

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

VALLIER WILLIAM TOMPKINS,

Petitioner,

v.

WARDEN BACA, *et al.*,

Respondents.

Case No. 3:16-cv-00444-MMD-WGC

ORDER

**I. INTRODUCTION**

In this habeas corpus action, brought by Nevada prisoner Vallier William Tompkins, the respondents have filed a motion to dismiss. The Court will grant that motion in part and deny it in part, as is explained below.

**II. BACKGROUND**

On July 3, 2012, Tompkins was charged by complaint, in a Reno justice court, with three counts of sexual assault, one count of battery with intent to commit sexual assault and one count of burglary. (See Criminal Complaint, Exh. 15 (ECF No. 22-15).) The justice court ordered a competency evaluation. (See Order for Competency Evaluations, Exh. 16 (ECF No. 22-16).) Two competency evaluation reports concluded that Tompkins was competent to stand trial, and the state district court made a finding to that effect. (See Competency Evaluation, Exh. 17 (ECF No. 22-17); Competency Evaluation, Exh. 19 (ECF No. 22-19); Order of Competency and Returning Matter to Justice Court, Exh. 21 (ECF No. 22-21).) Tompkins waived the preliminary hearing. (See Waiver of Preliminary Examination, Exh. 24 (ECF No. 22-24).) On September 13,

1 2012, the State charged Tompkins by information with three counts of sexual assault.  
2 (See Information, Exh. 23 (ECF No. 22-23).) Tompkins was arraigned on September 20,  
3 2012, and he pled guilty to each of the three sexual assault charges. (See Transcript of  
4 Arraignment, Exh. 25 (ECF No. 22-25); see also Guilty Plea Memorandum, Exh. 26  
5 (ECF No. 22-26).) On October 25, 2012, the court sentenced Tompkins to three  
6 consecutive terms of ten years to life in prison (with the first term running concurrent  
7 with a sentence imposed in a separate case). (See Transcript of Sentencing, Exh. 30  
8 (ECF No. 23-4).) The judgment of conviction was filed on October 30, 2012. (See  
9 Judgment, Exh. 31 (ECF No. 23-5).) Tompkins did not appeal from the judgment of  
10 conviction.

11 On July 11, 2013, Tompkins filed a petition for writ of habeas corpus in the state  
12 district court. (See Petition for Writ of Habeas Corpus, Exh. 39 (ECF No. 23-13).) The  
13 court appointed counsel for Tompkins. (See Order Granting *in Forma Pauperis* and  
14 Appointment of Counsel, Exh. 41 (ECF No. 23-15); Recommendation and Order for  
15 Appointment of Counsel, Exh. 42 (ECF No. 23-16).) On May 27, 2015, the state district  
16 court granted the State's motion to dismiss, and dismissed the petition, determining that  
17 the record showed each of Tompkins' claims to be meritless. (See Order Dismissing  
18 Petition for Writ of Habeas Corpus, Exh. 63 (ECF No. 24-19).) Tompkins appealed, and  
19 the Nevada Court of Appeals affirmed on February 17, 2016. (See Order of Affirmance,  
20 Exh. 77 (ECF No. 24-33).) The remittitur issued on March 15, 2016. (See Remittitur,  
21 Exh. 78 (ECF No. 24-34).)

22 This Court received a *pro se* petition for writ of habeas corpus from Tompkins,  
23 initiating this action, on July 26, 2016 (ECF No. 4). The Court appointed counsel, and,  
24 with counsel, Tompkins filed a first amended habeas petition on August 3, 2016. (See  
25 Order entered July 27, 2016 (ECF No. 3); First Amended Petition for Writ of Habeas  
26 Corpus (ECF No. 7).)

27 On June 19, 2017, Tompkins filed a second amended petition for writ of habeas  
28 corpus — now his operative petition — asserting the following claims:

1 Ground 1: "Tompkins' guilty plea was not entered into knowingly,  
2 intelligently, or voluntarily," in violation of his federal constitutional rights.

3 Ground 2: "Tompkins was denied his right to the effective assistance of  
4 counsel," in violation of his federal constitutional rights.

5 Ground 2(1): "Trial counsel failed to advise Tompkins of his right to  
6 appeal."

7 Ground 2(2): "Trial counsel failed to adequately investigate."

8 Ground 2(3): "Trial counsel failed to explain the nature and  
9 consequences of the guilty plea to Tompkins."

10 Ground 2(4): "Trial counsel had a conflict of interest in representing  
11 Tompkins."

12 Ground 2(5): "Trial counsel failed to object to highly prejudicial  
13 victim impact evidence."

14 Ground 3: "Improper victim impact evidence was admitted against  
15 Tompkins at his sentencing hearing," in violation of his federal  
16 constitutional rights.

17 Ground 4: "The cumulative effect of the errors in this case deprived  
18 Tompkins of his right to due process," in violation of his federal  
19 constitutional rights.

20 (Second Amended Petition for Writ of Habeas Corpus (ECF No. 21).)

21 On August 18, 2017, respondents filed a motion to dismiss (ECF No. 30), arguing  
22 that Tompkins' petition is barred by the statute of limitations, that none of Tompkins'  
23 claims have been exhausted in state court, and that Ground 3 is barred by the  
24 procedural default doctrine. (See Motion to Dismiss (ECF No. 30).) Tompkins filed an  
25 opposition to the motion to dismiss on November 8, 2017 (ECF No. 36).

26 On November 21, 2017, Tompkins filed a declaration (ECF No. 39) stating that  
27 he abandons Ground 2(2) of his second amended petition, his claim that his trial  
28 counsel was ineffective for not properly investigating the case. The Court will, therefore,  
dismiss Ground 2(2) on the ground that Tompkins has abandoned that claim.

Respondents filed a reply to Tompkins' opposition to their motion to dismiss on  
December 15, 2017 (ECF No. 40). In their reply, respondents abandoned their  
arguments based on the statute of limitations. (See Reply in Support of Motion to  
Dismiss (ECF No. 40) at 1-2.)

1     **III.     DISCUSSION**

2             A federal court may not grant habeas corpus relief on a claim not exhausted in  
3 state court. 28 U.S.C. § 2254(b). The exhaustion requirement is based on the policy of  
4 federal-state comity, and is intended to allow state courts the initial opportunity to  
5 correct constitutional deprivations. *See Picard v. Conner*, 404 U.S. 270, 275 (1971). To  
6 exhaust a claim, a petitioner must fairly present the claim to the highest available state  
7 court, and must give that court the opportunity to address and resolve it. *See Duncan v.*  
8 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,  
9 10 (1992). A claim is fairly presented to the state court if, before that court, the petitioner  
10 describes the operative facts and legal theory upon which the claim is based. *See*  
11 *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275;  
12 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982).

13             In Ground 1, Tompkins claims that his guilty plea was not entered into knowingly,  
14 intelligently, or voluntarily, because he “did not understand the nature of the charge;”  
15 because he “believed he had an insanity defense to the crime;” because of his  
16 “cognitive impairments and his psychiatric and other illness(es);” because he “did not  
17 understand that other plea options may have been available to him” under *North*  
18 *Carolina v. Alford*, 400 U.S. 25 (1970); because he “did not understand that he still had  
19 the right to appeal;” and because the “trial court’s plea canvass was insufficient on  
20 advising [him] of the rights he was waiving and the rights he was preserving by entering  
21 into the plea agreement.” (Second Amended Petition at 6-8.) In state court, on the other  
22 hand, Tompkins asserted that his plea was not knowing, intelligent and voluntary for  
23 only two reasons: because the trial court did not advise him of his right to appeal and  
24 because the trial court did not advise him of the possibility of an *Alford* plea. (*See*  
25 *Petition for Writ of Habeas Corpus*, Exh. 39 at 10, 12 (ECF No. 23-13 at 11, 13);  
26 *Appellant’s Opening Brief*, Exh. 69 at 4 (ECF No. 24-25 at 8).) To the extent of these  
27 claims presented in state court, Tompkins’ Ground 1 has been exhausted. Tompkins did  
28 not, however, assert in state court that his plea was not knowing, intelligent and

1 voluntary for the other reasons he claims in Ground 1. Accordingly, the Court finds that  
2 Ground 1 is exhausted in part and unexhausted in part. Ground 1 is exhausted to the  
3 extent that Tompkins claims that his plea was not knowing, intelligent and voluntary  
4 because the trial court did not advise him of his right to appeal or the possibility of an  
5 *Alford* plea; the remainder of Ground 1 is unexhausted. The Court will require Tompkins  
6 to make an election—to abandon the unexhausted portion of Ground 1, or to move for a  
7 stay of this action while he exhausts the unexhausted portion of Ground 1 in state court.  
8 If Tompkins does not elect one of those options within the time allowed, this action will  
9 be dismissed in its entirety pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

10 In Ground 2(4), Tompkins claims that his trial counsel was ineffective because of  
11 a conflict of interest. (See Second Amended Petition at 13-14.) Tompkins asserted this  
12 claim in state court. (See Petition for Writ of Habeas Corpus, Exh. 39 at 8 (ECF No. 23-  
13 13 at 9); Appellant's Opening Brief, Exh. 69 at 3 (ECF No. 24-25 at 7).) Ground 2(4) is  
14 exhausted. Respondents' motion to dismiss will be denied with respect to Ground 2(4).

15 In Ground 2(1), Tompkins claims that his trial counsel was ineffective for failing to  
16 advise him of his right to appeal. (See *id.* at 9.) In Ground 2(3), Tompkins claims that his  
17 trial counsel was ineffective for failing to explain the nature and consequences of the  
18 guilty plea to him. (See *id.* at 11-13.) In Ground 2(5), Tompkins claims that his trial  
19 counsel was ineffective for failing to object to highly prejudicial victim impact evidence.  
20 (See *id.* at 14.) Tompkins did not assert these claims in state court. (See Petition for  
21 Writ of Habeas Corpus, Exh. 39 (ECF No. 23-13); Appellant's Opening Brief, Exh. 69  
22 (ECF No. 24-25); see also Opposition to Motion to Dismiss at 16 (conceding these  
23 claims were not raised in state court).) However, any attempt to raise these claims in  
24 state court now, by means of a second state habeas petition, would be procedurally  
25 barred, as an untimely and successive petition. See NRS § 34.726, NRS 34.810.  
26 Grounds 2(1), 2(3) and 2(5), then, are subject to dismissal as procedurally defaulted,  
27 unless Tompkins can show cause and prejudice relative to the procedural default. See

28 ///

1 *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *see also Murray v. Carrier*, 477  
2 U.S. 478, 496 (1986).

3 To demonstrate cause for a procedural default, the petitioner must “show that  
4 some objective factor external to the defense impeded” his efforts to comply with the  
5 state procedural rules. *Murray*, 477 U.S. at 488. For cause to exist, the external  
6 impediment must have prevented the petitioner from raising the claim. *See McCleskey*  
7 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner  
8 bears “the burden of showing not merely that the errors [complained of] constituted a  
9 possibility of prejudice, but that they worked to his actual and substantial disadvantage,  
10 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,  
11 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170  
12 (1982).

13 Tompkins argues that ineffective assistance of counsel in his state habeas action  
14 was cause for his procedural default of these claims. (See Opposition to Motion to  
15 Dismiss at 16-23.) In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that  
16 ineffective assistance of post-conviction counsel may serve as cause, to overcome the  
17 procedural default of a claim of ineffective assistance of trial counsel. The Supreme  
18 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a  
19 postconviction proceeding does not establish cause” to excuse a procedural default.  
20 *Martinez*, 566 U.S. at 15. The Court, however, “qualif[ied] *Coleman* by recognizing a  
21 narrow exception: inadequate assistance of counsel at initial-review collateral  
22 proceedings may establish cause for a prisoner’s procedural default of a claim of  
23 ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral  
24 proceedings” as “collateral proceedings which provide the first occasion to raise a claim  
25 of ineffective assistance at trial.” *Id.* at 8. Here, the Court determines that Tompkins’  
26 argument based on *Martinez* raises the question of the merits of Grounds 2(1), 2(3) and  
27 2(5), and that, as a result, the matter of the procedural default of those claims will be  
28 better addressed after respondents file an answer, and Tompkins files a reply. The

1 Court will deny respondents' motion to dismiss as to Grounds 2(1), 2(3) and 2(5),  
2 without prejudice to respondents asserting their procedural default defense to these  
3 claims, along with their position on the merits of the claims, in their answer.

4 In Ground 3, Tompkins claims that improper victim impact evidence was admitted  
5 at his sentencing hearing, in violation of his federal constitutional rights. (See Second  
6 Amended Petition at 15.) Respondents argue that this claim was ruled procedurally  
7 defaulted in Tompkins' state habeas action, because such a claim cannot be raised in  
8 Nevada in a post-conviction petition for writ of habeas corpus. (See Order of Affirmance,  
9 Exh. 77 at 2 n.2 (ECF No. 24-33 at 3 n.2).) This amounted to an adequate and  
10 independent state ground for the Nevada Court of Appeals' ruling on this claim. See  
11 *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (procedural default doctrine applies  
12 where state court clearly relies on procedure rule, and, in the alternative, reaches the  
13 merits of claim); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir.1992) (same). Therefore,  
14 Ground 3, like Grounds 2(1), 2(3) and 2(5), is subject to dismissal as procedurally  
15 defaulted, unless Tompkins can show cause and prejudice. Tompkins argues that he  
16 can show cause and prejudice with respect to the procedural default of this claim on  
17 account of his counsel's failure to inform him that he had a right to appeal, which is  
18 essentially the claim made in Ground 2(1)). Here too, then, the Court determines that  
19 Tompkins' argument that he can show cause and prejudice relative to his procedural  
20 default of Ground 3 will be better addressed after respondents file an answer, and  
21 Tompkins files a reply. The Court will deny respondents' motion to dismiss Ground 3,  
22 without prejudice to respondents asserting their procedural default defense to that  
23 claim, along with their position on the merits of the claim, in their answer.

24 In Ground 4, Tompkins claims that the cumulative effect of the errors in his case  
25 deprived him of his right to due process in violation of his federal constitutional rights.  
26 This cumulative error claim is exhausted and not procedurally defaulted to the extent  
27 that Tompkins other claims are exhausted and not procedurally defaulted. Therefore,  
28 respondents' motion to dismiss will be denied relative to Ground 4.

1     **IV. CONCLUSION**


2             It is therefore ordered that respondents' motion to dismiss (ECF No. 30) is  
3 granted in part and denied in part. Ground 2(2) of petitioner's second amended petition  
4 for writ of habeas corpus is dismissed. With respect to the unexhausted claims in  
5 Ground 1 — all of Ground 1 except Tompkins' claims that that his plea was not  
6 knowing, intelligent and voluntary because the trial court did not advise him of his right  
7 to appeal or the possibility of an *Alford* plea — Tompkins will be required, within thirty  
8 (30) days from the date of this order, to file either a notice stating that he abandons  
9 those unexhausted claims or a motion for a stay of this action while he exhausts those  
10 claims in state court. If Tompkins takes neither of those actions within the time allowed,  
11 this action will be dismissed in its entirety pursuant to *Rose*, 455 U.S. 509. In all other  
12 respects, respondents' motion to dismiss is denied.

13             It is further ordered that, if petitioner abandons the unexhausted claims,  
14 respondents will have sixty (60) days from the filing of the notice of abandonment of  
15 those claims to file an answer, responding to all petitioner's remaining claims.

16             It is further ordered that, if petitioner files a motion for stay, respondents will have  
17 thirty (30) days to respond to that motion, and then petitioner will have twenty (20) days  
18 to file a reply.

19             It is further ordered that, in all other respects, the schedule for further  
20 proceedings set forth in the order entered September 20, 2016 (ECF No. 13), will  
21 remain in effect.

22                     DATED THIS 8<sup>th</sup> day of March 2018.

23  
24  
25     
26   MIRANDA M. DU  
27   UNITED STATES DISTRICT JUDGE  
28