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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HERIBERTO TORIBIO-RUIZ,

Petitioner,

v.

ISIDRO BACA, *et al.*,

Respondents.

Case No. 3:14-cv-00492-MMD-WGC

ORDER

I. SUMMARY

This is a habeas corpus action under 28 U.S.C. § 2254. Currently before the Court are Respondents' motion to dismiss Petitioner Heriberto Toribio-Ruiz's second amended petition for writ of habeas corpus ("Petition") (ECF No. 73).¹ The Court finds that grounds 4(b), 4(c), 4(d), 4(e), 5, and 6 in the Petition are procedurally defaulted. The Court also finds that Toribio-Ruiz has not shown good cause and prejudice to excuse the procedural default. The Court thus grants the motion to dismiss.

II. BACKGROUND

Toribio-Ruiz was charged with three counts of sexual misconduct upon two girls, B.S. and L.M. Regarding B.S., he was charged with one count of sexual assault on a child and one count of lewdness with a child under the age of 14 years. Regarding L.M., he was charged with one count of lewdness under the age of 14 years. (ECF No. 42-6.) A jury found Toribio-Ruiz guilty of all three counts. (ECF No. 49-3, 49-4, 49-5.) The trial court dismissed the count of lewdness regarding B.S. because it was redundant to the count of sexual assault regarding B.S. (ECF No. 50-5 at 10.) The trial court convicted Toribio-Ruiz

¹The Court has also reviewed Toribio-Ruiz's response (ECF No. 80) and Respondents' reply (ECF No. 81).

1 on the other two counts. (ECF No. 50-13.) Toribio-Ruiz appealed, and the Nevada
2 Supreme Court affirmed. (ECF No. 51-10.)

3 Toribio-Ruiz filed his first post-conviction habeas corpus petition in the state district
4 court. (ECF No. 51-11.) The state district court appointed counsel. (ECF No. 51-16.) About
5 a month and a half after appointment of counsel, Toribio-Ruiz filed a proper-person
6 amended/supplemental habeas corpus petition. (ECF No. 52-1.) After some procedural
7 confusion, Toribio-Ruiz filed a counseled supplement to the petition. (ECF No. 52-52.) The
8 state district court held an evidentiary hearing. (ECF No. 53-1.) The state district court then
9 denied the petition. (ECF No. 53-4.) Toribio-Ruiz appealed, and the Nevada Supreme
10 Court affirmed. (ECF No. 53-37.)

11 Toribio-Ruiz then commenced this action. The Court appointed the Federal Public
12 Defender to represent Toribio-Ruiz. Toribio-Ruiz filed a counseled first amended petition
13 and then a counseled second amended petition. (ECF No. 13, 31.) Respondents filed a
14 motion to dismiss. (ECF No. 40.) The Court granted the motion in part, finding that grounds
15 4(b), 4(c), 4(d), 4(e), 5, and 6 were not exhausted. (ECF No. 61.) The Court, with
16 reluctance, granted Toribio-Ruiz's request to stay the action while he exhausted those
17 grounds in state court. (ECF No. 66.)

18 Toribio-Ruiz filed his second post-conviction habeas corpus petition in the state
19 district court. (ECF No. 69-1.) The state district court dismissed the petition because it was
20 untimely under NRS § 34.726(1) and successive under NRS § 34.810(1)(b)(2). (ECF No.
21 69-5.) Toribio-Ruiz appealed. The Nevada Court of Appeals affirmed. (ECF No. 69-9.)

22 Toribio-Ruiz then returned to this Court, which reopened the action. (ECF No. 71.)
23 Respondents filed their renewed motion to dismiss. (ECF No. 73.)

24 **III. LEGAL STANDARD**

25 A federal court will not review a claim for habeas corpus relief if the decision of the
26 state court regarding that claim rested on a state-law ground that is independent of the
27 federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S.
28 722, 730-31 (1991).

1 In all cases in which a state prisoner has defaulted his federal claims in state
2 court pursuant to an independent and adequate state procedural rule,
3 federal habeas review of the claims is barred unless the prisoner can
4 demonstrate cause for the default and actual prejudice as a result of the
alleged violation of federal law, or demonstrate that failure to consider the
claims will result in a fundamental miscarriage of justice.

5 *Id.* at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The grounds for dismissal
6 upon which the Nevada Supreme Court relied in this case are adequate and independent
7 state rules. *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003) (NRS § 34.810);
8 *Loveland v. Hatcher*, 231 F.3d 640 (9th Cir. 2000) (NRS § 34.726); *Moran v. McDaniel*,
9 80 F.3d 1261 (9th Cir. 1996) (NRS § 34.726).

10 To demonstrate cause for a procedural default, the petitioner must “show that some
11 objective factor external to the defense impeded” his efforts to comply with the state
12 procedural rule. *Carrier*, 477 U.S. at 488.

13 To show prejudice, “[t]he habeas petitioner must show ‘not merely that the errors
14 at . . . trial created a *possibility* of prejudice, but that they worked to his actual and
15 substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’”
16 *Carrier*, 477 U.S. at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982))
17 (emphasis in original).

18 If a procedurally defaulted claim is a claim of ineffective assistance of trial counsel,
19 then the ineffective assistance of counsel in the initial state post-conviction proceedings,
20 or the absence of such counsel, can be cause to excuse the procedural default. *Martinez*
21 *v. Ryan*, 566 U.S. 1, 14 (2012). The petitioner also would need to show that the
22 procedurally defaulted claim of ineffective assistance of trial counsel is a substantial
23 claiming, meaning “that the [petitioner] must demonstrate that the claim has some merit.”
24 *Id.* Also, state law, either expressly or as a practical matter, must require that the petitioner
25 raise claims of ineffective assistance of counsel in the initial state post-conviction
26 proceedings and not on direct appeal. *Id.*

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1 **IV. DISCUSSION**

2 **A. Grounds 4(b), 4(d), 4(e), and 6 are procedurally defaulted**

3 These grounds were not exhausted because Toribio-Ruiz did not appeal their
4 denial to the Nevada Supreme Court. (ECF No. 61 at 2.) They now are procedurally
5 defaulted because the state courts used state-law procedural bars to deny relief. The
6 Court ruled, anticipatorily, that *Martinez* cannot excuse the procedural default because the
7 failure to exhaust, and thus the default, occurred when Toribio-Ruiz did not appeal the
8 denial of the grounds, and *Martinez* does not apply when post-conviction appellate
9 counsel causes a procedural default (ECF No. 61 at 4.) *See also Martinez v. Ryan*, 566
10 U.S. 1, 16 (2012).

11 Toribio-Ruiz asserts that the Court, in its earlier order, did not examine what post-
12 conviction counsel in the state district court did with these grounds. The Court is not
13 persuaded. Toribio-Ruiz raised each of these grounds in his initial proper-person state
14 post-conviction habeas corpus petition. Ground 4(b)'s equivalent was ground 3. (ECF No.
15 51-11 at 9.) Ground 4(d)'s equivalent was ground 15. (ECF No. 51-11 at 13.) Ground 4(e)'s
16 equivalent was ground 20. (ECF No. 51-11 at 14-15.) Ground 6's equivalent was ground
17 13. (ECF No. 51-11 at 12.) Toribio-Ruiz argues that state post-conviction counsel
18 abandoned these claims in the state district court, and, in the case of ground 4(b), waived
19 the claim at the evidentiary hearing. Appointed counsel did not re-allege these grounds in
20 the counseled supplemental petition. (See ECF No. 52-52.) However, that was not the end
21 of those grounds. Under Nevada law, appointed counsel may file a *supplement* to the
22 petition. NRS § 34.750(3). The terminology is important. The supplement does not
23 supersede the claims alleged in the initial proper-person petition. The supplement alleges
24 claims in addition to the claims alleged in the initial proper-person petition. The claims in
25 the initial state post-conviction petition still were pending. The state district court
26 understood this. It denied all the claims in the initial proper-person petition on their merits.
27 (ECF No. 53-4 at 4-9.)

28 The failure to exhaust, and the subsequent procedural default, occurred when post-

1 conviction appellate counsel did not raise the denial of those grounds on appeal. As noted
2 above, *Martinez* does not apply in this situation. *Martinez*, 566 U.S. at 16. A failure of post-
3 conviction appellate counsel to raise an issue on post-conviction appeal is not cause to
4 excuse a procedural default, because a person does not have a constitutional right to post-
5 conviction counsel and thus does not have a constitutional right to effective assistance of
6 post-conviction counsel. *Coleman*, 501 U.S. at 752 (citing *Pennsylvania v. Finley*, 481 U.S.
7 551 (1987)).

8 As a counter-example, if initial post-conviction counsel did everything that Toribio-
9 Ruiz argues now, but the state district court still denied the petition and post-conviction
10 appellate counsel still did not raise the denial of the grounds on appeal, then the grounds
11 still would be procedurally defaulted and *Martinez* still would be inapplicable. This
12 demonstrates that the default occurred in the appeal from the denial of the post-conviction
13 petition, not due to any actions of initial post-conviction counsel. Consequently, the
14 performance of initial post-conviction counsel cannot have caused the procedural default
15 in this case.

16 For these reasons, the Court dismisses grounds 4(b), 4(d), 4(e), and 6 as
17 procedurally defaulted.

18 **B. Ground 4(b), in the alternative, is not a substantial claim of ineffective**
19 **assistance of trial counsel**

20 Ground 4(b) is a claim that trial counsel provided ineffective assistance by not
21 calling as a witness an expert who reviewed the report of the examining nurse and
22 determined that she was incorrect in her findings of physical injury. Ground 4(b) has one
23 fact in its procedural history that it does not share with the other procedurally defaulted
24 grounds. This claim was ground 3 in Toribio-Ruiz's initial, proper-person state post-
25 conviction petition. (ECF No. 51-11 at 9.) At the state-court evidentiary hearing, the court
26 asked post-conviction counsel whether he would ask trial counsel about that claim. (ECF
27 No. 53-1 at 29-30.) Post-conviction counsel said, "Well, Your Honor, I think, having
28 reviewed the authority presented on that claim and having more fully reviewed what

1 occurred at that time as far as the examination of the girls and the fact that no testimony
2 was presented by the State as to any injury to the girls by any expert witness, then I'll
3 withdraw that particular claim at this time." (ECF No. 53-1 at 30.) The state district court
4 still denied the ground on its merits. (ECF No. 53-4 at 5.) In the event that the withdrawal
5 of the claim at the evidentiary hearing, and not the decision to not appeal the denial on the
6 merits, is the reason for the failure to exhaust and subsequent procedural default, the
7 Court has considered ground 4(b).

8 The issue of physical evidence of abuse was discussed tangentially during the trial.
9 Jovita Castaneda, a defense witness, testified on cross-examination that she was present
10 with Toribio-Ruiz when he spoke on the telephone with Juan Sanchez about the charges.
11 Sanchez was Castaneda's son and one of the girls' father. The police asked Sanchez to
12 call Toribio-Ruiz and talk about the case in hope of Toribio-Ruiz making incriminating
13 statements. Sanchez took notes during the telephone conversation, and a detective was
14 present with him. Castaneda testified, "I only heard [Toribio-Ruiz] say, 'Forgive me,' but I
15 don't know anything." (ECF No. 47-4 at 23.) This testimony surprised the defense. This
16 testimony did not surprise the prosecution, because the prosecutor met with Castaneda
17 before she testified, and she told the prosecutor about Toribio-Ruiz's statement. The
18 defense moved for a mistrial based upon prosecutorial misconduct.²

19 Castaneda's testimony by itself has nothing to do with ground 4(b). However, during
20 one of the hearings on the motion for mistrial, defense counsel discussed as background
21 an earlier dispute over the results of the physical examination by Nurse Lily Clarkson.
22 Clarkson determined that at least one of the girls had physical indications that
23 substantiated the allegation of abuse. The defense hired an expert to review Clarkson's
24 findings. The expert determined that nothing in the examinations indicated physical
25 injuries. The expert also said that the lack of any physical finding would not be
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27 ²This testimony was the subject of ground 4(c). The Court discussed trial counsel's
28 efforts to have the court declare a mistrial more fully in its order granting in part
Respondents' initial motion to dismiss. (ECF No. 61.)

1 determinative, because a physical examination would not find evidence of digital
2 penetration of a 5-year-old girl months after the occurrence. (ECF No. 19-5 at 13-14.)

3 Defense counsel then referred to an earlier hearing to determine the admissibility
4 of Dr. Deborah Davis as an expert on false confessions. (*Id.*) At that hearing, the
5 prosecutor asked Dr. Davis if she had any evidence that the girls' accusations of Toribio-
6 Ruiz abusing them were false. Dr. Davis noted that the physical examinations of the girls
7 were evidence that the girls' accusations were false. The examinations supposedly found
8 signs of physical abuse, but the examinations were conducted many months after Toribio-
9 Ruiz had any contact with the girls, meaning that Toribio-Ruiz could not have been the
10 person who caused the abuse, and thus the girls' accusations of Toribio-Ruiz were false.
11 (ECF No. 16-18 at 33-34.)

12 Returning to the hearing on the "forgive me" testimony, defense counsel noted that
13 after Dr. Davis testified at the earlier hearing, the prosecutor then had Clarkson's findings
14 checked independently and learned that Clarkson's conclusions were incorrect. (ECF No.
15 19-5 at 15.) The prosecutor then decided not to call Clarkson as a witness. (*Id.*)

16 At trial, the prosecution did not present any physical evidence of abuse. The
17 prosecution did call as a witness Detective Curtis Lampert, who interviewed Toribio-Ruiz
18 and to whom Toribio-Ruiz confessed. On cross-examination about his interrogation
19 technique, Lampert admitted that his statements to Toribio-Ruiz about evidence of
20 redness and abrasions were lies. (ECF No. 17-2 at 148-50.)

21 If post-conviction counsel's waiver of the claim at the state district court was what
22 caused the procedural default of ground 4(b), then the Court concludes that ground 4(b)
23 is not a substantial claim of ineffective assistance of trial counsel. The Court also
24 concludes that post-conviction counsel did not provide ineffective assistance by
25 withdrawing the claim.

26 First, the defense expert would not have rebutted any evidence of physical injury.
27 The prosecution decided not to have Clarkson testify. Without Clarkson's testimony, there
28 was no evidence of physical injury presented to the jury, and thus no evidence for the

1 defense expert to rebut. Trial counsel cannot have performed deficiently by failing to rebut
2 non-existent evidence. Furthermore, state post-conviction counsel, quoted above, gave
3 the lack of physical evidence in the prosecution's case as a reason why he withdrew the
4 claim. State post-conviction counsel thus did not provide ineffective assistance by
5 withdrawing the claim.

6 Second, trial counsel reasonably could have concluded that the defense expert's
7 testimony could have been harmful to the defense. The defense expert did not simply
8 conclude that the report of the examination showed no physical injury and that Clarkson
9 was wrong. The defense expert also noted that the time between Toribio-Ruiz's last
10 contact with the girls and the examinations of the girls was enough for any physical injuries
11 to have healed without any evidence of physical injuries remaining. If trial counsel called
12 the expert to testify, the expert almost certainly would have testified on cross-examination
13 that injuries, if any, would have healed by the time of the examinations. Trial counsel would
14 have put evidence damaging to Toribio-Ruiz before the jury—that Toribio-Ruiz might have
15 abused the girls, but the evidence was not preserved because the girls waited too long to
16 speak up. Trial counsel would have turned a strength of the defense—no physical
17 evidence of abuse—into an ambiguity at best. The Court cannot say that trial counsel
18 performed deficiently by avoiding the issue.

19 Third, trial counsel did use the lack of physical evidence as a strong point of the
20 defense. Detective Lampert admitted on cross-examination that he lied to Toribio-Ruiz
21 about the existence of physical evidence in his efforts to get Toribio-Ruiz to confess to the
22 crime. Later, Dr. Davis, an expert on interrogations, testified how interrogators try to
23 persuade the interrogatee that overwhelming evidence of guilt exists to obtain a
24 confession, and that, sometimes, an interrogatee might think that the only way to salvage
25 anything is to confess falsely. (ECF No. 48-4.) If counsel introduced the expert testimony
26 on the lack—and irrelevance—of physical evidence, then trial counsel risked undercutting
27 her own strategy. The jury might have been left thinking that the detective lied but no harm
28 occurred because the evidence of Toribio-Ruiz's abuse of the girls had healed by the time

1 of the interrogation.

2 **C. Grounds 4(c) and 5 are procedurally defaulted**

3 Toribio-Ruiz does not contest the procedural default of grounds 4(c) and 5. Ground
4 5 is a claim of ineffective assistance of appellate counsel, and *Martinez* does not apply to
5 it. *Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017). The Court dismisses ground 5 as
6 procedurally defaulted.

7 The Court reviewed ground 4(c) under *Martinez* in its order granting in part
8 Respondents' initial motion to dismiss. The Court found that ground 4(c) was not a
9 substantial claim of ineffective assistance of counsel and that state post-conviction
10 counsel did not perform deficiently by not raising it in the state post-conviction
11 proceedings. (ECF No. 61 at 4-10.)

12 The Court needs to correct a statement that it made in its earlier order, but the
13 correction does not change the conclusion. As stated in more detail in the earlier order,
14 Jovita Castaneda, a witness for the defense, surprised the defense by testifying that she
15 overheard Toribio-Ruiz say "forgive me" in a phone call to Juan Sanchez. Ground 4(c) is
16 a claim that trial counsel provided ineffective assistance by not calling Toribio-Ruiz as a
17 witness to testify about his explanation for the apology that Castaneda overheard. (ECF
18 No. 31 at 33.) The Court noted that Toribio-Ruiz did not allege what the explanation was.
19 (ECF No. 61 at 10.) However, Toribio-Ruiz did allege earlier in ground 4(c):

20 If asked Toribio-Ruiz would have explained that to the extent that he
21 apologized about anything during the conversation with Sanchez it was
22 related to his relationship with Castaneda, who is Sanchez's mother. He and
23 Castaneda had an on-again-off-again relationship. Sanchez seemed to be
the one who was most bothered by their unstable relationship. Toribio-Ruiz
was solely seeking Sanchez's forgiveness for the instability in his
relationship with Castaneda.

24 (ECF No. 31 at 33.) To the extent that the Court stated that Toribio-Ruiz had not alleged
25 the explanation in the Petition, the Court was incorrect. However, that correction does not
26 change the Court's ultimate conclusion, which the Court repeats here:

27 More importantly, petitioner does not allege that he told either defense
28 counsel or post-conviction counsel what this explanation is. The court recited
at length defense counsel's efforts to obtain a mistrial or a new trial to show

1 that defense counsel believed from the moment Castaneda testified about
2 the “forgive me” comment that both Castaneda and Sanchez lied about that
3 comment. Petitioner has a duty to be candid with counsel. *Taylor v. Illinois*,
4 484 U.S. 400, 418 (1988). If petitioner himself knew that he had said “forgive
5 me” to Sanchez, and that he had an explanation that put the comment into
6 a more favorable light, then he needed to tell that to defense counsel *before*
7 defense counsel started arguing that the “forgive me” comment was a
8 complete lie. Likewise, in the state post-conviction proceedings, petitioner
9 needed to tell his attorney that he did, in fact, say “forgive me” and had a
10 good explanation why he said it. Otherwise, post-conviction counsel
11 reasonably could have looked at the record and concluded that defense
12 counsel did all that she could to obtain a mistrial or a new trial. In other words,
13 post-conviction counsel did not perform deficiently because, for all he knew,
14 the record showed that defense counsel did not perform deficiently.
15 Petitioner has not shown cause to excuse the procedural default of ground
16 4(c).

17 (ECF No. 61 at 10) (footnote omitted) (emphasis in original). The Court thus dismisses
18 ground 4(c) as procedurally defaulted.

19 **V. CONCLUSION**

20 It is therefore ordered that Respondents’ renewed motion to dismiss (ECF No. 73)
21 is granted. Grounds 4(b), 4(c), 4(d), 4(e), 5, and 6 are dismissed as procedurally defaulted.

22 It is further ordered that that Respondents will have 60 days from the date of entry
23 of this order to file and serve an answer, which must comply with Rule 5 of the Rules
24 Governing Section 2254 Cases in the United States District Courts. Petitioner will have 45
25 days from the date on which the answer is served to file a reply.

26 DATED THIS 15th day of July 2020.



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MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE