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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY MERITT POSEY,
Petitioner,
v.
DWIGHT NEVEN, et al.,
Respondents.

Case No. 2:15-cv-01482-RFB-GWF

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion to dismiss (ECF No. 24). Respondents contend that the original petition is untimely and further that Grounds 1 and 2 of the first amended petition do not relate back to the original petition, if otherwise timely.

Background

Petitioner Anthony Posey challenges his Nevada state conviction, pursuant to a guilty plea, of two counts of abuse and/or neglect of an older person resulting in substantial bodily or mental harm or death.

Posey pled guilty specifically to Counts 4 and 7 in the indictment, and the remaining counts were dismissed pursuant to the plea agreement. (See ECF Nos. 25-31 & 25-32.)

At the sentencing, the presiding judge sentenced Posey to six to fifteen years on Count 4 and six to fifteen years on Count 7. The judge clearly stated that the sentence on Count 7 would run consecutive to the sentence on Count 4. (ECF No. 25-33 at 45-46.)

1 amended judgment, if no separate appeal is taken from the later judgment. The federal
2 petition clearly was timely if the federal limitation period did not begin running until after
3 the August 13, 2013, expiration of the time to seek certiorari review of the order of
4 affirmance on direct appeal. Respondents contend that the federal petition instead was
5 untimely because the limitation period began running after the expiration of the time to
6 appeal the amended judgment of conviction, on November 19, 2012. Respondents
7 maintain that the limitation period therefore expired one year later, on November 19,
8 2013, before Posey sought either state or federal postconviction review.

9 In *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017), the Ninth Circuit held that the
10 one-year federal limitation period under 28 U.S.C. § 2244(d) runs from the date of finality
11 of the judgment of conviction under which the petitioner then is being held. The court
12 accordingly held in that case that the limitation period therefore ran from the date of finality
13 of the amended judgment of conviction under which the petitioner then was held rather
14 than from the date of finality of the original judgment of conviction.

15 The Court notes, however, that *Smith* was decided in a procedural context in which
16 the amended judgment of conviction in question was filed years after completion of the
17 direct appeal proceedings filed following the original judgment of conviction. See 871 F.3d
18 at 685–86. Within that procedurally simple context, the decision speaks in unqualified
19 terms as to which judgment – the original judgment or amended judgment – is “the
20 judgment” for purposes of applying the statutory language of § 2244(d).¹ Under the
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22 ¹ 28 U.S.C. § 2244(d) provides in full:

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

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

26 (B) the date on which the impediment to filing an application
27 created 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 State
28 action;

1 unqualified language in the opinion, the matter of when the one-year period begins to run
2 under § 2244(d)(1) appears to turn solely upon which judgment the petitioner then was
3 being held under when he filed his federal petition. Under the panel's stated rationale,
4 that judgment is "the judgment" for purposes of applying § 2244(d)(1), without
5 qualification. See 871 F.3d at 686-88.

6 Petitioner contends that Smith does not apply to this case because the amended
7 judgment in this case corrected only a clerical error in the original judgment.

8 Whether such a change leads to a new intervening judgment for purposes of the
9 federal limitation period is subject to debate under current caselaw. On the one hand, the
10 Ninth Circuit decision in *Gonzalez v. Sherman*, 873 F.3d 763 (9th Cir. 2017),² includes
11 the following seemingly categorical language:

12 For AEDPA³ purposes, it does not matter whether the
13 error in the judgment was minor or major. What matters is
14 whether there is an amended judgment. Even if the judgment
15 is not substantively changed, it constitutes a new, intervening
16 judgment if the earlier judgment is amended or even if it is
17 reissued as an amended judgment as in *Magwood* [*v.*
Patterson, 561 U.S. 320 (2010)]. Here, the judgment, because
18 it contains the new, correct provision of presentence credits,
19 is an amended judgment.

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

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

27 (2) The time during which a properly filed application for State post-conviction or
28 other collateral review with respect to the pertinent judgment or claim is pending shall not
be counted toward any period of limitation under this subsection.

² *Gonzalez* addressed a question of whether a federal petition filed after an amended judgment of conviction was a successive petition. The same analysis that applies to determine whether an amended state court judgment is a new intervening judgment to in turn determine whether a federal petition is successive also applies to determine whether the federal limitation period has been started or restarted by an intervening judgment. See, e.g., *Smith*, 871 F.3d at 687.

³ The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

1 873 F.3d at 773 n.5. On the other hand, the same Gonzalez decision engages in an
2 extensive analysis under California state law to determine whether the amended
3 judgment would be a new judgment under state law, based upon, inter alia, a distinction
4 – under that state’s law – between correction of a “scrivener’s error” in memorializing the
5 oral pronouncement of the sentencing judge and a “rendering error” made by the court
6 itself in pronouncing sentence. See 873 F.3d at 769–73.

7 The Court concludes that it does not need to conduct an extensive analysis of such
8 fine points under Nevada state law to resolve the overall timeliness issue in this case.⁴
9 The Court instead concludes that the federal limitation period does not begin to run in this
10 procedural context until after the conclusion of review on the then-pending direct appeal
11 even if, arguendo, the amended judgment constituted a new intervening judgment for
12 purposes of AEDPA.

13 Even if the amended judgment became “the judgment” for purposes of applying
14 § 2244(d)(1) under Smith, the pertinent question in the Court’s view then becomes one
15 of when that judgment “became final by the conclusion of direct review or the expiration
16 of the time for seeking such review” for purposes of § 2244(d)(1)(A). Quite clearly, if the
17 state appellate courts overturned the conviction and/or sentence on the pending direct

18 ⁴ The Court is not fully sanguine that the prior Ninth Circuit law upon which Gonzalez ultimately
19 relies in truth requires analysis of state law to determine whether an amended judgment is a new intervening
20 judgment for purposes of the federal law in AEDPA. Gonzalez cites to Clayton v. Biter, 868 F.3d 840, 844
21 (9th Cir. 2017), for the proposition that “[w]e look to state law to determine whether a state court action
22 constitutes a new, intervening judgment.” 873 F.3d at 769. Clayton in turn cited to Hill v. Alaska, 297 F.3d
23 895 (9th Cir. 2002), for this proposition. Hill does not involve an amended judgment of conviction. The
24 question presented in Hill instead concerned whether a federal petition challenging the calculation of the
25 prisoner’s release date was successive to a prior federal petition challenging instead the validity of the
26 underlying conviction and sentence. Hill did not hold, nor could it hold, that state law is in any sense
27 determinative of the different question of whether an amended judgment of conviction is a new intervening
28 judgment for purposes of federal law. Even more significantly, nothing in the Supreme Court’s prior decision
in Magwood or the Ninth Circuit’s earlier leading decisions in Wentzell v. Neven, 675 F.3d 1124 (9th Cir.
2012), and Smith suggested that state law had any determinative role in the inquiry. The panel in Gonzalez
engaged in an extensive multi-page analysis of highly technical points of California law regarding judgments
to reach a decision. Calculation of the federal limitation period instead preferably should be capable of
being done quickly and reliably by busy courts and practitioners as well as – most importantly – by pro se
inmates untrained in the law. It is subject to question whether an analysis that turns upon arcane points of
state procedural law regarding judgments – to be determined definitively only years later by a federal
appellate court – serves anyone’s interests, and especially those of pro se inmates with only limited access
to legal resources in prison. The apparently more categorical expressions instead in note 5 in Gonzalez
and in Smith do have the advantage of greater simplicity in application, which is a very desirable virtue in
this context.

1 appeal, the amended judgment would be vacated or modified to the same extent as the
2 original judgment of conviction, without regard to whether the defendant also separately
3 appealed the amended judgment as to some issue specific to that judgment. That is,
4 clearly, the amended judgment would not stand following such a reversal on direct appeal
5 simply because no separate appeal was filed. The amended judgment both practically
6 and legally was just as much under review on direct appeal as was the original judgment,
7 given that both would be subject to being vacated or modified by a full or partial reversal.

8 The Court accordingly holds that, when an intervening new judgment is filed during
9 the pendency of a direct appeal and no separate appeal is filed, that new judgment
10 becomes final for purposes of § 2244(d)(1)(A) upon the conclusion of the then-pending
11 direct review proceedings or the expiration of the time for seeking further such direct
12 review, such as by the expiration of the time to seek certiorari review.⁵

13 This holding is fully in accord with the statutory language in § 2244(d)(1)(A). The
14 holding merely construes the meaning of the statutory language regarding when the
15 judgment “became final by the conclusion of direct review or the expiration of the time for
16 seeking such review” as applied to the specific context of an amended judgment being
17 filed during the pendency of a direct appeal.

18 Moreover, this construction of the statutory language in § 2244(d)(1)(A) avoids a
19 patently absurd result that Congress clearly did not intend and that is not compelled by
20 the plain language of the statute. There is no valid policy interest served by starting the
21 federal limitation period running while a petitioner’s direct appeal from his conviction and
22 sentence still is pending. Typically, no federal claims are exhausted at that point; and
23 there is no useful purpose served by starting the federal limitation period running at a time
24 when federal review would be premature. Indeed, given that the direct appeal is part of

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26 ⁵ In contrast, if a separate appeal is filed from the amended judgment that for some reason is not
27 consolidated with – and then also remains pending after – the disposition of the previously-pending appeal,
28 then it would appear that the limitation period would not begin to run until after the conclusion of such direct
review or the expiration of the time to further pursue such direct review. That is, it would appear that direct
review still would be ongoing with respect to the amended judgment, albeit based instead solely on the
separate appeal proceeding directed only to that judgment rather than also the prior appeal.

1 the original criminal proceeding, dismissal under the abstention rule in *Younger v. Harris*,
2 401 U.S. 37 (1971), typically is required if federal intervention is sought during the
3 pendency of the direct appeal. See, e.g., *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th
4 Cir. 1983); *Carden v. Montana*, 626 F.2d 82, 83-85 (9th Cir. 1980). Starting the federal
5 limitation period – which runs for only one year – running before the petitioner can even
6 effectively seek federal habeas relief just does not make sense. The federal limitation
7 period potentially even could expire in such a scenario before the direct appeal even was
8 concluded, serving no good policy reason. The Court sees no reason to make such a
9 nonsensical holding when the plain language of the statute readily can be construed, as
10 described above, in a manner that does not lead to such an absurd result.⁶

11 The only end served by construing the statute in the manner proposed by
12 respondents would be to create a “gotcha” trap for the unwary. The Supreme Court
13 repeatedly has declined to construe the federal habeas statutes in such a manner. See,
14 e.g., *Rose v. Lundy*, 455 U.S. 509, 520 (1982); see also *Rhines v. Weber*, 544 U.S. 269,
15 279 (2005) (Stevens, J., concurring). This Court also declines to do so here.

16 The original petition was timely.

17 **Relation Back**

18 Respondents contend in the alternative that Grounds 1 and 2 in the first amended
19 petition do not relate back to claims in the timely original petition.

20 A claim in an amended petition that is filed after the expiration of the limitation
21 period will be timely only if the claim relates back to a timely-filed claim pursuant to Rule
22 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out of “the

23 ⁶ Petitioners conceivably could protect their interests by filing a protective federal petition and
24 seeking a stay pending exhaustion of state court remedies, contending that the situation satisfied the
25 special circumstances exception to *Younger*. However, there seems to be little practical utility to construing
26 § 2244(d)(1)(A) in a manner that requires such a duplicative federal filing -- potentially years before the
27 state direct appeal and then likely state postconviction proceedings are concluded – simply because an
28 amended judgment was filed during still-ongoing state proceedings. Rather, the simple, common-sense
construction of § 2244(d)(1)(A) outlined in the text avoids such duplicative proceedings. It also avoids
penalizing pro se petitioners who may not have the legal savvy that would be necessary to recognize a
counterintuitive and highly technical legal point that the federal limitation period would be running against
them even before they had completed state direct appeal proceedings. Simplicity, again, is a desirable
virtue when construing a limitation statute that must be complied with by typically pro se litigants.

1 same conduct, transaction or occurrence" as the timely claim. *Mayle v. Felix*, 545 U.S.
2 644 (2005). In *Felix*, the Supreme Court held that habeas claims in an amended petition
3 do not arise out of "the same conduct, transaction or occurrence" as prior timely claims
4 merely because the claims all challenge the same trial, conviction or sentence. 545 U.S.
5 at 655–64. Rather, under the construction of the rule approved in *Felix*, Rule 15(c)
6 permits relation back of habeas claims asserted in an amended petition "only when the
7 claims added by amendment arise from the same core facts as the timely filed claims,
8 and not when the new claims depend upon events separate in 'both time and type' from
9 the originally raised episodes." *Id.* at 657. In this regard, the reviewing court looks to "the
10 existence of a common 'core of operative facts' uniting the original and newly asserted
11 claims." *Id.* at 659. A claim that merely adds "a new legal theory tied to the same
12 operative facts as those initially alleged" will relate back and be timely. *Id.* at 659 & n.5.

13 At the outset, the Court must reject two general arguments that Posey makes
14 regarding both Grounds 1 and 2.

15 First, petitioner urges that Grounds 1 and 2 relate back to claims in the original
16 petition because: (a) he attached a copy of the state district court's findings, conclusions
17 and order to his federal petition (which the petition form instructions require); (b) the order
18 therefore should be considered as part of his original petition; and (c) the order allegedly
19 discussed claims based on the same core facts. (ECF No. 31 at 12-14.) The Ninth Circuit
20 has rejected petitioner's premise that a state court order is incorporated into the original
21 petition by such attachment for purposes of relation back. *Ross v. Williams*, 896 F.3d
22 958, 963–73 (9th Cir. 2018). Posey's original petition made no reference to the state
23 court order or indicated that it sets forth facts supporting his claimed grounds for relief.
24 He therefore cannot rely upon the state court order as a basis for relation back. *Id.* at
25 973.

26 Second, petitioner maintains that, because pro se pleadings must be liberally
27 construed, his original petition need only give the respondents notice of the underlying
28 constitutional violations and/or operative facts. (ECF No. 31 at 11 & 13.) Under Rule 2(c)

1 of the Rules Governing Section 2254 Proceedings (the “Habeas Rules”), however, federal
2 pleading quite clearly is not notice pleading. As Justice Ginsburg’s opinion for the majority
3 states in Felix:

4 The “original pleading” to which Rule 15 refers is the
5 complaint in an ordinary civil case, and the petition in a
6 habeas proceeding. Under Rule 8(a), applicable to ordinary
7 civil proceedings, a complaint need only provide “fair notice of
8 what the plaintiff’s claim is and the grounds upon which it
9 rests.” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2
10 L.Ed.2d 80 (1957). Habeas Corpus Rule 2(c) is more
11 demanding. It provides that the petition must “specify all the
12 grounds for relief available to the petitioner” and “state the
13 facts supporting each ground.” See also Advisory
14 Committee’s Note on subd. (c) of Habeas Corpus Rule 2, 28
U.S.C., p. 469 (“In the past, petitions have frequently
contained mere conclusions of law, unsupported by any facts.
[But] it is the relationship of the facts to the claim asserted that
is important”); Advisory Committee’s Note on Habeas
Corpus Rule 4, 28 U.S.C., p. 471 (“[N]otice’ pleading is not
sufficient, for the petition is expected to state facts that point
to a real possibility of constitutional error.” (internal quotation
marks omitted)).

15 545 U.S. at 655. Federal habeas pleading is not notice pleading, even when the petitioner
16 is proceeding pro se. Habeas claims, including when pled by pro se litigants, must be
17 pled with specificity, although they nonetheless are construed liberally when alleged pro
18 se. See, e.g., *Felix*, 545 U.S. at 656; *Ross*, 896 F.3d at 971.⁷

19 The Court accordingly turns to the controlling inquiry of whether a common core of
20 operative facts unites the amended claims and a claim or claims in the original petition.

21 **Ground 1**

22 In amended Ground 1, Posey alleges that his guilty plea was not knowing,
23 intelligent or voluntary, in violation of the Fifth, Sixth and Fourteenth Amendments,
24 because he was coerced into entering the plea by the state district court and his counsel.
25 He alleges that he was coerced into entering a plea because:

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27 ⁷ Posey cites no apposite habeas case holding that only notice pleading is required when the
28 petitioner is proceeding pro se. Habeas cases stating only that pro se pleadings must be construed liberally
do not establish that only notice pleading is required, contrary to the holding in *Felix* and Habeas Rule 2(c).

1 (1) he was not allowed to enter a plea of not guilty by reason
2 of temporary insanity and was wrongly informed that it
3 would be impossible to pursue such a theory of defense
4 at trial;

5 (2) he was led to believe that trial would be futile because
6 his rights were consistently violated, including his right to
7 adequate notice of the grand jury proceedings; his pro se
8 motions were summarily denied without a hearing; and
9 he was denied effective assistance of counsel when
10 replacement counsel was not appointed following a
11 complete breakdown of trust and communication with
12 counsel, leading to Posey feeling abandoned by his
13 attorneys;

14 (3) he suffered from significant mental health problems that
15 should be taken into account with regard to whether the
16 plea was knowing, intelligent and voluntary, including a
17 history of blackouts and diagnoses of post-traumatic
18 stress disorder (“PTSD”), bipolar disorder, and
19 personality disorder; and

20 (4) he did not understand the plea deal, as he believed that
21 he would be receiving two sentences of two to twenty
22 years and he instead received two sentences of six to
23 fifteen years, which he believes is in violation of the plea
24 agreement.

25 He alleges that the totality of these circumstances “created a coercive environment
26 wherein Posey felt he had no option but to plead guilty.” (ECF No. 18 at 11-14.)

27 In original Ground 3, Posey alleged that he was denied due process of law in
28 violation of the Fourteenth Amendment because “I was coerced into taking a plea of guilty

1 due to the acts and omissions listed herein, which goaded me into same via the Court
2 and Defense Counsel.” (ECF No. 11 at 9.) While comparatively sparse, these allegations
3 did expressly incorporate “the acts and omissions listed” in the remainder of the pleading,
4 and a pleader of course can incorporate allegations from other grounds. In those
5 grounds, Posey alleged, inter alia, that:

6 (1) he was denied variously effective assistance of counsel,
7 an alleged Fourteenth Amendment right to be free from
8 arbitrariness, and due process of law because of, inter
9 alia, “Petitioner’s plea of not guilty by reason of temporary
10 insanity at the time of the commission of the crime’ being
11 changed to ‘not guilty’ without Petitioner’s knowledge;” and
12 because he “was deemed culpable in violation of Nevada
13 Law, N.R.S. 194.010(5), due to my having a ‘Blackout,’”
14 (id. at 5, 8 & 13);

15 (2) he was denied variously a Sixth Amendment right to fair
16 and full hearings, a right to equal protection of the law, and
17 a Sixth Amendment right to be present because the state
18 district court did not allow him to meaningfully present his
19 pro se motions to dismiss counsel, to rescind the judgment
20 denying same, and to dismiss the indictment, and his
21 efforts to raise issues throughout the criminal proceeding
22 were “completely disregarded,” and further because he
23 was denied his right to be present before the grand jury;
24 and he was denied effective assistance of counsel
25 because, inter alia, “counsel failed to object to numerous
26 substantive[,] procedural and/or “plain errors of the
27 prosecution and the Court (e.g.,: insufficient notice of
28 intent to go to the grand jury[.]” and “counsel Haylee

1 Kolkoski professed a complete breakdown in
2 communication between herself and Petitioner,
3 06/16/2011,” which “caused a lack of trust,” and “Petitioner
4 had counsel with a known ‘conflict of interest,’” (id. at 5, 6,
5 11, 13, 15, 17 & 19);

6 (3) he was denied due process because the “sentencing
7 judge intimated numerous opinions and bare assertions by
8 the trial court inconsistent with facts and evidence which
9 show I suffered ‘Blackouts,’” (id. at 8); and

10 (4) he was denied due process and an alleged right to be free
11 from arbitrariness because he “was not sentenced
12 according to a negotiated plea agreement” and the court
13 allowed itself and the prosecution to breach a negotiated
14 plea agreement between petitioner and the State in
15 violation of Nevada law (id. at 8 & 13).

16 Reading these allegations in the pro se original petition liberally, the Court finds
17 that amended Ground 1 shares a common core of operative facts with and relates back
18 to timely claims in the original petition to the extent, and only to the extent, that amended
19 Ground 1 alleges that Posey’s guilty plea was not knowing, intelligent or voluntary, in
20 violation of the Fifth, Sixth and Fourteenth Amendments, because he was coerced into
21 entering the plea by the state district court and his counsel, because:

22 (1) he was not allowed to enter a plea of not guilty by reason
23 of temporary insanity and was wrongly informed that it
24 would be impossible to pursue such a theory of defense at
25 trial;

26 (2) he was led to believe that trial would be futile because his
27 rights were consistently violated, including his right to
28 adequate notice of the grand jury proceedings; his pro se

1 motions were summarily denied without a hearing; and he
2 was denied effective assistance of counsel when
3 replacement counsel was not appointed following a
4 complete breakdown of trust and communication with
5 counsel, leading to Posey feeling abandoned by his
6 attorneys; and

7 (3) he had a history of blackouts,
8 such that the totality of these circumstances, and only these circumstances, created a
9 coercive environment wherein Posey felt that he had no option but to plead guilty.

10 The remaining allegations from amended Ground 1 that the Court summarized
11 previously but that the Court has not included in the recital immediately above do not
12 relate back to a claim in the original petition, as there are no specific factual allegations
13 in the original petition that would support such relation back. The Court notes that while
14 Posey included conclusory allegations in the original petition regarding breach of the plea
15 agreement, he made no specific allegations that the six to fifteen year sentences that he
16 received violated an agreement that he instead receive only two to twenty year sentences
17 and/or that he understood at the time of the plea that he would be receiving the latter
18 sentences. Conclusory claims that allege no specific facts allege no core of operative
19 facts that would support relation back. See, e.g., Ross, 896 F.3d at 971-72.

20 Amended Ground 1 therefore relates back and is timely only to the extent
21 described above.

22 **Ground 2**

23 In amended Ground 2, Posey alleges that he was denied effective assistance of
24 counsel because of a conflict of interest and/or irreconcilable differences between Posey
25 and the five or more lawyers with the county public defender who represented him at one
26 time or another, including initially attorney Haylee Kolkoski. (ECF No. 18 at 14–17.)

27 Respondents contend that Ground 2 does not relate back to a claim in the original
28 petition to the extent that it alleges an irreconcilable conflict with any of the deputy public

1 defenders other than Kolkoski because the original petition refers only to a conflict with
2 Kolkoski. (ECF No. 24 at 9; ECF No. 11 at 6 & 13.) The Court is not persuaded. A claim
3 that petitioner had an irreconcilable conflict with other deputies also with the county public
4 defender relates back to a common core of operative fact with the claim in the original
5 petition that petitioner had an irreconcilable conflict with deputy county public defender
6 Kolkoski. See, e.g., *Valdovinos v. McGrath*, 598 F.3d 568, 574-76 (9th Cir. 2010),
7 judgment vacated on other grounds for reconsideration, 562 U.S. 1196 (2011), prior
8 relevant holding adhered to in unpublished decision, 2011 WL 996660, 423 Fed.Appx.
9 720, 722 (9th Cir., Mar. 22, 2011) (Brady claim and related ineffective-assistance claim
10 based upon failure to disclose additional items of exculpatory evidence related back to
11 prior claims regarding nondisclosure of other items of exculpatory evidence); see also
12 *Rodriguez v. Adams*, 545 Fed.Appx. 620 (9th Cir. Nov. 18, 2013) (later claim that counsel
13 was ineffective for failing to investigate the testimony of two potential exculpatory
14 witnesses who were present at the scene related back to earlier claim that counsel was
15 ineffective for failing to investigate the testimony of three other witnesses who also were
16 present at the scene).

17 Ground 2 relates back to the original petition in full.

18 **Conclusion**

19 IT THEREFORE IS ORDERED that respondents' motion to dismiss (ECF No. 24)
20 is GRANTED IN PART and DENIED IN PART, such that Ground 1 is DISMISSED IN
21 PART with only the portion of the claim described at pages 12–13 of this order remaining
22 before the Court.

23 IT FURTHER IS ORDERED that respondents shall file an answer to all claims
24 remaining before the Court within forty-five (45) days of entry of this order and that
25 petitioner may file a reply within forty-five (45) days of service of the answer.⁸

26 ⁸ Respondents assert that they “reserve other applicable procedural arguments” in the event that
27 the Court disagrees with their timeliness argument pursuant to *Smith*. (ECF No. 24 at 7 n.5.) The
28 scheduling order in this case stated that respondents must raise all potential affirmative defenses in their
initial response and that successive motions to dismiss would not be entertained. (ECF No. 20.) Any
purported unilateral reservation notwithstanding, the next step in this case therefore is an answer and reply

1 The Court will be endeavoring to resolve this matter by September 30, 2019, if
2 possible. Accordingly, in the event of scheduling conflicts between this action and other
3 actions pending in this District, any requests for extension should be sought in the earlier-
4 filed case, absent extraordinary circumstances.

5 DATED: March 20, 2019.

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9 RICHARD F. BOULWARE, II
10 United States District Judge
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28 on the merits. See, e.g., *Morrison v. Mahoney*, 399 F.3d 1042, (9th Cir. 2005) (“Unless a court has ordered otherwise, separate motions to dismiss may be filed asserting different affirmative defenses.”) (emphasis added). The time to present procedural defenses beyond those raised in the motion to dismiss is past in this case.