

1 the deputy prosecutor had committed reversible misconduct during cross-examination and in
2 closing arguments. *State v. Nelson*, 177 Wash. App. 1035, Not Reported in P.3d (2013)
3 (unpublished). The Washington Court of Appeals affirmed on November 18, 2013, and issued
4 its mandate on January 17, 2014. *Id.*; *see also State v. Nelson*, Case No. 11-2-20771-4. It does
5 not appear that Mr. Nelson sought further review by the Washington Supreme Court.

6 After careful review of the petition and the balance of the record, the Court concludes
7 that Mr. Nelson’s petition is subject to dismissal because it is unexhausted and untimely.
8 However, Mr. Nelson is granted leave to explain to the Court why his petition should not be
9 dismissed and to file an amended petition that cures, if possible, the deficiencies noted herein.

10 DISCUSSION

11 Mr. Nelson may pursue federal habeas relief only after he has exhausted his state judicial
12 remedies. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The exhaustion of state court
13 remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. §
14 2254(b)(1). A petitioner can satisfy the exhaustion requirement by providing the highest state
15 court with a full and fair opportunity to consider all claims before presenting them to the federal
16 court. *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Middleton v. Cupp*, 768 F.2d 1083, 1086
17 (9th Cir. 1985). Not only has Mr. Nelson apparently failed to present his claims to Washington’s
18 highest court, but the claims he presented on direct appeal to the Court of Appeals differ
19 significantly from the claims presented here. Accordingly, Mr. Nelson has failed to exhaust his
20 state judicial remedies for purposes of this habeas petition.

21
22
23

Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (court may take judicial notice of court filings and
other matters of public record, as such documents “are not subject to reasonable dispute”).

1 Additionally, it appears Mr. Nelson’s habeas claims are procedurally defaulted in the
2 State of Washington, and if he attempts to present them in a state court challenge at this time, the
3 claims would be denied. Under RCW 7.36.130, “[n]o court or judge shall inquire into the
4 legality of any judgment or process whereby the party is in custody, or discharge the party when
5 the term of commitment has not expired,” unless a habeas petition is filed within the time
6 allowed by RCW 10.73.090. In turn, RCW 10.73.090 precludes the filing of a petition or motion
7 for collateral attack more than one year after the judgment becomes final. A judgment becomes
8 “final” under the statute on either the date an appellate court issues its mandate disposing of a
9 timely direct appeal, or the date the United States Supreme Court denies a timely petition for
10 certiorari to review a decision affirming the underlying judgment; whichever is later. RCW
11 10.73.090(3)(b), (c). Here, the Washington Court of Appeals affirmed the lower court’s decision
12 on November 18, 2013 and issued its mandate on January 17, 2014, and there is no indication
13 that further review was sought. Mr. Nelson had 30 days from the date the Appeals Court’s
14 decision was filed to seek review. RAP 13.4. That date has long passed.

15 A petitioner who procedurally defaults may receive review of the defaulted claims only if
16 he demonstrates “cause” for his procedural default and “actual prejudice” stemming from the
17 alleged errors. *Coleman v. Thompson*, 501 U.S. at 750. The petitioner must show an objective
18 factor actually caused the failure to properly exhaust a claim. Interference by state officials, the
19 unavailability of the legal or factual basis for a claim, or constitutionally ineffective assistance of
20 counsel may constitute cause. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner’s own
21 inadequacies are not sufficient cause to excuse a procedural default. *Hughes v. Idaho State Bd.*
22 *of Corrections*, 800 F.2d 905, 907-09 (9th Cir. 1986); *Thomas v. Lewis*, 945 F.2d 1119 (9th Cir.
23 1991). In short, Mr. Nelson must demonstrate cause (such as an objective external factor outside

1 his control that excused his procedural default) *and* prejudice (an error of constitutional
2 proportions that infected his whole trial). If he cannot do so, his federal claims are not
3 cognizable in this Court and must be dismissed.

4 Due to the deficiencies described above, the Court declines to serve the petition or to
5 direct that an answer be filed. Mr. Nelson may file an amended petition to cure, if possible, the
6 deficiencies noted above. The amended petition should be filed on the forms provided by the
7 Clerk. Mr. Nelson must correct the noted deficiencies **by July 21, 2017** or his petition will be
8 subject to dismissal with prejudice.

9 The Clerk is directed to send copies of this Order and of the Court's standard § 2254
10 forms to petitioner.

11 DATED this 21st day of June, 2017.

12
13 
14 _____
15 BRIAN A. TSUCHIDA
16 United States Magistrate Judge
17
18
19
20
21
22
23