

1 be cause to excuse the procedural default of a ground of ineffective assistance of trial
2 counsel. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). Respondents counter that post-
3 conviction counsel could not have been ineffective because the claim was not available
4 at the time since the state district court denied his petition on October 9, 2012.¹
5 Respondents continue that petitioner should have raised this claim in a second post-
6 conviction habeas corpus petition in the state court. Respondents make this argument to
7 show that *Martinez* is inapplicable because the procedural default would occur in the
8 second post-conviction petition, and *Martinez* does not apply to ineffective assistance of
9 post-conviction counsel in anything other than the initial post-conviction proceedings.
10 However, in making this argument, respondents note that petitioner in state court can
11 show cause to overcome a successive-petition bar and a time bar by showing an
12 impediment external to the defense prevented him from complying with the rules, and a
13 legal basis for a claim that was not reasonably available to counsel can be such an
14 impediment. (ECF No. 70 at 5-6) (quoting *Hathaway v. State*, 71 P.3d 503, 506 (Nev.
15 2003)). What the Court draws from this argument is that petitioner might be able to show
16 good cause to overcome any state procedural bars of the claim in ground 2, and perhaps
17 in ground 1, which is the *Batson* claim underlying the ineffective-assistance claim in
18 ground 2, regardless of whether post-conviction counsel was ineffective. That is sufficient
19 for this Court to conclude that petitioner has good cause to excuse his failure to exhaust.
20 As long as *Brass* is good law, the claim is not plainly without merit on its face. Petitioner
21 has been diligent in his efforts. A stay of the action is warranted based upon ground 2,
22 and there is no reason to examine the other unexhausted grounds.

23 It is therefore ordered that petitioner's motion for stay and abeyance (ECF No. 69)
24 is granted.

25 It is further ordered that this action is stayed pending exhaustion of the
26 unexhausted claims. Petitioner must return to this Court with a motion to reopen within

27 ¹The Nevada Supreme Court decided *Brass* on December 27, 2012. *Brass*, 291
28 P.3d 145.

1 forty-five (45) days of issuance of the remittitur by the Nevada Supreme Court at the
2 conclusion of the state court proceedings. Further, petitioner or respondents otherwise
3 may move to reopen the action and seek any relief appropriate under the circumstances.

4 It further is ordered that the Clerk of Court administratively close this action until
5 such time as the Court grants a motion to reopen.

6 DATED THIS 29th day of March 2018.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE