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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JAMES E. HERMANSON, )  
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 Petitioner, )  
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 v. )  
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 ISIDRO BACA, et al., )  
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 Respondents. )  
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3:17-cv-00721-HDM-CBC

**ORDER**

This counseled habeas matter pursuant to 28 U.S.C. § 2254 comes before the court on respondents' motion to dismiss the petition as partially unexhausted and non-cognizable. (ECF No. 31). Petitioner has opposed (ECF No. 37), and respondents have replied (ECF No. 41).

Petitioner challenges his 2013 state court conviction for sexual assault of a child under the age of 16. (ECF No. 21 at 2). He has filed a second amended petition asserting five grounds for relief. Respondents move to dismiss the petition as mixed because, as conceded by petitioner, Grounds 2, 4 and 5 are unexhausted. Respondents further argue that Ground 3 is not cognizable or, in the alternative, is also unexhausted.

In Ground 3, petitioner asserts that his federal due process rights were violated because the state court sentenced him without lawful authority to do so. Specifically, he asserts that he was sentenced without a presentence investigation report, which was impermissible under state law. (ECF No. 21 at 20-21). Respondents argue that Ground 3 asserts only a state law violation, which is not a cognizable federal habeas claim.

1           Petitioner frames Ground 3 as a violation of due process arising  
2 from a state law violation. The fact that petitioner has predicated  
3 his due process violation on a state law violation does not  
4 automatically render the claim a non-cognizable state law claim.  
5 While it is true that a violation of state law will not, standing  
6 alone, violate due process, it may rise to the level of a due process  
7 violation if it renders the petitioner's trial fundamentally unfair.  
8 See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). The question of  
9 whether the violation in this case rose to the level of a due process  
10 violation is not a question that should be resolved on a motion to  
11 dismiss. The motion to dismiss Ground 3 as non-cognizable will  
12 therefore be denied.

13           The court agrees with respondents, however, that Ground 3 is  
14 unexhausted. Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner  
15 first must exhaust state court remedies on a claim before presenting  
16 that claim to the federal courts. To satisfy this exhaustion  
17 requirement, the claim must have been fairly presented to the state  
18 courts completely through to the highest state court level of review  
19 available. *E.g.*, *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir.  
20 2003) (*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003).  
21 In the state courts, the petitioner must refer to the specific federal  
22 constitutional guarantee upon which she relies and must also state the  
23 facts that entitle her to relief on that federal claim. *E.g.*, *Shumway*  
24 *v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair  
25 presentation requires that the petitioner present the state courts  
26 with both the operative facts and the federal legal theory upon which  
27 the claim is based. *E.g.*, *Castillo v. McFadden*, 399 F.3d 993, 999  
28 (9th Cir. 2005). The exhaustion requirement ensures that the state

1 courts, as a matter of federal-state comity, will have the first  
2 opportunity to pass upon and correct alleged violations of federal  
3 constitutional guarantees. See, e.g., *Coleman v. Thompson*, 501 U.S.  
4 722, 731 (1991).

5 Petitioner asserts that he raised Ground 3 in a motion to correct  
6 illegal sentence. (Pet. Ex. 40).<sup>1</sup> However, although petitioner  
7 asserted due process several times in the motion, it was never in  
8 relation to his claim that he was improperly sentenced without a PSI.  
9 (*Id.* at 7-10). Petitioner argues that it was clear he was asserting  
10 a federal due process claim because he invoked his "constitutional  
11 rights" in the conclusion of the motion. (See *id.* at 11). But this  
12 invocation did not fairly present a due process claim, much less a  
13 federal due process claim, and it certainly did not exhaust the  
14 specific due process claim in Ground 3. See *Hiivala v. Wood*, 195 F.3d  
15 1098, 1106 (9th Cir. 1999) ("[G]eneral appeals to broad constitutional  
16 principles, such as due process, equal protection, and the right to  
17 a fair trial, are insufficient to establish exhaustion" and "to  
18 'fairly present' his federal claim to the state courts, [the  
19 petitioner has] to alert the state courts to the fact that he was  
20 asserting a claim under the United States Constitution.").

21 Moreover, even if the motion had sufficiently alleged Ground 3,  
22 petitioner did not pursue it through all avenues available because he  
23 voluntarily dismissed his appeal. (Resp. Ex. 118; Pet. Ex. 45).  
24 "Generally, a petitioner satisfies the exhaustion requirement if he

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26 <sup>1</sup> The exhibits cited in this order, comprising the relevant state court  
27 record, are located at ECF Nos. 14-17, 32-34 and 38. Because some of the  
28 exhibits were filed by petitioner and others by respondents, and both start  
at number 1, the court refers to the exhibits filed by petitioner (ECF Nos.  
14-17 & 38) as Pet. Ex. and the exhibits filed by respondents (ECF Nos. 32-  
34) as Resp. Ex.

1 properly pursues a claim (1) throughout the entire direct appellate  
2 process of the state, or (2) throughout one entire judicial  
3 postconviction process available in the state. Whether a claim is  
4 exhausted through a direct appellate procedure, a postconviction  
5 procedure, or both, the claim should be raised at all appellate stages  
6 afforded under state law as of right by that procedure." *Casey v.*  
7 *Moore*, 386 F.3d 896, 916 (9th Cir. 2004). Although petitioner later  
8 moved to reinstate his appeal, (Resp. Ex. 126), the Nevada Supreme  
9 Court declined to allow him to do so. Petitioner has not cited any  
10 authority to support a conclusion that pursuing his appeal in this  
11 fashion was sufficient to fairly present his claims to the state's  
12 highest courts. In fact, presenting a claim to the state's highest  
13 court for "the first and only time in a procedural context in which  
14 its merits will not be considered unless there are special and  
15 important reasons therefor . . . does not . . . constitute 'fair  
16 presentation.'" *Castille v. Peoples*, 489 U.S. 346, 351 (1989)  
17 (internal citations and quotation marks omitted).

18       Alternatively, petitioner argues that the exhaustion question  
19 is "premature" because Ground 3 is pending exhaustion by way of a writ  
20 of prohibition and associated motion for reconsideration that have  
21 been awaiting decision in state court since early 2018. (Pet. Exs. 46  
22 & 55). Even if petitioner's pending motions will eventually exhaust  
23 this claim, which the court does not conclude, the claim remains  
24 unexhausted at this time, and the court may not proceed on a mixed  
25 petition. Petitioner's argument is therefore not persuasive.

26       As petitioner has not fairly presented the federal due process  
27 claim asserted in Ground 3 to the state courts, Ground 3 is  
28 unexhausted.

1 As to Grounds 2, 4, and 5, petitioner concedes that these grounds  
2 are unexhausted but asserts that if he were to return to state court  
3 the petition would be dismissed as procedurally barred. He therefore  
4 asks the court to find the grounds technically exhausted but  
5 procedurally defaulted.

6 Although unexhausted, a claim may be subject to anticipatory  
7 procedural default if "it is clear that the state court would hold the  
8 claim procedurally barred." *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th  
9 Cir. 2002). Petitioner asserts he would face several procedural bars  
10 if he were to return to state court. *See, e.g., Nev. Rev. Stat. §§*  
11 *34.726 & 34.810*. However, a procedural default may be excused by a  
12 showing of cause and prejudice, or a fundamental miscarriage of  
13 justice, *Murray v. Carrier*, 477 U.S. 478, 496 (1986), and Nevada has  
14 cause and prejudice and fundamental miscarriage of justice exceptions  
15 to its procedural bars, which are substantially the same as the  
16 federal standards. If a petitioner has a potentially viable  
17 cause-and-prejudice or actual-innocence argument under the  
18 substantially similar federal and state standards, then petitioner  
19 cannot establish that "it is clear that the state court would hold the  
20 claim procedurally barred." For that reason, the courts in this  
21 district have generally declined to find a claim subject to  
22 anticipatory procedural default unless the petitioner represents that  
23 he would be unable to establish cause and prejudice in a return to  
24 state court. In such a case, the claim would generally be subject to  
25 immediate dismissal as procedurally defaulted, as the petitioner would  
26 have conceded that he has no grounds for exception to the procedural  
27 default in federal court.

28 A different situation is presented, however, where the Nevada

1 state courts do not recognize a potential basis to overcome the  
2 procedural default arising from the violation of a state procedural  
3 rule that is recognized under federal law. In *Martinez v. Ryan*, 566  
4 U.S. 1 (2012), the Supreme Court held that the absence or inadequate  
5 assistance of counsel in an initial-review collateral proceeding may  
6 be relied upon to establish cause excusing the procedural default of  
7 a claim of ineffective assistance of trial counsel. *Id.* at 9. The  
8 Supreme Court of Nevada does not recognize *Martinez* cause as cause to  
9 overcome a state procedural bar under Nevada state law. *Brown v.*  
10 *McDaniel*, 331 P.3d 867, 875 (Nev. 2014). Thus, a Nevada habeas  
11 petitioner who relies upon *Martinez*—and only *Martinez*—as a basis for  
12 overcoming a state procedural bar on an unexhausted claim can  
13 successfully argue that the state courts would hold the claim  
14 procedurally barred but that he nonetheless has a potentially viable  
15 cause-and-prejudice argument under federal law that would not be  
16 recognized by the state courts when applying the state procedural  
17 bars.

18 Here, petitioner advances only *Martinez* as a basis for excusing  
19 the procedural default of his claims. Further, Grounds 2, 4 and 5 are  
20 all at least potentially saved under *Martinez* because they are claims  
21 of ineffective assistance of trial counsel. As such, the court will  
22 grant petitioner's request to consider his unexhausted claims as  
23 technically exhausted but procedurally defaulted. Because the question  
24 of whether the claims are substantial is intertwined with the merits  
25 of the claims, the court defers until the merits determination the  
26 cause and prejudice analysis as to these claims.

### 27 **Options on a Mixed Petition**

28 A federal court may not entertain a habeas petition unless the

1 petitioner has exhausted all available and adequate state court  
2 remedies for all claims in the petition. *Rose v. Lundy*, 455 U.S. 509,  
3 510 (1982). A "mixed petition" containing both exhausted and  
4 unexhausted claims is subject to dismissal. *Id.*

5 Because petitioner's petition is mixed, he has three options:

6 1. File a motion to dismiss seeking partial dismissal of only the  
7 unexhausted claims;

8 2. File a motion to dismiss the entire petition without prejudice  
9 in order to return to state court to exhaust the unexhausted claims;  
10 and/or

11 3. File a motion for other appropriate relief, such as a motion  
12 for a stay and abeyance asking this Court to hold his exhausted claims  
13 in abeyance while he returns to state court to exhaust the unexhausted  
14 claims.

15 **Conclusion**

16 In accordance with the foregoing, IT IS THEREFORE ORDERED that  
17 respondents' motion to dismiss is GRANTED IN PART and DENIED IN PART  
18 as follows:

19 1. Ground Three states a cognizable claim but is unexhausted;

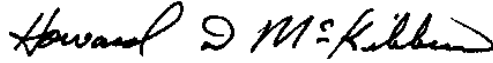
20 2. Grounds 2, 4 and 5 are technically exhausted but  
21 procedurally defaulted. The court will defer consideration  
22 of whether petitioner can establish cause and prejudice  
23 pursuant to *Martinez* until the time of the merits  
24 disposition. The answer and reply shall address the  
25 procedural default of those grounds and petitioner's  
26 argument for cause.

27 IT IS FURTHER ORDERED that within thirty days of the date of this  
28 order petitioner will advise the court how he would like to proceed

1 with his mixed petition by electing one of the options set forth  
2 above.

3 IT IS SO ORDERED.

4 DATED: This 3rd day of June, 2019.

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8 HOWARD D. MCKIBBEN  
9 UNITED STATES DISTRICT JUDGE  
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