

1 Background

2 In its opinion on Doyle's direct appeal, the Nevada Supreme Court described the
3 factual background of this case as follows:

4 On January 16, 1994, the nude body of twenty-year-old Ebony
5 Mason was discovered some twenty-five feet off the roadway in an
6 unimproved desert area of Clark County, Nevada. The woman's body was
7 found lying face down with hands extended overhead to a point on the
8 ground where it appeared some digging had occurred. A four-inch twig
9 protruded from the victim's rectum. Three distinct types of footwear
impressions were observed in the area, none of which matched the tread
design of a pair of women's athletic shoes located on the nearby dirt road.
Also observed in the area was a hole containing a broken condom, a
condom tip, an open but empty condom package and two small packages
of taco sauce.

10 In the opinion of the medical examiner, Mason died from asphyxia
11 due to strangulation or blunt trauma to the head. The autopsy revealed nine
12 broken ribs, multiple areas of external bruising, contusions, lacerations,
13 abrasions, and a ligature mark on the anterior surface of the neck.
14 Approximately 200 milliliters of fluid blood was found in Mason's chest
15 cavity. Mason's back and chest bore a number patterned contusions
consistent with footwear impressions found at the crime scene. Finally, the
autopsy revealed severe laceration of the head and subarachnoid
hemorrhage (a thin layer of blood surrounding the brain) indicating blunt
force trauma to the skull. Laboratory analysis revealed traces of the drug
PCP in Mason's system.

16 Michael Smith, who had been arrested in an unrelated matter,
17 provided the police with the names of those he believed were responsible
18 for the murder. Smith recounted statements made by Doyle regarding a
19 killing to which Doyle claimed to have been a party. According to Smith, he
20 and Doyle had overheard a girl tell some other people about her friend
21 having been killed. At that time, Doyle commented to Smith that "we had
22 to take someone out." Doyle further stated that he, Darrin Anderson, Shawn
23 Atkins, and "Bubba" Atkins were at Anderson's house with a girl and that
24 each had sex with the girl. While they were taking the girl home, she told
25 the men that she was going to report them for rape and jumped from the
26 truck in which they were riding. They were eventually able to coax the girl
27 back into the truck and decided to kill her rather than face possible rape
28 charges. The girl was apparently so inebriated or under the influence of
drugs that she was oblivious to the direction the men were travelling. When
they arrived at a remote area, the girl was pulled from the truck and choked.
Unsuccessful in their attempt to choke her to death, the men then beat the
girl. Finally, Doyle told Smith, two of the men held the girl down while the
other repeatedly dropped a brick on her face until she died.

With information obtained from Smith, the police contacted Darrin
Anderson, the owner of a small, yellow pickup truck. According to Anderson,
on the night of January 15, 1994, he was present with Doyle at the home of
Shawn and "Bubba" Atkins. After arriving, the four left the Atkins residence
to attend a nearby party. Anderson returned alone to the Atkins residence
a short time later, and the other three returned thereafter in the company of

1 Ebony Mason, who appeared inebriated or under the influence of drugs.
2 Later, Mason asked for a ride home, and Anderson suggested that Doyle
3 use Anderson's truck. At approximately 10:30 p.m., Doyle left with Mason
4 and the Atkins brothers in Anderson's truck. Anderson awoke the next
5 morning to find Doyle and the Atkins brothers asleep at the Atkins
6 residence. When police later searched Anderson's truck, they found a pair
7 of blood-stained white socks between the seats.

8 Further information led investigators to contact Mark Wattley,
9 another of Doyle's friends. Wattley was present during a conversation
10 where Doyle made statements describing how Shawn Atkins was unable to
11 subdue Mason and how "Bubba" Atkins intervened "and hit her with a head
12 punch and dropped her." Thereafter, Doyle told Wattley that he (Doyle)
13 began kicking Mason in the head. Eventually, one of the men grabbed a
14 brick or rock and hit the girl in the head. At one point in the conversation,
15 Doyle demonstrated how he (Doyle) jumped in the air and caused both of
16 his feet to come down on Mason during the beating.

17 The police investigation eventually led to the execution of a search
18 warrant at Doyle's residence. During the search, the police impounded a
19 pair of Adidas athletic shoes with soles that apparently matched treadwear
20 impressions found at the crime scene and on Mason's body. Doyle was then
21 placed under arrest. After being advised of his *Miranda* rights, Doyle
22 provided a statement to police explaining that he had been present when
23 Mason was killed but that he did not participate in the killing. Later analysis
24 of the impounded shoes confirmed that the treadwear impressions were
25 consistent with the footwear impressions retrieved from the scene of the
26 crime and observed upon Mason's body.

27 At trial, Doyle testified that on the night of January 15, 1994, "Bubba"
28 Atkins brought Mason to the Atkins residence. Some time after her arrival,
Mason asked for a ride downtown or home. Anderson then instructed Doyle
to take Anderson's truck and take Mason home. Doyle testified that Mason
wanted to engage in sex with him and the Atkins brothers, so all four drove
to Doyle's apartment where each of the men had sex with Mason.
Thereafter, the four left Doyle's apartment in Anderson's truck. Mason was
riding in the back of the truck, and at some point, the truck stopped at a red
light, and Mason jumped out of the truck. The Atkins brothers were
eventually able to get Mason back in the truck, and the four proceeded to a
deserted area outside Las Vegas.

Doyle further testified that, once stopped, Shawn Atkins hit Mason in
the face and a fight ensued. When it appeared that Shawn Atkins was
unable to subdue Mason, "Bubba" Atkins came to his aid. Doyle denied any
participation in the beating or killing, stating that he had watched from the
back of the truck as Shawn and "Bubba" Atkins beat and kicked the girl.
Later, while he and Shawn Atkins attempted to push start the truck, Doyle
testified that he saw "Bubba" Atkins standing over Mason with a brick raised
overhead. "Bubba" Atkins later discarded the brick in a garbage can.
According to Doyle, "Bubba" Atkins was wearing the athletic shoes
impounded by the police from Doyle's apartment.

Opinion, Exhibit 225, pp. 2-5 (ECF No. 174-7, pp. 29-32).

1 On January 12, 1995, a jury found Doyle guilty of first degree murder, conspiracy
2 to commit murder, first degree kidnapping, and sexual assault. See Verdicts, Exhibit 155
3 (ECF No. 172-11). Following a penalty hearing, the jury voted to impose the death
4 sentence for the murder. See Verdict, Exhibit 169 (ECF No. 173-10, p. 13). On May 23,
5 1995, the trial court sentenced Doyle to death for the murder. See Judgment of
6 Conviction, Exhibit 157 (ECF No. 173-2). Additionally, the court sentenced Doyle to six
7 years in prison for the conspiracy to commit murder, life in prison with the possibility of
8 parole for the kidnapping, and life in prison with the possibility of parole for the sexual
9 assault; the life sentences run consecutively to the death sentence and to one another,
10 and the six-year sentence runs concurrently with the other sentences. See *id.*

11 Doyle appealed. See Appellant's Opening Brief, Exhibit 172 (ECF No. 173-10, pp.
12 20-64). The Nevada Supreme Court reversed the sexual assault conviction, finding that
13 there was insufficient evidence to show beyond a reasonable doubt that the victim was
14 alive when the sexual assault occurred. See Opinion, Exhibit 225, pp. 16-22 (ECF No.
15 174-7, pp. 43-49). The Nevada Supreme Court affirmed Doyle's convictions of first degree
16 murder, conspiracy to commit murder, and first degree kidnapping, as well as the
17 sentences relative to those convictions. See *id.* The court denied rehearing on June 23,
18 1997. See Order Denying Rehearing, Exhibit 175 (ECF No. 173-10, p. 92).

19 Doyle then filed a petition for writ of habeas corpus in the state district court on
20 June 26, 1997. See Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 176
21 (ECF No. 174, pp. 2-41); Memorandum of Points and Authorities in Support of Petition
22 for Post-Conviction Relief, Exhibit 177 (ECF No. 174, pp. 43-67). The court held an
23 evidentiary hearing. See Transcript of Evidentiary Hearing, Respondents' Exhibit 3 (ECF
24 Nos. 209-4, 209-5). The state district court then denied the petition on October 1, 1998.
25 See Findings of Fact, Conclusions of Law and Order, Exhibit 181 (ECF No. 74, pp. 94-
26 98). Doyle appealed. See Appellant's Opening Brief, Exhibit 182 (ECF No. 174-2, pp. 2-
27 39). The Nevada Supreme Court affirmed on February 3, 2000. See Opinion, Exhibit 184
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1 (ECF No. 174-3, pp. 2-18). The Nevada Supreme Court issued its remittitur on April 13,
2 2000. See Remittitur, Respondents' Exhibit 5 (ECF No. 209-7).

3 Doyle initiated this federal habeas corpus action on February 28, 2000, by
4 submitting a *pro se* petition for writ of habeas corpus for filing (ECF No. 4). The Court
5 appointed counsel for Doyle. See Order entered May 2, 2000 (ECF No. 3). Approximately
6 eight years later, on May 14, 2008, following extensive discovery proceedings, Doyle filed
7 a first amended habeas petition (ECF No. 168).

8 Respondents moved to dismiss the first amended petition, arguing that it contained
9 claims that were unexhausted in state court (ECF No. 208). In response, Doyle moved
10 for a stay, to allow him to exhaust his claims in state court before proceeding with this
11 action (ECF No. 218). On December 18, 2009, the Court granted Doyle's motion, and
12 stayed this action; the Court denied the motion to dismiss as moot (ECF No. 230).

13 On July 24, 2009, Doyle filed, in the state district court, a second state petition for
14 writ of habeas corpus. See Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit
15 295 (ECF No. 265-3). On February 14, 2013, the court dismissed the petition, finding it
16 barred by the statute of limitations (NRS § 34.726), and by the laches doctrine (NRS §
17 34.800). See Findings of Fact, Conclusions of Law and Order, Exhibit 300 (ECF No. 266-
18 2). Doyle appealed. See Appellant's Opening Brief, Exhibit 301 (ECF No. 266-3). The
19 Nevada Supreme Court affirmed on September 22, 2015. See Order of Affirmance,
20 Exhibit 304 (ECF No. 266-6). The court denied rehearing on December 2, 2015. See
21 Order Denying Rehearing, Exhibit 306 (ECF No. 266-8). The United States Supreme
22 Court denied certiorari on May 2, 2016. See *Doyle v. Nevada*, 136 S.Ct. 1829 (2016). The
23 Nevada Supreme Court issued its remittitur on May 6, 2016. See Remittitur, Exhibit 1 to
24 Motion to Vacate Stay (ECF No. 256-1).

25 This Court then lifted the stay of this action on June 28, 2016 (ECF No. 258). And,
26 on October 28, 2016, Doyle filed a second amended petition for writ of habeas corpus
27 (ECF No. 265) now the operative petition. Doyle's second amended petition asserts the
28 following claims:

1 1. "[P]rosecutors excused prospective jurors on the basis of
2 race," in violation of Doyle's federal constitutional rights. Second Amended
 Petition (ECF No. 265), pp. 11-35.

3 2. Trial counsel were ineffective, in the penalty phase of the trial,
4 in violation of Doyle's federal constitutional rights, for "failing to investigate
 and present mitigating evidence." *Id.* at 35-97.

5 3A. Trial counsel were ineffective, in violation of Doyle's federal
6 constitutional rights, "for failing to object to improper victim-impact testimony
 during the guilt phase of trial." *Id.* at 98-100.

7 3B. Trial counsel were ineffective, in violation of Doyle's federal
8 constitutional rights, "for failing to object to prosecutors' misrepresentation
 of facts regarding the [Edwards] homicide." *Id.* at 100-06.

9 3C. Trial counsel were ineffective, in violation of Doyle's federal
10 constitutional rights, "for failing to object to prosecutors' use of gender to
 excuse prospective juror Emma Samuels." *Id.* at 106-08.

11 3D. Trial counsel were ineffective, in violation of Doyle's federal
12 constitutional rights, "for failing to seek exclusion of hearsay statements."
 Id. at 108-10.

13 3E. Trial counsel were ineffective, in violation of Doyle's federal
14 constitutional rights, "for failing to prepare Mr. Doyle for his testimony." *Id.*
 at 110-11.

15 3F. Trial counsel were ineffective, in violation of Doyle's federal
16 constitutional rights, for failing "to clarify when they could not hear or
 understand the trial judge." *Id.* at 111.

17 3G. Trial counsel were ineffective, in violation of Doyle's federal
18 constitutional rights, "for failing to move to suppress the evidence recovered
 as a result of the search warrant." *Id.* at 111-18.

19 3H. Trial counsel were ineffective, in violation of Doyle's federal
20 constitutional rights, "for failing to object to the introduction of a pair of
 stained pants without any explanatory testimony." *Id.* at 118-20.

21 3I. Trial counsel were ineffective, in violation of Doyle's federal
22 constitutional rights, "for failing to object to prejudicial and multiple enlarged
 photographs of the victim." *Id.* at 120-21.

23 3J. Trial counsel were ineffective, in violation of Doyle's federal
24 constitutional rights, for failing "to present evidence impeaching Michael
 Smith's testimony." *Id.* at 121-23.

25 3K. Trial counsel were ineffective, in violation of Doyle's federal
26 constitutional rights, "for failing to request an instruction for the lesser-
 included offense of second-degree kidnapping." *Id.* at 123-24.

27 4. In violation of Doyle's federal constitutional rights, "the
28 prosecutor introduced statements made by Mr. Doyle's codefendant without
 affording Mr. Doyle the opportunity to cross-examine" *Id.* at 125-27.

1 5. Doyle's federal constitutional rights were violated "because of
2 the admission of impermissible and unduly prejudicial victim-impact
evidence." *Id.* at 128-37.

3 6A1. Doyle's federal constitutional rights were violated as a result
4 of prosecutorial misconduct because "[t]he prosecutor improperly argued
about mercy." *Id.* at 139.

5 6A2. Doyle's federal constitutional rights were violated as a result
6 of prosecutorial misconduct because "[t]he prosecutor misled the jury about
life with parole sentencing." *Id.* at 140-41.

7 6A3. Doyle's federal constitutional rights were violated as a result
8 of prosecutorial misconduct because "[t]he prosecutor misled the jury
about mitigation." *Id.* at 141-42.

9 6A4. Doyle's federal constitutional rights were violated as a result
10 of prosecutorial misconduct because "[t]he prosecutor improperly
expressed his opinion about the propriety of the death penalty." *Id.* at 142.

11 6A5. Doyle's federal constitutional rights were violated as a result
12 of prosecutorial misconduct because "[t]he prosecutor scared the jury into
sentencing Mr. Doyle to death." *Id.* at 143.

13 6A6. Doyle's federal constitutional rights were violated as a result
14 of prosecutorial misconduct because "[t]he prosecutor improperly equated
the death penalty with self-defense." *Id.* at 144.

15 6A7. Doyle's federal constitutional rights were violated as a result
16 of prosecutorial misconduct because "[t]he prosecutor misled the jury about
Mr. Doyle's involvement in a drive-by shooting." *Id.* at 144-45.

17 6A8. Doyle's federal constitutional rights were violated as a result
18 of prosecutorial misconduct because "[t]he prosecutor misrepresented the
testimony of Gary and Maria Mason." *Id.* at 145-47.

19 7. Doyle's federal constitutional rights were violated "because
20 the prosecutors failed to disclose material evidence under *Brady v.*
Maryland, and knowingly presented false testimony in violation of *Napue v.*
Illinois." *Id.* at 148-69.

21 8E1. Doyle's federal constitutional rights were violated because
22 "Mr. Doyle cannot be guilty of both first-degree kidnapping predicated on
murder and first-degree murder predicated on kidnapping." *Id.* at 176-79.

23 8E2. Doyle's federal constitutional rights were violated because
24 "[t]he invalidity of Mr. Doyle's sexual assault conviction invalidates his first-
degree kidnapping and first-degree murder convictions." *Id.* at 179-83.

25 8E3. Doyle's federal constitutional rights were violated because
26 "[t]he Nevada Supreme Court improperly reweighed Mr. Doyle's
aggravating and mitigating circumstances after striking the kidnapping
27 aggravating circumstance." *Id.* at 183-87.

1 9A1. Doyle's federal constitutional rights were violated, in the guilt
2 phase of his trial, as a result of improper jury instructions, because "[t]he
trial court failed to properly instruct the jury as to the elements of first-degree
premeditated and deliberate murder." *Id.* at 188-94.

3 9A2. Doyle's federal constitutional rights were violated, in the guilt
4 phase of his trial, as a result of improper jury instructions, because "[t]he
trial court's reasonable doubt instruction was improper." *Id.* at 194-96.

5 9A3. Doyle's federal constitutional rights were violated, in the guilt
6 phase of his trial, as a result of improper jury instructions, because "[t]he
trial court's malice aforethought instruction was improper." *Id.* at 196-97.

7 9A4. Doyle's federal constitutional rights were violated, in the guilt
8 phase of his trial, as a result of improper jury instructions, because "[t]he
trial court's specific intent instruction was improper." *Id.* at 197-200.

9 9A5. Doyle's federal constitutional rights were violated, in the guilt
10 phase of his trial, as a result of improper jury instructions, because "[t]he
trial court's guilt or innocence instruction was improper." *Id.* at 200-01.

11 9A6. Doyle's federal constitutional rights were violated, in the guilt
12 phase of his trial, as a result of improper jury instructions, because "[t]he
kidnapping instructions reduced the state's burden of proof, allowing the
13 jury to find first-degree kidnapping based merely on second-degree
kidnapping." *Id.* at 201-06.

14 9B1. Doyle's federal constitutional rights were violated, in the
15 penalty phase of his trial, as a result of improper jury instructions, because
"[t]he trial court improperly answered the jury's question regarding
16 comparative culpability." *Id.* at 207-09.

17 9B2. Doyle's federal constitutional rights were violated, in the
18 penalty phase of his trial, as a result of improper jury instructions, because
"[t]he trial court improperly failed to give the presumption of life instruction."
Id. at 209-11.

19 9B3. Doyle's federal constitutional rights were violated, in the
20 penalty phase of his trial, as a result of improper jury instructions, because
"[t]he trial court's reasonable doubt instruction was improper." *Id.* at 211.

21 9B4. Doyle's federal constitutional rights were violated, in the
22 penalty phase of his trial, as a result of improper jury instructions, because
"[t]he trial court's *Edmund* instruction was improper." *Id.* at 211-13.

23 9B5. Doyle's federal constitutional rights were violated, in the
24 penalty phase of his trial, as a result of improper jury instructions, because
"[t]he trial court improperly failed [to] instruct the jury to find mitigating
25 circumstances did not outweigh aggravating circumstances beyond a
reasonable doubt." *Id.* at 213-16.

26 9B6. Doyle's federal constitutional rights were violated, in the
27 penalty phase of his trial, as a result of improper jury instructions, because
"[t]he trial court improperly failed to give the jury a form to indicate a finding
28 that mitigating circumstances outweighed aggravating circumstances,
creating an unconstitutional presumption of death." *Id.* at 216-21.

1 9B7. Doyle’s federal constitutional rights were violated, in the
2 penalty phase of his trial, as a result of improper jury instructions, because
3 “[t]he trial court’s anti-sympathy instruction was unduly prejudicial.” *Id.* at
4 221-22.

5 10. Doyle’s federal constitutional rights were violated as a result
6 of “the trial court’s failure to record critical proceedings.” *Id.* at 223-25.

7 11. Doyle’s death sentence is invalid, under the federal
8 constitution, because “execution by lethal injection violates the
9 constitutional prohibition against cruel and unusual punishments and his
10 rights under the First and Fourteenth Amendments.” *Id.* at 226-53.

11 12. Doyle’s death sentence is invalid, under the federal
12 constitution, “because his death sentence is the product of purposeful race
13 discrimination by state officials.” *Id.* at 254-57.

14 13. Doyle’s conviction and sentence violate the federal
15 constitution “because Mr. Doyle’s capital trial, sentencing, and review on
16 direct appeal were conducted before state judicial officers whose tenure in
17 office was not during good behavior but whose tenure was dependent on
18 popular election.” *Id.* at 258-62.

19 14. Doyle’s death sentence is invalid, under the federal
20 constitution, “because the Nevada capital punishment system operates in
21 an arbitrary and capricious manner.” *Id.* at 263-71.

22 15. Doyle’s death sentence is invalid, under the federal
23 constitution, “due to the restrictive conditions on Nevada’s death row.” *Id.* at
24 272-73.

25 16. Doyle’s death sentence is invalid, under the federal
26 constitution, “due to the jury finding the statutory aggravating circumstances
27 that the murder was committed to avoid or prevent lawful arrest.” *Id.* at 274-
28 89.

 17A. Doyle’s federal constitutional rights were violated because
“[t]here was insufficient evidence for the jury to convict Mr. Doyle of
conspiracy to commit murder.” *Id.* at 290-93.

 17B. Doyle’s federal constitutional rights were violated because
“[t]here was insufficient evidence of first-degree kidnapping.” *Id.* at 293-94.

 18. Doyle’s death sentence is invalid, under the federal
constitution, “due to the jury finding the statutory aggravating circumstances
that the murder was committed by a person under sentence of
imprisonment....” *Id.* at 296-97.

 19. Doyle’s conviction and death sentence are invalid under the
federal constitution “because of the cumulative effect of the errors in this
case.” *Id.* at 298-301.

 Respondents filed their motion to dismiss (ECF No. 277) on March 10, 2017,
arguing that various claims in Doyle’s second amended habeas petition are barred by the

1 statute of limitations, unexhausted in state court, procedurally defaulted, and not
2 cognizable in this federal habeas corpus action. Doyle filed an opposition to the motion
3 to dismiss on August 7, 2017 (ECF No. 284). Respondents filed a reply on October 27,
4 2017 (ECF No. 292).

5 On August 7, 2017, with his opposition to the motion to dismiss, Doyle filed a
6 motion for discovery (ECF No. 286) and a motion for evidentiary hearing (ECF No. 287).
7 Respondents filed oppositions to those motions on October 27, 2017 (ECF Nos. 293,
8 294). Doyle filed replies on December 18, 2017 (ECF Nos. 298, 299).

9 Analysis

10 Statute of Limitations

11 Legal Standards

12 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), there
13 is a statute of limitations applicable to federal habeas corpus petitions; it provides:

14 (d)(1) A 1-year period of limitation shall apply to an application for a
15 writ of habeas corpus by a person in custody pursuant to the judgment of a
State court. The limitation period shall run from the latest of --

16 (A) the date on which the judgment became final by the
17 conclusion of direct review or the expiration of the time for
seeking such review;

18 (B) the date on which the impediment to filing an
19 application created by State action in violation of the
Constitution or laws of the United States is removed, if the
20 applicant was prevented from filing by such State action;

21 (C) the date on which the constitutional right asserted
22 was initially recognized by the Supreme Court, if the right has
been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

23 (D) the date on which the factual predicate of the claim
24 or claims presented could have been discovered through the
exercise of due diligence.

25 28 U.S.C. § 2244(d)(1)(A-D).

26 The petitioner is entitled to statutory tolling of the limitations period while a
27 “properly filed application for State post-conviction or other collateral review with respect
28 to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

1 The AEDPA statute of limitations is also subject to equitable tolling. *Holland v.*
2 *Florida*, 560 U.S. 631, 649 (2010).

3 Expiration of the Limitations Period in this Case

4 Doyle's judgment of conviction became final on September 22, 1997, which was
5 90 days after the Nevada Supreme Court denied rehearing on Doyle's direct appeal. See
6 Order Denying Rehearing, Exhibit 175 (ECF No. 173-10, p. 92); see also *Clay v. United*
7 *States*, 537 U.S. 522, 528 n.3 (2003) (conviction final at expiration of 90-day period to
8 seek certiorari following decision of highest state court); *Bowen v. Roe*, 188 F.3d 1157,
9 1159 (9th Cir. 1999) (same).

10 Doyle timely filed his first state petition for writ of habeas corpus on June 26, 1997,
11 tolling the limitations period before it began to run. See Petition for Writ of Habeas Corpus
12 (Post-Conviction), Exhibit 176 (ECF No. 174, pp. 2-41); see also 28 U.S.C. § 2244(d)(2).
13 Doyle's first state habeas action concluded, and the statutory tolling ceased, on April 13,
14 2000, when the Nevada Supreme Court issued its remittitur after affirming the denial of
15 Doyle's petition. See Remittitur, Respondents' Exhibit 5 (ECF No. 209-7). The limitation
16 period for the filing of Doyle's federal habeas petition then began to run.

17 Doyle submitted his original *pro se* petition (ECF No. 4) for filing, to initiate this
18 case, on February 28, 2000. That petition was unquestionably timely filed.

19 There was no statutory tolling of the limitations period by virtue of the pendency of
20 this federal habeas corpus action. See *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001)
21 (pendency of federal habeas corpus action does not toll AEDPA limitations period).
22 Therefore, absent equitable tolling, the limitations period ran out on April 14, 2001.

23 Doyle did not file his first amended petition (ECF No. 168) until May 14, 2008, more
24 than seven years after the limitations period ran out. His second amended petition was
25 filed more than eight years after that, on October 28, 2016 (ECF No. 265). Therefore,
26 unless Doyle can show that equitable tolling is warranted, the question of the timeliness
27 of the claims in his second amended petition turns upon whether the claims in that petition
28 relate back to the filing of his timely original petition. In *Mayle v. Felix*, 545 U.S. 644

1 (2005), the Supreme Court held that “[s]o long as the original and amended petitions state
2 claims that are tied to a common core of operative facts, relation back will be in order,”
3 but “[a]n amended habeas petition ... does not relate back (and thereby escape AEDPA’s
4 one-year time limit) when it asserts a new ground for relief supported by facts that differ
5 in both time and type from those the original pleading set forth.” *Mayle*, 545 U.S. at 650,
6 664.

7 Equitable Tolling

8 Doyle argues that he is entitled to equitable tolling because he relied upon the
9 Court’s scheduling orders in this case. See Opposition to Motion to Dismiss (ECF No.
10 284), pp. 4-13.

11 The AEDPA limitations period is subject to equitable tolling. *Holland v. Florida*, 560
12 U.S. 631, 649 (2010). A petitioner may be entitled to equitable tolling if he can show “(1)
13 that he has been pursuing his rights diligently, and (2) that some extraordinary
14 circumstance stood in his way’ and prevented timely filing.” *Id.* (quoting *Pace v.*
15 *DiGuglielmo*, 544 U.S. 408, 418 (2005)); see also *Sossa v. Diaz*, 729 F.3d 1225, 1229
16 (9th Cir. 2013) (“[T]he requirement that extraordinary circumstances stood in [the
17 petitioner’s] way suggests that an external force must cause the untimeliness, rather than
18 ... merely oversight, miscalculation or negligence on [the petitioner’s] part, all of which
19 would preclude the application of equitable tolling.” (internal quotations and citations
20 omitted)); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (“The petitioner must
21 additionally show that the extraordinary circumstances were the cause of his untimeliness
22 ... and that the extraordinary circumstances made it impossible to file a petition on time.”
23 (internal quotations, citations, and alteration omitted)). “The high threshold of
24 extraordinary circumstances is necessary ‘lest the exceptions swallow the rule.’” *Lakey v.*
25 *Hickman*, 633 F.3d 782, 786 (9th Cir. 2011), quoting *Mendoza v. Carey*, 449 F.3d 1065,
26 1068 (9th Cir. 2006). It is the habeas petitioner’s burden to establish that equitable tolling
27 is warranted. *Pace*, 544 U.S. at 418; *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir.
28 2006) (“Our precedent permits equitable tolling of the one-year statute of limitations on

1 habeas petitions, but the petitioner bears the burden of showing that equitable tolling is
2 appropriate.”). Doyle does not show that equitable tolling is warranted.

3 Doyle argues, essentially, that he is entitled to equitable tolling because he relied
4 upon the Court’s scheduling orders in determining when to file his amended petition. See
5 Opposition to Motion to Dismiss, pp. 4-13. Instructions from a court do not serve as a
6 basis for equitable tolling unless the court “affirmatively misled” the petitioner. *Ford v.*
7 *Pliker*, 590 F.3d 782, 786-87 (9th Cir. 2009). There is no showing by Doyle that he was
8 affirmatively misled. The Court’s scheduling orders granted leave for Doyle to conduct
9 discovery, set time limits for Doyle to do investigation and conduct discovery, and set time
10 limits for Doyle to file his amended petition; those orders certainly were not extraordinary
11 in any way, and they did not make any statement about, or have any bearing on, the
12 operation of the statute of limitations. Doyle has not made any factual allegation, and he
13 has not proffered any evidence, suggesting otherwise.

14 Moreover, the United States Supreme Court decided *Mayle* on June 23, 2005,
15 holding that an amended habeas petition does not relate back when it asserts a new
16 ground for relief supported by facts that differ in both time and type from those set forth
17 in the original pleading. *Mayle*, 545 U.S. at 650. If Doyle and his counsel were under any
18 misconception about whether new claims in an amended petition would relate back to
19 Doyle’s original petition, *Mayle* cleared that up. However, despite the import of *Mayle*,
20 Doyle did not file his first amended habeas petition until May 14, 2008, almost three years
21 after *Mayle* clarified the law regarding the relation back of claims in amended habeas
22 petitions.

23 Doyle has not shown that any extraordinary circumstance prevented timely filing
24 of his first and second amended habeas petitions. See *Holland*, 560 U.S. at 649.
25 Equitable tolling is not warranted.

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1 Exhaustion of State Court Remedies

2 Legal Standards

3 A federal court may not grant relief on a habeas corpus claim not exhausted in
4 state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-
5 state comity, and is designed to give state courts the initial opportunity to correct alleged
6 constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust
7 a claim, a petitioner must fairly present that claim to the State's highest court, and must
8 give that court the opportunity to address and resolve it. See *Duncan v. Henry*, 513 U.S.
9 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair
10 presentation" requirement is satisfied when the claim has been presented to the highest
11 state court by describing the operative facts and the legal theory upon which the federal
12 claim is based. See *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693
13 F.2d 859, 862 (9th Cir.1982), *cert. denied*, 463 U.S. 1212 (1983). To fairly present a
14 federal constitutional claim to the state court, the petitioner must alert the court to the fact
15 that he asserts a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d
16 1098, 1106 (9th Cir.1999), *cert. denied*, 529 U.S. 1009 (2000), citing *Duncan*, 513 U.S.
17 at 365-66.

18 Nevada Supreme Court's Mandatory Review under NRS § 177.055

19 With respect to several of his claims – namely, Grounds 5, 6A1, 6A2, 6A3, 6A4,
20 6A5, 6A6, 6A7, 6A8, 9B1, 9B2, 9B3, 9B4, 9B5, 9B6, 9B7, 12, 14, 16 and 18 – Doyle
21 argues that the Nevada Supreme Court addressed his claims, on his direct appeal, as
22 part of its mandatory review under NRS § 177.055. See Opposition to Motion to Dismiss
23 (ECF No. 287), pp. 72-85. NRS § 177.055 requires the Nevada Supreme Court to
24 consider whether the evidence supported the finding of the aggravating circumstances;
25 whether the sentence was imposed under the influence of passion, prejudice, or any other
26 arbitrary factor; and whether the death sentence was excessive. Doyle argues that, by
27 virtue of this provision, the Nevada Supreme Court ruled upon the subject federal
28 constitutional claims in this case.

1 To show that a claim was exhausted on account of the Nevada Supreme Court's
2 mandatory review under NRS § 177.055, Doyle must show that the claims at issue were
3 "clearly encompassed" within the scope of NRS § 177.055 and "readily apparent" in the
4 record reviewed by the Nevada Supreme Court. See *Comer v. Schriro*, 463 F.3d 934,
5 954-56 (9th Cir. 2006).

6 As is discussed further below with respect to the individual claims, the Court
7 determines that the claims at issue – again, Grounds 5, 6A1, 6A2, 6A3, 6A4, 6A5, 6A6,
8 6A7, 6A8, 9B1, 9B2, 9B3, 9B4, 9B5, 9B6, 9B7, 12, 14, 16 and 18 – were not clearly
9 encompassed within the scope of NRS § 177.055, and Doyle has not shown them to have
10 been "readily apparent" in the record reviewed by the Nevada Supreme Court. The Court
11 finds that these claims were not exhausted on Doyle's direct appeal by virtue of the
12 Nevada Supreme Court's mandatory review under NRS § 177.055.

13 Anticipatory Default

14 The Supreme Court has recognized that under certain circumstances it may be
15 appropriate for a federal court to anticipate the state-law procedural bar of an
16 unexhausted claim, and to treat such a claim as subject to the procedural default doctrine.
17 "An unexhausted claim will be procedurally defaulted, if state procedural rules would now
18 bar the petitioner from bringing the claim in state court." *Dickens v. Ryan*, 740 F.3d 1302,
19 1317 (9th Cir. 2014) (citing *Coleman*, 501 U.S. at 731).

20 In light of the procedural history of this case, and, in particular, the rulings of the
21 state courts in Doyle's second state habeas action, Doyle's unexhausted claims would be
22 ruled procedurally barred in state court if Doyle were to return to state court to attempt to
23 exhaust those claims. Therefore, the anticipatory default doctrine applies to Doyle's
24 unexhausted claims, and the Court considers those claims to be technically exhausted,
25 but subject to the procedural default doctrine. See *Dickens*, 740 F.3d at 1317; see also
26 Motion to Dismiss (ECF No. 277), p. 38 (respondents' argument that anticipatory default
27 doctrine should apply to unexhausted claims); Opposition to Motion to Dismiss (ECF No.
28

1 284), pp. 85-88 (Doyle's argument that anticipatory default doctrine should apply to
2 unexhausted claims).

3 Procedural Default

4 Legal Standards

5 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
6 to comply with the State's procedural requirements in presenting his claims is barred by
7 the adequate and independent state ground doctrine from obtaining a writ of habeas
8 corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in
9 those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner
10 who has failed to meet the State's procedural requirements for presenting his federal
11 claims has deprived the state courts of an opportunity to address those claims in the first
12 instance."). Where such a procedural default constitutes an adequate and independent
13 state ground for denial of habeas corpus, the default may be excused only if "a
14 constitutional violation has probably resulted in the conviction of one who is actually
15 innocent," or if the prisoner demonstrates cause for the default and prejudice resulting
16 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

17 To demonstrate cause for a procedural default, the petitioner must "show that
18 some objective factor external to the defense impeded" his efforts to comply with the state
19 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
20 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499
21 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears "the burden
22 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
23 but that they worked to his actual and substantial disadvantage, infecting his entire
24 [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603
25 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

26 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
27 assistance of post-conviction counsel may serve as cause, to overcome the procedural
28 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme Court

1 noted that it had previously held, in *Coleman v. Thompson*, 501 U.S. 722, 746-47 (1991),
2 that “an attorney’s negligence in a postconviction proceeding does not establish cause”
3 to excuse a procedural default. *Martinez*, 566 U.S. at 15. The *Martinez* Court, however,
4 “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate assistance of counsel
5 at initial-review collateral proceedings may establish cause for a prisoner’s procedural
6 default of a claim of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-
7 review collateral proceedings” as “collateral proceedings which provide the first occasion
8 to raise a claim of ineffective assistance at trial.” *Id.* at 8.

9 The Procedural Default in this Case

10 On Doyle’s direct appeal and the appeal in his first state habeas action, the Nevada
11 Supreme Court addressed his claims on their merits. See Opinion, Exhibit 225, pp. 16-22
12 (ECF No. 174-7, pp. 43-49); Opinion, Exhibit 184 (ECF No. 174-3, pp. 2-18). Therefore,
13 claims asserted by Doyle on his direct appeal and on the appeal in his first state habeas
14 action were not procedurally barred in state court, and are not subject to the procedural
15 default doctrine in this case.

16 On Doyle’s appeal in his second state habeas action, however, the Nevada
17 Supreme Court ruled that his entire petition was untimely under NRS § 34.726, and barred
18 by laches under NRS § 34.800. See Order of Affirmance, Exhibit 304 (ECF No. 266-6).
19 Therefore, claims exhausted by Doyle in state court only in his second state habeas action
20 are subject to the procedural default doctrine.

21 Adequacy of the State Procedural Bars

22 Doyle argues that the state procedural rules applied to bar his claims in his second
23 state habeas action were not adequate to support application of the procedural default
24 doctrine. See Opposition to Motion to Dismiss (ECF No. 284), pp. 89-111.

25 A state procedural rule is “adequate” if it was “clear, consistently applied, and well-
26 established at the time of the petitioner’s purported default.” *Calderon v. United States*
27 *Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation
28 marks omitted); see also *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (state procedural rule

1 adequate if “firmly established and regularly followed by the time as of which it is to be
2 applied” (citation and internal quotation marks omitted)); *Lambright v. Stewart*, 241 F.3d
3 1201, 1203 (9th Cir. 2001).

4 In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003), the court of appeals
5 established a burden-shifting test for analyzing adequacy. Under *Bennett*, the State
6 carries the initial burden of pleading “the existence of an independent and adequate state
7 procedural ground as an affirmative defense.” *Bennett*, 322 F.3d at 586. The burden then
8 shifts to the petitioner “to place that defense in issue,” which the petitioner may do “by
9 asserting specific factual allegations that demonstrate the inadequacy of the state
10 procedure, including citation to authority demonstrating inconsistent application of the
11 rule.” *Id.* If the petitioner meets this burden, “the ultimate burden” of proving the adequacy
12 of the procedural rule rests with the State, which must demonstrate “that the state
13 procedural rule has been regularly and consistently applied in habeas actions.” *Id.*; see
14 also *King v. Lamarque*, 464 F.3d 963, 966-67 (9th Cir. 2006).

15 Here, the respondents meet their initial burden under *Bennett* by asserting that
16 NRS §§ 34.726 and 34.800 constituted independent and adequate state procedural
17 grounds for the Nevada Supreme Court’s rulings. See Motion to Dismiss (ECF No. 277),
18 pp. 30-31; see also *Bennett*, 322 F.3d at 586. In response, Doyle argues that both NRS
19 § 34.726 and 34.800 were inadequate to support application of the procedural default
20 doctrine. See Opposition to Motion to Dismiss (ECF No. 284), pp. 93-111.

21 Regarding NRS § 34.726, the Nevada statute of limitations, the Ninth Circuit Court
22 of Appeals has held that rule to be adequate to support application of the procedural
23 default defense. See *Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996); see also
24 *High v. Ignacio*, 408 F.3d 585, 590 (9th Cir. 2005); *Collier v. Bayer*, 408 F.3d 1279, 1285
25 (9th Cir. 2005); *Loveland v. Hatcher*, 231 F.3d 640, 642-63 (9th Cir. 2000). The Ninth
26 Circuit Court of Appeals has never ruled NRS § 34.726 to be inadequate. Nevertheless,
27 Doyle argues that NRS § 34.726 is inadequate in his case. See Opposition to Motion to
28 Dismiss (ECF No. 284), pp. 103-11. The Court finds that Doyle does not show NRS §

1 34.726 to be other than clear, consistently applied and well-established. The Nevada
2 courts' exercise of discretion in isolated cases does not necessarily render procedural
3 rules inadequate to support the procedural default defense in federal court. See *Walker*
4 *v. Martin*, 562 U.S. 307, 319-21 (2011) (rule not automatically inadequate "upon a
5 showing of seeming inconsistencies;" state court must be allowed discretion "to avoid the
6 harsh results that sometimes attend consistent application of an unyielding rule"); see
7 also *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009) ("[D]iscretionary rule can be 'firmly
8 established' and 'regularly followed' – even if the appropriate exercise of discretion may
9 permit consideration of a federal claim in some cases but not others."). Doyle has not met
10 his burden under *Bennett*, to assert specific factual allegations demonstrating the
11 inadequacy of the statute of limitations in NRS § 34.726. NRS § 34.726 is adequate to
12 support the procedural default defense asserted by respondents.

13 Regarding, Nevada's laches rule, codified at NRS § 34.800, the Ninth Circuit has
14 found that procedural rule, too, to be adequate for purposes of the procedural default
15 doctrine. See *Moran*, 80 F.3d at 1270; see also *Ybarra v. McDaniel*, 656 F.3d 984, 990-
16 91 (9th Cir. 2011). Here again, the Ninth Circuit Court of Appeals has never ruled NRS §
17 34.800 to be inadequate, but Doyle argues that NRS § 34.800 is inadequate in this case.
18 See Opposition to Motion to Dismiss (ECF No. 284), pp. 93-103. However, again, the
19 exercise of discretion in isolated cases does not necessarily render a procedural rule
20 inadequate to support the procedural default defense in federal court. See *Walker*, 562
21 U.S. at 319-21; *Beard*, 558 U.S. at 60-61. Doyle has not met his burden under *Bennett*,
22 to assert specific factual allegations demonstrating the inadequacy of the laches rule in
23 NRS § 34.800. NRS § 34.800 is adequate to support the procedural default defense
24 asserted by respondents.

25 Independence of the State Procedural Bars

26 Doyle also argues that the state procedural rules applied to bar his claims in state
27 court, in his second state habeas action, were not applied independently of federal law.
28 See Opposition to Motion to Dismiss (ECF No. 284), pp. 91-93.

1 “For a state procedural rule to be ‘independent,’ the state law basis for the decision
2 must not be interwoven with the federal law.” *Park v. California*, 202 F.3d 1146, 1152
3 (2000) (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). The state procedural
4 rule is “so interwoven if ‘the state has made application of the procedural bar depend on
5 an antecedent ruling on federal law [such as] the determination of whether federal
6 constitutional error has been committed.’” *Id.* (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75
7 (1985)).

8 Doyle relies on a footnote in the Supreme Court's opinion in *Rippo v. Baker*, 137
9 S.Ct. 905 (2017) (per curiam), and contends that the procedural rules were not applied
10 independently of federal law in this case because the Nevada Supreme Court considered
11 the merits of his claims in determining that he did not show cause and prejudice to
12 overcome the procedural bars. See Opposition to Motion to Dismiss (ECF No. 284), pp.
13 92-93. In *Rippo*, the Supreme Court reviewed, and overruled, the Nevada Supreme
14 Court's holding regarding the substantive federal-law claim in the case – a claim of
15 unconstitutional judicial bias. See *Rippo*, 137 S.Ct. at 906-07. In a footnote, the Supreme
16 Court stated:

17 The [Nevada Supreme Court] further relied on its bias holding to
18 determine that Rippo had not established cause and prejudice to overcome
19 various state procedural bars. 132 Nev., at —, 368 P.3d, at 745. Because
20 the court below did not invoke any state-law grounds “independent of the
21 merits of [Rippo's] federal constitutional challenge,” we have jurisdiction to
22 review its resolution of federal law. *Foster v. Chatman*, 578 U.S. —, —
23 —, 136 S.Ct. 1737, 1746, 195 L.Ed.2d 1 (2016).

24 *Id.* at 907 n.1. The Supreme Court appears to have seen the Nevada Supreme Court's
25 analysis of the substantive federal claim as antecedent to its ruling regarding the
26 procedural bar. That is not the case here. In this case, the Nevada Supreme Court first
27 identified the procedural bars, and stated that it was “prohibited by statute from
28 addressing the merits” of Doyle's claims absent a showing of good cause for Doyle's long
29 delay in asserting those claims. See Order of Affirmance, Exhibit 304, pp. 2-4 (ECF No.
30 266-6, pp. 3-5). The court then went on to determine that Doyle failed to show cause and
31 prejudice. See *id.* at 4-10 (ECF No. 266-6, pp. 5-11). In this case, the Nevada Supreme

1 Court's consideration of the merits of the federal claims was not antecedent to the ruling
2 regarding the procedural bars.

3 The Court determines that the Nevada courts' application of NRS §§ 34.726 and
4 34.800 to bar Doyle's claims in his second state habeas action was independent of federal
5 law, such as to allow application of the procedural default doctrine in this case.

6 Doyle's Claims of Actual Innocence under *Schlup*

7 Doyle argues that he can overcome the procedural default bars of his claims by a
8 showing of actual innocence. See Opposition to Motion to Dismiss (ECF No. 284), pp.
9 134-41.

10 A habeas petitioner can overcome a procedural default, allowing consideration of
11 the defaulted claim on its merits, by showing that he is actually innocent. See *Schlup v.*
12 *Delo*, 513 U.S. 298 (1995). To demonstrate actual innocence to overcome a procedural
13 bar under *Schlup*, a petitioner must present "new reliable evidence – whether it be
14 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical
15 evidence – that was not presented at trial." *Id.* at 324. By means of that evidence, and in
16 light of all the evidence in the case, the petitioner "must show that it is more likely than
17 not that no reasonable juror would have convicted him in the light of the new evidence."
18 *Id.* at 327; see also *id.* at 329 ("a petitioner does not meet the threshold requirement
19 unless he persuades the district court that, in light of the new evidence, no juror, acting
20 reasonably, would have voted to find him guilty beyond a reasonable doubt"); *House v.*
21 *Bell*, 547 U.S. 518, 538, quoting *Schlup*, 513 U.S. at 327-28 (regarding evidence to be
22 considered). "Based on this total record, the court must make a 'probabilistic
23 determination about what reasonable, properly instructed jurors would do.'" *House*, 547
24 U.S. at 538, quoting *Schlup*, 513 U.S. at 329. "The Court's function is not to make an
25 independent factual determination about what likely occurred, but rather to assess the
26 likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. Meeting this
27 standard "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in
28 the result of the trial without the assurance that the trial was untainted by constitutional

1 error,” warranting “a review of the merits of the constitutional claims[.]” *Schlup*, 513 U.S.
2 at 317.

3 Doyle first points out that the Nevada Supreme Court vacated his sexual assault
4 conviction, undermining one of the three theories of first degree murder relied upon by
5 the prosecution – that the murder was committed in perpetration of a sexual assault. See
6 Opposition to Motion to Dismiss (ECF No. 284), p. 135. This, however, does not show
7 Doyle to be factually innocent. There were two other theories of first degree murder
8 advanced by the prosecution: that the murder was committed in perpetration of
9 kidnapping, and that the killing was willful, deliberate and premeditated. There is no
10 showing that Doyle is innocent of murder under either of those theories.

11 Next, Doyle argues that new evidence impeaching the testimony of three
12 prosecution witnesses shows that he is innocent. See *id.* at 135-37. That, however, is not
13 the sort of new evidence of innocence contemplated by *Schlup*. Such evidence, providing
14 only “a basis for some degree of impeachment of the prosecution's main witnesses ...
15 does not ... fundamentally call into question the reliability of [the] conviction.” *Sistrunk v.*
16 *Armenakis*, 292 F.3d 669, 677 (9th Cir. 2002) (en banc). The impeachment evidence
17 proffered by Doyle is not such as to make it more likely than not that no reasonable juror
18 would have found Doyle guilty beyond a reasonable doubt had they seen that evidence.

19 Doyle also argues that he can show his innocence by means of newly developed
20 evidence suggesting that he is a “follower,” and that, in his childhood, he was forced to
21 passively observe violence and abuse against young women. See Opposition to Motion
22 to Dismiss (ECF No. 284), pp. 137-39. Here too, the Court finds that this evidence does
23 not show Doyle’s actual innocence as contemplated in *Schlup*.

24 Finally, Doyle argues that he can show that he is actually innocent of the death
25 penalty. See *id.* at 139-41. Doyle points out that the Nevada Supreme Court struck one
26 of the aggravating circumstances found by the jury – that the murder was committed by
27 a person engaged in the commission of or an attempt to commit a kidnapping. Doyle
28 argues that the other two aggravating circumstances found by the jury – that the murder

1 was committed by a person under sentence of imprisonment, and that the murder was
2 committed to avoid or prevent a lawful arrest – are unconstitutionally vague. Doyle also
3 argues that new mitigating evidence would outweigh the two remaining aggravating
4 circumstances. This is not new evidence of factual innocence, as contemplated by
5 *Schlup*.

6 Doyle requests an evidentiary hearing with respect to his claim of actual innocence
7 under *Schlup*. See Motion for Evidentiary Hearing (ECF No. 287), pp. 6-7. The Court finds
8 that an evidentiary hearing on this issue is unnecessary. Viewing the evidence proffered
9 by Doyle in support of his arguments under *Schlup* in the light most favorable to Doyle,
10 the Court determines that Doyle falls far short of making the required showing to
11 overcome his procedural defaults.

12 Cognizability and Ripeness of Claims

13 In their motion to dismiss, respondents make arguments that certain of Doyle's
14 claims are not ripe or cognizable, such that relief may be granted upon them in this federal
15 habeas corpus action. See Motion to Dismiss (ECF No. 277), pp. 39-40. The Court
16 determines that those arguments will be better addressed – with respect to the claims
17 remaining after this motion to dismiss is resolved – after respondents file an answer and
18 Doyle files a reply. The Court declines to address these arguments at this time. This order
19 is without prejudice to respondents reasserting these arguments in their answer.

20 Analysis of Individual Claims

21 Ground 1

22 In Ground 1 of his second amended habeas petition, Doyle claims that
23 “prosecutors excused prospective jurors on the basis of race,” in violation of his federal
24 constitutional rights. Second Amended Petition (ECF No. 265), pp. 11-35.

25 Respondents do not argue that Ground 1 is barred by the statute of limitations.
26 See Motion to Dismiss (ECF No. 277). Ground 1 of Doyle's second amended petition
27 arises from the same core of operative facts as Ground 1 of his original petition, and it
28

1 therefore relates back to the filing of the original petition. See Petition for Writ of Habeas
2 Corpus (ECF No. 4), p. 3. Ground 1 is not barred by the statute of limitations.

3 Nor do respondents argue that the due process and equal protection claims in
4 Ground 1 are unexhausted or procedurally defaulted. See Motion to Dismiss (ECF No.
5 277), pp. 29, 31-33.

6 Respondents do, however, argue that the ineffective assistance of counsel claims
7 in Ground 1 are unexhausted in state court. See *id.* at 32-33. Doyle responds, arguing
8 that he did raise the ineffective assistance of counsel portions of Ground 1 in his second
9 state habeas action, and the Nevada courts declined to rule on them in that action, on the
10 ground of law of the case, meaning that the ineffective assistance of counsel claims must
11 have been asserted and ruled upon on their merits previously in state court (though Doyle
12 does not point to any previous state-court proceeding in which they were actually
13 asserted). See Opposition to Motion to Dismiss (ECF No. 284), pp. 61-64. To support his
14 argument that he raised these ineffective assistance of counsel claims in his second state
15 habeas action, Doyle points only to the heading of Claim 1 in his petition in that action,
16 which stated:

17 Mr. Doyle's conviction and death sentence are invalid under the state
18 and federal constitutional guarantees of due process, equal protection,
19 effective assistance of counsel, an impartial jury, and a reliable sentencing
20 determination because prosecutors excused prospective jurors on the basis
of race. The Nevada Supreme Court violated procedural due process in its
review of this claim. U.S. Const. amends. VI, XIII & XIV; Nev. Const. art. I,
§§ 1, 8, art. IV, § 21.

21 Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 295, p. 19 (ECF No. 265-3,
22 p. 20). That, however, is the only reference to ineffective assistance of counsel in Claim
23 1 of Doyle's petition in his second state habeas action. There are no factual allegations
24 supporting any such claims. In contrast, in Ground 1 of his second amended petition in
25 this case, Doyle included the following:

26 3. Insofar as prior counsel failed to conduct a thorough
27 comparative juror analysis, counsel were ineffective.

28 Both trial and appellate counsel had an obligation to raise non-
frivolous objections and provide arguments in support thereof. See *Evitts v.*

1 *Lucey*, 469 U.S. 387, 396 (1985); *Smith v. Robbins*, 528 U.S. 259, 285
2 (2000); see also 1989 ABA Guidelines, Guideline 11.7.2, 11.7.3. Here, trial
3 counsel raised a *Batson*, objection, and argued the objection on appeal,
4 however, counsel failed to conduct a thorough comparative juror analysis.
5 *Compare* Claim One with ECF No. 173-10 at 41-47. This was deficient. And,
6 had counsel acted deficiently, the result of Mr. Doyle's state proceedings
7 would have been different because error under *Batson* is structural,
8 requiring a new trial. See *Batson*, 476 U.S. at 100.

9 Second Amended Petition (ECF No. 265), p. 34. Those allegations do not appear in the
10 petition filed in Doyle's second state habeas action. There were no facts asserted in Claim
11 1 of that petition to substantiate any ineffective assistance of counsel claim. The same
12 was true in Doyle's briefing on the appeal in that action. In fact, on the appeal in Doyle's
13 second state habeas action, Doyle stated in his opening brief: "Trial counsel did
14 everything possible to prevent a *Batson* violation." Appellant's Opening Brief, Exhibit 301,
15 p. 7 (ECF No. 266-3, p. 29). Doyle did not fairly present the factual bases for the
16 ineffective assistance of counsel claims in Ground 1 to the state supreme court, in his
17 second state habeas action, such as to give that court an opportunity to rule on such
18 claims. The ineffective assistance of counsel claims in Ground 1 are unexhausted.

19 As is discussed above, the anticipatory default doctrine applies, and the Court
20 considers the claims of ineffective assistance of counsel in Ground 1 to be technically
21 exhausted, but procedurally defaulted.

22 Inadequate assistance of counsel in a first state habeas action may establish
23 cause for the procedural default of a claim of ineffective assistance of trial counsel. See
24 *Martinez*, 566 U.S. at 9. This rule may provide a means for Doyle to overcome the
25 procedural default of the ineffective assistance of trial counsel claim in Ground 1.
26 However, this issue is intertwined with the merits of Ground 1, such that it will be better
27 addressed in conjunction with the merits of the claim. The Court will, therefore, deny
28 respondents' motion to dismiss with respect to the ineffective assistance of trial counsel
29 claim in Ground 1, without prejudice to respondents asserting the anticipatory procedural
30 default defense to that claim in their answer.

31 *Martinez* does not apply to claims of ineffective assistance of appellate counsel,
32 however. See *Davila v. Davis*, 137 S. Ct. 2058, 2062–2063, 2065–66 (2017). Doyle does

1 not make any argument, specific to the claim of ineffective assistance of appellate counsel
2 in Ground 1, that he can overcome the anticipatory procedural default of that claim.

3 Therefore, the claim of ineffective assistance of appellate counsel in Ground 1 will
4 be dismissed as procedurally defaulted; respondents' motion to dismiss will be denied
5 with respect to the remainder of Ground 1.

6 Ground 2

7 In Ground 2 of his second amended petition, Doyle claims that his trial counsel
8 were ineffective, in the penalty phase of his trial, in violation of his federal constitutional
9 rights, for "failing to investigate and present mitigating evidence." Second Amended
10 Petition (ECF No. 265), pp. 35-97.

11 Respondents argue that Ground 2 is barred by the statute of limitations. There is
12 no claim in Doyle's original petition arising from the same operative facts, so Ground 2
13 does not relate back to the filing of Doyle's original petition. See Petition for Writ of Habeas
14 Corpus (ECF No. 4). Doyle argues, however, that Ground 2 is timely because the factual
15 predicate of the claim could not previously "have been discovered through the exercise
16 of due diligence." See Opposition to Motion to Dismiss (ECF No. 284), pp. 14-19; see
17 *also* 28 U.S.C. § 2244(d)(1)(D). The Court finds Doyle's argument in this regard to be
18 without merit. The mitigating evidence that Doyle faults his trial counsel for not
19 investigating and presenting at trial concerns events that occurred in Doyle's childhood.
20 There is no reason shown by Doyle why it necessarily took him eight years to formulate
21 and plead this claim in this case. 28 U.S.C. § 2244(d)(1)(D) does not save Ground 2 from
22 the operation of the statute of limitations. Ground 2 is barred by the statute of limitations.

23 Respondents also argue that Ground 2 is procedurally defaulted. However, as this
24 is a claim of ineffective assistance of trial counsel, Doyle could possibly show cause and
25 prejudice to overcome the procedural default, on account of ineffective assistance of
26 counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. That issue, however,
27 is intertwined with the question of the merits of the claim, which has not yet been fully
28

1 briefed. Therefore, the Court does not reach the question whether this claim is barred by
2 the procedural default doctrine.

3 Ground 2 will be dismissed as barred by the statute of limitations.

4 Ground 3A

5 In Ground 3A of his second amended petition, Doyle claims that his trial counsel
6 were ineffective, in violation of his federal constitutional rights, “for failing to object to
7 improper victim-impact testimony during the guilt phase of trial.” Second Amended
8 Petition (ECF No. 265), pp. 98-100.

9 Respondents argue that Ground 3A is barred by the statute of limitations. Doyle
10 makes no argument that Ground 3A relates back to his original petition, or that it is
11 otherwise timely. There is no claim in Doyle’s original petition that arises from the same
12 core of operative facts. See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 3A
13 does not relate back to the filing of Doyle’s original petition, and is barred by the statute
14 of limitations.

15 Respondents also argue that Ground 3A is procedurally defaulted. However, as
16 this is a claim of ineffective assistance of trial counsel, Doyle could possibly show cause
17 and prejudice to overcome the procedural default, on account of ineffective assistance of
18 counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. That issue, however,
19 is intertwined with the question of the merits of the claim, which has not yet been fully
20 briefed. Therefore, the Court does not reach the question whether this claim is barred by
21 the procedural default doctrine.

22 Ground 3A will be dismissed as barred by the statute of limitations.

23 Ground 3B

24 In Ground 3B of his second amended petition, Doyle claims that his trial counsel
25 were ineffective, in violation of his federal constitutional rights, “for failing to object to
26 prosecutors’ misrepresentation of facts regarding the [Edwards] homicide.” Second
27 Amended Petition (ECF No. 265), pp. 100-06.

1 Respondents argue that Ground 3B is barred by the statute of limitations. There is
2 no claim in Doyle's original petition that arises from the same core of operative facts. See
3 Petition for Writ of Habeas Corpus (ECF No. 4). Ground 3B does not relate back to the
4 filing of Doyle's original petition. Doyle argues, however, that Ground 3B is timely because
5 the factual predicate of the claim could not previously "have been discovered through the
6 exercise of due diligence." See Opposition to Motion to Dismiss (ECF No. 284), pp. 19-
7 22; see also 28 U.S.C. § 2244(d)(1)(D). The Court finds Doyle's argument in this regard
8 to be without merit. Doyle argues that he only discovered the factual predicate of this
9 claim in March 2005, when the State produced certain documents in discovery in this
10 case, and in March 2008, when Doyle's sister signed a declaration stating, in essence,
11 that Doyle was not in a gang. With respect to the material received in March 2005, that
12 was more than three years before Doyle filed his first amended petition; Doyle's argument
13 does not account for that three-year delay. And, with respect to Doyle's sister's
14 declaration – and, for that matter, the material received in March 2005, to the extent Doyle
15 claims it revealed that he was not in a gang – surely, Doyle did not need a declaration of
16 his sister, or any discovery from the State, to know whether or not he was in a gang. 28
17 U.S.C. § 2244(d)(1)(D) does not save Ground 3B from the operation of the statute of
18 limitations. Ground 3B is barred by the statute of limitations.

19 Respondents also argue that Ground 3B is procedurally defaulted. Doyle argues
20 that he can overcome the procedural default of this claim by showing cause and prejudice
21 on account of the State's suppression of evidence, and also on account of ineffective
22 assistance of counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. Those
23 issues are intertwined with the question of the merits of the claim, which has not yet been
24 fully briefed. Therefore, the Court does not reach the question whether this claim is barred
25 by the procedural default doctrine.

26 Ground 3B will be dismissed as barred by the statute of limitations.
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Ground 3C

In Ground 3C of his second amended petition, Doyle claims that his trial counsel were ineffective, in violation of his federal constitutional rights, “for failing to object to prosecutors’ use of gender to excuse prospective juror Emma Samuels.” Second Amended Petition (ECF No. 265), pp. 106-08.

Respondents argue that Ground 3C does not relate back to Doyle’s original petition, and is therefore barred by the statute of limitations. Doyle argues that Ground 3C relates back to Ground 1 of his original petition, which is a claim that his constitutional rights were violated because the State used peremptory challenges to remove African-Americans from the jury pool. See Opposition to Motion to Dismiss (ECF No. 284), pp. 23-24; see *also* Petition for Writ of Habeas Corpus (ECF No. 4), p. 3. The Court finds that Ground 3C does not relate back. Ground 3C of Doyle’s second amended petition concerns trial counsel’s failure to object to the peremptory strike of the juror as allegedly based on gender; Ground 1 of Doyle’s original petition claims the State’s peremptory strike of the juror was because she is African-American. The core of operative facts underlying the two claims is different. Ground 3C does not relate back, and it is therefore barred by the statute of limitations.

Respondents also argue that Ground 3C is procedurally defaulted. However, as this is a claim of ineffective assistance of trial counsel, Doyle could possibly show cause and prejudice to overcome the procedural default, on account of ineffective assistance of counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. That issue, however, is intertwined with the question of the merits of the claim, which has not yet been fully briefed. Therefore, the Court does not reach the question whether this claim is barred by the procedural default doctrine.

Ground 3C will be dismissed as barred by the statute of limitations.

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Ground 3D

In Ground 3D of his second amended petition, Doyle claims that his trial counsel were ineffective, in violation of his federal constitutional rights, “for failing to seek exclusion of hearsay statements.” Second Amended Petition (ECF No. 265), pp. 108-10.

Respondents argue that Ground 3D is barred by the statute of limitations. Doyle makes no argument that Ground 3D relates back to his original petition, or any other argument that Ground 3D, specifically, is timely. There is no claim in Doyle’s original petition that arises from the same core of operative facts as Ground 3D. See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 3D does not relate back to the filing of Doyle’s original petition, and is barred by the statute of limitations.

Respondents also argue that Ground 3D is procedurally defaulted. However, as this is a claim of ineffective assistance of trial counsel, Doyle could possibly show cause and prejudice to overcome the procedural default, on account of ineffective assistance of counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. That issue, however, is intertwined with the question of the merits of the claim, which has not yet been fully briefed. Therefore, the Court does not reach the question whether this claim is barred by the procedural default doctrine.

Ground 3D will be dismissed as barred by the statute of limitations.

Ground 3E

In Ground 3E of his second amended petition, Doyle claims that his trial counsel were ineffective, in violation of his federal constitutional rights, “for failing to prepare Mr. Doyle for his testimony.” Second Amended Petition (ECF No. 265), pp. 110-11.

Respondents argue that Ground 3E is barred by the statute of limitations. Doyle, however, argues that such a claim was incorporated into his original petition, and, therefore, Ground 3E relates back to the filing of the original petition. On page 10 of his *pro se* original petition, Doyle stated:

Petitioner is informed and believes that numerous additional meritorious claims exist under the Fifth, Sixth, Eighth, and Fourteenth Amendments that would demonstrate the invalidity of his conviction and

1 sentencing under the federal constitution. Such additional claims were not
2 raised in direct appeal or state post-conviction proceedings, due to the
3 ineffective assistance and/or conflicts of interest of previous counsel, and/or
4 the concealment of evidence by State actors. A list of potential claims that
5 Petitioner drew to the attention of post-conviction habeas counsel, but which
6 previous counsel ignored, is attached to this petition. Petitioner will seek to
7 amend this petition to include any actual constitutional claims, pursuant to
8 *McClesky v. Zant*, 499 U.S. 467 (1991), after counsel has been appointed
9 in this case and has conducted litigation necessary to file such a petition.
10 See *McFarland v. Scott*, 512 U.S. 849, 855-856 (1994).

11 Petition for Writ of Habeas Corpus, p. 10 (ECF No. 4, p. 10). Attached to the original
12 petition are documents, including an April 7, 1999, letter from Doyle to his state post-
13 conviction counsel, listing claims that Doyle apparently wanted his state post-conviction
14 counsel to assert. See Petition for Writ of Habeas Corpus (ECF No. 4, pp. 54-61). The
15 Court construes Doyle's *pro se* original petition liberally in determining what claims it
16 asserted. See *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010); *Zichko v. Idaho*, 247
17 F.3d 1015, 1020 (9th Cir. 2001). The Court determines that the additional claims listed in
18 the documents attached to Doyle's original petition (ECF No. 4, pp. 54-61) were included
19 in the original petition for purposes of the *Mayle* relation back analysis. One of those
20 claims was that: "Counsel failed to prepare me to take the stand prior to calling me to the
21 stand." Petition for Writ of Habeas Corpus (ECF No. 4, p. 54). Ground 3E relates back to
22 that claim in his original petition, and, consequently, is not barred by the statute of
23 limitations.

24 Respondents also argue that Ground 3E is procedurally defaulted. However, as
25 this is a claim of ineffective assistance of trial counsel, Doyle can possibly show cause
26 and prejudice to overcome the procedural default, on account of ineffective assistance of
27 counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. That issue, however,
28 is intertwined with the question of the merits of the claim, which has not yet been fully
briefed.

The Court will, therefore, deny respondents' motion to dismiss, with respect to
Ground 3E, without prejudice to respondents raising the procedural default defense in
their answer.

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Ground 3F

In Ground 3F of his second amended habeas petition, Doyle claims that his trial counsel were ineffective, in violation of his federal constitutional rights, for failing “to clarify when they could not hear or understand the trial judge.” Second Amended Petition (ECF No. 265), p. 111.

Respondents argue that Ground 3F is barred by the statute of limitations. Doyle makes no argument that Ground 3F relates back to his original petition, or any other argument that Ground 3F, specifically, is timely. There is no claim in Doyle’s original petition that arises from the same core of operative facts as Ground 3F. See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 3F does not relate back to the filing of Doyle’s original petition, and is barred by the statute of limitations.

Respondents also argue that Ground 3F is procedurally defaulted. However, as this is a claim of ineffective assistance of trial counsel, Doyle could possibly show cause and prejudice to overcome the procedural default, on account of ineffective assistance of counsel in his first state habeas action. See *Martinez*, 566 U.S. at 9. That issue, however, is intertwined with the question of the merits of the claim, which has not yet been fully briefed. Therefore, the Court does not reach the question whether this claim is barred by the procedural default doctrine.

Ground 3F will be dismissed as barred by the statute of limitations.

Ground 3G

In Ground 3G of his second amended petition, Doyle claims that his trial counsel were ineffective, in violation of his federal constitutional rights, “for failing to move to suppress the evidence recovered as a result of the search warrant.” Second Amended Petition (ECF No. 265), pp. 111-18.

Respondents do not argue that Ground 3G is barred by the statute of limitations. See Motion to Dismiss (ECF No. 277), p. 21. Ground 3G of Doyle’s second amended petition arises from the same core of operative facts as Ground 5(2) of his original petition,

1 and it therefore relates back to the filing of the original petition. See Petition for Writ of
2 Habeas Corpus (ECF No. 4), p. 8. Ground 3G is not barred by the statute of limitations.

3 Nor do respondents argue that Ground 3G is unexhausted or barred by the
4 procedural default doctrine. See Motion to Dismiss (ECF No. 277), p. 31.

5 Respondents' motion to dismiss will be denied with respect to Ground 3G.

6 Ground 3H

7 In Ground 3H of his second amended petition, Doyle claims that his trial counsel
8 were ineffective, in violation of his federal constitutional rights, "for failing to object to the
9 introduction of a pair of stained pants without any explanatory testimony." Second
10 Amended Petition (ECF No. 265), pp. 118-20.

11 Respondents do not argue that Ground 3H is barred by the statute of limitations.
12 See Motion to Dismiss (ECF No. 277), p. 21. Ground 3H of Doyle's second amended
13 petition arises from the same core of operative facts as Ground 5(3) of his original petition,
14 and it therefore relates back to the filing of the original petition. See Petition for Writ of
15 Habeas Corpus (ECF No. 4), p. 8. Ground 3H is not barred by the statute of limitations.

16 Nor do respondents argue that Ground 3H is unexhausted or barred by the
17 procedural default doctrine. See Motion to Dismiss (ECF No. 277), p. 31.

18 Respondents' motion to dismiss will be denied with respect to Ground 3H.

19 Ground 3I

20 In Ground 3I of his second amended petition, Doyle claims that his trial counsel
21 were ineffective, in violation of his federal constitutional rights, "for failing to object to
22 prejudicial and multiple enlarged photographs of the victim." Second Amended Petition
23 (ECF No. 265), pp. 120-21.

24 Respondents do not argue that Ground 3I is barred by the statute of limitations.
25 See Motion to Dismiss (ECF No. 277), p. 21. Ground 3I of Doyle's second amended
26 petition arises from the same core of operative facts as Ground 5(4) of his original petition,
27 and it therefore relates back to the filing of the original petition. See Petition for Writ of
28 Habeas Corpus (ECF No. 4), p. 8. Ground 3I is not barred by the statute of limitations.

1 Nor do respondents argue that Ground 3I is unexhausted or barred by the
2 procedural default doctrine. See Motion to Dismiss (ECF No. 277), p. 31.

3 Respondents' motion to dismiss will be denied with respect to Ground 3I.

4 Ground 3J

5 In Ground 3J of Doyle's second amended petition, he claims that his trial counsel
6 were ineffective, in violation of his federal constitutional rights, for failing "to present
7 evidence impeaching Michael Smith's testimony." Second Amended Petition (ECF No.
8 265), pp. 121-23.

9 Respondents argue that Ground 3J is barred by the statute of limitations. In
10 response, in part, Doyle argues that Ground 3J relates back, because in the supplemental
11 claims in the documents attached to his original petition, Doyle claimed: "Michael Smith
12 told Officer Moviglia and others that he would do anything to get a deal." See Opposition
13 to Motion to Dismiss (ECF No. 284), pp. 25-28. That claim shares a common core of
14 operative fact with Ground 3J of Doyle's second amended petition: the alleged
15 unreliability of Michael Smith's testimony. Ground 3J relates back to the filing of Doyle's
16 original petition, and is not barred by the statute of limitations.

17 Respondents also argue that Ground 3J is unexhausted in state court. See Motion
18 to Dismiss (ECF No. 277), pp. 32-33. In response, Doyle argues that he did raise the
19 claim in Ground 3J in his second state habeas action, and the Nevada courts declined to
20 rule on the claim in that action, on the ground of law of the case, meaning that the claim
21 must have been asserted and ruled upon on its merits previously in state court. See
22 Opposition to Motion to Dismiss (ECF No. 284), pp. 64-66. As support for this argument,
23 Doyle points to passages in his petition in his second state habeas action where he claims
24 ineffective assistance of counsel on account of counsel's failure to conduct a thorough,
25 independent, and complete investigation of easily obtainable impeachment evidence, and
26 he points to passages in other claims in the petition in which the reliability of Michael
27 Smith's testimony is questioned. See *id.* Those allegations, however, did not fairly inform
28 the state courts that Doyle intended to assert a claim like that in Ground 3J. Doyle did not

1 fairly present the factual bases for the ineffective assistance of counsel claim in Ground
2 3J to the state courts, in his second state habeas action, such as to give those courts an
3 opportunity to rule on that claim. The ineffective assistance of counsel claim in Ground 3J
4 is unexhausted in state court. As is discussed above, the anticipatory default doctrine
5 applies, and the Court considers the claims of ineffective assistance of counsel in Ground
6 3J to be technically exhausted, but procedurally defaulted. Inadequate assistance of
7 counsel in a first state habeas action may establish cause for the procedural default of a
8 claim of ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 9. This rule may
9 provide a means for Doyle to overcome the procedural default of the ineffective
10 assistance of trial counsel claim in Ground 3J. However, this issue is intertwined with the
11 merits of Ground 3J, such that it will be better addressed in conjunction with the merits of
12 the claim.

13 The Court will, therefore, deny respondents' motion to dismiss with respect to
14 Ground 3J, without prejudice to respondents asserting the anticipatory procedural default
15 defense to that claim in their answer.

16 Ground 3K

17 In Ground 3K of his second amended petition, Doyle claims that his trial counsel
18 were ineffective, in violation of his federal constitutional rights, "for failing to request an
19 instruction for the lesser-included offense of second-degree kidnapping." Second
20 Amended Petition (ECF No. 265), pp. 123-24.

21 Respondents argue that Ground 3K is barred by the statute of limitations. Doyle
22 makes no argument that Ground 3K relates back to his original petition, or any other
23 argument that Ground 3K, specifically, is timely. There is no claim in Doyle's original
24 petition that arises from the same core of operative facts as Ground 3K. *See* Petition for
25 Writ of Habeas Corpus (ECF No. 4). Ground 3K does not relate back to the filing of
26 Doyle's original petition, and is barred by the statute of limitations.

27 Respondents also argue that Ground 3K is unexhausted in state court. *See* Motion
28 to Dismiss (ECF No. 277), p. 33. Doyle makes no responsive argument that Ground 3K

1 is exhausted; instead, Doyle concedes that Ground 3K was not presented in state court.
2 See Opposition to Motion to Dismiss (ECF No. 284), pp. 85-88. As is discussed above,
3 the anticipatory default doctrine applies, and the Court considers the claims of ineffective
4 assistance of counsel in Ground 3K to be technically exhausted, but procedurally
5 defaulted. Inadequate assistance of counsel in a first state habeas action may establish
6 cause for the procedural default of a claim of ineffective assistance of trial counsel. See
7 *Martinez*, 566 U.S. at 9. This rule may provide a means for Doyle to overcome the
8 procedural default of the ineffective assistance of trial counsel claim in Ground 3J.
9 However, this issue is intertwined with the merits of Ground 3J, such that it will be better
10 addressed in conjunction with the merits of the claim. Therefore, the Court does not reach
11 the question whether this claim is barred by the procedural default doctrine.

12 Ground 3K will be dismissed as barred by the statute of limitations.

13 Ground 4

14 In Ground 4 of his second amended habeas petition, Doyle claims that his federal
15 constitutional rights were violated because “the prosecutor introduced statements made
16 by Mr. Doyle’s codefendant without affording Mr. Doyle the opportunity to cross-examine
17” Second Amended Petition (ECF No. 265), pp. 125-27.

18 Respondents argue that Ground 4 is barred by the statute of limitations. Doyle
19 makes no argument that Ground 4 relates back to his original petition, or any other
20 argument that Ground 4, specifically, is timely. There is no claim in Doyle’s original petition
21 that arises from the same core of operative facts as Ground 4. See Petition for Writ of
22 Habeas Corpus (ECF No. 4). Ground 4 does not relate back to the filing of Doyle’s original
23 petition, and is barred by the statute of limitations.

24 Respondents also argue that Ground 4 is procedurally defaulted. See Motion to
25 Dismiss (ECF No. 277), pp. 31-32. With respect to part of Ground 4 – all except the claim
26 of ineffective assistance of trial counsel – Doyle offers no argument, specific to Ground
27 4, to overcome the procedural default. With respect to the claim of ineffective assistance
28 of trial counsel in Ground 4, inadequate assistance of counsel in a first state habeas action

1 may establish cause for the procedural default of such a claim. See *Martinez*, 566 U.S.
2 at 9. This could provide a means for Doyle to overcome the procedural default of the
3 ineffective assistance of trial counsel claim in Ground 4. However, this issue is intertwined
4 with the question of the merits of Ground 4, and the briefing of the merits of the claim is
5 not complete. Therefore, the Court does not reach the question of the procedural default
6 of the ineffective assistance of trial counsel claim in Ground 4.

7 All of Ground 4, except the claim of ineffective assistance of trial counsel, will be
8 dismissed as barred by both the statute of limitations and the procedural default doctrine.
9 The claim of ineffective assistance of trial counsel in Ground 4 will be dismissed as barred
10 by the statute of limitations.

11 Ground 5

12 In Ground 5 of his second amended petition, Doyle claims that his federal
13 constitutional rights were violated “because of the admission of impermissible and unduly
14 prejudicial victim-impact evidence.” Second Amended Petition (ECF No. 265), pp. 128-
15 37.

16 Respondents argue that Ground 5 is barred by the statute of limitations. Doyle
17 makes no argument that Ground 5 relates back to his original petition, or any other
18 argument that Ground 5, specifically, is timely. There is no claim in Doyle’s original petition
19 that arises from the same core of operative facts as Ground 5. See Petition for Writ of
20 Habeas Corpus (ECF No. 4). Ground 5 does not relate back to the filing of Doyle’s original
21 petition, and is barred by the statute of limitations.

22 Respondents also argue that Ground 5 is barred by the procedural default doctrine.
23 See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle responds, arguing that the
24 Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
25 mandatory review under NRS § 177.055, and, therefore, is not procedurally defaulted.
26 See Opposition to Motion to Dismiss (ECF No. 287), pp. 80-81. Specifically, Doyle points
27 out that, under NRS § 177.055, the Nevada Supreme Court was required to determine
28 whether the death sentence was “imposed under the influence of passion, prejudice or

1 any arbitrary factor.” See *id.* The Court determines, however, that Doyle has not shown
2 that the claim at issue here was “clearly encompassed” within the scope of NRS § 177.055
3 and readily apparent in the record reviewed by the Nevada Supreme Court. Ground 5
4 was not exhausted on Doyle’s direct appeal, or in his first state habeas action, and, as a
5 result, is procedurally defaulted.

6 Ground 5 will be dismissed as barred by both the statute of limitations and the
7 procedural default doctrine.

8 Ground 6A1

9 In Ground 6A1 of his second amended petition, Doyle claims that his federal
10 constitutional rights were violated as a result of prosecutorial misconduct because “[t]he
11 prosecutor improperly argued about mercy.” Second Amended Petition (ECF No. 265),
12 p. 139.

13 Respondents argue that Ground 6A1 is barred by the statute of limitations. Doyle
14 makes no argument that Ground 6A1 relates back to his original petition, or any other
15 argument that Ground 6A1, specifically, is timely. There is no claim in Doyle’s original
16 petition that arises from the same core of operative facts as Ground 6A1. See Petition for
17 Writ of Habeas Corpus (ECF No. 4). Ground 6A1 does not relate back to the filing of
18 Doyle’s original petition, and is barred by the statute of limitations.

19 Respondents also argue that Ground 6A1 is barred by the procedural default
20 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
21 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
22 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
23 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
24 however, that Doyle has not shown that this claim was “clearly encompassed” within the
25 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
26 Supreme Court. Ground 6A1 was not exhausted on Doyle’s direct appeal, or in his first
27 state habeas action, and is subject to the procedural default doctrine. With respect to the
28 claim of ineffective assistance of trial counsel in Ground 6A1, inadequate assistance of

1 counsel in a first state habeas action may establish cause for the procedural default of
2 such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to
3 overcome the procedural default of the ineffective assistance of trial counsel claim in
4 Ground 6A1. However, this issue is intertwined with the question of the merits of Ground
5 6A1, and the briefing of the merits of the claim is not complete. Therefore, the Court does
6 not reach the question of the procedural default of the claim of ineffective assistance of
7 trial counsel in Ground 6A1.

8 All of Ground 6A1, except the claim of ineffective assistance of trial counsel, will
9 be dismissed as barred by both the statute of limitations and the procedural default
10 doctrine. The claim of ineffective assistance of trial counsel in Ground 6A1 will be
11 dismissed as barred by the statute of limitations.

12 Ground 6A2

13 In Ground 6A2 of his second amended petition, Doyle claims that his federal
14 constitutional rights were violated as a result of prosecutorial misconduct because “[t]he
15 prosecutor misled the jury about life with parole sentencing.” Second Amended Petition
16 (ECF No. 265), pp. 140-41.

17 Respondents argue that Ground 6A2 is barred by the statute of limitations. Doyle
18 makes no argument that Ground 6A2 relates back to his original petition, or any other
19 argument that Ground 6A2, specifically, is timely. There is no claim in Doyle’s original
20 petition that arises from the same core of operative facts as Ground 6A2. See Petition for
21 Writ of Habeas Corpus (ECF No. 4). Ground 6A2 does not relate back to the filing of
22 Doyle’s original petition. Ground 6A2 is barred by the statute of limitations.

23 Respondents also argue that Ground 6A2 is barred by the procedural default
24 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
25 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
26 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
27 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
28 however, that Doyle has not shown that this claim was “clearly encompassed” within the

1 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
2 Supreme Court. Ground 6A2 was not exhausted on Doyle's direct appeal, or in his first
3 state habeas action, and is subject to the procedural default doctrine. Therefore, part of
4 Ground 6A2 – all except the claim of ineffective assistance of trial counsel – is subject to
5 dismissal as procedurally defaulted. With respect to the claim of ineffective assistance of
6 trial counsel in Ground 6A2, inadequate assistance of counsel in a first state habeas
7 action may establish cause for the procedural default of such a claim. *See Martinez*, 566
8 U.S. at 9. This could provide a means for Doyle to overcome the procedural default of the
9 ineffective assistance of trial counsel claim in Ground 6A2. However, that issue is
10 intertwined with the question of the merits of Ground 6A2, and the briefing of the merits
11 of the claim is not complete. Therefore, the Court does not reach the question of the
12 procedural default of the claim of ineffective assistance of trial counsel in Ground 6A2.

13 All of Ground 6A2, except the claim of ineffective assistance of trial counsel, will
14 be dismissed as barred by both the statute of limitations and the procedural default
15 doctrine. The claim of ineffective assistance of trial counsel in Ground 6A2 will be
16 dismissed as barred by the statute of limitations.

17 Ground 6A3

18 In Ground 6A3 of his second amended petition, Doyle claims that his federal
19 constitutional rights were violated as a result of prosecutorial misconduct because “[t]he
20 prosecutor mislead the jury about mitigation.” Second Amended Petition (ECF No. 265),
21 pp. 141-42.

22 Respondents argue that Ground 6A3 is barred by the statute of limitations. Doyle
23 makes no argument that Ground 6A3 relates back to his original petition, or any other
24 argument that Ground 6A3, specifically, is timely. There is no claim in Doyle's original
25 petition that arises from the same core of operative facts as Ground 6A3. *See* Petition for
26 Writ of Habeas Corpus (ECF No. 4). Ground 6A3 does not relate back to the filing of
27 Doyle's original petition, and is barred by the statute of limitations.

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1 Respondents also argue that Ground 6A3 is barred by the procedural default
2 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
3 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
4 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
5 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
6 however, that Doyle has not shown that this claim was “clearly encompassed” within the
7 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
8 Supreme Court. Ground 6A3 was not exhausted on Doyle’s direct appeal, or in his first
9 state habeas action, and is subject to the procedural default doctrine. Therefore, part of
10 Ground 6A3 – all except the claim of ineffective assistance of trial counsel – is subject to
11 dismissal as procedurally defaulted. With respect to the claim of ineffective assistance of
12 trial counsel in Ground 6A3, inadequate assistance of counsel in a first state habeas
13 action may establish cause for the procedural default of such a claim. See *Martinez*, 566
14 U.S. at 9. This could provide a means for Doyle to overcome the procedural default of the
15 ineffective assistance of trial counsel claim in Ground 6A3. However, that issue is
16 intertwined with the question of the merits of Ground 6A3, and the briefing of the merits
17 of the claim is not complete. Therefore, the Court does not reach the question of the
18 procedural default of the claim of ineffective assistance of trial counsel in Ground 6A3.

19 All of Ground 6A3, except the claim of ineffective assistance of trial counsel, will
20 be dismissed as barred by both the statute of limitations and the procedural default
21 doctrine. The claim of ineffective assistance of trial counsel in Ground 6A3 will be
22 dismissed as barred by the statute of limitations.

23 Ground 6A4

24 In Ground 6A4 of his second amended petition, Doyle claims that his federal
25 constitutional rights were violated as a result of prosecutorial misconduct because “[t]he
26 prosecutor improperly expressed his opinion about the propriety of the death penalty.”
27 Second Amended Petition (ECF No. 265), p. 142.

1 Respondents argue that Ground 6A4 is barred by the statute of limitations. Doyle
2 makes no argument that Ground 6A4 relates back to his original petition, or any other
3 argument that Ground 6A4, specifically, is timely. There is no claim in Doyle's original
4 petition that arises from the same core of operative facts as Ground 6A4. See Petition for
5 Writ of Habeas Corpus (ECF No. 4). Ground 6A4 does not relate back to the filing of
6 Doyle's original petition. Ground 6A4 is barred by the statute of limitations.

7 Respondents also argue that Ground 6A4 is barred by the procedural default
8 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
9 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
10 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
11 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
12 however, that Doyle has not shown that this claim was "clearly encompassed" within the
13 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
14 Supreme Court. Ground 6A4 was not exhausted on Doyle's direct appeal, or in his first
15 state habeas action, and is subject to the procedural default doctrine. Therefore, part of
16 Ground 6A4 – all except the claim of ineffective assistance of trial counsel – is subject to
17 dismissal as procedurally defaulted. With respect to the claim of ineffective assistance of
18 trial counsel in Ground 6A4, inadequate assistance of counsel in a first state habeas
19 action may establish cause for the procedural default of such a claim. See *Martinez*, 566
20 U.S. at 9. This could provide a means for Doyle to overcome the procedural default of the
21 ineffective assistance of trial counsel claim in Ground 6A4. However, that issue is
22 intertwined with the question of the merits of Ground 6A4, and the briefing of the merits
23 of the claim is not complete. Therefore, the Court does not reach the question of the
24 procedural default of the claim of ineffective assistance of trial counsel in Ground 6A4.

25 All of Ground 6A4, except the claim of ineffective assistance of trial counsel, will
26 be dismissed as barred by both the statute of limitations and the procedural default
27 doctrine. The claim of ineffective assistance of trial counsel in Ground 6A4 will be
28 dismissed as barred by the statute of limitations.

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Ground 6A5

In Ground 6A5 of his second amended petition, Doyle claims that his federal constitutional rights were violated as a result of prosecutorial misconduct because “[t]he prosecutor scared the jury into sentencing Mr. Doyle to death.” Second Amended Petition (ECF No. 265), p. 143.

Respondents argue that Ground 6A5 is barred by the statute of limitations. Doyle makes no argument that Ground 6A5 relates back to his original petition, or any other argument that Ground 6A5, specifically, is timely. There is no claim in Doyle’s original petition that arises from the same core of operative facts as Ground 6A5. See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 6A5 does not relate back to the filing of Doyle’s original petition, and is barred by the statute of limitations.

Respondents also argue that Ground 6A5 is barred by the procedural default doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted. See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines, however, that Doyle has not shown that this claim was “clearly encompassed” within the scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada Supreme Court. Ground 6A5 was not exhausted on Doyle’s direct appeal, or in his first state habeas action, and is subject to the procedural default doctrine. Therefore, part of Ground 6A5 – all except the claim of ineffective assistance of trial counsel – is subject to dismissal as procedurally defaulted. With respect to the claim of ineffective assistance of trial counsel in Ground 6A5, inadequate assistance of counsel in a first state habeas action may establish cause for the procedural default of such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to overcome the procedural default of the ineffective assistance of trial counsel claim in Ground 6A5. However, that issue is intertwined with the question of the merits of Ground 6A5, and the briefing of the merits

1 of the claim is not complete. Therefore, the Court does not reach the question of the
2 procedural default of the claim of ineffective assistance of trial counsel in Ground 6A5.

3 All of Ground 6A5, except the claim of ineffective assistance of trial counsel, will
4 be dismissed as barred by both the statute of limitations and the procedural default
5 doctrine. The claim of ineffective assistance of trial counsel in Ground 6A5 will be
6 dismissed as barred by the statute of limitations.

7 Ground 6A6

8 In Ground 6A6 of his second amended petition, Doyle claims that his federal
9 constitutional rights were violated as a result of prosecutorial misconduct because “[t]he
10 prosecutor improperly equated the death penalty with self-defense.” Second Amended
11 Petition (ECF No. 265), p. 144.

12 Respondents argue that Ground 6A6 is barred by the statute of limitations. Doyle
13 makes no argument that Ground 6A6 relates back to his original petition, or any other
14 argument that Ground 6A6, specifically, is timely. There is no claim in Doyle’s original
15 petition that arises from the same core of operative facts as Ground 6A6. See Petition for
16 Writ of Habeas Corpus (ECF No. 4). Ground 6A6 does not relate back to the filing of
17 Doyle’s original petition, and is barred by the statute of limitations.

18 Respondents also argue that Ground 6A6 is barred by the procedural default
19 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
20 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
21 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
22 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
23 however, that Doyle has not shown that this claim was “clearly encompassed” within the
24 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
25 Supreme Court. Ground 6A6 was not exhausted on Doyle’s direct appeal, or in his first
26 state habeas action, and is subject to the procedural default doctrine. Therefore, part of
27 Ground 6A6 – all except the claim of ineffective assistance of trial counsel – is subject to
28 dismissal as procedurally defaulted. With respect to the claim of ineffective assistance of

1 trial counsel in Ground 6A6, inadequate assistance of counsel in a first state habeas
2 action may establish cause for the procedural default of such a claim. See *Martinez*, 566
3 U.S. at 9. This could provide a means for Doyle to overcome the procedural default of the
4 ineffective assistance of trial counsel claim in Ground 6A6. However, that issue is
5 intertwined with the question of the merits of Ground 6A6, and the briefing of the merits
6 of the claim is not complete. Therefore, the Court does not reach the question of the
7 procedural default of the claim of ineffective assistance of trial counsel in Ground 6A6.

8 All of Ground 6A6, except the claim of ineffective assistance of trial counsel, will
9 be dismissed as barred by both the statute of limitations and the procedural default
10 doctrine. The claim of ineffective assistance of trial counsel in Ground 6A6 will be
11 dismissed as barred by the statute of limitations.

12 Ground 6A7

13 In Ground 6A7 of his second amended petition, Doyle claims that his federal
14 constitutional rights were violated as a result of prosecutorial misconduct because “[t]he
15 prosecutor misled the jury about Mr. Doyle’s involvement in a drive-by shooting.” Second
16 Amended Petition (ECF No. 265), pp. 144-45.

17 Respondents argue that Ground 6A7 is barred by the statute of limitations. There
18 is no claim in Doyle’s original petition that arises from the same core of operative facts.
19 See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 6A7 does not relate back to
20 the filing of Doyle’s original petition. Doyle argues, however, that Ground 6A7 is timely
21 because the factual predicate of the claim could not previously “have been discovered
22 through the exercise of due diligence.” See Opposition to Motion to Dismiss (ECF No.
23 284), pp. 28-29; see also 28 U.S.C. § 2244(d)(1)(D). Doyle’s argument is without merit.
24 The point of Ground 6A7 is that the subject argument of the prosecutor was not supported
25 by evidence presented by the prosecution at trial. See Second Amended Petition (ECF
26 No. 265), p. 144. The only evidence cited in Ground 6A7, in support of the claim, is trial
27 testimony. The factual predicate of the claim was apparent at trial. 28 U.S.C. §
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1 2244(d)(1)(D) does not save Ground 6A7 from the operation of the statute of limitations.
2 Ground 6A7 is barred by the statute of limitations.

3 Respondents also argue that Ground 6A7 is barred by the procedural default
4 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
5 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
6 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
7 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
8 however, that Doyle has not shown that this claim was “clearly encompassed” within the
9 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
10 Supreme Court. Ground 6A7 was not exhausted on Doyle’s direct appeal, or in his first
11 state habeas action, and is subject to the procedural default doctrine. Doyle also argues,
12 however, that he can overcome the procedural default of Ground 6A7 by showing cause
13 and prejudice on account of the State’s suppression of evidence, and also, with respect
14 to the claim of ineffective assistance of trial counsel in Ground 6A7, on account of
15 ineffective assistance of counsel in his first state habeas action. See *Martinez*, 566 U.S.
16 at 9; *Strickler v. Greene*, 527 U.S. 263, 282 (1999). Those issues are intertwined with the
17 question of the merits of the claim, which has not yet been fully briefed. Therefore, the
18 Court does not reach the question whether this claim is barred by the procedural default
19 doctrine.

20 Ground 6A7 will be dismissed as barred by the statute of limitations.

21 Ground 6A8

22 In Ground 6A8, Doyle claims that his federal constitutional rights were violated as
23 a result of prosecutorial misconduct because “[t]he prosecutor misrepresented the
24 testimony of Gary and Maria Mason.” Second Amended Petition (ECF No. 265), pp. 145-
25 47.

26 Respondents argue that Ground 6A8 is barred by the statute of limitations. There
27 is no claim in Doyle’s original petition that arises from the same core of operative facts.
28 See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 6A8 does not relate back to

1 the filing of Doyle's original petition. Doyle argues, however, that Ground 6A8 is timely
2 because the factual predicate of the claim could not previously "have been discovered
3 through the exercise of due diligence." See Opposition to Motion to Dismiss (ECF No.
4 284), pp. 29-31; see *also* 28 U.S.C. § 2244(d)(1)(D). Specifically, Doyle argues that his
5 claim is based on a document – a report of an arrest of Ebony Mason – that he obtained
6 in discovery in this case on February 6, 2008. See Opposition to Motion to Dismiss (ECF
7 No. 284), pp. 30-31. Doyle included this claim in his first amended petition, which was
8 filed about three months later, on May 14, 2008. See First Amended Petition (ECF No.
9 168), pp. 119-21. There is no indication that Doyle could have discovered this document
10 earlier through the exercise of due diligence. The Court determines that Ground 6A8 was
11 timely asserted in Doyle's first amended petition, and is not barred by the statute of
12 limitations.

13 Respondents also argue that Ground 6A8 is barred by the procedural default
14 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
15 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
16 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
17 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
18 however, that Doyle has not shown that this claim was "clearly encompassed" within the
19 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
20 Supreme Court. Ground 6A8 was not exhausted on Doyle's direct appeal, or in his first
21 state habeas action. Therefore, part of Ground 6A8 – all except the claim of ineffective
22 assistance of trial counsel – is subject to dismissal as procedurally defaulted. With respect
23 to the claim of ineffective assistance of trial counsel in Ground 6A8, inadequate
24 assistance of counsel in a first state habeas action may establish cause for the procedural
25 default of such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle
26 to overcome the procedural default of the ineffective assistance of trial counsel claim in
27 Ground 6A8. However, this issue is intertwined with the question of the merits of Ground
28 6A8, and the briefing of the merits of the claim is not complete.

1 Therefore, all of Ground 6A8, except the claim of ineffective assistance of trial
2 counsel, will be dismissed as barred by the procedural default doctrine. The Court will
3 deny the motion to dismiss with respect to the ineffective assistance of trial counsel claim
4 in Ground 6A8, without prejudice to respondents asserting the procedural default defense
5 in their answer.

6 Ground 7

7 In Ground 7 of his second amended petition, Doyle claims that his federal
8 constitutional rights were violated “because the prosecutors failed to disclose material
9 evidence under *Brady v. Maryland*, and knowingly presented false testimony in violation
10 of *Napue v. Illinois*. Second Amended Petition (ECF No. 265), pp. 148-69; *see also Brady*
11 *v. Maryland*, 373 U.S. 83 (1963).

12 Respondents argue that Ground 7 is barred by the statute of limitations. There is
13 no claim in Doyle’s original petition that arises from the same core of operative facts. *See*
14 *Petition for Writ of Habeas Corpus* (ECF No. 4). Ground 7 does not relate back to the
15 filing of Doyle’s original petition. Doyle argues that Ground 7 is timely because the factual
16 predicate of the claim could not previously “have been discovered through the exercise
17 of due diligence.” *See Opposition to Motion to Dismiss* (ECF No. 284), pp. 19-22; *see*
18 *also* 28 U.S.C. § 2244(d)(1)(D). Doyle states that he discovered the factual predicate of
19 the claim through discovery and investigation done in this case between 2000 and 2004.
20 *See Opposition to Motion to Dismiss* (ECF No. 284), p. 33. That, however, was more than
21 three years before Doyle filed his first amended petition; Doyle’s argument does not
22 account for that delay. 28 U.S.C. § 2244(d)(1)(D) does not save Ground 7 from the
23 operation of the statute of limitations. Ground 7 is barred by the statute of limitations.

24 Respondents also argue that Ground 6A8 is barred by the procedural default
25 doctrine. *See Motion to Dismiss* (ECF No. 277), pp. 31-32. Doyle argues that he can
26 overcome the procedural default of Ground 7 by showing cause and prejudice on account
27 of the State’s suppression of evidence, and also, with respect to the claim of ineffective
28 assistance of trial counsel in Ground 7, on account of ineffective assistance of counsel in

1 his first state habeas action. See *Martinez*, 566 U.S. at 9; *Strickler*, 527 U.S. at 282. Those
2 issues, however, are intertwined with the question of the merits of the claim, which has
3 not yet been fully briefed. Therefore, the Court does not reach the question whether this
4 claim is barred by the procedural default doctrine.

5 Ground 7 will be dismissed as barred by the statute of limitations.

6 Ground 8E1

7 In Ground 8E1 of his second amended petition, Doyle claims that his federal
8 constitutional rights were violated because “Mr. Doyle cannot be guilty of both first-degree
9 kidnapping predicated on murder and first-degree murder predicated on kidnapping.”
10 Second Amended Petition (ECF No. 265), pp. 176-79.

11 Respondents argue that Ground 8E1 is barred by the statute of limitations because
12 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
13 8E1 relates back to his original petition, or any other argument that Ground 8E1,
14 specifically, is timely. There is no claim in Doyle’s original petition that arises from the
15 same core of operative facts as Ground 8E1. See Petition for Writ of Habeas Corpus
16 (ECF No. 4). Ground 8E1 does not relate back to the filing of Doyle’s original petition.
17 Ground 8E1 is barred by the statute of limitations.

18 Respondents also argue that Ground 8E1 is unexhausted in state court. See
19 Motion to Dismiss (ECF No. 277), pp. 34-35. In response, Doyle argues that he did raise
20 the claim in Ground 8E1 in his second state habeas action. See Opposition to Motion to
21 Dismiss (ECF No. 284), pp. 66-68. As support for this argument, Doyle points to passages
22 in Claim 8 of his petition in his second state habeas action, in which he claimed that his
23 federal constitutional rights were violated because the prosecutors used the same acts to
24 support his conviction of murder and to support an aggravating circumstance. See *id.*;
25 Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 295, pp. 145-49 (ECF No.
26 265-3, pp. 146-50). That claim, however, was different from the claim in Ground 8E1.
27 Doyle did not fairly present the factual or legal bases for the claim in Ground 8E1 to the
28 state courts in his second state habeas action, such as to give those courts an opportunity

1 to rule on that claim. Ground 8E1 is unexhausted in state court. As is discussed above,
2 the anticipatory default doctrine applies, and the Court considers Ground 8E1 to be
3 technically exhausted, but procedurally defaulted. Doyle does not make any argument,
4 specific to Ground 8E1, that he can overcome the anticipatory procedural default of that
5 claim.

6 Ground 8E1 will be dismissed as barred by both the statute of limitations and the
7 procedural default doctrine.

8 Ground 8E2

9 In Ground 8E2 of his second amended petition, Doyle claims that his federal
10 constitutional rights were violated because “[t]he invalidity of Mr. Doyle’s sexual assault
11 conviction invalidates his first-degree kidnapping and first-degree murder convictions.”
12 Second Amended Petition (ECF No. 265), pp. 179-83.

13 Respondents argue that Ground 8E2 is barred by the statute of limitations because
14 it does not relate back to Doyle’s original petition. Doyle argues that Ground 8E2 relates
15 back to his original petition because he attached to his original petition a copy of the
16 Nevada Supreme Court’s opinion on his direct appeal, in which that court vacated his
17 sexual assault conviction and “analyzed the connectedness of [his] sexual assault,
18 murder, and kidnapping convictions.” Opposition to Motion to Dismiss (ECF No. 284), pp.
19 35-36. The Court finds this argument to be meritless. There is nothing in Doyle’s original
20 petition indicating that any portion of the Nevada Supreme Court’s opinion was
21 incorporated into that petition to state a claim. Ground 8E2 does not relate back to Doyle’s
22 original petition, and is barred by the statute of limitations.

23 Respondents also argue that Ground 8E2 is unexhausted in state court. See
24 Motion to Dismiss (ECF No. 277), pp. 34-35. In response, Doyle argues that he raised
25 the claim in Ground 8E2 on his direct appeal. See Opposition to Motion to Dismiss (ECF
26 No. 284), pp. 68-69. Doyle points out that on his direct appeal, he argued, successfully,
27 that there was insufficient evidence to support the sexual assault conviction, because the
28 victim may have been dead before the sexual assault occurred; however, Doyle does not

1 show that he argued on his direct appeal that, as a matter of federal constitutional law,
2 invalidating the sexual assault conviction necessarily invalidated his kidnapping and
3 murder convictions. On his direct appeal, Doyle did not fairly present the factual or legal
4 bases for the claim in Ground 8E2 to the Nevada Supreme Court, such as to give that
5 court an opportunity to rule on that claim. Ground 8E2 is unexhausted in state court. As
6 is discussed above, the anticipatory default doctrine applies, and the Court considers
7 Ground 8E2 to be technically exhausted, but procedurally defaulted. Doyle does not make
8 any argument, specific to Ground 8E2, that he can overcome the anticipatory procedural
9 default of that claim.

10 Ground 8E2 will be dismissed as barred by both the statute of limitations and the
11 procedural default doctrine.

12 Ground 8E3

13 In Ground 8E3 of his second amended petition, Doyle claims that his federal
14 constitutional rights were violated because “[t]he Nevada Supreme Court improperly
15 reweighed Mr. Doyle’s aggravating and mitigating circumstances after striking the
16 kidnapping aggravating circumstance.” Second Amended Petition (ECF No. 265), pp.
17 183-87.

18 Respondents argue that Ground 8E3 is barred by the statute of limitations because
19 it does not relate back to Doyle’s original petition. Doyle points out, however, that the
20 factual predicate of this claim only arose when the Nevada Supreme Court ruled on the
21 appeal in his second state habeas action. See Opposition to Motion to Dismiss (ECF No.
22 284), pp. 37-38. The Nevada Supreme Court issued that ruling on September 22, 2015,
23 and denied rehearing on December 2, 2015. See Order of Affirmance, Exhibit 304 (ECF
24 No. 266-6); Order Denying Rehearing, Exhibit 306 (ECF No. 266-8). After the United
25 States Supreme Court denied certiorari on May 2, 2016, the Nevada Supreme Court
26 issued its remittitur on May 6, 2016. See *Doyle v. Nevada*, 136 S.Ct. 1829 (2016);
27 Remittitur, Exhibit 1 to Motion to Vacate Stay (ECF No. 256-1). Doyle filed his second
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1 amended petition in this action less than six months later, on October 28, 2016. Ground
2 8E3 is not barred by the statute of limitations. See 28 U.S.C. § 2244(d)(1)(D).

3 Respondents also argue that Ground 8E3 is barred by the procedural default
4 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle makes no argument,
5 specific to Ground 8E3, to the contrary. There is no showing that Doyle has ever asserted
6 the claim in Ground 8E3 in the state courts, in a manner such that it was not procedurally
7 barred. And, the Court determines that Ground 8E3 would be procedurally barred if Doyle
8 were to return to state court to present that claim. Therefore, the anticipatory default
9 doctrine applies, and the Court considers this claim to be technically exhausted, but
10 procedurally defaulted. Doyle does not make any argument, specific to Ground 8E3, that
11 he can overcome the procedural default of that claim.

12 Ground 8E3 will be dismissed as barred by the procedural default doctrine.

13 Ground 9A1

14 In Ground 9A1 of his second amended petition, Doyle claims that his federal
15 constitutional rights were violated, in the guilt phase of his trial, as a result of improper
16 jury instructions, because “[t]he trial court failed to properly instruct the jury as to the
17 elements of first-degree premeditated and deliberate murder.” Second Amended Petition
18 (ECF No. 265), pp. 188-94.

19 Respondents argue that Ground 9A1 is barred by the statute of limitations because
20 it does not relate back to Doyle’s original petition. Doyle argues in response that Ground
21 9A1 relates back to Ground 3 in his original petition. See Opposition to Motion to Dismiss
22 (ECF No. 284), pp. 51-53; Petition for Writ of Habeas Corpus (ECF No. 4), p. 5. In reply,
23 respondents would further parse Ground 9A1, and argue that, to the extent it includes
24 consideration of the felony-murder instruction given at Doyle’s trial, it does not relate back.
25 The Court disagrees; Ground 9A1, in its entirety, deals with the question of the jury
26 instructions’ definition of premeditation, and it relates back to Ground 3 in Doyle’s original
27 petition. Ground 9A1 is not barred by the statute of limitations.

1 Respondents do not argue that Ground 9A1 is unexhausted or barred by the
2 procedural default doctrine. See Motion to Dismiss (ECF No. 277), p. 31.

3 Respondents' motion to dismiss will be denied with respect to Ground 9A1.

4 Ground 9A2

5 In Ground 9A2 of his second amended petition, Doyle claims that his federal
6 constitutional rights were violated, in the guilt phase of his trial, as a result of improper
7 jury instructions, because "[t]he trial court's reasonable doubt instruction was improper."
8 Second Amended Petition (ECF No. 265), pp. 194-96.

9 Respondents argue that Ground 9A2 is barred by the statute of limitations because
10 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
11 9A2 relates back to his original petition, or any other argument that Ground 9A2,
12 specifically, is timely. There is no claim in Doyle's original petition that arises from the
13 same core of operative facts as Ground 9A2. See Petition for Writ of Habeas Corpus
14 (ECF No. 4). Ground 9A2 does not relate back to the filing of Doyle's original petition.
15 Ground 9A2 is barred by the statute of limitations.

16 Respondents also argue that Ground 9A2 is barred by the procedural default
17 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle makes no argument,
18 specific to Ground 9A2, to the contrary.

19 Ground 9A2 will be dismissed as barred by both the statute of limitations and the
20 procedural default doctrine.

21 Ground 9A3

22 In Ground 9A3 of his second amended petition, Doyle claims that his federal
23 constitutional rights were violated, in the guilt phase of his trial, as a result of improper
24 jury instructions, because "[t]he trial court's malice aforethought instruction was
25 improper." Second Amended Petition (ECF No. 265), pp. 196-97.

26 It is unclear whether respondents contend, in their motion to dismiss, whether
27 Ground 9A3 is barred by the statute of limitations. See Motion to Dismiss (ECF No. 277),
28 p. 26. And, perhaps as a result of that ambiguity, Doyle did not make any argument in his

1 opposition to the motion to dismiss particular to Ground 9A3. At any rate, the Court
2 determines that Ground 9A3 relates back to Ground 4 of Doyle's original petition, and is
3 not barred by the statute of limitations.

4 Respondents do not argue that Ground 9A3 is unexhausted or barred by the
5 procedural default doctrine. See Motion to Dismiss (ECF No. 277), p. 31.

6 Respondents' motion to dismiss will be denied with respect to Ground 9A3.

7 Ground 9A4

8 In Ground 9A4 of his second amended petition, Doyle claims that his federal
9 constitutional rights were violated, in the guilt phase of his trial, as a result of improper
10 jury instructions, because "[t]he trial court's specific intent instruction was improper."
11 Second Amended Petition (ECF No. 265), pp. 197-200.

12 Respondents argue that Ground 9A4 is barred by the statute of limitations because
13 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
14 9A4 relates back to his original petition, or any other argument that Ground 9A4,
15 specifically, is timely. There is no claim in Doyle's original petition that arises from the
16 same core of operative facts as Ground 9A4. See Petition for Writ of Habeas Corpus
17 (ECF No. 4). Ground 9A4 does not relate back to the filing of Doyle's original petition.
18 Ground 9A4 is barred by the statute of limitations.

19 Respondents also argue that Ground 9A4 is barred by the procedural default
20 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle makes no argument,
21 specific to Ground 9A4, to the contrary.

22 Ground 9A4 will be dismissed as barred by both the statute of limitations and the
23 procedural default doctrine.

24 Ground 9A5

25 In Ground 9A5 of his second amended petition, Doyle claims that his federal
26 constitutional rights were violated, in the guilt phase of his trial, as a result of improper
27 jury instructions, because "[t]he trial court's guilt or innocence instruction was improper."
28 Second Amended Petition (ECF No. 265), pp. 200-01.

1 Respondents argue that Ground 9A5 is barred by the statute of limitations because
2 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
3 9A5 relates back to his original petition, or any other argument that Ground 9A5,
4 specifically, is timely. There is no claim in Doyle's original petition that arises from the
5 same core of operative facts as Ground 9A5. See Petition for Writ of Habeas Corpus
6 (ECF No. 4). Ground 9A5 does not relate back to the filing of Doyle's original petition.
7 Ground 9A5 is barred by the statute of limitations.

8 Respondents argue that Ground 9A5 is procedurally defaulted. See Motion to
9 Dismiss (ECF No. 277), p. 31. With respect to all of Ground 9A5, except the claim of
10 ineffective assistance of trial counsel, Doyle offers no argument, specific to Ground 9A5,
11 to overcome the procedural default. With respect to the claim of ineffective assistance of
12 trial counsel in Ground 9A5, inadequate assistance of counsel in a first state habeas
13 action may establish cause for the procedural default of such a claim. See *Martinez*, 566
14 U.S. at 9. This could provide a means for Doyle to overcome the procedural default of the
15 ineffective assistance of trial counsel claim in Ground 9A5. However, this issue is
16 intertwined with the question of the merits of Ground 9A5, and the briefing of the merits
17 of the claim is not complete. The Court does not reach the question of the procedural
18 default of the claim of ineffective assistance of trial counsel in Ground 9A5.

19 All of Ground 9A5, except the claim of ineffective assistance of trial counsel, will
20 be dismissed as barred by both the statute of limitations and the procedural default
21 doctrine. The claim of ineffective assistance of trial counsel in Ground 9A5 will be
22 dismissed as barred by the statute of limitations.

23 Ground 9A6

24 In Ground 9A6 of his second amended petition, Doyle claims that his federal
25 constitutional rights were violated, in the guilt phase of his trial, as a result of improper
26 jury instructions, because “[t]he kidnapping instructions reduced the state’s burden of
27 proof, allowing the jury to find first-degree kidnapping based merely on second-degree
28 kidnapping.” Second Amended Petition (ECF No. 265), pp. 201-06.

1 Respondents argue that Ground 9A6 is barred by the statute of limitations because
2 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
3 9A6 relates back to his original petition, or any other argument that Ground 9A6,
4 specifically, is timely. There is no claim in Doyle's original petition that arises from the
5 same core of operative facts as Ground 9A6. See Petition for Writ of Habeas Corpus
6 (ECF No. 4). Ground 9A6 does not relate back to the filing of Doyle's original petition.
7 Ground 9A6 is barred by the statute of limitations.

8 Respondents also argue that Ground 9A6 is unexhausted in state court. See
9 Motion to Dismiss (ECF No. 277), p. 36. Doyle concedes as much. See Opposition to
10 Motion to Dismiss (ECF No. 284), pp. 85-88. As is discussed above, the anticipatory
11 default doctrine applies, and the Court considers Ground 9A6 to be technically exhausted,
12 but procedurally defaulted. Doyle does not make any argument, specific to Ground 9A6,
13 that he can overcome the anticipatory procedural default of that claim.

14 Ground 9A6 will be dismissed as barred by both the statute of limitations and the
15 procedural default doctrine.

16 Ground 9B1

17 In Ground 9B1 of his second amended petition, Doyle claims that his federal
18 constitutional rights were violated, in the penalty phase of his trial, as a result of improper
19 jury instructions, because "[t]he trial court improperly answered the jury's question
20 regarding comparative culpability." Second Amended Petition (ECF No. 265), pp. 207-09.

21 Respondents argue that Ground 9B1 is barred by the statute of limitations because
22 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
23 9B1 relates back to his original petition, or any other argument that Ground 9B1,
24 specifically, is timely. There is no claim in Doyle's original petition that arises from the
25 same core of operative facts as Ground 9B1. See Petition for Writ of Habeas Corpus
26 (ECF No. 4). Ground 9B1 does not relate back to the filing of Doyle's original petition.
27 Ground 9B1 is barred by the statute of limitations.

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1 Respondents also argue that Ground 9B1 is barred by the procedural default
2 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
3 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
4 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
5 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
6 however, that Doyle has not shown that this claim was “clearly encompassed” within the
7 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
8 Supreme Court. Ground 9B1 was not exhausted on Doyle’s direct appeal, or in his first
9 state habeas action, and is subject to the procedural default doctrine. Doyle makes no
10 other argument, specific to Ground 9B1, that he can overcome the procedural default of
11 that claim.

12 Ground 9B1 will be dismissed as barred by both the statute of limitations and the
13 procedural default doctrine.

14 Ground 9B2

15 In Ground 9B2 of his second amended petition, Doyle claims that his federal
16 constitutional rights were violated, in the penalty phase of his trial, as a result of improper
17 jury instructions, because “[t]he trial court improperly failed to give the presumption of life
18 instruction.” Second Amended Petition (ECF No. 265), pp. 209-11.

19 Respondents argue that Ground 9B2 is barred by the statute of limitations because
20 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
21 9B2 relates back to his original petition, or any other argument that Ground 9B2,
22 specifically, is timely. There is no claim in Doyle’s original petition that arises from the
23 same core of operative facts as Ground 9B2. See Petition for Writ of Habeas Corpus
24 (ECF No. 4). Ground 9B2 does not relate back to the filing of Doyle’s original petition.
25 Ground 9B2 is barred by the statute of limitations.

26 Respondents also argue that Ground 9B2 is barred by the procedural default
27 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
28 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its

1 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
2 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
3 however, that Doyle has not shown that this claim was “clearly encompassed” within the
4 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
5 Supreme Court. Ground 9B2 was not exhausted on Doyle’s direct appeal, or in his first
6 state habeas action, and is subject to the procedural default doctrine. Doyle makes no
7 other argument, specific to Ground 9B2, that he can overcome the procedural default of
8 that claim.

9 Ground 9B2 will be dismissed as barred by both the statute of limitations and the
10 procedural default doctrine.

11 Ground 9B3

12 In Ground 9B3 of his second amended petition, Doyle claims that his federal
13 constitutional rights were violated, in the penalty phase of his trial, as a result of improper
14 jury instructions, because “[t]he trial court’s reasonable doubt instruction was improper.”
15 Second Amended Petition (ECF No. 265), p. 211.

16 Respondents argue that Ground 9B3 is barred by the statute of limitations because
17 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
18 9B3 relates back to his original petition, or any other argument that Ground 9B3,
19 specifically, is timely. There is no claim in Doyle’s original petition that arises from the
20 same core of operative facts as Ground 9B3. See Petition for Writ of Habeas Corpus
21 (ECF No. 4). Ground 9B3 does not relate back to the filing of Doyle’s original petition.
22 Ground 9B3 is barred by the statute of limitations.

23 Respondents also argue that Ground 9B3 is barred by the procedural default
24 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
25 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
26 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
27 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
28 however, that Doyle has not shown that this claim was “clearly encompassed” within the

1 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
2 Supreme Court. Ground 9B3 was not exhausted on Doyle's direct appeal, or in his first
3 state habeas action, and is subject to the procedural default doctrine. With respect to all
4 of Ground 9B3, except the claim of ineffective assistance of trial counsel, Doyle offers no
5 argument, specific to Ground 9B3, to overcome the procedural default. With respect to
6 the claim of ineffective assistance of trial counsel in Ground 9B3, inadequate assistance
7 of counsel in a first state habeas action may establish cause for the procedural default of
8 such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to
9 overcome the procedural default of the ineffective assistance of trial counsel claim in
10 Ground 9B3. However, this issue is intertwined with the question of the merits of Ground
11 9B3, and the briefing of the merits of the claim is not complete. Therefore, the Court does
12 not reach the question of the procedural default of the claim of ineffective assistance of
13 trial counsel in Ground 9B3.

14 All of Ground 9B3, except the claim of ineffective assistance of trial counsel, will
15 be dismissed as barred by both the statute of limitations and the procedural default
16 doctrine. The claim of ineffective assistance of trial counsel in Ground 9B3 will be
17 dismissed as barred by the statute of limitations.

18 Ground 9B4

19 In Ground 9B4 of his second amended petition, Doyle claims that his federal
20 constitutional rights were violated, in the penalty phase of his trial, as a result of improper
21 jury instructions, because "[t]he trial court's *Edmund* instruction was improper." Second
22 Amended Petition (ECF No. 265), pp. 211-13.

23 Respondents argue that Ground 9B4 is barred by the statute of limitations because
24 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
25 9B4 relates back to his original petition, or any other argument that Ground 9B4,
26 specifically, is timely. There is no claim in Doyle's original petition that arises from the
27 same core of operative facts as Ground 9B4. See Petition for Writ of Habeas Corpus
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1 (ECF No. 4). Ground 9B4 does not relate back to the filing of Doyle's original petition.
2 Ground 9B4 is barred by the statute of limitations.

3 Respondents also argue that Ground 9B4 is barred by the procedural default
4 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. In response, Doyle argues
5 that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
6 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
7 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
8 however, that Doyle has not shown that this claim was "clearly encompassed" within the
9 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
10 Supreme Court. Ground 9B4 was not exhausted on Doyle's direct appeal, or in his first
11 state habeas action, and is subject to the procedural default doctrine. With respect to all
12 of Ground 9B4, except the claim of ineffective assistance of trial counsel, Doyle offers no
13 argument, specific to Ground 9B4, to overcome the procedural default. With respect to
14 the claim of ineffective assistance of trial counsel in Ground 9B4, inadequate assistance
15 of counsel in a first state habeas action may establish cause for the procedural default of
16 such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to
17 overcome the procedural default of the ineffective assistance of trial counsel claim in
18 Ground 9B4. However, this issue is intertwined with the question of the merits of Ground
19 9B4, and the briefing of the merits of the claim is not complete. Therefore, the Court does
20 not reach the question of the procedural default of the claim of ineffective assistance of
21 trial counsel in Ground 9B4.

22 All of Ground 9B4, except the claim of ineffective assistance of trial counsel, will
23 be dismissed as barred by both the statute of limitations and the procedural default
24 doctrine. The claim of ineffective assistance of trial counsel in Ground 9B4 will be
25 dismissed as barred by the statute of limitations.

26 Ground 9B5

27 In Ground 9B5 of his second amended petition, Doyle claims that his federal
28 constitutional rights were violated, in the penalty phase of his trial, as a result of improper

1 jury instructions, because “[t]he trial court improperly failed [to] instruct the jury to find
2 mitigating circumstances did not outweigh aggravating circumstances beyond a
3 reasonable doubt.” Second Amended Petition (ECF No. 265), pp. 213-16.

4 Respondents argue that Ground 9B5 is barred by the statute of limitations because
5 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
6 9B5 relates back to his original petition, or any other argument that Ground 9B5,
7 specifically, is timely. There is no claim in Doyle’s original petition that arises from the
8 same core of operative facts as Ground 9B5. See Petition for Writ of Habeas Corpus
9 (ECF No. 4). Ground 9B5 does not relate back to the filing of Doyle’s original petition.
10 Ground 9B5 is barred by the statute of limitations.

11 Respondents also argue that Ground 9B5 is barred by the procedural default
12 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle also argues that the
13 Nevada Supreme Court addressed this claim, on his direct appeal, as part of its
14 mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted.
15 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
16 however, that Doyle has not shown that this claim was “clearly encompassed” within the
17 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
18 Supreme Court. Ground 9B5 was not exhausted on Doyle’s direct appeal, or in his first
19 state habeas action, and is subject to the procedural default doctrine. With respect to all
20 of Ground 9B5, except the claim of ineffective assistance of trial counsel, Doyle offers no
21 argument, specific to Ground 9B5, to overcome the procedural default. With respect to
22 the claim of ineffective assistance of trial counsel in Ground 9B5, inadequate assistance
23 of counsel in a first state habeas action may establish cause for the procedural default of
24 such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to
25 overcome the procedural default of the ineffective assistance of trial counsel claim in
26 Ground 9B5. However, this issue is intertwined with the question of the merits of Ground
27 9B5, and the briefing of the merits of the claim is not complete. Therefore, the Court does
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1 not reach the question of the procedural default of the claim of ineffective assistance of
2 trial counsel in Ground 9B5.

3 All of Ground 9B5, except the claim of ineffective assistance of trial counsel, will
4 be dismissed as barred by both the statute of limitations and the procedural default
5 doctrine. The claim of ineffective assistance of trial counsel in Ground 9B5 will be
6 dismissed as barred by the statute of limitations.

7 Ground 9B6

8 In Ground 9B6 of his second amended petition, Doyle claims that his federal
9 constitutional rights were violated, in the penalty phase of his trial, as a result of improper
10 jury instructions, because “[t]he trial court improperly failed to give the jury a form to
11 indicate a finding that mitigating circumstances outweighed aggravating circumstances,
12 creating an unconstitutional presumption of death.” Second Amended Petition (ECF No.
13 265), pp. 216-21.

14 Respondents argue that Ground 9B6 is barred by the statute of limitations because
15 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
16 9B6 relates back to his original petition, or any other argument that Ground 9B6,
17 specifically, is timely. There is no claim in Doyle’s original petition that arises from the
18 same core of operative facts as Ground 9B6. See Petition for Writ of Habeas Corpus
19 (ECF No. 4). Ground 9B6 does not relate back to the filing of Doyle’s original petition.
20 Ground 9B6 is barred by the statute of limitations.

21 Respondents also argue that Ground 9B6 is unexhausted in state court. See
22 Motion to Dismiss (ECF No. 277), p. 37. Doyle responds, arguing that the Nevada
23 Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review
24 under NRS § 177.055, and, therefore, it is not unexhausted or procedurally defaulted.
25 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
26 however, that Doyle has not shown that this claim was “clearly encompassed” within the
27 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
28 Supreme Court. Ground 9B6 was not exhausted on Doyle’s direct appeal, or in his first

1 state habeas action, and is subject to the procedural default doctrine. With respect to all
2 of Ground 9B6, except the claim of ineffective assistance of trial counsel, Doyle offers no
3 argument, specific to Ground 9B6, to overcome the procedural default. With respect to
4 the claim of ineffective assistance of trial counsel in Ground 9B6, inadequate assistance
5 of counsel in a first state habeas action may establish cause for the procedural default of
6 such a claim. See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to
7 overcome the procedural default of the ineffective assistance of trial counsel claim in
8 Ground 9B6. However, this issue is intertwined with the question of the merits of Ground
9 9B6, and the briefing of the merits of the claim is not complete. Therefore, the Court does
10 not reach the question of the procedural default of the claim of ineffective assistance of
11 trial counsel in Ground 9B6.

12 All of Ground 9B6, except the claim of ineffective assistance of trial counsel, will
13 be dismissed as barred by both the statute of limitations and the procedural default
14 doctrine. The claim of ineffective assistance of trial counsel in Ground 9B6 will be
15 dismissed as barred by the statute of limitations.

16 Ground 9B7

17 In Ground 9B7 of his second amended petition, Doyle claims that his federal
18 constitutional rights were violated, in the penalty phase of his trial, as a result of improper
19 jury instructions, because “[t]he trial court’s anti-sympathy instruction was unduly
20 prejudicial.” Second Amended Petition (ECF No. 265), pp. 221-22.

21 Respondents argue that Ground 9B7 is barred by the statute of limitations because
22 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
23 9B7 relates back to his original petition, or any other argument that Ground 9B7,
24 specifically, is timely. There is no claim in Doyle’s original petition that arises from the
25 same core of operative facts as Ground 9B7. See Petition for Writ of Habeas Corpus
26 (ECF No. 4). Ground 9B7 does not relate back to the filing of Doyle’s original petition.
27 Ground 9B7 is barred by the statute of limitations.

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1 Respondents also argue that Ground 9B7 is unexhausted in state court. See
2 Motion to Dismiss (ECF No. 277), p. 37. Doyle responds, arguing that the Nevada
3 Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review
4 under NRS § 177.055, and, therefore, it is not unexhausted or procedurally defaulted.
5 See Opposition to Motion to Dismiss (ECF No. 284), pp. 81-82. The Court determines,
6 however, that Doyle has not shown that this claim was “clearly encompassed” within the
7 scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
8 Supreme Court. Ground 9B7 has not been presented in state court, but would be
9 procedurally barred if Doyle were to return to state court to present the claim. Therefore,
10 the anticipatory default doctrine applies, and the Court considers this claim to be
11 technically exhausted, but procedurally defaulted. Doyle offers no argument, specific to
12 Ground 9B7, to overcome the procedural default.

13 Ground 9B7 will be dismissed as barred by both the statute of limitations and the
14 procedural default doctrine.

15 Ground 10

16 In Ground 10 of his second amended petition, Doyle claims that his federal
17 constitutional rights were violated as a result of “the trial court’s failure to record critical
18 proceedings.” Second Amended Petition (ECF No. 265), pp. 223-25.

19 Respondents argue that Ground 10 is barred by the statute of limitations because
20 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
21 10 relates back to his original petition, or any other argument that Ground 10, specifically,
22 is timely. There is no claim in Doyle’s original petition that arises from the same core of
23 operative facts as Ground 10. See Petition for Writ of Habeas Corpus (ECF No. 4).
24 Ground 10 does not relate back to the filing of Doyle’s original petition. Ground 10 is
25 barred by the statute of limitations.

26 Respondents also argue that Ground 10 is barred by the procedural default
27 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. With respect to the claim of
28 ineffective assistance of trial counsel in Ground 10, inadequate assistance of counsel in

1 a first state habeas action may establish cause for the procedural default of such a claim.
2 See *Martinez*, 566 U.S. at 9. This could provide a means for Doyle to overcome the
3 procedural default of the ineffective assistance of trial counsel claim in Ground 10.
4 However, this issue is intertwined with the question of the merits of Ground 10, and the
5 briefing of the merits of the claim is not complete. The Court does not reach the question
6 of the procedural default of the claim of ineffective assistance of trial counsel in Ground
7 10.

8 All of Ground 10, except the claim of ineffective assistance of trial counsel, will be
9 dismissed as barred by both the statute of limitations and the procedural default doctrine.
10 The claim of ineffective assistance of trial counsel in Ground 10 will be dismissed as
11 barred by the statute of limitations.

12 Ground 11

13 In Ground 11 of his second amended petition, Doyle claims that his death sentence
14 is invalid, under the federal constitution, because “execution by lethal injection violates
15 the constitutional prohibition against cruel and unusual punishments and his rights under
16 the First and Fourteenth Amendments.” Second Amended Petition (ECF No. 265), pp.
17 226-53.

18 Respondents argue that Ground 11 is barred by the statute of limitations because
19 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
20 11 relates back to his original petition, or any other argument that Ground 11, specifically,
21 is timely. There is no claim in Doyle’s original petition that arises from the same core of
22 operative facts as Ground 11. See Petition for Writ of Habeas Corpus (ECF No. 4).
23 Ground 11 does not relate back to the filing of Doyle’s original petition. Ground 11 is
24 barred by the statute of limitations.

25 Respondents also argue that Ground 11 should be dismissed because it is not ripe
26 for review or cognizable in this action. See Motion to Dismiss (ECF No. 277), p. 39. The
27 Court declines to address these arguments.

28 Ground 11 will be dismissed as barred by the statute of limitations.

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Ground 12

In Ground 12 of his second amended petition, Doyle claims that his death sentence is invalid, under the federal constitution, “because his death sentence is the product of purposeful race discrimination by state officials.” Second Amended Petition (ECF No. 265), pp. 254-57.

Respondents argue that Ground 12 is barred by the statute of limitations because it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground 12 relates back to his original petition, or any other argument that Ground 12, specifically, is timely. There is no claim in Doyle’s original petition that arises from the same core of operative facts as Ground 12. See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 12 does not relate back to the filing of Doyle’s original petition. Ground 12 is barred by the statute of limitations.

Respondents also argue that Ground 12 is barred by the procedural default doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle argues, in turn, that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review under NRS § 177.055, and, therefore, it is not procedurally defaulted. See Opposition to Motion to Dismiss (ECF No. 284), pp. 83-84. The Court determines, however, that Doyle has not shown that this claim was “clearly encompassed” within the scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada Supreme Court. Ground 12 was not exhausted on Doyle’s direct appeal, and is procedurally defaulted. Doyle offers no other argument, specific to Ground 12, to overcome the procedural default.

Ground 12 will be dismissed as barred by both the statute of limitations and the procedural default doctrine.

Ground 13

In Ground 13 of his second amended petition, Doyle claims that his conviction and sentence violate the federal constitution “because Mr. Doyle’s capital trial, sentencing, and review on direct appeal were conducted before state judicial officers whose tenure in

1 office was not during good behavior but whose tenure was dependent on popular
2 election.” Second Amended Petition (ECF No. 265), pp. 258-62.

3 Respondents argue that Ground 13 is barred by the statute of limitations because
4 it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground
5 13 relates back to his original petition, or any other argument that Ground 13, specifically,
6 is timely. There is no claim in Doyle’s original petition that arises from the same core of
7 operative facts as Ground 13. See Petition for Writ of Habeas Corpus (ECF No. 4).
8 Ground 13 does not relate back to the filing of Doyle’s original petition. Ground 13 is
9 barred by the statute of limitations.

10 Respondents also argue that Ground 13 is barred by the procedural default
11 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle makes no argument,
12 specific to Ground 13, to the contrary.

13 Ground 13 will be dismissed as barred by both the statute of limitations and the
14 procedural default doctrine.

15 Ground 14

16 In Ground 14 of his second amended petition, Doyle claims that his death sentence
17 is invalid, under the federal constitution, “because the Nevada capital punishment system
18 operates in an arbitrary and capricious manner.” Second Amended Petition (ECF No.
19 265), pp. 263-71.

20 Respondents argue that Ground 14 is barred by the statute of limitations because
21 it does not relate back to Doyle’s original petition. Doyle responds, arguing first that
22 Ground 14 is based on a constitutional right only recently recognized, in *Hurst v. Florida*,
23 136 S.Ct. 616 (2016). See Opposition to Motion to Dismiss (ECF No. 284), pp. 54-55.
24 However, that argument is belied by a reading of Ground 14; Ground 14 is not based to
25 any significant degree on *Hurst*. Doyle also argues that he could not have discovered the
26 factual predicate for Ground 14 any sooner, and he pursued his rights diligently after *Hurst*
27 was decided and after he discovered the factual predicate of the claim. See *id.* at 55-56.
28 Those arguments, too, are belied by a reading of Ground 14. It is plain that the factual

1 predicate for Ground 14 was discoverable long before 2016 – in fact, Doyle pled a similar
2 claim in his first amended petition in 2008. See Amended Petition for Writ of Habeas
3 Corpus (ECF No. 168), pp. 190-92. Finally, Doyle argues that Ground 14 relates back to
4 the filing of his original habeas petition because he attached to that petition a copy of the
5 Nevada Supreme Court’s opinion on his direct appeal, in which the Nevada Supreme
6 Court stated that Doyle’s death sentence was not imposed “under the influence of ... any
7 arbitrary factor.” See Opposition to Motion to Dismiss (ECF No. 284), pp. 56-57. That
8 argument is without merit; there is nothing in Doyle’s original petition indicating that any
9 portion of the Nevada Supreme Court’s opinion was incorporated into that petition to state
10 a claim. Ground 14 does not relate back to Doyle’s original petition, and is barred by the
11 statute of limitations.

12 Respondents also argue that Ground 14 is barred by the procedural default
13 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle argues that the Nevada
14 Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review
15 under NRS § 177.055, and, therefore, it is not procedurally defaulted. See Opposition to
16 Motion to Dismiss (ECF No. 284), pp. 83-84. The Court determines, however, that Doyle
17 has not shown that this claim was “clearly encompassed” within the scope of NRS §
18 177.055 and readily apparent in the record reviewed by the Nevada Supreme Court.
19 Ground 14 was not exhausted on Doyle’s direct appeal, and is procedurally defaulted.
20 Doyle offers no other argument, specific to Ground 14, to overcome the procedural
21 default.

22 Ground 14 will be dismissed as barred by both the statute of limitations and the
23 procedural default doctrine.

24 Ground 15

25 In Ground 15 of his second amended petition, Doyle claims that his death sentence
26 is invalid, under the federal constitution, “due to the restrictive conditions on Nevada’s
27 death row.” Second Amended Petition (ECF No. 265), pp. 272-73.

1 Respondents argue that Ground 15 is barred by the statute of limitations because
2 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
3 15 relates back to his original petition, or any other argument that Ground 15, specifically,
4 is timely. There is no claim in Doyle's original petition that arises from the same core of
5 operative facts as Ground 15. See Petition for Writ of Habeas Corpus (ECF No. 4).
6 Ground 15 does not relate back to the filing of Doyle's original petition. Ground 15 is
7 barred by the statute of limitations.

8 Respondents also argue that Ground 15 is barred by the procedural default
9 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle makes no argument,
10 specific to Ground 15, to the contrary.

11 Ground 15 will be dismissed as barred by both the statute of limitations and the
12 procedural default doctrine.

13 Ground 16

14 In Ground 16 of his second amended petition, Doyle claims that his death sentence
15 is invalid, under the federal constitution, "due to the jury finding the statutory aggravating
16 circumstances that the murder was committed to avoid or prevent lawful arrest." Second
17 Amended Petition (ECF No. 265), pp. 274-89.

18 Respondents argue that Ground 16 is barred by the statute of limitations because
19 it does not relate back to Doyle's original petition. Doyle makes no argument that Ground
20 16 relates back to his original petition, or any other argument that Ground 16, specifically,
21 is timely. There is no claim in Doyle's original petition that arises from the same core of
22 operative facts as Ground 16. See Petition for Writ of Habeas Corpus (ECF No. 4).
23 Ground 16 does not relate back to the filing of Doyle's original petition. Ground 16 is
24 barred by the statute of limitations.

25 Respondents also argue that Ground 16 is barred by the procedural default
26 doctrine. See Motion to Dismiss (ECF No. 277), pp. 31-32. Doyle argues that the Nevada
27 Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review
28 under NRS § 177.055, and, therefore, it is not procedurally defaulted. See Opposition to

1 Motion to Dismiss (ECF No. 284), pp. 84-85. Specifically, Doyle points out that the
2 Nevada Supreme Court ruled that the evidence at trial supported the aggravating
3 circumstances found by the jury. See *id.* That issue, considered by the Nevada Supreme
4 Court, was different from the issue raised by the claim in Ground 16. The Court
5 determines that Doyle has not shown that this claim was “clearly encompassed” within
6 the scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
7 Supreme Court. Ground 16 was not exhausted on Doyle’s direct appeal, and is
8 procedurally defaulted. Doyle offers no other argument, specific to Ground 16, to
9 overcome the procedural default.

10 Ground 16 will be dismissed as barred by both the statute of limitations and the
11 procedural default doctrine.

12 Ground 17A

13 In Ground 17A of his second amended petition, Doyle claims that his federal
14 constitutional rights were violated because “[t]here was insufficient evidence for the jury
15 to convict Mr. Doyle of conspiracy to commit murder.” Second Amended Petition (ECF
16 No. 265), pp. 290-93.

17 Respondents argue that Ground 17A is barred by the statute of limitations because
18 it does not relate back to Doyle’s original petition. Doyle responds by pointing to Ground
19 2 of his original petition, which asserted such a claim. See Opposition to Motion to Dismiss
20 (ECF No. 284), pp. 57-60; see *also* Petition for Writ of Habeas Corpus (ECF No. 4), p. 4.
21 The Court determines that Ground 17A relates back to Doyle’s original petition, and is not
22 barred by the statute of limitations.

23 Respondents do not contend that Ground 17A is unexhausted or procedurally
24 defaulted.

25 The Court will deny the motion to dismiss with respect to Ground 17A.
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Ground 17B

In Ground 17B of his second amended petition, Doyle claims that his federal constitutional rights were violated because “[t]here was insufficient evidence of first-degree kidnapping.” Second Amended Petition (ECF No. 265), pp. 293-94.

Respondents argue that Ground 17B is barred by the statute of limitations because it does not relate back to Doyle’s original petition. Doyle responds by pointing to Ground 2 of his original petition, which asserted such a claim. See Opposition to Motion to Dismiss (ECF No. 284), pp. 57-60; see *also* Petition for Writ of Habeas Corpus (ECF No. 4), p. 4. The Court determines that Ground 17B relates back to Doyle’s original petition, and is not barred by the statute of limitations.

Respondents do not contend that Ground 17B is unexhausted or procedurally defaulted.

The Court will deny the motion to dismiss with respect to Ground 17B.

Ground 18

In Ground 18 of his second amended petition, Doyle claims that his death sentence is invalid, under the federal constitution, “due to the jury finding the statutory aggravating circumstances that the murder was committed by a person under sentence of imprisonment....” Second Amended Petition (ECF No. 265), pp. 296-97.

Respondents argue that Ground 18 is barred by the statute of limitations because it does not relate back to Doyle’s original petition. Doyle makes no argument that Ground 18 relates back to his original petition, or any other argument that Ground 18, specifically, is timely. There is no claim in Doyle’s original petition that arises from the same core of operative facts as Ground 18. See Petition for Writ of Habeas Corpus (ECF No. 4). Ground 18 does not relate back to the filing of Doyle’s original petition. Ground 18 is barred by the statute of limitations.

Respondents also argue that Ground 18 is unexhausted in state court. See Motion to Dismiss (ECF No. 277), p. 37. Doyle responds, arguing that the Nevada Supreme Court addressed this claim, on his direct appeal, as part of its mandatory review under NRS §

1 177.055, and, therefore, it is not unexhausted or procedurally defaulted. See Opposition
2 to Motion to Dismiss (ECF No. 284), pp. 84-85. Specifically, Doyle points out that the
3 Nevada Supreme Court ruled that the evidence at trial supported the aggravating
4 circumstances found by the jury. See *id.* That issue, considered by the Nevada Supreme
5 Court, was different from the issue raised by the claim in Ground 18. The Court
6 determines that Doyle has not shown that this claim was “clearly encompassed” within
7 the scope of NRS § 177.055 and readily apparent in the record reviewed by the Nevada
8 Supreme Court. Ground 18 has not been presented in state court, but would be
9 procedurally barred if Doyle were to return to state court to present the claim. Therefore,
10 the anticipatory default doctrine applies, and the Court considers this claim to be
11 technically exhausted, but procedurally defaulted. Doyle offers no argument, specific to
12 Ground 18, to overcome the procedural default.

13 Ground 18 will be dismissed as barred by both the statute of limitations and the
14 procedural default doctrine.

15 Ground 19

16 In Ground 19 of his second amended petition, Doyle claims that his conviction and
17 death sentence are invalid under the federal constitution “because of the cumulative effect
18 of the errors in this case.” Second Amended Petition (ECF No. 265), pp. 298-301.

19 This cumulative error claim is exhausted, and is not barred by the statute of
20 limitations or the procedural default doctrine, to the extent there are other viable claims in
21 Doyle’s second amended petition.

22 This cumulative error claim encompasses all other claims of cumulative error found
23 elsewhere in Doyle’s second amended petition – thus, the Court does not treat those
24 other cumulative error claims as distinct claims requiring separate analysis.

25 The motion to dismiss will be denied with respect to Ground 19.

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1 Motion for Discovery

2 Doyle filed a motion for discovery (ECF No. 286) with his opposition to the motion
3 to dismiss. Respondents filed an opposition to the motion for discovery (ECF No. 293),
4 and Doyle filed a reply (ECF No. 299).

5 A habeas petitioner is not entitled to discovery “as a matter of ordinary course.”
6 *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); see also *Campbell v. Blodgett*, 982 F.2d
7 1356, 1358 (9th Cir. 1993). However, “[a] judge may, for good cause, authorize a party to
8 conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of
9 discovery.” Rule 6(a) of the Rules Governing § 2254 Cases. There is good cause for
10 discovery “where specific allegations before the court show reason to believe that the
11 petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled
12 to relief.” *Bracy*, 520 U.S. at 908-09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).
13 The ultimate question whether discovery is justified is within the discretion of the Court.
14 *Id.*

15 Doyle requests leave of court to conduct discovery with respect to Ground 11.
16 However, as is discussed above, Ground 11 is barred by the statute of limitations, and
17 will be dismissed on that ground. The discovery Doyle proposes does not go to the
18 question of the statute of limitations bar; rather, it goes to the merits of the claim. Because
19 Ground 11 is barred by the statute of limitations, and because the discovery sought by
20 Doyle would not affect that conclusion, the discovery would be for naught.

21 The Court will deny Doyle’s motion for discovery. The denial of Doyle’s motion for
22 discovery is without prejudice to Doyle filing a new motion for discovery, if factually and
23 legally justified, in conjunction with the briefing of the merits of his remaining claims, as
24 contemplated in the scheduling order entered June 28, 2016 (ECF No. 258).

25 Motion for Evidentiary Hearing

26 Doyle also filed a motion for an evidentiary hearing (ECF No. 287). Respondents
27 filed an opposition to that motion (ECF No. 294), and Doyle filed a reply (ECF No. 294).

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1 Evidentiary hearings are authorized in federal habeas corpus actions by Rule 8 of
2 the Rules Governing § 2254 Cases. However, an evidentiary hearing is not required if the
3 issues can be resolved by reference to the state court record. *See Totten v. Merkle*, 137
4 F.3d 1172, 1176 (9th Cir. 1998) (“It is axiomatic that when issues can be resolved with
5 reference to the state court record, an evidentiary hearing becomes nothing more than a
6 futile exercise.”); *see also Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (“[I]f the record
7 refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district
8 court is not required to hold an evidentiary hearing.”). Moreover, “an evidentiary hearing
9 is not required if the claim presents a purely legal question and there are no disputed
10 facts.” *Beardslee v. Woodford*, 358 F.3d 560, 585 (9th Cir. 2004); *see also Hendricks v.*
11 *Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992).

12 Doyle requests an evidentiary hearing to prove his allegations that there is cause
13 and prejudice with respect to his procedural defaults, under *Martinez* and because of
14 alleged *Brady* violations. *See* Motion for Evidentiary Hearing (ECF No. 287), pp. 3-6.
15 However, in this order the Court declines to reach the question whether there was such
16 cause and prejudice. Those issues will be resolved, as necessary, in conjunction with the
17 Court’s consideration of the merits of the subject claims. Therefore, an evidentiary hearing
18 regarding these issues is unnecessary at this time.

19 Doyle also requests an evidentiary hearing with respect to his contention that he
20 can overcome the procedural default of his claims by a showing of actual innocence under
21 *Schlup*. *See* Motion for Evidentiary Hearing (ECF No. 287), pp. 6-7. As is discussed
22 above, however, the Court determines that Doyle’s proffered evidence regarding the
23 Nevada Supreme Court vacating his sexual assault conviction, regarding potential
24 impeachment of certain witnesses, regarding his upbringing, and regarding the Nevada
25 Supreme Court striking one of the aggravating circumstances found by the jury, if viewed
26 in the light most favorable to Doyle, is not such as to show his actual innocence within the
27 meaning of *Schlup*. The Court finds that an evidentiary hearing is unwarranted with regard
28 to these issues.

1 Nor is an evidentiary hearing warranted with respect to the question of equitable
2 tolling of the statute of limitations. See Reply to Opposition to Motion for Evidentiary
3 Hearing (ECF No. 298), pp. 23-27 (asserting this basis for Doyle's request for an
4 evidentiary hearing, for first time, in the reply in support of the motion). The Court resolves
5 that issue based upon uncontested facts that are clear in the record.

6 The Court will deny Doyle's motion for an evidentiary hearing. The denial of this
7 motion is without prejudice to Doyle filing a new motion for an evidentiary hearing, if
8 factually and legally justified, in conjunction with the briefing of the merits of his remaining
9 claims, as contemplated in the scheduling order entered June 28, 2016 (ECF No. 258).

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1 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (ECF No. 277)
2 is **GRANTED IN PART AND DENIED IN PART**. The following claims are dismissed: the
3 ineffective assistance of appellate counsel claim in Ground 1; Grounds 2, 3A, 3B, 3C, 3D,
4 3F, 3K, 4, 5, 6A1, 6A2, 6A3, 6A4, 6A5, 6A6, 6A7; all of Ground 6A8 except the ineffective
5 assistance of trial counsel claim; and Grounds 7, 8E1, 8E2, 8E3, 9A2, 9A4, 9A5, 9A6,
6 9B1, 9B2, 9B3, 9B4, 9B5, 9B6, 9B7, 10, 11, 12, 13, 14, 15, 16 and 18.

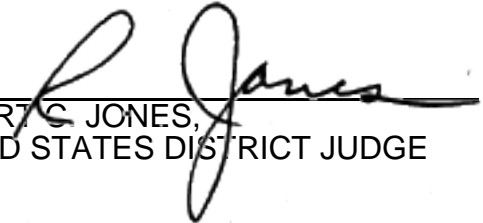
7 **IT IS FURTHER ORDERED** that petitioner's Motion for Discovery (ECF No. 286)
8 is **DENIED**.

9 **IT IS FURTHER ORDERED** that petitioner's Motion for Evidentiary Hearing (ECF
10 No. 287) is **DENIED**.

11 **IT IS FURTHER ORDERED** that respondents shall, within 90 days from the date
12 of this order, file an answer, responding to the remaining claims in petitioner's second
13 amended habeas petition (Ground 1, other than the claim of ineffective assistance of
14 appellate counsel; Grounds 3E, 3G, 3H, 3I, and 3J; the claim of ineffective assistance of
15 trial counsel in Ground 6A8; and Grounds 9A1, 9A3, 17A, 17B and 19).

16 **IT IS FURTHER ORDERED** that, in all other respects, the schedule for further
17 proceedings set forth in the order entered June 28, 2016 (ECF No. 258) shall remain in
18 effect.

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20 DATED THIS 23rd day of May, 2018.

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23 ROBERT C. JONES,
24 UNITED STATES DISTRICT JUDGE