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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HUBERT W. DRAW, JR.,

Case No. 3:15-cv-00224-MMD-WGC

Petitioner,

ORDER

v.

ISIDRO BACA, et al.,

Respondents.

I. Introduction

In this habeas corpus action, brought pro se by Nevada prisoner Hubert W. Draw, Jr., the respondents have filed a motion to dismiss (dkt. no. 10), arguing that certain claims in Draw's petition are unexhausted, that certain of Draw's claims are procedurally defaulted, and that certain of Draw's claims should be dismissed because they are based on state law or are conclusory. The parties have fully briefed the motion to dismiss. The Court finds one of Draw's claims to be unexhausted in state court; the Court will grant Draw an opportunity to make an election to either abandon that claim or move for a stay. In all other respects, the Court will deny the motion to dismiss.

II. Background

On October 31, 2007, after a jury trial in Nevada's Eighth Judicial District Court (Clark County), Draw was convicted of one count of sexual assault with a minor under sixteen years of age, and seven counts of open or gross lewdness (a gross misdemeanor). See Judgment of Conviction, Exhibit 50. (The exhibits referred to in this

1 order were filed by respondents and are found in the record at dkt. nos. 11-16.) Draw
2 was sentenced to five to twenty years in prison on the sexual assault charge and
3 concurrent one year sentences on the lewdness charges. See *id.*

4 Draw appealed, and the Nevada Supreme Court affirmed on July 22, 2010. See
5 Order of Affirmance, Exhibit 72.

6 On May 19, 2011, Draw filed a petition for writ of habeas corpus in the state district
7 court. See Petition for Writ of Habeas Corpus, Exhibit 75; Petition for Writ of Habeas
8 Corpus of Actual Innocence, Exhibit 76. The court appointed counsel for Draw, and, with
9 counsel, Draw supplemented his petition. See Supplemental Brief in Support of
10 Defendant's Writ of Habeas Corpus, Exhibit 93. The state district court held an evidentiary
11 hearing. See Recorder's Transcript of Hearing, October 31, 2013, Exhibit 100. The court
12 denied Draw's petition. See *id.* at 47-49; Findings of Fact, Conclusions of Law and Order,
13 Exhibit 111. Draw appealed, and the Nevada Supreme Court affirmed the denial of his
14 state habeas petition on February 12, 2015. See Order of Affirmance, Exhibit 134.

15 The Court received Draw's federal habeas petition on April 22, 2015, and, after
16 Draw paid the filing fee, the petition was filed on July 13, 2015 (dkt. no. 6). Draw's petition
17 asserts ten claims, including three with several subclaims:

18 1. Draw's federal constitutional rights were violated because the state
19 district court's court reporter "destroyed all case related transcripts of this
20 petitioner's pre-trial proceeding (calendar call, motion hearings, status
checks, etc.)." Petition for Writ of Habeas Corpus (dkt. no. 6), at 9-12.

21 2. Draw's federal constitutional rights were violated because the justice
22 court's court reporter "destroyed all petitioner's rough draft transcripts of his
preliminary hearing...." *Id.* at 14-16.

23 3. Draw's federal constitutional rights were violated, on account of
ineffective assistance of his trial counsel, because:

24 a. trial counsel failed to timely prepare for trial;

25 b. trial counsel failed to acquire allegedly missing
26 transcripts from the court reporters;

27 c. trial counsel failed to investigate the police officers'
28 alleged use of force during his arrest, and his subsequent
hospitalization; and

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- d. trial counsel failed to properly investigate his case.
- Id. at 18-21.
4. Draw's federal constitutional rights were violated, on account of ineffective assistance of his trial counsel, because:
- a. trial counsel failed to properly investigate his case;
 - b. trial counsel failed to investigate the police officers' alleged use of force during his arrest, and his subsequent hospitalization;
 - c. trial counsel failed to interview the police officers who were present when he was arrested;
 - d. trial counsel failed to investigate "what facts were generated by the responding detective;"
 - e. trial counsel failed to investigate witness Shawn Fishel; and
 - f. trial counsel failed to investigate alleged prosecutorial misconduct.

- Id. at 23-27.
5. Draw's federal constitutional rights were violated because his trial counsel failed to inform him of counsel's alleged conflict of interest. Id. at 29-31.
6. Draw's federal constitutional rights were violated, on account of ineffective assistance of his appellate counsel, because:
- a. appellate counsel failed to assert a claim on appeal regarding his arrest and the alleged use of force during his arrest;
 - b. appellate counsel failed to assert claims of ineffective assistance of trial counsel;
 - c. appellate counsel failed to assert a claim based on trial counsel's alleged conflict of interest;
 - d. appellate counsel failed to assert a claim based on the court reporters' alleged destruction of records and transcripts;
 - e. appellate counsel failed to assert claims of prosecutorial misconduct for witness tampering and other misconduct, and claims of civil rights violations; and
 - f. appellate counsel failed to assert a claim based on ineffective assistance of trial counsel regarding the waiver of his right to a speedy trial.

Id. at 33-38.

1 7. Draw's federal constitutional rights were violated, on account of
2 ineffective assistance of his trial counsel, because counsel failed to obtain
a psychological evaluation of the victims. *Id.* at 44-46.

3 8. Draw's federal constitutional rights were violated, on account of
4 ineffective assistance of his trial counsel, because counsel "failed to prevent
5 the civil proceedings from family court to enter into the criminal side of
6 petitioner's case." *Id.* at 44-46.

7 9. Draw's federal constitutional rights were violated, on account of
8 ineffective assistance of his trial and appellate counsel, because counsel
9 failed "to raise the issue that impermissible bad act evidence was
10 introduced...." *Id.* at 49-50.

11 10. Draw's federal constitutional rights were violated, on account of
12 ineffective assistance of appellate counsel, because counsel failed to assert
13 claims based on alleged Batson violations during the jury selection process.
14 *Id.* at 51-55 (referring to *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding
15 that it is an Equal Protection violation where jurors are excluded based
16 solely on race)).

17 Respondents filed their motion to dismiss (dkt. no. 10) on September 14, 2015. Draw filed
18 an opposition to the motion to dismiss on November 24, 2015 (dkt. no. 19). Respondents
19 filed a reply in support of their motion to dismiss on December 4, 2015 (dkt. no. 20). Draw
20 filed a supplemental opposition to the motion to dismiss (dkt. no. 24), and respondents
21 filed a reply to that supplemental opposition on February 11, 2016 (dkt. no. 25).

22 **III. DISCUSSION**

23 **A. Exhaustion**

24 A federal court may not grant habeas corpus relief on a claim not exhausted in
25 state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-
26 state comity, and is intended to allow state courts the initial opportunity to correct
27 constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust
28 a claim, a petitioner must fairly present the claim to the highest state court, and must give
that court the opportunity to address and resolve it. See *Duncan v. Henry*, 513 U.S. 364,
365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). A claim is
fairly presented to the state's highest court if, before that court, the petitioner describes
the operative facts and legal theory upon which the claim is based. See *Anderson v.*
Harless, 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*,

1 693 F.2d 859, 862 (9th Cir. 1982).

2 Respondents argue in their motion to dismiss that Draw has not exhausted Claims
3 6a, 6d and 6e in state court.

4 In Claim 6a, Draw claims that his federal constitutional rights were violated, on
5 account of ineffective assistance of his appellate counsel, because his appellate counsel
6 failed to assert a claim on appeal regarding his arrest and the alleged use of force during
7 his arrest. See Petition for Writ of Habeas Corpus (dkt. no. 6), at 33. Draw raised such a
8 claim in his pro se petition in his state habeas corpus action. See Petition for Writ of
9 Habeas Corpus, Exhibit 75, at 32-33. On the appeal from the denial of his state habeas
10 petition, Draw argued that the state district court erred in denying the claims in his pro se
11 petition. See Fast Track Statement, Exhibit 125, at 24-25. Claim 6a is exhausted.

12 In Claim 6d, Draw claims that his federal constitutional rights were violated, on
13 account of ineffective assistance of his appellate counsel, because his appellate counsel
14 failed to assert a claim based on the court reporters' alleged destruction of records and
15 transcripts. See Petition for Writ of Habeas Corpus (dkt. no. 6), at 34-35. Draw raised such
16 a claim in his pro se petition in his state habeas corpus action. See Petition for Writ of
17 Habeas Corpus, Exhibit 75, at 36-37. On the appeal from the denial of his state habeas
18 petition, Draw argued that the state district court erred in denying the claims in his pro se
19 petition. See Fast Track Statement, Exhibit 125, at 24-25. Claim 6d is exhausted.

20 In Claim 6e, Draw claims that his federal constitutional rights were violated, on
21 account of ineffective assistance of his appellate counsel, because his appellate counsel
22 failed to assert claims of prosecutorial misconduct for witness tampering and other
23 misconduct, and claims of civil rights violations. See Petition for Writ of Habeas Corpus
24 (dkt. no. 6), at 35-37. Draw did not raise such a claim in his state habeas action. See
25 Petition for Writ of Habeas Corpus, Exhibit 75; Petition for Writ of Habeas Corpus of Actual
26 Innocence, Exhibit 76; Supplemental Brief in Support of Defendant's Writ of Habeas
27 Corpus, Exhibit 93. Draw did, in his state habeas petition, make similar allegations, but
28 those were part of his claim regarding his appellate counsel's failure to raise the issue of

1 the court reporters' alleged destruction of records and transcripts. See Petition for Writ of
2 Habeas Corpus, Exhibit 75, at 36-37. That claim, however, is different from the claim
3 raised in this case as Claim 6e; in state court, Draw did not assert an independent claim
4 like the one now asserted as Claim 6e. Claim 6e is unexhausted.

5 With respect to Claim 6e, therefore, Draw will be granted an opportunity to make
6 an election, to either file a notice of abandonment of that claim, indicating that he elects
7 to abandon Claim 6e and proceed with the litigation of his remaining claims in this case,
8 or, alternatively, file a motion for stay, requesting a stay of this action to allow him to return
9 to state court to exhaust Claim 6e. If Draw elects to file a motion for stay, he must make
10 a showing that a stay is warranted, as prescribed in *Rhines v. Weber*, 544 U.S. 269
11 (2005). If Draw does not, within the time allowed, file a notice of abandonment of Claim
12 6e, or a motion for a stay to allow exhaustion of that claim in state court, Draw's entire
13 habeas petition will be dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982). Draw
14 should take note: if this case is dismissed, in its entirety, even "without prejudice," it is
15 possible that he would be barred by the statute of limitations from initiating a new federal
16 habeas corpus action.

17 **B. Procedural Default**

18 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
19 to comply with the state's procedural requirements in presenting his claims is barred from
20 obtaining a writ of habeas corpus in federal court by the adequate and independent state
21 ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in those
22 cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who
23 has failed to meet the State's procedural requirements for presenting his federal claims
24 has deprived the state courts of an opportunity to address those claims in the first
25 instance."). Where such a procedural default constitutes an adequate and independent
26 state ground for denial of habeas corpus, the default may be excused only if "a
27 constitutional violation has probably resulted in the conviction of one who is actually
28 innocent," or if the prisoner demonstrates cause for the default and prejudice resulting

1 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

2 To demonstrate cause for a procedural default, the petitioner must "show that
3 some objective factor external to the defense impeded" his efforts to comply with the state
4 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
5 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499
6 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears "the burden
7 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
8 but that they worked to his actual and substantial disadvantage, infecting his entire
9 [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603
10 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

11 In their motion to dismiss, respondents argue that Claims 1 and 2 of Draw's habeas
12 petition are barred by the procedural default doctrine.

13 Claims 1 and 2 are Draw's claims that his federal constitutional rights were violated
14 because court reporters in the justice court and state district court destroyed court records
15 and transcripts. See *Petition for Writ of Habeas Corpus* (dkt. no. 6), at 9-12, 14-16.

16 Draw raised such claims as Grounds 1 and 2 of his state habeas petition. *Petition*
17 *for Writ of Habeas Corpus*, Exhibit 75, at 8-9, 11-13. Regarding those claims, the state
18 district court ruled as follows:

19 As to grounds 1 and 2 of Defendant's Pro Per Petition, these grounds
20 are waived and dismissed pursuant to NRS 34.810(1)(b)(2).

21 * * *

22 Defendant's claims that his due process rights were violated by the alleged
23 destruction of transcripts from his calendar calls and Preliminary Hearing
24 should have been raised on direct appeal and he fails to show good cause
25 for his failure to raise them. Further, there was no evidence presented that
any transcripts were destroyed or caused Defendant any prejudice.
Maningo was not aware of any missing transcripts. EHT at 20; 49.

26 Findings of Fact, Conclusions of Law and Order, Exhibit 111, at 5 ("Maningo" was one of
27 Draw's trial attorneys; "EHT" refers to the transcript of the evidentiary hearing, which is
28 Exhibit 100 in the record for this case). The Nevada Supreme Court affirmed, ruling that

1 the state district court did not err in rejecting these claims. See Order of Affirmance,
2 Exhibit 134, at 3. Therefore, the state courts ruled that these claims were procedurally
3 barred under state law, and they are subject to the procedural default doctrine.

4 In response, in his supplemental opposition to the motion to dismiss, Draw argues
5 that the default of these claims was caused by ineffective assistance of his appellate
6 counsel. See Supplemental Opposition to Motion to Dismiss (dkt. no. 24), at 3-5. Draw
7 also asserts such ineffective assistance of his appellate counsel as a separate claim for
8 relief, in Claim 6d. See Petition for Writ of Habeas Corpus (dkt. no. 6), at 34-35. And, as
9 is discussed above, the Court finds that claim to be exhausted in state court. See
10 discussion above, regarding exhaustion of Claim 6d.

11 Draw's argument that there is cause and prejudice, based on ineffective assistance
12 of his appellate counsel, concerning the procedural default of Claims 1 and 2, will be
13 better addressed in conjunction with the merits of all Draw's claims, after respondents file
14 an answer and Draw a reply. Therefore, the Court will deny respondents' motion to
15 dismiss with respect to Claims 1 and 2, without prejudice to respondents raising the
16 procedural default defense to those claims in their answer, along with their briefing
17 regarding the merits of these claims.

18 **C. Claims 6b, 6c and 6f**

19 Respondents argue in their motion to dismiss that 6b, 6c and 6f -- claims that
20 Draw's federal constitutional rights were violated on account of ineffective assistance of
21 his appellate counsel -- are "barred because they present questions of state law." See
22 Motion to Dismiss, at 11-12.

23 However, the questions of state law raised by these claims are incidental to the
24 claims that Draw's federal constitutional rights were violated on account of ineffective
25 assistance of his appellate counsel. There is no showing by respondents that these claims
26 of ineffective assistance of appellate counsel are "barred." Rather, respondents'
27 arguments go to the question of the merits of these claims.

28 The Court will deny respondents' motion to dismiss Claims 6b, 6c and 6f, without

1 prejudice to respondents' raising the same arguments in their answer, with regard to the
2 merits of those claims.

3 **D. Claims 3, 4 and 5**

4 Respondents argue in their motion to dismiss that Claims 3, 4 and 5 "are
5 conclusory and must be dismissed." See Motion to Dismiss, at 12-14.

6 The Court finds that respondents' arguments that these claims are conclusory and
7 unsupported will be better addressed in conjunction with the merits of all Draw's claims,
8 after respondents file an answer and Draw a reply. Therefore, the Court will deny
9 respondents' motion to dismiss with respect to Claims 3, 4 and 5, without prejudice to
10 respondents making the same arguments in their answer, with respect to the merits of
11 these claims.

12 **IV. CONCLUSION**

13 It is therefore ordered that respondents' motion to dismiss (dkt. no. 10) is granted
14 in part and denied in part. The court finds Claim 6e to be unexhausted, and will grant
15 petitioner an opportunity to make an election with respect to that claim; in all other
16 respects, respondents' motion to dismiss is denied.

17 It is further ordered that, with respect to Claim 6e, which is unexhausted in state
18 court, petitioner must, within 60 days from the date of this order, make an election; within
19 that time, petitioner must do one of the following: (1) file a declaration stating that he
20 wishes to abandon Claim 6e and proceed with this action with regard to his remaining
21 claims, or (2) file a motion for a stay, requesting that this case be stayed while he exhausts
22 his unexhausted claims. If petitioner does not make that election within the time allowed,
23 the Court will dismiss his entire habeas petition, without prejudice, pursuant to *Rose v.*
24 *Lundy*, 455 U.S. 509 (1982).

25 DATED THIS 22nd day of April, 2016.

26 

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MIRANDA M. DU
28 UNITED STATES DISTRICT JUDGE