

1 Background¹

2 In its decision affirming Robins' conviction and sentence, the Nevada Supreme Court
3 described the background facts, and Robins' trial, as follows:

4 The evidence adduced at trial demonstrated a pattern of abusive treatment of
5 eleven-month-old Brittany Smith (Brittany) by Robins, who was living with the child
6 and her mother, Lovell McDowell. This abusive treatment by Robins ultimately
7 resulted in the infant's untimely and brutally violent death.

8 Several witnesses testified concerning Robins' abusive treatment of Brittany.
9 Evidence indicated that Robins regularly punched and kicked Brittany. He often held
10 his hand over her mouth and nose until she gasped for breath. On several occasions
11 Robins held Brittany underwater in the bathtub until she came up gasping for breath.
12 One witness observed an occasion when Robins caused the infant to turn blue from
13 lack of breath. Robins frequently shut Brittany in a dark bathroom for several hours at
14 a time. Once he was seen holding the infant over a second floor railing by her neck
15 and shaking her. Other incidents of abuse by Robins included putting Brittany on the
16 top shelf of a closet (some six feet above the floor), closing the door, and letting her
17 fall to the floor. Robins would also force his finger down Brittany's throat and cause
18 her to gag. One witness testified that Robins frequently repeated this abuse until the
19 child could no longer gag and ceased crying.

20 At one point Brittany suffered a broken leg, for which medical treatment was
21 delayed. The child's fracture was evidenced by a painful knot on her leg. Initially,
22 neither Robins nor the mother sought treatment for the infant; however, after the knot
23 reappeared and became quite painful, Brittany was taken to the hospital. Radiographs
24 revealed that Brittany's right femur was fractured and that callus had formed, which
25 meant the fracture was from ten to fourteen days old. Moreover, an examination of
26 the radiographs also showed the presence of a previous partially healed fracture that
27 occurred ten to twenty days earlier. Brittany's condition required her placement in a
28 body cast. A witness recounted seeing Robins swing Brittany by the cross-bar of her
29 cast (the body cast extended from Brittany's waist down her legs, with a cross-bar
30 between the legs).

31 Over a period of time, several reports were received by the Las Vegas
32 Metropolitan Police Department's (LVMPD) child abuse unit concerning Brittany.
33 However, follow-up investigations failed to uncover the extent of the abuse in the
34 home and no remedial action was ever taken. Brittany's mother, Lovell McDowell,
35 was interviewed concerning the child's broken leg. McDowell falsely explained at
36 the time that the injury was caused by babysitters, whose whereabouts in California
37 were unknown.

38 The events leading to Brittany's death occurred in the early morning hours of
39 April 19, 1988. The details of that morning were supplied by several witnesses.

40 ¹ This statement of the background of the case is set forth only to provide context for this order.
41 The court does not intend, in this section of this order, to make any finding with respect to any disputed
42 fact.

1 McDowell testified that on the night Brittany died, the child was sleeping and
2 she and Robins finished eating around 12:30 a.m. Thereafter, she fell asleep but was
3 soon awakened by sounds of gagging or choking. She hollered to Robins, "What's
4 wrong with Brittany?" He responded, "nothing wrong." The mother arose and
5 encountered Robins, who was holding Brittany, in the hallway. She then returned to
6 the room to get Brittany a towel when she heard Robins hollering, "Brittany, come
7 on. Brittany, wake up. Wake up Brittany." McDowell immediately dialed 911 and
8 thereafter ran into the parking lot of their apartment complex, screaming that her
9 baby had stopped breathing. An Air Force Sergeant heard the screams and sought to
10 help the child by performing CPR. The security guard called the LVMPD and
11 paramedics were also immediately summoned.

12
13 The paramedics rushed Brittany to the hospital where measures were taken to
14 restore breathing and a heartbeat. The infant could not be revived, however, and was
15 pronounced dead shortly after her arrival.

16
17 A LVMPD officer responding to a call met Robins outside the apartment at
18 approximately 2:30 a.m. Robins was given a Miranda warning, following which he
19 gave the officer a brief statement recounting the events of the evening. Later a
20 homicide detective with the LVMPD was dispatched to Robins' apartment in
21 reference to an infant's death. A taped statement was taken from Robins and
22 following an investigation, Robins was arrested for Brittany's murder.

23
24 A medical examiner's autopsy investigation revealed a number of injuries,
25 some of which were substantially more recent than others. The external exam
26 revealed bruises under Brittany's jaw, bruises on the upper portion of her sternum
and a number of bruises on her back. Additionally, there was a small hemorrhage in
the left flank. The internal examination uncovered a number of injuries. First, there
were multiple hemorrhages in the scalp on the left side and top of the head and there
were bilateral subdural hemorrhages. The brain was swollen (a direct response to
injury). Further internal examination of the abdominal and thoracic cavities revealed
additional injuries. There were a number of hemorrhages in the mesentery
(supporting connective tissue) of the intestines. Additionally, there was substantial
internal scarring on the left side below the kidney. The scar tissue encased the ureter,
and extended from the kidney down to the large intestine.

19 Dr. Hollander's microscopic examination of the scar tissue revealed numerous
20 injuries. There were fresh hemorrhages, granulation tissue (the body's first reaction to
21 injury in the healing process), and fibrous (scar) tissue which takes approximately six
22 weeks from the initial injury to form. The medical examiner noted that Brittany's
right femur showed signs of having been broken in the past. She had to reference
Brittany's medical records to ascertain that the leg had been broken twice and was in
the process of healing.

23 Finally, the autopsy revealed that Brittany had suffered a transverse separation
24 of her eleventh thoracic vertebra (a broken back). It was the examiner's opinion that
25 this injury was the result of substantial blunt force trauma that was administered less
26 than twenty-four hours prior to Brittany's death.

In conclusion, the medical examiner opined that CPR, even if improperly
performed, could not have caused Brittany's injuries. She was of the opinion that
Brittany was a battered child and that death was by homicide.

1 Robins testified on his own behalf. He admitted doing many of the things
2 testified to by the State's witnesses. However, he characterized his actions as rough
3 play, to make Brittany tough. Incredibly, Robins stated that he had no intention of
4 hurting Brittany.

5 Robins specifically denied ever picking Brittany up by the cross-bar of her
6 body cast. He also denied putting his finger down Brittany's throat to gag her. He did
7 admit to putting his fingers in Brittany's mouth in an effort to prevent her from
8 spitting. Robins testified that he never hit Brittany in the face with his fists with or
9 without jewelry on his hands and denied the existence of the bathtub incidents.

10 Robins admitted placing Brittany in the bathroom when she cried and
11 company was present. His stated reason for doing so was to persuade her to stop
12 crying. Robins also denied that he had ever picked the child up by her neck as
13 charged by a State's witness. He said that he had picked her up by the arms. Again,
14 he denied any intention of hurting the baby in any of these actions.

15 Robins also placed a benign connotation on Brittany's experience on the
16 closet shelf. He stated that in an effort to teach Brittany not to crawl off the bed, he
17 put her on the bottom shelf of the closet and allowed her to fall off that shelf. The
18 shelf, according to Robins, was three and one-half inches above the floor. He denied
19 ever placing Brittany on a closet shelf six feet above the floor.

20 Concerning the events on the night Brittany died, Robins testified in detail.
21 He stated that he and McDowell had been engaged in a "romantic encounter," after
22 which they fell asleep. Robins said he woke up and that following a telephone call, he
23 and McDowell ordered pizza. Robins also stated that McDowell did not go to sleep
24 after eating pizza, as she had testified. Robins said he told McDowell he was going to
25 wake Brittany in order to check on her because she had been congested with a cold
26 and had occasionally vomited.

After Brittany was awake, Robins said he played with her for a few minutes.
McDowell called out, telling Robins not to be too long with Brittany. Eventually,
Robins kissed Brittany and got up to leave when he heard Brittany cough twice and
saw her start to spit up. He said Brittany was breathing rapidly and that he froze,
waiting for her to snap out of it. According to Robins, Brittany just stopped breathing.
Robins testified that at that point he panicked. He said he yelled, "Brittany, wake up.
Brittany, wake up." In an effort to awaken her, Robins threw water in her face but she
was still unresponsive. At that point he laid her back down and tried to apply CPR.

Robins spoke freely with the police and stated that he told them to the best of
his knowledge what had occurred. Robins said he loved Brittany like a daughter, and
while admitting to rough play, he denied any intention to hurt or kill Brittany. He
admitted to being the last person to see Brittany conscious.

Five days following the return of guilty verdicts by the jury, the penalty
hearing commenced. The State called several witnesses who described Robins as an
extremely violent man. In particular, Robins had severely beaten a young man who
was involved in Robins' drug sales. Robins had made numerous statements to friends
and associates that he would kill a police officer. Finally, there was evidence that
Robins had threatened to bomb the apartment where McDowell, Brittany and another

1 of McDowell's boyfriends were living. His stated purpose was to kill everyone in the
2 apartment. The police were called and the situation was peacefully resolved.

3 McDowell concluded her testimony during the penalty phase by relating, over
4 defense counsel's objection, that her brother and uncle had received threatening notes
5 while she was in jail. Robins was also in jail when the notes were delivered.

6 Additionally, there was evidence indicating Robins was substantially involved
7 in the sale of rock cocaine. Evidence of one of Robins' arrests for the sale of cocaine
8 was introduced. Robins objected to this testimony because charges were never filed.
9 There was also some testimony tending to connect Robins with gangs.

10 In his defense, Robins called several witnesses. Generally, the tenor of the
11 testimony concerned not seeing Robins abuse either Brittany or other children he had
12 been around, his general nature and non-violent personality.

13 *Robins v. State*, 106 Nev. 611, 614-18, 798 P.2d 558, 560-64 (1990), *cert. denied*, 499 U.S.
14 970 (1991).

15 Robins was convicted of felony child abuse with substantial bodily harm, and first degree
16 murder. Exhibits R43, R47.² For the child abuse, Robins was sentenced to 20 years in prison.
17 Exhibit R47. For the murder, he was sentenced to death. Exhibit R43.

18 Robins appealed. Exhibit R48. On September 19, 1990, the Nevada Supreme Court
19 affirmed the conviction and sentences. Exhibit R65 (opinion published at *Robins v. State*,
20 106 Nev. 611, 798 P.2d 558 (1990), *cert. denied*, 499 U.S. 970 (1991)) (a copy of the decision is
21 located in the record at Exhibit R65). On December 18, 1990, the Nevada Supreme Court denied
22 Robins' petition for rehearing. Exhibits R66, R67. Robins then petitioned the United Supreme
23 Court for certiorari, and that petition was denied on April 15, 1991. Exhibit R71. The Nevada
24 Supreme Court's remittitur issued on April 23, 1991. Exhibit R72.

25 On July 5, 1991, Robins filed a petition for post-conviction relief in the state district court.
26 Exhibit R80, R87. The state district court denied that petition on March 9, 1992. Exhibit R97.
Robins appealed. Exhibit R98. On May 27, 1993, the Nevada Supreme Court remanded the case to
the district court for an evidentiary hearing. Exhibit R112. The evidentiary hearing was held on

² Unless otherwise noted, exhibits identified in this order in the form "Exhibit R1,"
"Exhibit R2," etc., were filed by respondents in support of their motion to dismiss, and are located
in the record at docket #144 through #152.

1 January 31, February 20, March 6, March 13, and March 20, 1997. Exhibits R140, R141, R145,
2 R150, R152. On March 6, 1997, while the evidentiary was pending, Robins filed, in the Nevada
3 Supreme Court, a petition for writ of mandamus, seeking to expand the scope of the issues to be
4 considered on remand, and seeking the admission of certain evidence at the evidentiary hearing.
5 Exhibit R147. That petition was denied. Exhibit R148. On June 10, 1997, the state district court
6 issued an order again denying Robins' petition for post-conviction relief. Exhibit R153.

7 Robins again appealed. Exhibit R154. Back in the Nevada Supreme Court, Robins moved
8 for another remand, so that other issues could be pursued at an evidentiary hearing. Exhibits R158.
9 That motion was denied. Exhibit R161. Robins' motion for reconsideration of that ruling was also
10 denied. Exhibits R163, R165. On November 24, 1998, the Nevada Supreme Court dismissed the
11 appeal. Exhibit R171. On March 17, 1999, the Nevada Supreme Court denied a petition for
12 rehearing. Exhibits R175, R177. The Nevada Supreme Court's remittitur issued on April 2, 1999.
13 Exhibit R178.³

14 On April 6, 1999, this court received from Robins a *pro se* habeas corpus petition
15 (docket #5), initiating this action. On September 9, 1999, Robins filed a supplement to his habeas
16 petition (docket #7).

17 Robins was granted *in forma pauperis* status (docket #4, #5), and was appointed counsel
18 (docket #4, #6, #8, #10, #12, #18, #19). Robins then was granted leave to conduct discovery. He
19 filed his first motion for leave to conduct discovery on July 7, 2000 (docket #22); the court entered
20 an order on April 3, 2001, granting that motion in part and denying it in part (docket #46). Robins
21 filed a second motion for leave to conduct discovery on August 20, 2001 (docket #56); the court
22 granted that motion on December 18, 2001 (docket #62). Robins filed a third motion for leave to
23 conduct discovery on September 3, 2002 (docket #76); the court denied that motion on
24
25

26 ³ These state-court proceedings, between 1991 and 1999, are referred to in this order as Robins'
"first state petition."

1 September 30, 2003 (docket #87). On April 16, 2004, Robins filed an amended petition for writ of
2 habeas corpus (docket #91).

3 On August 30, 2004, respondents filed a motion to dismiss (docket #98). Robins did not file
4 an opposition to the motion to dismiss, but, rather, on December 3, 2004, he filed a motion for a stay
5 (docket #101). The court granted the motion for a stay (docket #104), and, on March 14, 2005, after
6 Robins filed a fully-exhausted second amended habeas petition (docket #105), the court stayed the
7 case, to allow Robins an opportunity to exhaust claims in state court (docket #106).

8 On May 11, 2005, Robins filed a petition for writ of habeas corpus in the state district court.
9 Exhibit R180. The state district court denied that petition on September 18, 2006. Exhibit R199.
10 Robins appealed. Exhibit R200. The Nevada Supreme Court affirmed on January 20, 2009.
11 Exhibit R228. The court denied rehearing on May 19, 2009. Exhibit R234. The court's remittitur
12 issued on June 16, 2009. Exhibit R235.⁴

13 On June 19, 2009, Robins moved to vacate the stay of this action (docket #125). On
14 June 23, 2009, the stay was lifted and the case reopened (docket #126). On September 22, 2009,
15 Robins filed a third amended petition for writ of habeas corpus (docket #133). The third amended
16 petition contains 24 separate claims, which are referred to in this order as Grounds 1 through 24.

17 On January 8, 2010, the respondents filed a motion to dismiss (docket #143), asserting that
18 various of Robins' claims are untimely, unexhausted, and procedurally barred. Robins responded to
19 that motion on May 12, 2010 (docket #168), and respondents replied on July 9, 2010 (docket #177).

20 On May 17, 2010, Robins filed a motion for an evidentiary hearing (docket #171).
21 Respondents filed an opposition to that motion on July 9, 2010 (docket #176). Robins replied on
22 July 29, 2010 (docket #178). On April 26, 2010, Robins filed a motion for leave to conduct
23 discovery (docket #155). Respondents filed an opposition to that discovery motion on July 9, 2010
24 (docket #175). Robins did not file a reply.

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26 ⁴ These state-court proceedings, between 2005 and 2009, are referred to in this order as Robins'
"second state petition."

1 The Motion to Dismiss

2 A. Statute of Limitations

3 Respondents argue that the statute of limitations applicable to federal habeas corpus actions
4 bars Grounds 9 through 24 of Robins' third amended habeas petition.

5 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)
6 went into effect. Pub.L. No. 104-132, 110 Stat. 1214-1226 (1996). The AEDPA made various
7 amendments to the statutes controlling federal habeas corpus practice, one of which imposed a
8 one-year statute of limitations on the filing of federal habeas corpus petitions. With respect to the
9 statute of limitations, the habeas corpus statute provides:

10 (d)(1) A 1-year period of limitation shall apply to an application for a writ
11 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 --

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

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

17 (C) the date on which the constitutional right asserted was initially
18 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

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

21 28 U.S.C. § 2244(d)(1).

22 For convictions that became final prior to the enactment of the AEDPA, a petitioner had until
23 April 24, 1997, to file a federal habeas corpus petition. *Patterson v. Stewart*, 251 F.3d 1243, 1245-
24 46 (9th Cir. 2001). That is the case here. Robins' conviction became final on April 15, 1991, when
25 the United States Supreme Court denied petitioner's petition for a writ of certiorari, with respect to
26 the ruling of the Nevada Supreme Court affirming his conviction and sentence. *See* Exhibit R71.

1 Therefore, without the benefit of any tolling, the limitations period applicable to Robins' federal
2 habeas corpus action would have expired on April 24, 1997. *See Patterson*, 251 F.3d at 1245-46.

3 The AEDPA limitations period, however, is tolled while a "properly filed application" for
4 post-conviction or other collateral relief is pending before a state court. 28 U.S.C. § 2244(d)(2).
5 A "properly filed application" is one in which the "delivery and acceptance are in compliance with
6 the applicable laws and rules governing filings." *Dictado v. Ducharme*, 244 F.3d 724, 726-27
7 (9th Cir. 2001) (quoting *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)).

8 Robins filed his first state petition in the state district court on July 5, 1991. Exhibit R80,
9 R87. That proceeding remained pending until the Nevada Supreme Court issued its remittitur on
10 April 2, 1999. *See* Exhibit R178. Robins did not pursue further state-court litigation until
11 May 11, 2005, when he filed his second state petition in the state district court. *See* Exhibit R180.
12 Without the benefit of equitable tolling, then, the limitations period for Robins' federal habeas
13 petition expired on April 2, 2000.

14 Robins filed his original petition in this action (docket #5, filed May 5, 1999), and the
15 supplement to it (docket #7, filed September 9, 1999), before the AEDPA limitations period ran out.
16 However, his first amended petition (docket #91, filed April 16, 2004), his second amended petition
17 (docket #105, filed February 17, 2005), and his third amended petition (docket #133, filed
18 September 22, 2009) were all filed after the expiration of the AEDPA limitations period. Therefore,
19 absent any equitable tolling, new claims added by Robins in his amended petitions could be
20 considered timely only if they relate back, under Federal Rule of Civil Procedure 15(c), to the date
21 of the filing of the original petition or the supplement to it.

22 In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court held, in the context of federal
23 habeas corpus litigation, that "[s]o long as the original and amended petition state claims that are
24 tied to a common core of operative facts, relation back will be in order." *Mayle*, 545 U.S. at 664.
25 However, "[a]n amended habeas petition ... does not relate back (and thereby escape AEDPA's
26 one-year time limit) when it asserts a new ground for relief supported by facts that differ in both

1 time and type from those the original pleading set forth.” *Id.* at 650. The *Mayle* decision instructed
2 that the phrase, “conduct, transaction, or occurrence,” as used in Rule 15(c), is not synonymous with
3 “trial, conviction, or sentence.” *Id.* at 656-64. Therefore, if the core operative facts of a claim were
4 pled in Robins’ original petition, or the supplement to it, and then the claim was later presented in
5 Robins’ third amended petition, the claim will relate back under *Mayle*, and will not be barred by the
6 statute of limitations; on the other hand, if the core operative facts underlying a claim were pled for
7 the first time in the first, second, or third amended petition, without the benefit of equitable tolling,
8 the claim is barred by the statute of limitations.

9 Respondents argue that the operative facts of Grounds 9 through 24 of Robins’ third
10 amended petition were not set forth in Robins’ original petition or the supplement to that petition.
11 *See* Motion to Dismiss (docket #143), pp. 12-14. Robins does not challenge respondents’ relation-
12 back analysis regarding Grounds 9, 10, and 12 through 24. The court has compared the various
13 versions of Robins’ petition, and finds that the claims in Grounds 9, 10, and 12 through 24 of the
14 third amended petition do not relate back ,under *Mayle*, to his timely-filed original petition and
15 supplement, and are therefore barred by the statute of limitations, absent equitable tolling.

16 Robins challenges respondents’ analysis of Ground 11, with respect to the accrual of the
17 claim. *See* Amended Opposition to Motion to Dismiss (docket #168), pp. 14-24. In Ground 11,
18 Robins claims that his constitutional rights were violated as a result of “the State’s failure to disclose
19 material impeachment evidence regarding benefits received by the key prosecution witnesses.”
20 Third Amended Petition, p. 81. Robins argues that, because the State withheld information
21 concerning alleged benefits conferred on the witnesses, his discovery of the factual basis for the
22 claim, and the accrual of the claim, were delayed. Amended Opposition to Motion to Dismiss,
23 pp. 14-24. This argument, however, is without merit. Robins does not state with any specificity
24 how or when he first discovered the factual basis for Ground 11. *See id.* And, at any rate, it is clear
25 from the record that the discovery occurred no later than September 3, 2002; on that date, Robins
26 filed his third motion for leave to conduct discovery, and set forth the Ground 11 claim in some

1 detail in that motion. *See* Third Motion for Leave to Conduct Discovery (docket #76), pp. 10-39.
2 Plainly, then, sometime prior to September 3, 2002, Robins had discovered the factual basis for
3 Ground 11. However, even after that date, Robins waited another 19 months before filing an
4 amended petition setting forth the claim in Ground 11. *See* Amended Petition for Writ of Habeas
5 Corpus (docket #91), pp. 74-90. Robins delayed for well over a year, after discovering the factual
6 basis for the claim, and therefore after the latest arguable accrual of the claim in Ground 11.

7 Therefore, the court finds that Grounds 9 through 24 of Robins' third amended habeas
8 petition were first asserted after the expiration of the AEDPA limitations period, do not relate back
9 to the filing of a timely petition, and, without the benefit of equitable tolling, are barred by the
10 statute of limitations.

11 The AEDPA statute of limitations is subject to equitable tolling. *Holland v. Florida*,
12 --- U.S. ----, 130 S.Ct. 2549, 2562 (2010). The petitioner bears the burden of showing that equitable
13 tolling is appropriate. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005). The
14 petitioner must establish: "(1) that he has been pursuing his rights diligently, and (2) that some
15 extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 130 S.Ct. at
16 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)) (internal quotation marks omitted).
17 The application of equitable tolling is "highly fact-dependent." *Espinoza-Matthews*, 432 F.3d at
18 1026; *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000); *see also Holland*, 130 S.Ct. at
19 2565 ("often fact-intensive"). "[T]he threshold necessary to trigger equitable tolling ... is very
20 high, lest the exceptions swallow the rule." *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011
21 (9th Cir.2009) (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.2002), and *United States v.*
22 *Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000)).

23 Robins argues that he should receive the benefit of equitable tolling "because material
24 changes in the legal landscape of habeas corpus resulted in his failure to file an amended petition."
25 Amended Opposition to Motion to Dismiss, p. 6. Specifically, Robins points to the changes made
26 by *Mayle*, in 2005, with respect to Federal Rule of Civil Procedure 15(c) and the relation back of

1 amended pleadings to earlier pleadings with respect to compliance with the statute of limitations.
2 *See id.* at pp. 7-11. Robins suggests that he could have, but did not, earlier seek to amend his
3 petition to set forth the claims in Grounds 9 through 24, because of the Ninth Circuit Court of
4 Appeals' construction of Rule 15(c), in habeas cases, prior to *Mayle*. However, Robins does not
5 explain why, allegedly relying on the pre-*Mayle* law, he chose to withhold these claims and not
6 assert them sooner. This is not the sort of extraordinary circumstance – *preventing timely filing* –
7 that would justify equitable tolling. There was no extraordinary circumstance *preventing* Robins
8 from asserting Grounds 9 through 24 in a timely manner.

9 Robins also argues that the court's scheduling orders lulled him into delaying the assertion of
10 Grounds 9 through 24 in an amended petition. The court finds this argument to be without merit as
11 well. The scheduling orders set deadlines for certain activities in the case, including the filing of an
12 amended petition; the scheduling orders did not *prevent* the earlier filing of an amended petition, and
13 the scheduling orders did not have any effect at all on the running of the statute of limitations. *See*,
14 *e.g.*, First Scheduling Order (docket #11); Second Scheduling Order (docket #20). Robins has not
15 pointed to any language in the court's scheduling orders that allegedly misled him with respect to the
16 operation of the statute of limitations.

17 Robins is not entitled to equitable tolling. Grounds 9 through 24 were first asserted well
18 after the expiration of the AEDPA limitations period, and did not relate back to the filing of a timely
19 petition. Grounds 9 through 24 will, therefore, be dismissed on statute of limitations grounds.⁵

20 B. Exhaustion

21 A federal court may not grant relief on a habeas corpus claim not exhausted in state court.
22 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is
23 designed to give state courts the initial opportunity to correct alleged constitutional deprivations.
24 *See Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present
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26 ⁵ Grounds 9 through 24 are also barred by the procedural default doctrine, as is discussed *infra*,
and those claims are dismissed on that ground as well.

1 the claim to the State’s highest court, and must give that court the opportunity to address and resolve
2 it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995)(*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S.
3 1, 10 (1992).

4 Respondents argue that Grounds 9, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, and 24, of
5 Robins’ third amended habeas petition, are unexhausted.⁶

6 The claims in Grounds 9 through 24 were asserted in Robins’ second state petition. *See*
7 Exhibit R180. Those claims were denied by the state district court, on procedural grounds. *See*
8 Exhibit R199. Robins appealed that ruling, and it was affirmed on appeal. *See* Exhibits R217,
9 R228. Therefore, Grounds 9 through 24 are exhausted. However, as is discussed elsewhere in this
10 order, those claims are barred by both the statute of limitations and the procedural default doctrine.

11 C. Procedural Default

12 Respondents contend that the doctrine of procedural default precludes this court from
13 considering the merits of Grounds 9 through 24.

14 A federal court generally will not review a claim for habeas corpus relief if the decision of
15 the state court denying the claim rested on a state law ground that is independent of the federal
16 question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31
17 (1991). The Court in *Coleman* stated the effect of a procedural default as follows:

18 In all cases in which a state prisoner has defaulted his federal claims in state court
19 pursuant to an independent and adequate state procedural rule, federal habeas review
20 of the claims is barred unless the prisoner can demonstrate cause for the default and
actual prejudice as a result of the alleged violation of federal law, or demonstrate that
failure to consider the claims will result in a fundamental miscarriage of justice.

21 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

22 A state procedural bar is “independent” if the state court explicitly invokes the procedural
23 rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir.1995).

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26 ⁶ In their motion to dismiss, respondents also argued that Ground 8 is unexhausted. Motion to
Dismiss, pp. 16-17. However, respondents withdrew that argument in their reply. Reply, p. 14.

1 The state procedural bar is not independent if the application of the procedural rule depends on a
2 consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir.2000).

3 A state procedural rule is “adequate” if it is “clear, consistently applied, and well-established
4 at the time of the petitioner’s purported default.” *Calderon v. United States Dist. Court (Bean)*,
5 96 F.3d 1126, 1129 (9th Cir.1996) (citation and internal quotation marks omitted).

6 Robins asserted the claims in Grounds 9 through 24 in his second state petition. *See* Exhibit
7 R180. The state district court denied each of those claims on procedural grounds. *See* Exhibit R199.
8 Specifically, the state district court ruled that those claims were barred by the statute of limitations
9 under NRS 34.726, barred by the laches doctrine under NRS 34.800, and barred as a second or
10 successive petition under NRS 34.810(1)(b)(2). *See id.* Robins appealed that ruling, and it was
11 affirmed on appeal. *See* Exhibits R217, R228.

12 With respect to the claims in Grounds 9, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, and 24,
13 the Nevada Supreme Court did not at all discuss the merits of the claims in affirming their denial on
14 procedural grounds. *See* Exhibit R228. The denial of those claims was clearly based on independent
15 state procedural grounds.

16 With respect to the claims in Grounds 11 and 16, the Nevada Supreme Court did include,
17 in its ruling, some discussion of the merits of the claims, in the context of cause and prejudice
18 analyses. *See* Exhibit R228, p. 8 (regarding the claim in Ground 11) and p. 10 (regarding the claim
19 in Ground 16). The discussion of the merits of a claim in a cause and prejudice analysis, however, is
20 part of the application of the procedural rule, and does not show inadequacy of that procedural rule.
21 *See Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir.1996). The Nevada Supreme Court’s denial of
22 the claims in Grounds 11 and 16, then, was independent, for purposes of application of the
23 procedural default doctrine.

24 Robins next argues that the procedural bars imposed by the Nevada courts are not adequate
25 to preclude federal habeas review. *See* Amended Opposition to Motion to Dismiss, pp. 31-37.

26

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

11 The respondents, in their motion to dismiss, pled the existence of independent and adequate
12 state procedural grounds, with respect to the state courts’ denials of the claims in Grounds 9 through
13 24, and by doing so, met their initial burden under *Bennett*. Motion to Dismiss, p. 19.

14 In his response to the motion to dismiss, Robins claims that the state courts have not
15 consistently applied the procedural rules in NRS 34.726, NRS 34.800, and NRS 34.8180. Amended
16 Opposition to Motion to Dismiss, pp. 31-37. Robins cites cases that he believes illustrate that the
17 Nevada courts did not, around the time of his default, consistently apply the procedural rules at
18 issue. *Id.* While the court does not find Robins’ showing to be especially compelling, the court does
19 find that Robins has put the procedural default defense at issue, and has thereby met his burden
20 under *Bennett*. The burden, then, shifts to the respondents, to show the adequacy of the procedural
21 bar, by demonstrating that the procedural rules in NRS 34.726, NRS 34.800, and NRS 34.810 have
22 been regularly and consistently applied. *See Bennett*, 322 F.3d at 586.

23 The Ninth Circuit has instructed that the court’s past determinations as to the adequacy of a
24 procedural rule for a given time period are to be accorded deference in applying the *Bennett*
25 analysis. In *King v. Lamarque*, the court held as follows:
26

1 In *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir.1998), we held that a petitioner had
2 not met his burden because we had already held the state procedural rule to be
3 consistently applied and the petitioner failed to cite cases demonstrating subsequent
4 inconsistent application. *Id.* at 932. This holding helps prevent inconsistent
5 determinations regarding a state procedural rule’s adequacy during a given time
6 period. This same reasoning provides a firm foundation for applying the *Ortiz*
7 requirement bilaterally. Once we have found a state procedural rule to be inadequate,
8 petitioners may fulfill their burden under *Bennett* by simply challenging the adequacy
9 of the procedure; the burden then shifts back to the government to demonstrate that
10 the law has subsequently become adequate. . . .

11 This holding is necessary to maintain the primary principle we announced in
12 *Bennett*: the government bears the ultimate burden of establishing the adequacy of a
13 rule. This burden should exist whether or not the petitioner identifies the correct basis
14 upon which to challenge the adequacy of the rule. If we held otherwise, the
15 government could avoid its burden under *Bennett*, and illogical results would occur.
16 Here, for example, we would bar King’s claim based on a procedural rule already
17 found to be inadequate. In essence, we would be holding that the same rule is
18 adequate in some cases and inadequate in others. This defies common sense. A
19 procedural rule is either adequate or inadequate during a given time period; its
20 adequacy does not depend upon the facts of a petitioner's case.

21 *King v. Lamarque*, 464 F.3d 963, 967-68 (9th Cir.2006) (emphasis added). Thus, as the court of
22 appeals instructed in *King*, this court defers to the court of appeals’ rulings with respect to the
23 adequacy of Nevada’s procedural bars around the time of Robins’ default.

24 Robins’ default in state court occurred on July 5, 1991, when Robins filed his timely
25 first state petition without raising the claims now stated in Grounds 9 through 24. *See Valerio v.*
26 *Crawford*, 306 F.3d 742, 776 (9th Cir.2002) (*en banc*), *cert. denied*, 538 U.S. 994 (2003)
27 (“The procedural default, if any, occurred at this time because Valerio omitted the claims from his
28 Chapter 177 petition, and it is the consequence of this omission that is in dispute.”).⁷

29 The Ninth Circuit Court of Appeals has held the statute of limitations codified at
30 NRS 34.726 to be adequate to preclude federal habeas review. In *Moran*, a capital case, the court
31 of appeals ruled that, as of 1996, the Nevada Supreme Court consistently applied the statute of
32 limitations set forth in NRS 34.726, as well as the laches doctrine codified in NRS 34.800.

33 ⁷ Robins asserts that, with respect to NRS 34.726, his default occurred on January 1, 1994,
34 one year after NRS 34.726 was enacted. *See Reply in Support of Motion for Evidentiary Hearing*
35 (docket #178), pp. 5-6. This is a reasonable alternative view of the date of the NRS 34.726 default.
36 Using January 1, 1994, as the date of default, however, would not significantly change the analysis and
37 would not change the outcome.

1 See *Moran*, 80 F.3d at 1269-70; see also *Valerio*, 306 F.3d at 778 (discussing holding in *Moran*).
2 Similarly, in *Loveland v. Hatcher*, 231 F.3d 640, 642-44 (9th Cir.2000), also a capital case, the court
3 of appeals ruled that, as of 1993, the Nevada Supreme Court consistently applied the statute of
4 limitations in NRS 34.726.

5 With respect to the adequacy of the procedural rule codified in NRS 34.810, which
6 essentially states that a claim is waived if not raised in earlier legal proceedings, the legal landscape
7 is more complicated. In *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir.1995), a capital case, the
8 court of appeals considered NRS 177.375, a procedural rule substantially similar to that in
9 NRS 34.810, and held that the Nevada courts had not applied that rule consistently as of 1985.
10 See *McKenna*, 65 F.3d at 1488-89; see also *Moran*, 80 F.3d at 1270 (9th Cir.1996) (discussing
11 *McKenna*). In the capital case of *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir.2001), the court of
12 appeals held that the NRS 34.810 procedural rule was inadequate as of 1985. See *Petrocelli*, 248
13 F.3d at 887-88. And, later, in *Valerio*, the court held that the procedural bar under NRS 34.810, for
14 failure to raise claims in earlier state-court habeas proceedings, was inadequate as of 1990. See
15 also *Sechrest v. Ignacio*, 549 F.3d 789, 802-03 (9th Cir.2008) (following *Valerio*, and holding that
16 the procedural rule in NRS 34.810 was inadequate as of 1985).

17 The court considers unpublished as well as published decisions of the Nevada Supreme
18 Court to determine whether that court had, “in actual practice, a clear, consistently applied, and
19 well-established rule at the time of [petitioner’s] purported default.” *Powell v. Lambert*, 357 F.3d
20 871, 872 (9th Cir.2004) (internal quotation marks omitted). A rule need not be applied in every case
21 to be considered consistently applied; however, it must be applied in the “vast majority of cases.”
22 *Dugger v. Adams*, 489 U.S. 401, 410-11 n. 6 (1989).

23 In *Bennett*, the Court of Appeals indicated that the scope of the state’s “ultimate burden”
24 would depend on the nature and depth of the petitioner’s allegations of inadequacy. *Bennett*, 322
25 F.3d at 584-85 (quoting *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir.1999)).

26

1 Respondents cite a number of unpublished and published opinions in which the Nevada
2 Supreme Court enforced procedural defaults in capital cases around the time of Robins' default.
3 See Reply, pp. 18-20. Those opinions reinforce the rulings of the Ninth Circuit Court of Appeals, in
4 *Moran* and *Loveland*, that, in the early 1990's the Nevada courts consistently applied the statute of
5 limitations of NRS 34.726 and the laches doctrine of NRS 34.800. The court concludes that, in light
6 of *Moran* and *Loveland*, and according those decisions deference as instructed in *King*, respondents
7 have carried their burden, and have shown the procedural rules in NRS 34.726 and NRS 34.800 to
8 be adequate to support a procedural default in this action.

9 On the other hand, keeping in mind the holdings in *McKenna*, *Petrocelli*, *Valerio*, and
10 *Sechrest*, and affording those rulings the deference mandated under *King*, the court concludes that
11 respondents have not shown the procedural rule in NRS 34.810 to have been adequate to support a
12 procedural default in the early 1990's, when Robins' default occurred. The inadequacy of the
13 procedural rule in NRS 34.810 is of no effect here, however, as all of the claims at issue – the claims
14 in Grounds 9 through 24 – were held by the Nevada Supreme Court to be defaulted under all three
15 statutes, NRS 34.726, NRS 34.800, and NRS 34.810. See Exhibit R228, p. 3. Therefore, while
16 NRS 34.810 was not adequate to support a procedural default in this case, NRS 34.726 and
17 NRS 34.800 were adequate, and Robins defaulted his claims in Grounds 9 through 24 under each of
18 those statutes.

19 Robins argues that he can show "cause" for the procedural default. See Amended Opposition
20 to Motion to Dismiss, p. 31. Specifically, he asserts that there is cause, "due to the failure of the
21 habeas court to comply with former Nev. Rev. Stat. § 177.380(3), repealed, 1991 Nev. Stats. ch. 44,
22 which required the court to admonish the petitioner and counsel that all claims must be raised in an
23 initial post-conviction proceeding." *Id.* To demonstrate cause for a procedural default, the
24 petitioner must show that "some objective factor external to the defense impeded" his efforts to
25 comply with the state procedural rule. *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir.2004)
26 (quoting *Pizzuto v. Arave*, 280 F.3d 949, 975 (9th Cir.2002), and *Murray v. Carrier*, 477 U.S. 478,

1 488 (1986)); *see also* *McClesky v. Zant*, 499 U.S. 467, 497 (1991) (“For cause to exist, the external
2 impediment, whether it be government interference or the reasonable unavailability of the factual
3 basis for the claim, must have prevented petitioner from raising the claim.”). Robins makes no
4 showing that he was impeded or prevented from raising his claims by the alleged failure of the
5 Nevada courts to comply with the Nevada statute, and warn him that he must raise all his claims in
6 his first state petition. Moreover, Robins does not even address the question of “prejudice.”
7 *See* Amended Opposition to Motion to Dismiss, p. 31.

8 Robins also argues that it would amount to a fundamental miscarriage of justice for this
9 court not to consider certain of his claims. *See* Amended Opposition to Motion to Dismiss,
10 pp. 24-31. In order to make such a showing, Robins must establish that the constitutional error
11 complained of probably resulted in the conviction of an actually innocent person. *Schlup v. Delo*,
12 513 U.S. 298, 327-328 (1995); *McClesky*, 499 U.S. at 494 (“These are extraordinary instances when
13 a constitutional violation probably has caused the conviction of one innocent of the crime.”);
14 *Murray*, 477 U.S. at 496; *Harris v. Vasquez*, 949 F.2d 1497, 1515 (9th Cir.1990); *see also* *Bousley v.*
15 *United States*, 523 U.S. 614, 623 (1998) (“Actual innocence means factual innocence, not mere
16 legal insufficiency.”). Here, Robins focuses on Grounds 1, 7, and 8, arguing that, but for the
17 constitutional errors alleged in those claims, no reasonable juror would have found him guilty of
18 murder, or eligible for the death penalty. *See* Amended Opposition to Motion to Dismiss, pp. 24-31.
19 Robins’ argument in this regard is off the mark, however, as respondents do not assert that any of
20 Grounds 1, 7, and 8 is procedurally defaulted. Robins makes no showing that dismissing Grounds 9
21 through 24, as procedurally defaulted, will amount to a miscarriage of justice.

22 Therefore, the court finds Grounds 9 through 24 to be procedurally defaulted, and those
23 claims will be dismissed on that ground.⁸

26 ⁸ Grounds 9 through 24 are also barred by the statute of limitations, as is discussed *supra*, and those claims are dismissed on that ground as well.

1 The Motion for an Evidentiary Hearing

2 Robins filed a motion for evidentiary hearing (docket #171). Respondents filed an
3 opposition to that motion (docket #176), and Robins replied (docket #178).

4 Robins requests an evidentiary hearing with regard to the procedural bars affecting
5 Grounds 9 through 24 of his petition. Robins requests an evidentiary hearing “to show that
6 Nevada’s procedural default rules are not clearly established and adequate to bar federal habeas
7 review of his constitutional claims,” “to prove the allegations of cause and prejudice contained in his
8 amended opposition to the State’s motion to dismiss,” “to develop the allegations [of] cause and
9 prejudice, that he is actually innocent of first degree murder and the application of the death penalty,
10 that he acted diligently in pursuing the factual basis of his *Brady* claim, and that he is entitled to
11 equitable tolling of the statute of limitations based upon the uncertainty in the law governing
12 amended petitions, his good faith reliance upon this Court’s scheduling orders, and that any ‘delay’
13 in litigation is not attributable to Mr. Robins.” Amended Motion for Evidentiary Hearing (docket
14 #171), pp. 2-3.

15 Robins, however, has not shown that he would have any possibility of overcoming the statute
16 of limitations or procedural default bar if granted an evidentiary hearing. In his motion, Robins did
17 not state in any detail at all – beyond the very general descriptions above – what factual issues
18 should be the subject of an evidentiary hearing. Nor did Robins describe what evidence he wishes to
19 present at an evidentiary hearing.

20 In his reply, in support of his motion for an evidentiary hearing, Robins focuses only on his
21 request for an evidentiary hearing on the question of the adequacy of the state procedural bars
22 precluding this court’s adjudication of Grounds 9 through 24 on their merits. *See* Reply in Support
23 of Motion for Evidentiary Hearing (docket #178). Robins does not explain, however, and this court
24 cannot discern, what Robins could possibly present at an evidentiary hearing on the adequacy issue.
25 *See Bennett*, 322 F.3d at 584 (The adequacy analysis “should be limited to the language of the state
26

1 court opinions” rather than “based on a *post hoc* examination of the pleadings and record” in the
2 cases reviewed.).

3 The court will deny Robins’ motion for evidentiary hearing.

4 The Motion for Leave to Conduct Discovery

5 Robins also filed a motion for leave to conduct discovery (docket #155). Respondents filed
6 an opposition to that motion (docket #175), and Robins did not reply.

7 In the discovery motion, Robins requests leave to conduct discovery regarding Ground 11.
8 In Ground 11, Robins claims that his constitutional rights were violated as a result of “the State’s
9 failure to disclose material impeachment evidence regarding benefits received by the key
10 prosecution witnesses.” Third Amended Petition, p. 81. In the discovery motion, Robins seeks
11 discovery going to the merits of Ground 11.

12 Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts states:
13 “A party shall be entitled to invoke the processes of discovery available under the Federal Rules of
14 Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good
15 cause shown grants leave to do so, but not otherwise.” The Supreme Court has provided guidance
16 regarding the manner in which a district court’s discretion is to be exercised on Rule 6 motions. The
17 Supreme Court has instructed that if through “specific allegations before the court,” the petitioner
18 can “show reason to believe that the petitioner may, if the facts are fully developed, be able to
19 demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities
20 and procedures for an adequate inquiry.” *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (*quoting*
21 *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

22 As is discussed above, Ground 11 is barred by the statute of limitations and by the procedural
23 default doctrine, and Ground 11 will be dismissed on those bases. Robins does not explain any way
24 in which the requested discovery could help Robins overcome the statute of limitations and
25 procedural default bars.

26

1 Because Ground 11 is procedurally barred, and must be dismissed on statute of limitations
2 and procedural default grounds, Robins cannot make a showing of good cause for this discovery,
3 under Rule 6 and *Bracy*. The court will, therefore, deny this discovery, which goes to the merits of
4 a claim to be dismissed on procedural grounds.

5 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (docket #143) is
6 **GRANTED IN PART AND DENIED IN PART**, as follows.

7 **IT IS FURTHER ORDERED** that the motion to dismiss is denied with respect to the
8 following claims in petitioner's Third Amended Petition for Writ of Habeas Corpus (docket #133):
9 Grounds 1, 2, 3, 4, 5, 6, 7, and 8. The motion to dismiss is granted with respect to the following
10 claims in the third amended petition: Grounds 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23,
11 and 24. Grounds 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24, of the third
12 amended petition, are **DISMISSED**.

13 **IT IS FURTHER ORDERED** that petitioner's Amended Motion for Evidentiary Hearing
14 (docket #171) is **DENIED**.

15 **IT IS FURTHER ORDERED** that petitioner's Motion for Leave to Conduct Discovery
16 (docket #155) is **DENIED**.

17 **IT IS FURTHER ORDERED** that respondents shall have **90 days** from the date of entry of
18 this order to file and serve an answer, responding to Grounds 1, 2, 3, 4, 5, 6, 7, and 8 of petitioner's
19 third amended petition. In all other respects, the schedule for further proceedings in this case will be
20 governed by the scheduling order entered July 7, 2009 (docket #130).

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Dated this 11th day of August, 2010.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE