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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DANIEL A. RAMET,

Petitioner,

v.

ROBERT LeGRANDE, et. al,

Respondents.

Case No. 3:14-cv-00452-MMD-WGC

ORDER

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by Daniel A. Ramet, a Nevada prisoner. On October 2, 2015, respondents filed a motion to dismiss arguing that Ramet has not exhausted state court remedies for certain claims in his petition, that one of his claims does not meet habeas pleading standards, and that one of his claims is not cognizable in a federal habeas proceeding. (ECF No. 20.) Ramet has filed his opposition to the motion and his own motion asking the court for an evidentiary hearing in support of that opposition. (ECF Nos. 23, 24.) This order decides both motions.

**I. PROCEDURAL BACKGROUND<sup>1</sup>**

On June 4, 2007, a jury in the state district court for Clark County, Nevada, found Ramet guilty of first degree murder. After a sentencing hearing the following day, the jury imposed a sentence of life without possibility of parole. The court entered a judgment of conviction on August 31, 2007. Ramet appealed.

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<sup>1</sup>This procedural background is derived from the exhibits filed under ECF Nos. 10-14 and this Court's own docket.

1 On June 4, 2009, the Nevada Supreme Court affirmed the conviction in an  
2 opinion that discussed in detail only one of Ramet's claims of error, that being his claim  
3 that testimony concerning his refusal to consent to a search of his home, coupled with  
4 the prosecutor's reference to it in closing argument, violated his Fourth Amendment  
5 rights. The Nevada Supreme Court found any error in admission of that evidence  
6 harmless, and it summarily denied the remainder of Ramet's claims in a footnote.

7 On December 11, 2009, Ramet filed a proper person state habeas petition, which  
8 the state district court ultimately denied without appointing counsel to represent Ramet.  
9 The Nevada Supreme Court reversed the district court, finding the state district court  
10 erred in failing to appoint counsel, and remanded to the district court for further  
11 proceedings. Appointed counsel filed a supplemental petition. The state district court  
12 held an evidentiary hearing and subsequently denied the petition. Ramet appealed. On  
13 July 22, 2014, the Nevada Supreme Court affirmed the denial of relief.

14 On August 28, 2014, this Court received Ramet's federal habeas petition. With  
15 the assistance of appointed counsel, Ramet filed an amended petition on May 11, 2015.

## 16 **II. EXHAUSTION**

17 Respondents argue Ramet has failed to exhaust state court remedies for Claims  
18 2, 3, 4, 5, 6 and 10 of his amended petition. A federal court will not grant a state  
19 prisoner's petition for habeas relief until the prisoner has exhausted his available state  
20 remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. §  
21 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his  
22 claims before he presents those claims in a federal habeas petition. *O'Sullivan v.*  
23 *Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365  
24 (1995). A claim remains unexhausted until the petitioner has given the highest available  
25 state court the opportunity to consider the claim through direct appeal or state collateral  
26 review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison*  
27 *v. McCarthey*, 653 F.2d 374, 376 (9th Cir.1981).

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1 A habeas petitioner must “present the state courts with the same claim he urges  
2 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). To achieve  
3 exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting  
4 claims under the United States Constitution” and given the opportunity to correct alleged  
5 violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995);  
6 *see Hiivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999). It is well settled that 28 U.S.C.  
7 § 2254(b) “provides a simple and clear instruction to potential litigants: before you bring  
8 any claims to federal court, be sure that you first have taken each one to state court.”  
9 *Jiminez v. Rice*, 276 F.3d 478, 481 (9<sup>th</sup> Cir. 2001) (quoting *Rose*, 455 U.S. at 520).

10 A claim is not exhausted unless the petitioner has presented to the state court  
11 the same operative facts and legal theory upon which his federal habeas claim is based.  
12 *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9<sup>th</sup> Cir. 1994). The  
13 exhaustion requirement is not met when the petitioner presents to the federal court facts  
14 or evidence which place the claim in a significantly different posture than it was in the  
15 state courts, or where different facts are presented at the federal level to support the  
16 same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9<sup>th</sup> Cir. 1988).

17 **A. Claim 2**

18 In Claim 2, Ramet alleges that he was provided ineffective assistance of counsel  
19 (IAC), in violation of his rights under the Sixth and Fourteenth Amendment, because trial  
20 counsel failed to accurately advise him of the consequences of going to trial.  
21 Respondents contend the claim is unexhausted because, in state court, Ramet alleged  
22 that counsel was ineffective for discouraging him from accepting the State’s plea offer,  
23 which, according to respondents, is a different theory. Respondents also argue that  
24 Ramet has added new factual allegations in his federal petition that were not presented  
25 to the state court.

26 While there are differences, the claim Ramet presented to the Nevada Supreme  
27 Court is the “substantial equivalent” of the claim he now presents to this Court. *See*  
28 *Picard*, 404 U.S. at 278. That is, comparing the relevant portion of the brief Ramet filed

1 in the Nevada Supreme Court (ECF No. 14 at 13-23) with Claim 2 shows that the legal  
2 theory and supporting factual allegations in each are essentially the same. In addition,  
3 any new factual allegations included in Ramet's federal petition did not so fundamentally  
4 alter the legal claim already considered by the state courts as to render it unexhausted.  
5 *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (petitioner's new evidence regarding  
6 brain damage did not fundamentally alter legal claim where petitioner had provided the  
7 state court with a neuropsychological expert's initial analysis regarding his brain  
8 damage).<sup>2</sup>

9 Claim 2 is exhausted.

10 **B. Claim 3**

11 In Claim 3, Ramet alleges that he did not knowingly or voluntarily waive his rights  
12 under *Miranda v. Arizona*, 384 U.S. 436 (1966), and the admission of his involuntary  
13 confession violated his Fifth and Fourteenth Amendment rights. Respondents argue that  
14 Ramet has added new facts to his claim in federal court that were not included in his  
15 state court claim. Here again, this Court concludes that any additional facts in Ramet's  
16 federal petition did not fundamentally alter the claim presented to the state court.

17 Claim 3 is exhausted.

18 **C. Claim 4**

19 In Claim 4, Ramet alleges that the police failed to honor his invocation of his right  
20 to remain silent, in violation of his Fifth, Sixth, and Fourteenth Amendment rights, and  
21 that trial and direct appeal counsel were ineffective for failing to raise this claim, in  
22 violation of his Sixth and Fourteenth Amendment rights. Ramet concedes that he has  
23 not presented this claim to the Nevada courts, but argues that the claim is technically  
24 exhausted because a state court remedy is no longer available. He further argues that

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26 <sup>2</sup>This Court rejects respondents' argument that *Vasquez* is no longer good law in  
27 light of *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Pinholster* limits this court's review of  
28 claims adjudicated on the merits in state court to the record that was before the state  
court. 563 U.S. at 181. It does not speak, however, to whether newly-presented factual  
allegations in a federal habeas claim render it unexhausted.

1 he can overcome any procedural default of the claim because his post-conviction  
2 counsel was ineffective in failing to present the claim in that proceeding.

3 This Court agrees that if Ramet were to present Claim 4 to the Nevada courts it  
4 would be subject to state procedural bars such as Nev. Rev. Stat. §§ 34.726 and  
5 34.810, which impose time and successiveness limits, respectively.<sup>3</sup> The Supreme  
6 Court has recognized that if state-court remedies are no longer available because the  
7 prisoner failed to comply with procedural requirements for presenting his claim, those  
8 remedies are technically exhausted, but the claim is then subject to the doctrine of  
9 procedural default. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (citing *Coleman v.*  
10 *Thompson*, 501 U.S. 722, 744-51 (1991) and *Gray v. Netherland*, 518 U.S. 152, 162  
11 (1996)).

12 “A prisoner may obtain federal review of a defaulted claim by showing cause for  
13 the default and prejudice from a violation of federal law.” *Martinez v. Ryan*, 132 S.Ct.  
14 1309, 1316 (2012) (citing *Coleman*, 501 U.S. at 750)). In *Martinez*, the Supreme Court  
15 held that, in collateral proceedings that provide the first occasion to raise a claim of  
16 ineffective assistance at trial, ineffective assistance of post-conviction counsel in that  
17 proceeding may establish cause for a prisoner's procedural default of such a claim.  
18 *Martinez*, 132 S. Ct. at 1315. The Court stressed that its holding was a “narrow  
19 exception” to the rule in *Coleman* that “an attorney's ignorance or inadvertence in a  
20 postconviction proceeding does not qualify as cause to excuse a procedural default.” *Id.*  
21 In *Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013), the Ninth Circuit expanded *Martinez*  
22 to allow ineffective assistance of post-conviction counsel to be used as a means to  
23 excuse the default of claims of ineffective assistance of appellate counsel. *Nguyen*, 736  
24 F.3d at 1295.

25 \_\_\_\_\_  
26 <sup>3</sup>Under Nev. Rev. Stat. § 34.726(1), a petition is untimely if filed later than one  
27 year after the entry of the judgment of conviction or, if an appeal has been taken from  
28 the judgment, within one year after the Nevada Supreme Court issues its remittitur. Nev.  
Rev. Stat. § 34.810 addresses successive petitions and requires dismissal of claims  
that have already been raised and adjudicated on the merits, as well as claims that  
could have been raised in an earlier proceeding, but were not.

1 To the extent he seeks to excuse the default of alleged constitutional violations  
2 arising from police conduct, Ramet's *Martinez* argument is a non-starter in that he is  
3 seeking to excuse the default of a non-IAC claim. *Martinez* applies only to ineffective  
4 assistance of trial or, under *Nguyen*, appellate counsel. It has not been expanded to  
5 other types of claims. *Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9<sup>th</sup> Cir. 2015)  
6 (explaining that the Ninth Circuit has "not allowed petitioners to substantially expand the  
7 scope of *Martinez* beyond the circumstances present in *Martinez*"); *Hunton v. Sinclair*,  
8 732 F.3d 1124, 1126–27 (9<sup>th</sup> Cir. 2013) (denying petitioner's claim that *Martinez*  
9 permitted the resuscitation of a procedurally defaulted *Brady* claim, holding that only the  
10 Supreme Court could expand the application of *Martinez* to other areas).

11 With respect to the trial and appellate IAC claims in Claim 4, Ramet must show  
12 not only post-conviction counsel's ineffectiveness but also "that the underlying  
13 ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the  
14 prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at 1318-  
15 19. Because these determinations are intertwined with the ultimate merit of Claim 4, the  
16 Court will defer ruling on the cause and prejudice issue until the merits of the claim are  
17 briefed in respondents' answer and petitioner's reply brief.

#### 18 **D. Claim 5**

19 In Claim 5, Ramet contends that the State failed to prove the victim's death was  
20 the result of criminal agency, in violation of his rights under the Fourth and Fourteenth  
21 Amendments. Respondents argue the claim is unexhausted because it includes an  
22 allegation that was not part of Ramet's state court presentation of the claim — i.e., that  
23 the jury was never instructed that the State had to prove *corpus delicti* beyond a  
24 reasonable doubt. In context, however, this allegation is not intended as an additional  
25 claim of error, but instead, merely to highlight the likelihood that the jury was unaware of  
26 the *corpus delicti* element. (ECF No. 9 at 39.) Because it does not fundamentally alter  
27 the claim Ramet presented to the Nevada Supreme Court, the allegation does not  
28 render Claim 5 unexhausted.

1 Claim 5 is exhausted.

2 **E. Claim 6**

3 In Claim 6, Ramet alleges that trial counsel was ineffective, in violation of his  
4 Sixth and Fourteenth Amendment rights, for failing to request an instruction that the  
5 State was required to prove *corpus delecti* beyond a reasonable doubt. Ramet makes  
6 the same technical exhaustion/*Martinez* argument for Claim 6 that he makes for Claim  
7 4. Here again, the Court will defer ruling on the cause and prejudice issue until the  
8 merits of the claim are briefed in respondents' answer and petitioner's reply brief.

9 **F. Claim 10**

10 In Claim 10, Ramet alleges that the cumulative effect of the constitutional errors  
11 deprived him of due process, in violation of his rights under the Fourteenth Amendment.  
12 Ramet concedes he has not presented a cumulative error claim to the Nevada Supreme  
13 Court, but argues that this Court must nonetheless conduct a cumulative error analysis.

14 The Ninth Circuit has held that a claim of cumulative error was not exhausted  
15 where "cumulative error was not labeled as an issue in the [state court] brief's table of  
16 contents and the petitioner did not argue cumulative error or cite any authority on  
17 cumulative error." *Wooten v. Kirkland*, 540 F.3d 1019, 1026 (9th Cir. 2008). While this  
18 Court agrees that, under certain circumstances, it may be appropriate to consider the  
19 cumulative prejudicial impact of multiple errors, none of the cases Ramet cites stands  
20 for the proposition that his cumulative error claim is exempt from the exhaustion  
21 requirement.

22 Ground 10 is unexhausted.

23 **III. COGNIZABILITY**

24 Respondents contend that Claim 5 of Ramet's amended petition is not  
25 cognizable in a federal habeas proceeding. A petitioner in an action filed under 28  
26 U.S.C. § 2254(a) is only entitled to relief "on the ground that he is in custody in violation  
27 of the Constitution or laws or treaties of the United States." "[I]t is not the province of a

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1 federal habeas court to reexamine state-court determinations on state-law questions.”  
2 *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

3 With respect to Claim 5, respondents argue that the *corpus delicti* rule is not  
4 grounded in the U.S. Constitution and, instead, is strictly a creature of state law. Under  
5 Nevada law, “[t]he *corpus delicti* of a crime must be proven independently of the  
6 defendant's extrajudicial admissions.” *Doyle v. State*, 921 P.2d 901, 910 (Nev. 1996),  
7 *overruled on other grounds by Kaczmarek v. State*, 91 P.3d 16, 29 (Nev. 2004).  
8 Ramet’s response to respondents’ argument is that, although proof of *corpus delicti* is a  
9 state law requirement, the requirement that the State prove *all* elements of a crime is a  
10 matter of federal due process.

11 This Court concludes that Claim 5 presents a federal issue under *Jackson v.*  
12 *Virginia*, 443 U.S. 307 (1979). *See Jackson*, 443 U.S. at 324 (holding that a petitioner  
13 “is entitled to habeas corpus relief if it is found that upon the record evidence adduced  
14 at the trial no rational trier of fact could have found proof of guilt beyond a reasonable  
15 doubt” and that “the standard must be applied with explicit reference to the substantive  
16 elements of the criminal offense as defined by state law.”). Thus, the claim is cognizable  
17 in a federal habeas proceeding.

#### 18 **IV. HABEAS PLEADING STANDARD**

19 Respondents argue that Claim 7 of Ramet’s amended petition fails to meet the  
20 pleading standard applicable to federal habeas petitions. The Supreme Court discussed  
21 those pleading requirements as follows:

22 Habeas Corpus Rule 2(c) . . . provides that the petition must  
23 “specify all the grounds for relief available to the petitioner” and “state the  
24 facts supporting each ground.” See also Advisory Committee's Note on  
25 subd. (c) of Habeas Corpus Rule 2, 28 U.S.C., p. 469 (“In the past,  
26 petitions have frequently contained mere conclusions of law, unsupported  
27 by any facts. [But] it is the relationship of the facts to the claim asserted  
28 that is important . . . .”); Advisory Committee's Note on Habeas Corpus  
Rule 4, 28 U.S.C., p. 471 (“ ‘[N]otice’ pleading is not sufficient, for the  
petition is expected to state facts that point to a real possibility of  
constitutional error.” (internal quotation marks omitted)).

28 *Mayle v. Felix*, 545 U.S. 644, 655 (2005)



1 In Claim 7, Ramet alleges that trial counsel was ineffective, in violation of his  
2 Sixth and Fourteenth Amendment rights, for failing to adequately investigate his mental  
3 health and failing to adequately present this issue to the jury. Ineffective assistance of  
4 counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Under  
5 *Strickland*, a petitioner must satisfy two prongs to obtain habeas relief — deficient  
6 performance by counsel and prejudice. 466 U.S. at 687. With respect to the  
7 performance prong, a petitioner must carry the burden of demonstrating that his  
8 counsel’s performance was so deficient that it fell below an “objective standard of  
9 reasonableness.” *Id.* at 688. In assessing prejudice, the court “must ask if the defendant  
10 has met the burden of showing that the decision reached would reasonably likely have  
11 been different absent [counsel’s] errors.” *Id.* at 696.

12 Respondents argue that Claim 7 fails to meet the federal habeas pleading  
13 standard because it fails to specify what a mental health expert would have testified to  
14 at trial. According to respondents, the absence of allegations on this point means that  
15 Ramet has not alleged facts that, if proven to be true, would satisfy either prong of the  
16 *Strickland* standard. Respondents’ argument in this regard goes to the merits of the  
17 claim. The Court reserves judgment as to the viability of Claim 7 and will address the  
18 claim in its final order on the merits of Ramet’s remaining habeas claims.

## 19 **V. MOTION FOR EVIDENTIARY HEARING**

20 Ramet requests an evidentiary hearing to assist in demonstrating that post-  
21 conviction counsel was ineffective for the purpose of avoiding the procedural default of  
22 his IAC claims. As noted above, the Court will first address whether the underlying  
23 ineffective assistance of counsel claims are meritorious. Accordingly, Ramet’s motion  
24 for an evidentiary hearing will be denied without prejudice.

## 25 **VI. CONCLUSION**

26 Based on the foregoing, it is ordered that respondents’ motion to dismiss (ECF  
27 No. 20) is granted in part and denied in part. The Court dismisses, as procedurally  
28 defaulted, claims for relief in Claim 4 that are not premised on ineffective assistance of

1 counsel. The IAC claims in Claim 4 and 6 are also procedurally defaulted. The Court  
2 reserves judgment as to whether petitioner can demonstrate cause and prejudice to  
3 overcome the default of those claims.

4 Claim 10 is unexhausted. Petitioner will have twenty (20) days to inform this  
5 Court in a sworn declaration that he wishes to formally and forever abandon this ground  
6 for relief and proceed on the exhausted grounds. If petitioner fails to respond to this  
7 order within the time permitted, this case may be dismissed pursuant to *Rose v. Lundy*.

8 It is further ordered that respondents will have thirty (30) days from the date  
9 petitioner serves his declaration of abandonment in which to file an answer to  
10 petitioner's remaining grounds for relief.

11 It is further ordered that petitioner will have thirty (30) days following service of  
12 respondents' answer in which to file a reply.

13 It is further ordered that respondents' motion for an evidentiary hearing (ECF No.  
14 24) is denied.

15 Dated this 12<sup>th</sup> day of September 2016.



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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE