

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

Petitioner, )  
)  
) Case No. CV-  
)  
vs. )  
)  
) ORDER REGARDING  
) PROCEDURAL DEFAULT<sup>1</sup>  
Respondents. )

Respondents have opposed the petition for writ of habeas corpus arguing that certain grounds for relief asserted therein are barred from federal review by the doctrine of procedural default. Although grounds \_\_\_ of the petition were fairly presented to the Nevada Supreme Court and are, therefore, exhausted, there is another barrier which precludes consideration of these grounds.

The doctrine of procedural default generally prohibits a federal court from considering a specific habeas ground where the state’s highest court declined to reach the merits of that claim on procedural grounds. See Murray v. Carrier, 477 U.S. 478 (1986); Engle v. Isaac, 456 U.S. 107 (1982). Only upon a showing of “actual cause” and “prejudice” is a federal court permitted to entertain such grounds. Murray, 477 U.S. at 492; Engle, 456 U.S. at 129.

In his petition for **state habeas corpus relief/post conviction relief (choose appropriate)**, Petitioner did raise ground \_\_\_ as presented in the instant petition: Petitioner argued that **(explain petitioner’s argument in the state court)** . However, the state supreme court held that Petitioner was barred from presenting this claim because he had not complied with state procedural rules in bringing that claim. Specifically, because petitioner had not **(explain what procedural bar prevented the supreme court from ruling on Petitioner’s claim)** . The court’s refusal to entertain the state petition was on procedural grounds. **(THE ABOVE ANALYSIS MUST BE COMPLETED FOR EACH CLAIM UPON WHICH PETITIONER PROCEDURALLY DEFAULTED.)**

Having determined that Petitioner suffered procedural default on grounds \_\_\_\_, review of these grounds is foreclosed unless Petitioner can satisfy one of two tests: to overcome procedural default, Petitioner must establish either (1) “cause for the default and prejudice attributable thereto,” or (2) “that failure to consider [his defaulted] claim[s] will result in a fundamental miscarriage of justice.” Harris v. Reed, 489 U.S. 255, 262 (1989) (citations omitted).

To demonstrate “cause” for his procedural default, Petitioner must present his reasons for failing to comply with Nevada’s procedural rules. In general, “the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules.” Murray, 477

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1. Issued when respondents file a motion to dismiss wherein they argue that certain grounds for relief are barred by procedural default Orders petitioner to show cause and prejudice for the grounds procedurally barred in order to have the merits addressed

U.S. at 488 (emphasis added). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. *Id.* see also Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

Assuming Petitioner can show cause for his procedural default, he also must show prejudice arising from the alleged constitutional errors. In the instant case, Petitioner would have to show that he suffered actual prejudice from (insert the act Petitioner claims was a violation of his rights). Petitioner must show “not merely that the errors of the trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original). In essence, to show actual prejudice on the basis of his claims, Petitioner must demonstrate that the alleged errors so infected the **trial/entry of plea/sentencing** that his resulting **conviction/sentence** violated due process. *Id.*

As an alternative to showing “cause and prejudice,” Petitioner may attempt to show that dismissal of his instant grounds on procedural default principles will result in a “fundamental miscarriage of justice.” Such a showing, however, is very difficult to make. It requires Petitioner to demonstrate that he is “actually innocent” of the crime of which he was convicted. See Smith v. Murray, 477 U.S. 527, 537 (1986) (citing Murray v. Carrier, 477 U.S. at 496); see also Engle, 456 U.S. at 134–35.

IT IS THEREFORE **ORDERED** that Petitioner shall have to and including (usually approximately 30 days) within which to file points and authorities addressing whether he can overcome the procedural default bar that is applicable to grounds \_\_\_\_\_ of his instant petition. Respondents shall then have to and including (usually approximately 20 days) within which to file opposing points and authorities. Petitioner shall then have (usually approximately 15 days) within which to file a reply.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

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UNITED STATES DISTRICT JUDGE