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## UNITED STATES DISTRICT COURT

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## DISTRICT OF NEVADA

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MANUEL SAUCEDO LOPEZ,

Case No. 2:01-cv-00406-RCJ-NJK

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Petitioner,

ORDER

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v.

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WILLIAM GITTERE,<sup>1</sup> *et al.*,

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Respondents.

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On September 27, 2018, this court entered an order granting in part and denying in part respondents' motion to dismiss Lopez's second amended petition for writ of habeas corpus (ECF No. 139). ECF No. 182. Petitioner Lopez has filed a motion for partial reconsideration of that order. ECF No. 183. With that motion, he asks the court to revisit its decision to dismiss as untimely certain *Brady*<sup>2</sup> claims contained in his second amended petition (in particular, Grounds 2.A, 2.B, and 2.C (part)). For the reasons that follow, the court will deny the motion.

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1. *Application of 28 U.S.C. § 2244(d)(1)(D).*

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Lopez argues the court erred, in finding Grounds 2.A and 2.B untimely, because it applied 28 U.S.C. § 2244(d)(1)(D) in a manner that was arbitrary and without legal support. Grounds 2.A and 2.B are claims that the State presented false testimony and failed to disclose material exculpatory and impeachment information relating to two of its witnesses -- Arturo Montes (2.A) and Maria Lopez (2.B). Section 2244(d)(1)(D) requires

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<sup>1</sup> William Gittere is substituted for Timothy Filson as the warden of Ely State Prison. See Fed. R. Civ. P. 25(d).

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<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

1 that a claim be filed within one year of “the date on which the factual predicate of the  
2 claim or claims presented could have been discovered through the exercise of due  
3 diligence.” 28 U.S.C. § 2244(d)(1)(D). Lopez contends the court misapplied §  
4 2244(d)(1)(D) by focusing on when the “much” of the evidence or when the “critical”  
5 evidence supporting the claims was obtained by the petitioner.

6 Lopez is correct in the sense that the date the evidence is obtained is not  
7 necessarily germane to the triggering date under § 2244(d)(1)(D). Instead, as  
8 respondents point out, the relevant date is when the petitioner knew, or should have  
9 known, of the facts supporting the claim. *See Ford v. Gonzalez*, 683 F.3d 1230, 1235  
10 (9<sup>th</sup> Cir. 2012) (“The ‘due diligence’ clock starts ticking when a person knows or through  
11 diligence could discover the vital facts, regardless of when their legal significance is  
12 actually discovered.”).

13 Lopez’s only argument suggesting that the relevant facts supporting Grounds 2.A  
14 or 2.B could not have been known to him prior to November 28, 2005 (i.e., one year  
15 prior to filing the petition containing the grounds) is that evidence he obtained in 2006  
16 “revealed that Montes had fraudulently procured a driver’s license using an alias and  
17 that he further lied on the application by using a false name, false Social Security  
18 number, and false birth date.” ECF No. 183, p. 6. For reasons explained in the court’s  
19 prior order (ECF No. 182, p. 13-15), Lopez can hardly claim that it was the discovery of  
20 this evidence that finally provided him with the factual predicate for Ground 2.A. *Cf.*  
21 *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9<sup>th</sup> Cir. 2001) (remanding case for a  
22 determination as to “when with the exercise of due diligence Hasan could have  
23 discovered . . . [the] factual predicate to support the prejudice prong of his ineffective  
24 assistance of counsel claim”). Thus, the court stands by its § 2244(d)(1)(D) analysis of  
25 Grounds 2.A and 2.B.<sup>3</sup>

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27 <sup>3</sup> In his reply in support of his motion for reconsideration, Lopez faults the court for not “definitively stat[ing] at what  
28 point [he] actually knew or should have known the facts to raise the prosecutorial misconduct claim.” ECF No. 191,  
p. 12. Lopez is correct that the court has not identified a specific date. It has, however, given ample reasons for  
finding that the date is prior to November 28, 2005. ECF No. 182, p. 13-17.

1           2. *Ground 2 as one consolidated claim.*

2           Lopez argues that this court erred by treating Grounds 2.A, 2.B, and 2.C, as  
3 presenting separate individual claims rather than one consolidated prosecutorial  
4 misconduct claim. According to Lopez, he separated Ground 2 by topic for ease of  
5 reference, not because each topic represents a separate claim. He contends that,  
6 because federal law requires a habeas court to assess the cumulative effect of *Brady*  
7 violations, this court must consider the ground as a unified claim.

8           The only *Brady* claim this court found timely is the portion of Ground 2.C alleging  
9 the State presented false testimony and improperly withheld evidence in relation to the  
10 processing of hair evidence. ECF No. 182, p. 18. Lopez's argument might have some  
11 merit if the additional *Brady* claims in Ground 2 were more closely related, factually, to  
12 this timely claim. See *Valdovinos v. McGrath*, 598 F.3d 568, 575 (9<sup>th</sup> Cir. 2010) (finding  
13 amended *Brady* claims related back to claim in original petition because each was "of  
14 the same type-exculpatory information the government had in its file-that the  
15 government failed to disclose at the required time"). Because the facts underlying the  
16 untimely claims are sufficiently different, the court declines to treat the *Brady* claims in  
17 Ground 2 as a unified claim.

18           3. *Equitable tolling.*

19           Lopez argues that court neglected to address his arguments that he is entitled to  
20 equitable tolling from the time he filed his initial timely petition until the time formal  
21 discovery in this case was closed. In addition, he argues that the decision of the Ninth  
22 Circuit Court of Appeals in *Williams v. Filson*, 908 F.3d 546 (9<sup>th</sup> Cir. 2018), is an  
23 intervening change in controlling law that warrants reconsideration of his equitable  
24 tolling claims.

25           Addressing the latter first, this court agrees that, based on *Williams*, Lopez is  
26 arguably entitled to equitable tolling from 2001, when he filed his initial petition, until  
27 June 23, 2005, when the Supreme Court decided *Mayle v. Felix*, 545 U.S. 644 (2005).  
28 The court in *Williams* concluded that Williams was entitled to equitable tolling from

1 August 29, 1998, and September 17, 1999, because, during that time, he reasonably  
2 relied on the unsettled state of the law “when he assumed that the claims asserted in  
3 his amended petition would relate back to the claims asserted in his original April 1998  
4 petition.” *Williams*, 908 F.3d at 559-61. The factors the court cited as supporting  
5 *Williams*’s reasonable reliance were (1) the absence of case law in August 1998  
6 suggesting that the relation back doctrine might serve to bar his amended claims and  
7 (2) the court’s scheduling orders that contemplated *Williams* would be permitted to add  
8 new claims to his petition without concern that the claims could be time-barred. *Id.*

9 The problem for Lopez is that he did not file his amended petition containing his  
10 new *Brady* claims until November 28, 2006, more than seventeen months after the  
11 issuance of *Mayle*. Once *Mayle* was decided Lopez was on notice that “newly added  
12 claims might not relate back and could therefore be deemed untimely.” *Id.* at 561. In this  
13 court’s view, even a generous interpretation of *Williams* would provide, at most, a new  
14 one-year period beginning with the issuance of *Mayle*. Thus, *Williams* does not support  
15 sufficient equitable tolling to render Lopez’s amended *Brady* claims timely.

16 For the period between *Mayle* and the filing of his amended petition, Lopez  
17 contends that equitable tolling is warranted due to his reliance on this court’s scheduling  
18 orders and the State’s failure to disclose evidence. With respect to the former he relies  
19 upon *Sossa v. Diaz*, 729 F.3d 1225 (9<sup>th</sup> Cir. 2013), and *Prieto v. Quarterman*, 456 F.3d  
20 511 (5<sup>th</sup> Cir. 2006).

21 Relying on *Prieto*, the court of appeals in *Sossa* held that the lower court should  
22 have granted equitable tolling to a *pro se* habeas petitioner who had sought and  
23 obtained extensions of time to file an amended petition beyond the statutory deadline.  
24 729 F.3d at 1235. The court reasoned that *Sossa*’s request to extend the due date for  
25 his amended petition was premised “on the understanding that if the request were  
26 granted and [he] filed his amended petition by the new due date, the petition would be  
27 deemed timely,” and that “[b]y granting *Sossa*’s request . . . , the magistrate judge  
28 conveyed that the premise of *Sossa*’s request was accurate.” *Id.* at 1233. According to

1 the court in *Sossa*, “the magistrate judge’s order granting *Sossa*’s extension request  
2 affirmatively misled him in the very manner that the Supreme Court’s decision in *Piiler v.*  
3 *Ford*,<sup>4</sup> and our decisions in *Ford* and *Brambles*,<sup>5</sup> require.” *Id.* (footnotes added).

4 *Sossa* is distinguishable from this case. For one, *Sossa* was proceeding *pro se*  
5 with scant legal resources and filed his amended petition only eighteen days after the  
6 statutory deadline. 729 F.3d at 1227-28. In addition, *Sossa*’s initial petition contained no  
7 substantive claims. 729 F.3d at 1227. So, in granting *Sossa*’s requests for additional  
8 time, the magistrate judge was, in essence, setting a new deadline for *Sossa*’s initial  
9 petition. Not only were the court’s extensions “affirmatively” misleading, the denial of  
10 equitable tolling would have meant the complete dismissal of *Sossa*’s case, a harsh  
11 result under the circumstances.

12 Here, Lopez had filed an initial petition containing numerous substantive claims.  
13 ECF No. 1. Lopez had benefit of experienced counsel who specialize in federal habeas  
14 law, but nonetheless waited seventeen months after the issuance of *Mayle* to file his  
15 amended petition. Lopez is correct that the court entered several orders, post-*Mayle*,  
16 that permitted him additional time to complete discovery prior to filing an amended  
17 petition. The court did not, however, affirmatively mislead Lopez. Filing an amended  
18 petition does not necessarily involve bringing claims that do not share a common core  
19 of operative facts with existing claims. Given *Mayle*’s clear holding, Lopez was obliged  
20 to recognize the time constraints on bringing claims that did not relate back to his initial  
21 petition.

22 This court is also not persuaded that the State’s alleged failure to disclose  
23 evidence justifies equitable tolling. As discussed in the order deciding the motion to  
24 dismiss, Lopez was aware of the underlying facts giving rise to his *Brady* claims well  
25 before November 28, 2005. While he may have still been pursuing discovery beyond  
26 that date, he was not *required* to complete discovery before filing an amended petition.

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27 <sup>4</sup> 542 U.S. 225 (2004).

28 <sup>5</sup> *Brambles v. Duncan*, 412 F.3d 1066 (9<sup>th</sup> Cir. 2005)

1 Similarly, he was free to continue collecting evidence in support of his claims after filing  
2 his amended petition.

3 In addition, this case bears only faint resemblance to *King v. Bell*, 378 F.3d 550  
4 (6<sup>th</sup> Cir. 2004), the primary case Lopez relies upon to support his position. In *King*, the  
5 State's failure to comply with an initial order to provide a transcript of *voir dire*  
6 proceedings necessitated a modified scheduling order in which "the court ordered, with  
7 the State's concurrence, that King's petition be due 15 days after the transcripts were  
8 provided." *King*, 378 F.3d at 553. Despite King's timely compliance with the order, the  
9 district court granted the State's motion to dismiss the entire petition on statute of  
10 limitation grounds. *Id.* at 552. The court of appeals in *King* found that the petition was  
11 late "only because the government did not comply timely with a court order to produce  
12 *voir dire* transcripts." *Id.* at 553 (emphasis in original). In granting equitable tolling, the  
13 court recognized the inequity of the State delaying production of relevant evidence,  
14 "agreeing to a court-approved extended filing schedule, and then sandbagging [the  
15 defendant] with a statute of limitations defense." *Id.* at 554.

16 No similar unfairness occurred here. Unlike in *King*, the filing of the operative  
17 petition in this case was not directly tied to a specific event or occurrence over which the  
18 State had exclusive control. Instead, Lopez, aware of the facts underlying his *Brady*  
19 claims and presumably the *Mayle* holding, continued to litigate discovery issues, to little  
20 apparent avail, while his deadlines for those claims, under § 2244(d)(1)(D), passed. In  
21 short, it cannot be said that the State's conduct was an "extraordinary circumstance  
22 [that] stood in his way and prevented timely filing." See *Holland v. Florida*, 560 U.S. 631,  
23 649 (2010).

24 The court denies equitable tolling with respect to Lopez's *Brady* claims.

25 4. *Grounds 2.A and 2.B relate back.*

26 Lopez argues that Ground 2.A and Ground 2.B are timely because they relate  
27 back to claims the court found timely – i.e., Ground 2.C and Ground 11.V. As noted  
28 above, the timely portion of Ground 2.C is a claim that the State presented false

1 testimony and improperly withheld evidence in relation to the processing of hair  
2 evidence. Ground 11.V is claim that trial counsel provided ineffective assistance of  
3 counsel because he failed to file a timely notice of appeal from the trial court's denial of  
4 his motion for a new trial. ECF No. 126, p. 313-14.

5 Lopez's arguments notwithstanding, neither Ground 2.A nor Ground 2.B shares a  
6 "common core of operative facts" with Ground 11.V. *Mayle*, 545 U.S. at 664. Ground  
7 2.C was not in a timely filed petition to which Ground 2.A or Ground 2.B could relate  
8 back. It was timely only because the court concluded that Lopez did not uncover  
9 operative facts in support of the claim until June 2006. ECF No. 182, p. 17-18. In any  
10 case, neither Ground 2.A nor Ground 2.B "arise from the same core facts" as Ground  
11 2.C. *Mayle*, 545 U.S. at 657. Thus, the court rejects Lopez's relation back argument.

12 IT IS THEREFORE ORDERED that petitioner's motion for partial reconsideration  
13 (ECF No. 183) is DENIED.

14 IT IS FURTHER ORDERED that petitioner's motion to correct clerical error (ECF  
15 No. 190) is GRANTED. The court's order of September 27, 2018, (ECF No. 182) is  
16 corrected to state that Ground 2 (**except 2.A, 2.B, and 2.C**) is procedurally defaulted.

17 IT IS FURTHER ORDERED that respondents shall have **sixty (60) days** from  
18 the date on which this order is entered within which to file their answer to the remaining  
19 claims in petitioner's second amended petition (ECF No. 126). In all other respects, the  
20 scheduling of this matter is governed by the scheduling order entered June 28, 2016  
21 (ECF No. 124).

22 IT IS FURTHER ORDERED that petitioner's motion for extension of time (ECF  
23 No. 189) is GRANTED *nunc pro tunc* as of December 10, 2018.

24 DATED THIS 26 day of FEBRUARY, 2019.

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28 UNITED STATES DISTRICT JUDGE