC claims—Grounds 10(B)(2),  
9 10(B)(3), 10(B)(6) in part, and 10(B)(7)—to the state court in his initial post-conviction  
10 proceedings and those claims are themselves procedurally defaulted. Accordingly, Morris may  
11 not rely upon those appellate-level IAC claims to establish cause excusing the procedural default  
12 of Grounds 4, 5, 8 in part, and 9.

#### 13 **D. Grounds 2, 3, 6, and 7**

14 Federal courts review appellate IAC claims in accordance with the standard set out in  
15 *Strickland v. Washington*, 466 U.S. 668 (1984). *E.g.*, *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th  
16 Cir. 1989). Under *Strickland*, a petitioner must (1) show that “his counsel was objectively  
17 unreasonable . . . in failing to find arguable issues on appeal—that is, that counsel unreasonably  
18 failed to discover nonfrivolous issues and to file a merits brief raising them,” and (2) demonstrate  
19 prejudice—that is, “he must show a reasonable probability that, but for counsel’s unreasonable  
20 failure to file a merits brief, he would have prevailed on his appeal.” *Smith v. Robbins*, 528 U.S.  
21 259, 285 (2000). When analyzing an IAC claim, a court may first consider either the question of  
22 deficient performance or the question of prejudice. *Strickland*, 466 U.S. at 697.

23 Courts must apply a strong presumption that counsel’s challenged conduct may be  
24 considered sound strategic decisions. *Id.* at 689 (internal quotation omitted); *Cullen v. Pinholster*,  
25 563 U.S. 170, 191 (2011). “The lawyer has discharged his constitutional responsibility so long as  
26 his decisions fall within the ‘wide range of professionally competent assistance.’” *Buck v. Davis*,  
27 --- U.S. ---, 137 S. Ct. 759, 775 (2017) (noting that *Strickland* “sets a high bar” for deficient  
28 performance) (quoting at *Strickland*, 466 U.S. 690).

1 Morris fails to demonstrate constitutional violations excusing the procedural default of  
2 Grounds 2, 3, 6, and 7 through corresponding appellate IAC claims—Grounds 10(B)(1), 10(B)(4),  
3 and 10(B)(5)—which he exhausted in his first state petition and post-conviction appeal. (Exs. 87,  
4 94, 126, ECF Nos. 15-2, 15-24, 28-1.)

5 With regard to Grounds 2 and 3, Morris’s claims of insufficient evidence supporting the  
6 convictions for fraudulent acts at two casinos, Brooks testified that his impression of the trial  
7 testimony was that “overwhelming evidence” supported the convictions. (Ex. 99, ECF No. 15-24  
8 at 10–11; *see also* Ex. 97, ECF No. 15-22 at 4.) Brooks affirmatively chose not to make such a  
9 challenge because it would not have been productive. (*Id.*)

10 As to Ground 6, Morris’s claim the state court interfered with his right to testify at trial,  
11 Brooks testified that the record did not support such a claim. (Ex. 99, ECF No. 15-24 at 14–18.)  
12 Following review of the record, Brooks surmised that the state court judge left the decision in  
13 Morris’s hands, “if Mr. Morris wants to testify -- he can let the Court know he wants to testify.”  
14 (*Id.* at 15.) Brooks therefore felt he had nothing to work with on that issue and declined to  
15 challenge it on appeal. (*Id.* at 17–18; *see also* Ex. 97, ECF No. 15-22 at 5.)

16 Regarding Ground 7, Morris’s claim the state court erred by giving a flight instruction,  
17 Brooks testified to his “impression that the evidence was sufficient to support that instruction,”  
18 and even if the evidence had not been sufficient, he may not have “raised that issue in light of the  
19 overwhelming evidence in this case.” After “considering the evidence,” he declined to raise the  
20 issue as “it was just going nowhere.” (Ex. 99, ECF No. 15-24 at 18.)

21 Brooks’ testimony demonstrates that Morris’s appellate IAC claims—Grounds 10(B)(1),  
22 10(B)(4), and 10(B)(5)—do not provide cause to excuse the default of Grounds 2, 3, 6, and 7.  
23 Brooks diligently evaluated the record and made objectively reasonable professional judgments  
24 that such claims would not be successful on appeal. His decisions clearly fall within the wide  
25 range of sound strategic decisions presumed under *Strickland*. Morris fails to refute counsel’s  
26 strategic reasons for deciding against litigating these issues. Because Morris fails to demonstrate  
27 that Brooks’ performed deficiently, the Court need not address *Strickland*’s prejudice prong. *See*  
28 *Strickland*, 466 U.S. at 697 (if a petitioner fails to satisfy one element of an IAC claim, the court



1 need not consider the other).

2 Finally, the Court is not persuaded by Morris's argument that Grounds 2–9 are now fully  
3 exhausted and ripe for federal review. (ECF No. 75 at 5.) As he acknowledges, Grounds 2–9 were  
4 not presented to the Nevada courts until his second round of post-conviction proceedings, and the  
5 Nevada Supreme Court affirmed the dismissal of the second state petition as time-barred and  
6 successive as well as the state court's finding that he failed to establish good cause to overcome  
7 the procedural bars. (Ex. 166, ECF No. 77-12.)

8 **IT IS THEREFORE ORDERED:**

9 1. Respondents' Amended Motion to Dismiss (ECF No. 73) is GRANTED IN PART  
10 AND DENIED IN PART as explained herein. The following claims of Petitioner Brent  
11 Morris's First Amended Petition for Writ of Habeas Corpus (ECF No. 25) are  
12 DISMISSED with prejudice as procedurally defaulted:

- 13 a. Grounds 2, 3, 4, 5, 6, 7, and 9 in their entirety; and  
14 b. Ground 8 to the extent it asserts the state court erred by (i) using Morris's prior  
15 convictions that were stale, trivial, and remote in adjudicating him as a habitual  
16 criminal, and (ii) failing to make a finding that habitual criminal status was just  
17 and proper.

18 2. Respondents will have **60 days** to answer the surviving grounds of the Amended  
19 Petition:

- 20 a. Ground 1 to the extent it asserts Morris's 2011 convictions are infirm because  
21 he was not properly on the "Black List" (*see* ECF No. 42 at 4–5);  
22 b. Ground 8 to the extent it asserts Morris's habitual criminal adjudication was  
23 improperly based on an invalid Michigan conviction (ECF No. 48 at 2–3);  
24 c. IAC Ground 10 and subclaims 10(A)(1), 10(A)(2), 10(B)(1), 10(B)(2),  
25 10(B)(3), 10(B)(4), 10(B)(5), 10(B)(6), 10(B)(7), and 10(B)(8); and  
26 d. Ground 11 regarding cumulative error to the extent Morris's claims were  
27 "presented to, and therefore exhausted before, the Nevada Supreme Court."  
28 (ECF No. 42 at 10.)

