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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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9 JOSHUA RYAN GROW,

Case No. 3:17-cv-00637-MMD-WGC

10

Petitioner,

ORDER

v.

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12 JAMES DZURENDA, *et al.*,

13

Respondents.

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15 **I. INTRODUCTION**

16 In this habeas corpus action, brought by Nevada prisoner Joshua Ryan Grow, the
17 Respondents have filed a motion to dismiss. The Court will grant that motion in part and
18 deny it in part, as is explained below.

19 **II. BACKGROUND**

20 On March 1, 2013, Grow was charged by complaint, in a Carson City justice court,
21 with one count of trafficking in a Schedule I controlled substance, 28 grams or more. (See
22 Criminal Complaint, Exh. 2 (ECF No. 14-2).) The justice court held a preliminary hearing
23 on April 8, 2013, and, at the conclusion of the preliminary hearing, bound Grow over to
24 the district court. (See Transcript of Preliminary Hearing, Exh. 3 (ECF No. 14-3).) In the
25 First Judicial District Court (Carson City), on April 10, 2013, Grow was charged, by
26 information, with trafficking in a Schedule I controlled substance, 28 grams or more. (See
27 Criminal Information, Exh. 6 (ECF No. 14-6).)

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1 Grow's trial was held on December 17 and 18, 2013. (See Transcript of Trial,
2 December 17, 2013, Exh. 28 (ECF No. 14-28); Transcript of Trial, December 18, 2013,
3 Exh. 31 (ECF No. 14-31).) The jury found Grow guilty of the charge in the information.
4 (See Verdict, Exh. 36 (ECF No. 15).) Grow was sentenced, on May 19, 2014, to eight to
5 twenty years in prison; a judgment of conviction was filed on May 21, 2014, and an
6 amended judgment was filed on June 5, 2014. (See Judgment of Conviction, Exh. 45
7 (ECF No. 15-9); Amended Judgment of Conviction, Exh. 47 (ECF No. 15-11).)

8 Grow appealed. (See Fast Track Statement, Exh. 55 (ECF No. 15-19).) The
9 Nevada Court of Appeals affirmed the amended judgment of conviction on May 28, 2015.
10 (See Order of Affirmance, Exh. 63 (ECF No. 15-27).) Grow petitioned the Court of Appeals
11 for rehearing. (See Petition for Rehearing, Exh. 64 (ECF No. 15-28).) On June 29, 2015,
12 the Court of Appeals denied rehearing, but ordered its order of affirmance amended to
13 delete a footnote regarding Grow's sentence. (See Order Denying Rehearing and
14 Amending Order, Exh. 65 (ECF No. 15-29).)

15 On October 1, 2015, Grow filed, in the state district court, a *pro se* post-conviction
16 petition for writ of habeas corpus. (See Petition for Writ of Habeas Corpus Post-
17 Conviction, Exh. 73 (ECF No. 16-2).) Counsel was appointed for Grow, and, with counsel,
18 he filed a supplemental petition. (See Supplemental Post-Conviction Petition for a Writ of
19 Habeas Corpus, Exh. 78 (ECF No. 16-7).) The state district court held an evidentiary
20 hearing, then denied Grow's petition on September 6, 2016. (See Order Denying Petition
21 for Post-Conviction Writ of Habeas Corpus, Exh. 87 (ECF No. 16-16).) Grow appealed.
22 (See Appellant's Opening Brief, Exh. 100 (ECF No. 16-29).) The Nevada Court of Appeals
23 affirmed the denial of Grow's petition on August 16, 2017. (See Order of Affirmance, Exh.
24 106 (ECF No. 16-35).)

25 This Court received a *pro se* petition for writ of habeas corpus from Grow, initiating
26 this action, on October 23, 2017 (ECF No. 7). The Court reads Grow's petition to assert
27 the following claims:
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1A. Grow's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to request a jury instruction consistent with *Champion v. State*, 490 P.2d 1056 (Nev. 1971).

1B. Grow's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to request a "mere presence" jury instruction.

1C. Grow's federal constitutional rights were violated as a result of ineffective assistance of his appellate counsel, on account of his appellate counsel's failure to claim, on his direct appeal, that his federal constitutional right to due process of law was violated by the lack of a jury instruction consistent with *Champion*.

1D. Grow's federal constitutional rights were violated as a result of ineffective assistance of his appellate counsel, on account of his appellate counsel's failure to claim, on his direct appeal, that his federal constitutional right to due process of law was violated by the lack of a "mere presence" jury instruction.

2A. Grow's federal constitutional rights were violated because there was insufficient evidence presented at trial to support his conviction.

2B. Grow's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to move for a directed verdict or for a judgment of acquittal.

3A. Grow's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to move to exclude evidence regarding a piece of felt found in his vehicle.

3B. Grow's federal constitutional rights were violated as a result of the admission of evidence at trial regarding a piece of felt found in his vehicle.

4A. Grow's federal constitutional rights were violated as a result of evidence of prior bad acts.

4B. Grow's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to adequately object to introduction of evidence of prior bad acts.

5A. Grow's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to move to exclude evidence regarding a photograph found on his mobile telephone.

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1 5B. Grow's federal constitutional rights were violated as a result of
2 ineffective assistance of his trial counsel, on account of his trial counsel's
3 failure to move to exclude evidence regarding a container containing
methamphetamine.

4 6. Grow's federal constitutional rights were violated as a result of the
5 cumulative effect of the alleged errors.

6 (See Petition for Writ of Habeas Corpus (ECF No. 7).)

7 On February 2, 2018, Respondents filed a motion to dismiss (ECF No. 13), arguing
8 that none of Grow's claims have been exhausted in state court, and that certain of his
9 claims are not cognizable in this federal habeas corpus action. Grow filed an opposition
10 to the motion to dismiss (ECF No. 17) on April 2, 2018. Respondents filed a reply (ECF
11 No. 20) on May 2, 2018.

12 **III. DISCUSSION**

13 **A. Exhaustion of State Court Remedies**

14 A federal court may not grant habeas corpus relief on a claim not exhausted in
15 state court. 28 U.S.C. § 2254(b). The exhaustion requirement is based on the policy of
16 federal-state comity, and is intended to allow state courts the initial opportunity to correct
17 constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust
18 a claim, a petitioner must fairly present the claim to the highest available state court, and
19 must give that court the opportunity to address and resolve it. See *Duncan v. Henry*, 513
20 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). A
21 claim is fairly presented to the state court if, before that court, the petitioner describes the
22 operative facts and legal theory upon which the claim is based. See *Anderson v. Harless*,
23 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*, 693 F.2d
24 859, 862 (9th Cir. 1982).

25 **1. Ground 1A**

26 In Ground 1A of his habeas petition, Grow claims that his federal constitutional
27 rights were violated as a result of ineffective assistance of his trial counsel, on account of
28 his trial counsel's failure to request a jury instruction consistent with *Champion*. (See

1 Petition for Writ of Habeas Corpus (ECF No. 7).) *Champion* is a 1971 Nevada Supreme
2 Court opinion in which the court held that, under certain circumstances, a criminal
3 defendant is entitled to a jury instruction concerning an addict-informer's testimony. 490
4 P.2d at 543.

5 Grow did not assert this claim of ineffective assistance of his trial counsel on either
6 his direct appeal or the appeal in his state habeas action. (See Fast Track Statement,
7 Exh. 55 (ECF No. 15-19); Appellant's Opening Brief, Exh. 100 (ECF No. 16-29).)
8 Therefore, Ground 1A has not been exhausted in state court.

9 However, any attempt to assert this claim in state court now, by means of a second
10 state habeas petition, would be procedurally barred, as an untimely and successive
11 petition. See NRS § 34.726, NRS § 34.810. Ground 1A, then, is subject to dismissal as
12 procedurally defaulted, unless Grow can show cause and prejudice relative to the
13 procedural default. See *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991); see also
14 *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

15 To demonstrate cause for a procedural default, a petitioner must “show that some
16 objective factor external to the defense impeded” his efforts to comply with the state
17 procedural rules. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
18 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499
19 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden
20 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
21 but that they worked to his actual and substantial disadvantage, infecting his entire
22 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
23 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

24 Grow might argue that ineffective assistance of counsel in his state habeas action
25 was cause for his procedural default of this claim. In *Martinez v. Ryan*, 566 U.S. 1 (2012),
26 the Supreme Court ruled that ineffective assistance of post-conviction counsel may serve
27 as cause, to overcome the procedural default of a claim of ineffective assistance of trial
28 counsel. In *Martinez*, the Supreme Court noted that it had previously held, in *Coleman*,

1 that “an attorney’s negligence in a post-conviction proceeding does not establish cause”
2 to excuse a procedural default. *Martinez*, 566 U.S. at 15. The *Martinez* Court, however,
3 “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate assistance of counsel
4 at initial-review collateral proceedings may establish cause for a prisoner’s procedural
5 default of a claim of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-
6 review collateral proceedings” as “collateral proceedings which provide the first occasion
7 to raise a claim of ineffective assistance at trial.” *Id.* at 8. The Court determines that an
8 argument based on *Martinez* would raise the question of the merits of Ground 1A, and
9 that, therefore, the matter of the procedural default of the claim will be better addressed
10 after Respondents file an answer.

11 The Court will therefore deny Respondents’ motion to dismiss with respect to
12 Ground 1A, without prejudice to Respondents asserting the procedural default defense
13 to the claim, along with their position on the merits of the claim, in their answer.

14 **2. Ground 1B**

15 In Ground 1B of his habeas petition, Grow claims that his federal constitutional
16 rights were violated as a result of ineffective assistance of his trial counsel, on account of
17 his trial counsel’s failure to request a “mere presence” jury instruction. (See Petition for
18 Writ of Habeas Corpus (ECF No. 7).)

19 Grow did not assert this claim of ineffective assistance of his trial counsel on his
20 direct appeal or the appeal in his state habeas action. (See Fast Track Statement, Exh.
21 55 (ECF No. 15-19); Appellant’s Opening Brief, Exh. 100 (ECF No. 16-29).) Therefore,
22 like Ground 1A, Ground 1B is unexhausted in state court.

23 However, here again, the claim would be procedurally barred if asserted now in
24 state court, so the procedural default doctrine applies. As this is a claim of ineffective
25 assistance of trial counsel, Grow could argue that ineffective assistance of counsel in his
26 state habeas action caused the procedural default. That argument is intertwined with the
27 merits of the claim, such that it will be better addressed after Respondents file an answer.
28 The Court will therefore deny Respondents’ motion to dismiss with respect to Ground 1B,

1 without prejudice to Respondents asserting the procedural default defense, along with
2 their position on the merits of the claim, in their answer.

3 **3. Ground 1C**

4 In Ground 1C of his habeas petition, Grow claims that his federal constitutional
5 rights were violated as a result of ineffective assistance of his appellate counsel, on
6 account of his appellate counsel's failure to claim, on his direct appeal, that his federal
7 constitutional right to due process of law was violated by the lack of a jury instruction
8 consistent with *Champion*. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

9 Grow did not assert this claim of ineffective assistance of his appellate counsel on
10 the appeal in his state habeas action. (See Appellant's Opening Brief, Exh. 100 (ECF No.
11 16-29).) Ground 1C is likewise unexhausted in state court.

12 If asserted now in state court, Ground 1C would be procedurally barred, as
13 untimely and successive. See NRS § 34.726, NRS § 34.810. Therefore, the claim is
14 technically exhausted, but procedurally defaulted. Here though, as this is a claim of
15 ineffective assistance of appellate counsel, as opposed to trial counsel, *Martinez* does
16 not apply, and ineffective assistance of counsel in Grow's state habeas action would not
17 function as cause for the procedural default. See *Davila v. Davis*, 137 S. Ct. 2058, 2062–
18 66 (2017) (holding that *Martinez* does not apply to claims of ineffective assistance of direct
19 appeal counsel). Therefore, Ground 1C will be dismissed as procedurally defaulted.

20 **4. Ground 1D**

21 In Ground 1D of his habeas petition, Grow claims that his federal constitutional
22 rights were violated as a result of ineffective assistance of his appellate counsel, on
23 account of his appellate counsel's failure to claim, on his direct appeal, that his federal
24 constitutional right to due process of law was violated by the lack of a "mere presence"
25 jury instruction. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

26 Grow did not assert this claim of ineffective assistance of his appellate counsel on
27 the appeal in his state habeas action. (See Appellant's Opening Brief, Exh. 100 (ECF No.
28 16-29).) Therefore, Ground 1D is unexhausted in state court.

1 If asserted now in state court, Ground 1D would be procedurally barred, as
2 untimely and successive. See NRS § 34.726, NRS § 34.810. Therefore, as with Ground
3 1C, this claim is technically exhausted, but procedurally defaulted. Here again, however,
4 as this is a claim of ineffective assistance of appellate counsel, as opposed to trial
5 counsel, *Martinez* does not apply, and ineffective assistance of counsel in Grow's state
6 habeas action would not function as cause for the procedural default. See *Davila*, 137 S.
7 Ct. at 2062-66 (holding that *Martinez* does not apply to claims of ineffective assistance of
8 direct appeal counsel). Therefore, Ground 1D will be dismissed as procedurally defaulted.

9 **5. Ground 2A**

10 In Ground 2A of his habeas petition, Grow claims that his federal constitutional
11 rights were violated because there was insufficient evidence presented at trial to support
12 his conviction. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

13 Grow asserted this claim on his direct appeal. (See Fast Track Statement, Exh. 55
14 at 14–16 (ECF No. 15-19 at 15–17).) Ground 2A is exhausted in state court. The Court
15 will deny Respondents' motion to dismiss with respect to Ground 2A.

16 **6. Ground 2B**

17 In Ground 2B of his habeas petition, Grow claims that his federal constitutional
18 rights were violated as a result of ineffective assistance of his trial counsel, on account of
19 his trial counsel's failure to move for a directed verdict or for a judgment of acquittal. (See
20 Petition for Writ of Habeas Corpus (ECF No. 7).)

21 Grow did not assert this claim of ineffective assistance of his trial counsel on either
22 his direct appeal or the appeal in his state habeas action. (See Fast Track Statement,
23 Exh. 55 (ECF No. 15-19); Appellant's Opening Brief, Exh. 100 (ECF No. 16-29).) Ground
24 2B is unexhausted in state court.

25 However, this claim would be procedurally barred if asserted now in state court, so
26 the procedural default doctrine applies. As this is a claim of ineffective assistance of trial
27 counsel, Grow could argue that ineffective assistance of counsel in his state habeas
28 action caused the procedural default. That argument is intertwined with the merits of the

1 claim, such that it will be better addressed after Respondents filed an answer. The Court
2 will, therefore, deny Respondents' motion to dismiss with respect to Ground 2B, without
3 prejudice to Respondents asserting the procedural default defense, along with their
4 position on the merits of the claim, in their answer.

5 **7. Ground 3A**

6 In Ground 3A of his habeas petition, Grow claims that his federal constitutional
7 rights were violated as a result of ineffective assistance of his trial counsel, on account of
8 his trial counsel's failure to move to exclude evidence regarding a piece of felt found in
9 his vehicle. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

10 Grow did not assert this claim of ineffective assistance of his trial counsel on either
11 his direct appeal or the appeal in his state habeas action. (See Fast Track Statement,
12 Exh. 55 (ECF No. 15-19); Appellant's Opening Brief, Exh. 100 (ECF No. 16-29).) Ground
13 3A is thus unexhausted in state court.

14 However, this claim would be procedurally barred if asserted now in state court, so
15 the procedural default doctrine applies. As this is a claim of ineffective assistance of trial
16 counsel, Grow could argue that ineffective assistance of counsel in his state habeas
17 action caused the procedural default. That argument is intertwined with the merits of the
18 claim, such that it will be better addressed after Respondents file an answer. The Court
19 will therefore deny Respondents' motion to dismiss with respect to Ground 3A, without
20 prejudice to Respondents asserting the procedural default defense, along with their
21 position on the merits of the claim, in their answer.

22 **8. Ground 3B**

23 In Ground 3B of his habeas petition, Grow claims that his federal constitutional
24 rights were violated as a result of the admission of evidence at trial regarding a piece of
25 felt found in his vehicle. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

26 Grow asserted a similar claim relating to the admission of evidence regarding the
27 felt on his direct appeal. (See Fast Track Statement, Exh. 55 at 16–19 (ECF No. 15-19 at
28 17–20).) However, there, Grow did not claim a violation of his federal constitutional rights.

1 In his briefing of that claim on his direct appeal, Grow claimed that his “due process
2 rights ... to a fair trial” were violated. (See *id.* at 19 (ECF No. 15-19 at 20).) That, however,
3 is insufficient for exhaustion. “The mere similarity between a claim of state and federal
4 error is insufficient to establish exhaustion. Moreover, general appeals to broad
5 constitutional principles, such as due process, equal protection, and the right to a fair trial,
6 are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.
7 1999) (citations omitted).

8 In his briefing of the claim on his direct appeal, Grow cited *Arizona v. Youngblood*,
9 488 U.S. 51, 58 (1988). (See Fast Track Statement, Exh. 55, p. 18 (ECF No. 15-19 at
10 19).) However, the *Youngblood* case did not involve the question of a constitutional
11 violation stemming from the admission of evidence, and Grow did not cite it in support of
12 a claim of such a violation. Grow’s citation of *Youngblood* was not such as to alert the
13 state court that he claimed a federal constitutional violation as a result of the admission
14 of evidence regarding the felt.

15 Ground 3B was not exhausted in state court. If asserted now in state court, Ground
16 3B would be procedurally barred, as untimely and successive. See NRS § 34.726, NRS
17 § 34.810. Therefore, this claim is technically exhausted, but procedurally defaulted. As
18 this is not a claim of ineffective assistance of trial counsel, *Martinez* does not apply. Grow
19 asserts no argument to overcome the procedural default. Therefore, Ground 3B will be
20 dismissed as procedurally defaulted.

21 **9. Ground 4A**

22 In Ground 4A of his habeas petition, Grow claims that his federal constitutional
23 rights were violated as a result of evidence of prior bad acts. (See Petition for Writ of
24 Habeas Corpus (ECF No. 7).)

25 Grow asserted a similar claim regarding prior bad act evidence on his direct
26 appeal. (See Fast Track Statement, Exh. 55 at 19–21 (ECF No. 15-19 at 20–22).)
27 However, there, Grow did not claim a violation of his federal constitutional rights.

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1 In his briefing of the claim on his direct appeal, Grow claimed that his “due process
2 rights ... to a fair trial” were violated. (*See id.* at 19 (ECF No. 15-19 at 20).) Here again,
3 though, that is insufficient for exhaustion. *See Hiivala*, 195 F.3d at 1106. Moreover, in his
4 briefing of the claim on his direct appeal, Grow cited no federal authority.

5 Ground 4A was not exhausted in state court. If asserted now in state court, Ground
6 4A would be procedurally barred, as untimely and successive. *See* NRS § 34.726, NRS
7 § 34.810. Therefore, this claim is technically exhausted, but procedurally defaulted. As
8 this is not a claim of ineffective assistance of trial counsel, *Martinez* does not apply. Grow
9 asserts no argument to overcome the procedural default. Therefore, Ground 4A will be
10 dismissed as procedurally defaulted.

11 **10. Ground 4B**

12 In Ground 4B of his habeas petition, Grow claims that his federal constitutional
13 rights were violated as a result of ineffective assistance of his trial counsel, on account of
14 his trial counsel’s failure to adequately object to introduction of evidence of prior bad acts.
15 (*See* Petition for Writ of Habeas Corpus (ECF No. 7).)

16 Grow did not assert this claim of ineffective assistance of his trial counsel on either
17 his direct appeal or the appeal in his state habeas action. (*See* Fast Track Statement,
18 Exh. 55 (ECF No. 15-19); Appellant’s Opening Brief, Exh. 100 (ECF No. 16-29).) Ground
19 4B is unexhausted in state court.

20 However, this claim would be procedurally barred if asserted now in state court, so
21 the procedural default doctrine applies. As this is a claim of ineffective assistance of trial
22 counsel, Grow could argue that ineffective assistance of counsel in his state habeas
23 action caused the procedural default. That argument is intertwined with the merits of the
24 claim, such that it will be better addressed after Respondents file an answer. The Court
25 will therefore deny Respondents’ motion to dismiss with respect to Ground 4B, without
26 prejudice to Respondents asserting the procedural default defense, along with their
27 position on the merits of the claim, in their answer.

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11. Ground 5A

In Ground 5A of his habeas petition, Grow claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to move to exclude evidence regarding a photograph found on his mobile telephone. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

Grow did not assert this claim of ineffective assistance of his trial counsel on his direct appeal or the appeal in his state habeas action. (See Fast Track Statement, Exh. 55 (ECF No. 15-19); Appellant's Opening Brief, Exh. 100 (ECF No. 16-29).) Therefore, Ground 5A is unexhausted in state court.

However, this claim would be procedurally barred if asserted now in state court, so the procedural default doctrine applies. As this is a claim of ineffective assistance of trial counsel, Grow could argue that ineffective assistance of counsel in his state habeas action caused the procedural default. That argument is intertwined with the merits of the claim, such that it will be better addressed after Respondents file an answer. The Court will therefore deny Respondents' motion to dismiss with respect to Ground 5A, without prejudice to Respondents asserting the procedural default defense, along with their position on the merits of the claim, in their answer.

12. Ground 5B

In Ground 5B of his habeas petition, Grow claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure to move to exclude evidence regarding a container containing methamphetamine. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

Grow asserted this claim on the appeal in his state habeas action. (See Appellant's Opening Brief, Exh. 100 at 4–7 (ECF No. 16-29 at 8–11).)

Respondents argue that Grow has changed his presentation of this claim in federal court—by adding allegations concerning the photograph found on his telephone and admitted into evidence—such that it is unexhausted in state court. (See Motion to Dismiss (ECF No. 13 at 8).) A claim is unexhausted if, in federal court, it is fundamentally altered

1 such as to place it in a significantly different and stronger evidentiary posture than when
2 the state court considered it. *See Dickens v. Ryan*, 740 F.3d 1302, 1318–19 (9th Cir.
3 2014) (en banc). The Court determines that Grow has not fundamentally altered this claim
4 in federal court.

5 Ground 5B is exhausted in state court. The Court will deny Respondents' motion
6 to dismiss with respect to Ground 5B.

7 **13. Ground 6**

8 In Ground 6 of his habeas petition, Grow claims that the cumulative effect of the
9 errors in his case deprived him of his rights to due process of law and a fair trial in violation
10 of his federal constitutional rights. (See Petition for Writ of Habeas Corpus (ECF No. 7).)

11 This cumulative error claim is exhausted and not procedurally defaulted to the
12 extent that Grow's other claims are exhausted and not procedurally defaulted. Therefore,
13 Respondents' motion to dismiss will be denied relative to Ground 6.

14 **B. Cognizability of Claims**

15 The Court declines to address, on this motion to dismiss, Respondents' arguments
16 that certain of Grow's claims are not cognizable in this federal habeas corpus action.
17 Those arguments will be better addressed in conjunction with the merits of the claims.
18 Respondents may assert these same arguments, where appropriate, in their answer.

19 **IV. CONCLUSION**

20 It is therefore ordered that Respondents' motion to dismiss (ECF No. 13) is granted
21 in part and denied in part. Grounds 1C, 1D, 3B and 4A of the habeas petition (as those
22 claims are described above) are dismissed. In all other respects, Respondents' motion to
23 dismiss is denied.

24 It is further ordered that Respondents are to file an answer, responding to the
25 claims remaining in the habeas petition, within 90 days from the date of this order. After
26 Respondents file their answer, Petitioner will have 90 days to file a reply.

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DATED THIS 6th day of August 2018.



MIRANDA M. DU,
UNITED STATES DISTRICT JUDGE