

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 ROBERT JACKSON,
5 Petitioner,

6 v.

7
8 CALVIN JOHNSON, *et al.*,
9 Respondents.

Case No. 2:20-cv-02100-KJD-DJA

ORDER

10
11
12 I. Introduction

13 This action is a *pro se* petition for a writ of habeas corpus by Nevada prisoner
14 Robert Jackson. Respondents have filed a motion to dismiss. The Court will grant that
15 motion in part and deny it in part. The Court will dismiss certain of Jackson's claims.
16 The Court will set a schedule for Respondents to file an answer responding to the
17 claims not dismissed, and for Petitioner to file a reply.

18 II. Background

19 After a jury trial in August 2014, Jackson was found guilty of multiple crimes
20 stemming from a shooting in Las Vegas. Trial Transcripts, Exhs. 83, 85, 90, 92, 93, 95,
21 97, 99, 100 (ECF Nos. 13-33, 13-35, 13-40, 13-42, 13-43, 13-45, 14-2, 14-4, 14-5).
22 Following the verdict, the trial court granted Jackson a new trial on two of the charges
23 (Counts 8 and 9). Transcript, September 10, 2014, Exh. 109 (ECF No. 14-14); Order,
24 Exh. 110 (ECF No. 14-15). The State appealed from that order. Notice of Appeal, Exh.
25 113 (ECF No. 14-18).

26 At a sentencing hearing on February 18, 2015, Jackson was sentenced to prison
27 terms as follows: on Count 1, attempted murder, 4–10 years, plus a consecutive term of
28 2–5 years for use of a deadly weapon and gang activity enhancement; on Count 2,

1 attempted murder, 4–10 years, plus a consecutive term of 2–5 years for use of a deadly
2 weapon and gang activity enhancement, consecutive to Count 1; on Count 3, battery
3 resulting in substantial bodily harm, 2–6 years, plus a consecutive term of 2–5 years for
4 use of a deadly weapon and gang activity enhancement, concurrent with Counts 1 and
5 2; on Count 4, attempted murder, 4–10 years, plus a consecutive term of 2–5 years for
6 use of a deadly weapon and gang activity enhancement, consecutive to Counts 1, 2 and
7 3; on Count 5, battery, 2–6 years, plus a consecutive term of 2–5 years for use of a
8 deadly weapon and gang activity enhancement, concurrent with Count 4; on Count 6,
9 attempted murder, 4–10 years, plus a consecutive term of 2–5 years for use of a deadly
10 weapon and gang activity enhancement, consecutive to Counts 1, 2, 3, 4 and 5; on
11 Count 7, battery, 2–6 years, plus a consecutive term of 2–5 years for use of a deadly
12 weapon and gang activity enhancement, concurrent with Count 6; and on Count 10,
13 possession of a firearm by an ex-felon, to a maximum of 4 years, with a minimum parole
14 eligibility of 19 months, concurrent to all other counts. Transcript of Sentencing,
15 Exh. 133 (ECF No. 14-38). The judgment of conviction was filed on March 4, 2015.
16 Judgment of Conviction, Exh. 135 (ECF No. 14-40). Jackson appealed. Notice of
17 Appeal, Exh. 140 (ECF No. 14-45). The Nevada Court of Appeals consolidated the
18 appeals for their disposition and affirmed in part, reversed in part, and remanded on
19 March 16, 2016. Order Affirming in Part, Reversing in Part and Remanding, Exh. 188
20 (ECF No. 15-48). The Nevada Court of Appeals reversed the grant of a new trial on
21 Count 8 and vacated Count 1, and remanded. *Id.*

22 Jackson was re-sentenced on October 5, 2016. Transcript, October 5, 2016
23 (ECF No. 16-21). He received the same prison sentences as before on Counts 2, 3, 4,
24 5, 6, 7 and 10. *Id.* Counts 1, 8 and 9 were dismissed. *Id.* An amended judgment of
25 conviction was filed on October 14, 2016. Amended Judgment of Conviction, Exh. 213
26 (ECF No. 16-23). In the amended judgment, Jackson was sentenced to prison as
27 follows: on Count 2, attempted murder, 4–10 years, plus a consecutive term of 2–5
28 years for use of a deadly weapon and gang activity enhancement; on Count 3, battery

1 resulting in substantial bodily harm, 2–6 years, plus a consecutive term of 2–5 years for
2 use of a deadly weapon and gang activity enhancement, concurrent with Count 2; on
3 Count 4, attempted murder, 4–10 years, plus a consecutive term of 2–5 years for use of
4 a deadly weapon and gang activity enhancement, consecutive to Counts 2 and 3; on
5 Count 5, battery, 2–6 years, plus a consecutive term of 2–5 years for use of a deadly
6 weapon and gang activity enhancement, concurrent with Count 4; on Count 6,
7 attempted murder, 4–10 years, plus a consecutive term of 2–5 years for use of a deadly
8 weapon and gang activity enhancement, consecutive to Counts 2, 3, 4 and 5; on Count
9 7, battery, 2–6 years, plus a consecutive term of 2–5 years for use of a deadly weapon
10 and gang activity enhancement, concurrent with Count 6; and on Count 10, possession
11 of a firearm by an ex-felon, to a maximum of 4 years, with a minimum parole eligibility of
12 19 months, concurrent to all other counts. *Id.* The aggregate total of Jackson’s prison
13 sentences is 45 years with a minimum parole eligibility of 18 years. *Id.*

14 Jackson appealed from the amended judgment of conviction. Notice of Appeal,
15 Exh. 216 (ECF No. 16-26). The Nevada Court of Appeals affirmed on June 19, 2018.
16 Order of Affirmance, Exh. 288 (ECF No. 17-48). The remittitur issued on July 16, 2018.
17 Remittitur, Exh. 293 (ECF No. 18-3).

18 On June 19, 2019, Jackson filed a petition for writ of habeas corpus in the state
19 district court. Petition for Writ of Habeas Corpus, Exh. 334 (ECF No. 18-44). The state
20 district court denied the petition in a written order on October 16, 2019. Findings of Fact,
21 Conclusions of Law, and Order, Exh. 343 (ECF No. 19-8). Jackson appealed. Notice of
22 Appeal, Exh. 347 (ECF No. 19-12). The Nevada Court of Appeals affirmed on
23 August 12, 2020. Order of Affirmance, Exh. 365 (ECF No. 19-30). The Nevada Court of
24 Appeals ruled that the petition was untimely filed, and that Jackson did not show actual
25 innocence such as to overcome the statute of limitations bar. *Id.* Jackson filed a petition
26 for rehearing (Exh. 368 (ECF No. 19-33)), which was denied on October 23, 2020.
27 Order Denying Rehearing, Exh. 369 (ECF No. 19-34). The remittitur issued on
28 November 17, 2020. Remittitur, Exh. 370 (ECF No. 19-35).

1 Jackson also pursued two motions to correct illegal sentence, and a petition for
2 writ of mandamus, related to his convictions in this case. The first was a motion to
3 correct illegal sentence filed on November 30, 2015. Motion to Correct Illegal Sentence,
4 Exh. 179 (ECF No. 15-39). The state district court denied that motion in a written order
5 filed on June 14, 2016. Order Denying Defendant's Motion to Correct Illegal Sentence,
6 Exh. 199 (ECF No. 16-9). Jackson appealed from that ruling, and, on July 12, 2017, the
7 Nevada Supreme Court affirmed. Order of Affirmance, Exh. 244 (ECF No. 17-4). The
8 remittitur issued on August 8, 2017. Remittitur, Exh. 247 (ECF No. 17-7).

9 Jackson filed his second motion to correct illegal sentence on December 20,
10 2017. Motion to Correct an Illegal Sentence, Exh. 261 (ECF No. 17-21). The state
11 district court denied that motion in a written order filed on February 20, 2018. Order
12 Denying Defendant's Pro Per Motion to Correct Illegal Sentence, Exh. 271 (ECF No. 17-
13 31). Jackson appealed from that ruling, but, on June 22, 2018, the Nevada Supreme
14 Court dismissed the appeal, ruling that Jackson's notice of appeal was untimely filed.
15 Order Dismissing Appeal, Exh. 291 (ECF No. 18-1). The remittitur issued on July 18,
16 2018. Remittitur, Exh. 294 (ECF No. 18-4).

17 On February 23, 2018—before he filed his notice of appeal regarding his second
18 motion to correct illegal sentence—Jackson filed, in the state district court, a motion for
19 rehearing of that matter. Motion for Rehearing, Exh. 272 (ECF No. 17-32). The state
20 district court denied that motion in a written order filed on August 21, 2018. Order
21 Denying Defendant's Pro Per Motion for Rehearing on the Motion to Correct an Illegal
22 Sentence, Exh. 296 (ECF No. 18-6). Jackson appealed from that ruling. Notice of
23 Appeal, Exh. 297 (ECF No. 18-7). The Nevada Court of Appeals affirmed on
24 October 16, 2019. Order of Affirmance, Exh. 344 (ECF No. 19-9). The remittitur issued
25 on November 12, 2019. Remittitur, Exh. 350 (ECF No. 19-15).

26 On February 13, 2020, Jackson filed a petition for writ of mandamus in the
27 Nevada Supreme Court. Petition for Writ of Mandamus, Exh. 357 (ECF No. 19-22). The
28 Nevada Supreme Court denied that petition on February 27, 2020. Order Denying

1 Petition for Writ of Mandamus, Exh. 358 (ECF No. 19-23). A Notice in Lieu of Remittitur
2 was issued on March 23, 2020. Notice in Lieu of Remittitur, Exh. 361 (ECF No. 19-26).

3 Jackson initiated this federal habeas corpus action, *pro se*, on November 13,
4 2020. See Petition for Writ of Habeas Corpus (ECF No. 7). On December 14, 2020, the
5 Court granted Jackson's motion for leave to amend his petition to include two legal
6 citations that were left out of his original petition. Order entered December 14, 2020
7 (ECF No. 6). Jackson's petition includes the following claims (organized and stated as
8 in the petition):

9 Ground 1: The Nevada Court of Appeals ignored Petitioner's Second
10 Direct Appeal when ruling that the Petition for the Writ of Habeas Corpus
(Post-Conviction) was filed late.

11 Ground 2: Counsel were ineffective for failing to raise structural and
12 instructional errors, issues of fundamental fairness, and dead-bang
13 winners, in favor of the cursory analysis and conclusive arguments of far
weaker issues.

14 Sub-Ground 1: The Prosecution constructively amended the indictment to
15 assert a substantively different factual basis than Petitioner was originally
indicted for.

16 Sub-Ground 2: Jury instruction no. 14 is fundamentally defective in
defining an essential element of Attempted Murder.

17 Sub-Ground 3: The erroneous and misleading transferred intent
18 instruction on Attempted Murder amounted to prosecutorial impairment of
the grand jury's independent role.

19 Sub-Ground 4: The indictment is multiplicitious in charging the same
20 offense in Counts 2, 4 and 6.

21 Sub-Ground 5: The indictment is Fatally Duplicitous in charging the
22 Petitioner with attempting to murder a single individual and an alternative
group of individuals in each count.

23 Sub-Ground 6: Actual Innocence: Conviction of Petitioner is Miscarriage of
Justice.

24 Sub-Ground 7: Perjured testimony was used by prosecution to obtain
25 Petitioner's indictment and conviction.

26 Sub-Ground 8: The government misconduct used to obtain the indictment
against the Petitioner amounts to a Due Process violation.

27 Sub-Ground 9: The prosecution failed to preserve and disclose evidence
28 favorable to the Petitioner.

1 Sub-Ground 10: The cumulative effect of prejudicial trial errors and
2 insufficient evidence denied the Petitioner a fair trial. Jackson also
includes several other specific claims, not asserted elsewhere in his
petition, in Sub-Ground 10.

3 Sub-Ground 11: The original Superseding Indictment fails to state an
4 offense in the attempted murder and gang enhancement counts.

5 Sub-Ground 12: The charges in the 2007 criminal complaint were
6 broadened and substantially amended after the Statute of Limitations
expired.

7 Petition for Writ of Habeas Corpus (ECF No. 7).

8 Respondents filed their motion to dismiss on July 8, 2021 (ECF No. 11),
9 contending that Jackson's entire petition is barred by the statute of limitations, and that
10 all his claims are unexhausted in state court and/or procedurally defaulted. The parties
11 have fully briefed the motion to dismiss (ECF Nos. 20, 21).

12 III. Discussion

13 A. Statute of Limitations

14 The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996,
15 established a one-year statute of limitations for federal habeas petitions filed by
16 prisoners challenging state convictions; the statute provides:

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

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

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

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

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

1 28 U.S.C. 2244(d)(1). The one-year AEDPA limitations period is tolled during the time
2 that a properly filed application for state post-conviction or other collateral review is
3 pending in state court. See 28 U.S.C. § 2244(d)(2). The limitations period is also subject
4 to equitable tolling; a habeas petitioner is entitled to equitable tolling if the petitioner
5 shows “(1) that he has been pursuing his rights diligently, and (2) that some
6 extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v.*
7 *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418
8 (2005)); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). Also, a petitioner may
9 overcome a statute of limitations bar by showing that he is actually innocent. *McQuiggin*
10 *v. Perkins*, 569 U.S. 383, 386 (2013).

11 In this case, the amended judgment of conviction was filed on October 14, 2016.
12 Amended Judgment of Conviction, Exh. 213 (ECF No. 16-23). When a state court
13 judgment of conviction is amended, the one-year AEDPA limitations period is measured
14 from the date on which the amended judgment becomes final, rather than the date of
15 finality of the original judgment, because the petitioner is in custody pursuant to the
16 amended judgment. See *Smith v. Williams*, 871 F.3d 684, 687–88 (9th Cir. 2017). This
17 application of the statute of limitations, in the context of an amended judgment of
18 conviction, was compelled by the Supreme Court’s decision in *Magwood v. Patterson*,
19 561 U.S. 320 (2010), which had held that a habeas petition filed after an amended
20 judgment of conviction was entered on the same conviction was not a second or
21 successive petition for purposes of 28 U.S.C. § 2244(b). See *Smith*, 871 F.3d at 687.
22 On the other hand, when amendment of a judgment of conviction merely corrects a
23 scrivener's error, it does not change the underlying judgment, but “only the written
24 record that erroneously reflects that judgment,” so that sort of amendment does not re-
25 start the statute of limitations. *Gonzalez v. Sherman*, 873 F.3d 763, 769 (9th Cir. 2017).

26 The amended judgment of conviction in this case was entered after his
27 resentencing, and it included sentences for fewer crimes than the original judgment of
28 conviction. Compare Judgment of Conviction, Exh. 135 (ECF No. 14-40), with Amended

1 Judgment of Conviction, Exh. 213 (ECF No. 16-23). The amended judgment of
2 conviction in this case did not merely correct a scrivener's error; it changed the
3 convictions pursuant to which Jackson was sentenced, and it changed his sentence.
4 Therefore, without tolling, the one-year statute of limitations applicable to this case
5 would have begun to run when the amended judgment of conviction became final,
6 which was September 17, 2018, 90 days after the Nevada Court of Appeals affirmed the
7 amended judgment of conviction. See Order of Affirmance, Exh. 288 (ECF No. 17-48)
8 (affirming amended judgment of conviction on June 19, 2018); see also *Bowen v. Roe*,
9 188 F.3d 1157, 1159 (9th Cir. 1999) (“[W]hen a petitioner fails to seek a writ of certiorari
10 from the United States Supreme Court, the AEDPA's one-year limitations period begins
11 to run on the date the ninety-day period defined by Supreme Court Rule 13 expires.”).

12 Respondents argue, correctly, that Jackson receives no statutory tolling on
13 account of his state habeas petition, because the Nevada Court of Appeals ruled that
14 petition untimely and barred by the state statute of limitations. See Order of Affirmance,
15 Exh. 365 (ECF No. 19-30); see also *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005)
16 (“Because the state court rejected petitioner’s ... petition as untimely, it was not
17 ‘properly filed,’ and he is not entitled to statutory tolling under § 2244(d)(2).”) This Court
18 is not empowered to evaluate the state court’s ruling that Jackson’s state habeas
19 petition was untimely filed. See *Pace*, 544 U.S. at 414 (“When a postconviction petition
20 is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2).”
21 (quoting *Carey v. Saffold*, 536 U.S. 214, 226 (2002))); *White v. Martel*, 601 F.3d 882,
22 884 (9th Cir.) (“[T]he adequacy analysis used to decide procedural default issues is
23 inapplicable to the issue of whether a state petition was ‘properly filed’ for purposes of
24 section 2244(d)(2).”), *cert. denied*, 562 U.S. 896 (2010).

25 However, the Court finds that Jackson’s second motion to correct illegal
26 sentence does qualify for statutory tolling under section 2244(d)(2). When the amended
27 judgment of conviction became final, on September 17, 2018, Jackson was then
28 litigating his second motion to correct illegal sentence. He had filed that motion on

1 December 20, 2017. Motion to Correct an Illegal Sentence, Exh. 261 (ECF No. 17-21).
2 The state district court denied the motion on February 20, 2018 (Order Denying
3 Defendant's Pro Per Motion to Correct Illegal Sentence, Exh. 271 (ECF No. 17-31)), but
4 Jackson filed a motion for rehearing of the motion. Motion for Rehearing, Exh. 272 (ECF
5 No. 17-32). The state district court denied the motion for rehearing on August 21, 2018
6 (Order Denying Defendant's Pro Per Motion for Rehearing on the Motion to Correct an
7 Illegal Sentence, Exh. 296 (ECF No. 18-6)), and Jackson filed a timely notice of appeal
8 from that ruling on August 27, 2018. Notice of Appeal, Exh. 297 (ECF No. 18-7).
9 Therefore, when the amended judgment of conviction became final, and the AEDPA
10 limitations period otherwise would have begun to run, the limitations period was tolled
11 under section 2244(d)(2) on account of the then pending appeal regarding the denial of
12 the motion for rehearing of Jackson's second motion to correct illegal sentence. That
13 appeal was not completed—and the statutory tolling did not cease—until the remittitur
14 was issued on November 12, 2019, after the Nevada Court of Appeals affirmed the
15 denial of the motion. Order of Affirmance, Exh. 344 (ECF No. 19-9); Remittitur, Exh. 350
16 (ECF No. 19-15).

17 Respondents argue that, because Jackson filed an untimely interim appeal after
18 the district court denied his second motion to correct illegal sentence, and while his
19 motion for reconsideration was pending, his second motion to correct illegal sentence
20 does not qualify for statutory tolling. See Motion to Dismiss (ECF No. 11), pp. 9–10;
21 Reply in Support of Motion to Dismiss (ECF No. 21), p. 4. This argument is made
22 without legal support, and, in this Court's view, it is meritless. Jackson's second motion
23 to correct illegal sentence was properly filed in the district court, as was his motion for
24 rehearing of that motion; the district court ruled on the merits of both the motion to
25 correct illegal sentence and the motion for rehearing of that motion, and, on the appeal
26 after the denial of the motion for rehearing, the Nevada Court of Appeals ruled on the
27 merits of the appeal. The Court finds statutory tolling under section 2244(d)(2) to be
28

1 warranted, for Jackson's second motion to correct illegal sentence, from December 20,
2 2017, until November 12, 2019.

3 Consequently, the Court determines that Jackson's federal habeas petition was
4 timely filed. The limitations period began running on November 13, 2019, the day after
5 the remittitur was issued after the Nevada Court of Appeals affirmed the denial of
6 Jackson's second motion to correct illegal sentence. See Fed.R.Civ.P. 6(a)(1)(A) (In
7 computing limitations period, "exclude the day of the event that triggers the period.").
8 Jackson submitted his federal habeas petition for filing exactly one year later, on
9 November 13, 2020. It happens that 2020 was a leap year, meaning November 13, 2020,
10 was actually 366 days later, but, when applying a statute of limitations, the filer receives
11 the benefit of the extra leap year day, and a one-year limitations period expires on the
12 anniversary of the date on which it began to run. See *United States v. Tawab*, 984 F.2d
13 1533, 1534 (9th Cir. 1993) ("year," in statute of limitations, means calendar year, not 365
14 days. during leap year.); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000),
15 *cert. denied*, 521 U.S. 878 (2000) ("The anniversary date will be the last day to file even
16 when the intervening period includes the extra leap year day."). Respondents' motion to
17 dismiss will be denied to the extent it is based on the statute of limitations.

18 B. Exhaustion and Procedural Default

19 A federal court will not grant a state prisoner's petition for writ of habeas corpus
20 unless the petitioner has exhausted available state-court remedies. 28 U.S.C.
21 § 2254(b); see also *Rose v. Lundy*, 455 U.S. 509 (1982). This means that a petitioner
22 must give the state courts a fair opportunity to act on each claim before presenting
23 those claims in a federal habeas petition. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844
24 (1999). A claim remains unexhausted until the petitioner has given the highest available
25 state court the opportunity to consider the claim through direct appeal or state collateral
26 review proceedings. See *Casey v. Byford*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison*
27 *v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

1 To exhaust a claim in state court, a habeas petitioner must “present the state
2 courts with the same claim he urges upon the federal court.” *Picard v. Connor*, 404 U.S.
3 270, 276 (1971). To achieve exhaustion, the state court must be “alerted to the fact that
4 the prisoner [is] asserting claims under the United States Constitution” and given the
5 opportunity to correct alleged violations of the prisoner’s federal rights. *Duncan v.*
6 *Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.
7 1999). A claim is not exhausted unless the petitioner has presented to the state court
8 the same operative facts and legal theory upon which his federal habeas claim is based.
9 See *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
10 exhaustion requirement is not met when the petitioner presents to the federal court facts
11 or evidence which place the claim in a significantly different posture than it was in the
12 state courts, or where different facts are presented at the federal level to support the
13 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988). On the other
14 hand, new allegations that do not “fundamentally alter the legal claim already
15 considered by the state courts” will not render a claim unexhausted. *Vasquez v. Hillery*,
16 474 U.S. 254, 260 (1986); see also *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir.
17 1994). 28 U.S.C. § 2254(b) “provides a simple and clear instruction to potential litigants:
18 before you bring any claims to federal court, be sure that you first have taken each one
19 to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose*, 455
20 U.S. at 520).

21 The Supreme Court has recognized that under certain circumstances it may be
22 appropriate for a federal court to anticipate a state-law procedural bar of an
23 unexhausted claim, and to treat such a claim as technically exhausted but subject to the
24 procedural default doctrine. “An unexhausted claim will be procedurally defaulted, if
25 state procedural rules would now bar the petitioner from bringing the claim in state
26 court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (citing *Coleman v.*
27 *Thompson*, 501 U.S. 722, 731 (1991)).

1 In light of the procedural history of this case, and, in particular, the Nevada Court
2 of Appeals' ruling that Jackson's state habeas petition was barred because it was
3 untimely when filed in June 2019, the Court determines that any claims not yet
4 presented by Jackson in state court would be ruled procedurally barred in state court if
5 Jackson were to return to state court to attempt to exhaust those claims. See Order of
6 Affirmance, Exh. 365 (ECF No. 19-30); Order Denying Rehearing, Exh. 369 (ECF No.
7 19-34). The anticipatory default doctrine applies to any claims not yet presented in state
8 court, and the Court considers those claims to be technically exhausted but subject to
9 the procedural default doctrine. See *Dickens*, 740 F.3d at 1317. Therefore, the Court
10 determines that all the claims in Jackson's habeas petition are either exhausted or
11 technically exhausted but subject to the procedural default doctrine.

12 Turning to the procedural default doctrine, then, a federal court will not review a
13 claim for habeas corpus relief if the decision of the state court denying the claim
14 rested—or, in the case of a technically exhausted claim, would rest—on a state law
15 ground that is independent of the federal question and adequate to support the
16 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). The Court in *Coleman*
17 stated the effect of a procedural default as follows:

18 In all cases in which a state prisoner has defaulted his federal
19 claims in state court pursuant to an independent and adequate state
20 procedural rule, federal habeas review of the claims is barred unless the
21 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.

22 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). A
23 state procedural bar is “independent” if the state court explicitly invokes the procedural
24 rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th
25 Cir. 1995). A state court's decision is not “independent” if the application of a state's
26 default rule depends on a consideration of federal law. *Park v. California*, 202 F.3d
27 1146, 1152 (9th Cir. 2000). A state procedural rule is “adequate” if it is “clear,
28 consistently applied, and well-established at the time of the petitioner's purported

1 default.” *Calderon v. United States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir.
2 1996) (citation and internal quotation marks omitted). A discretionary state procedural
3 rule can serve as an adequate ground to bar federal habeas review because, even if
4 discretionary, it can still be “firmly established” and “regularly followed.” *Beard v.*
5 *Kindler*, 558 U.S. 53, 60–61 (2009). Also, a rule is not automatically inadequate “upon a
6 showing of seeming inconsistencies” given that a state court must be allowed discretion
7 “to avoid the harsh results that sometimes attend consistent application of an unyielding
8 rule.” *Walker v. Martin*, 562 U.S. 307, 320 (2011). The Ninth Circuit Court of Appeals
9 has held that the Nevada statute of limitations, Nev. Rev. Stat. 34.726, is adequate to
10 support application of the procedural default doctrine. See *Valerio v. Crawford*, 306 F.3d
11 742, 776–78 (9th Cir. 2002); *Loveland v. Hatcher*, 231 F.3d 640, 642–43 (9th Cir. 2000);
12 *Moran v. McDaniel*, 80 F.3d 1261, 1268–70 (9th Cir.1996).

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

23 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
24 assistance of post-conviction counsel may serve as cause, to overcome the procedural
25 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
26 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
27 postconviction proceeding does not establish cause” to excuse a procedural default.
28 *Martinez*, 566 U.S. at 15. The *Martinez* Court, however, “qualif[ied] *Coleman* by

1 recognizing a narrow exception: inadequate assistance of counsel at initial-review
2 collateral proceedings may establish cause for a prisoner’s procedural default of a claim
3 of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral
4 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
5 of ineffective assistance at trial.” *Id.* at 8.

6 Jackson’s Claim of Actual Innocence

7 A petitioner can overcome the procedural default of a claim, or a statute of
8 limitations bar of a claim, by showing that he is actually innocent. *See Schlup v. Delo*,
9 513 U.S. 298 (1995); *see also McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013)
10 (application to limitations bar). To demonstrate actual innocence under *Schlup*, a
11 petitioner must present “new reliable evidence—whether it be exculpatory scientific
12 evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not
13 presented at trial.” *Schlup*, 513 U.S. at 324. Taking into account all the evidence in the
14 case, the petitioner “must show that it is more likely than not that no reasonable juror
15 would have convicted him in the light of the new evidence.” *McQuiggin*, 569 U.S. at 399
16 (quoting *Schlup*, 513 U.S. at 327); *see also Schlup*, 513 U.S. at 329 (“a petitioner does
17 not meet the threshold requirement unless he persuades the district court that, in light of
18 the new evidence, no juror, acting reasonably, would have voted to find him guilty
19 beyond a reasonable doubt”); *House v. Bell*, 547 U.S. 518, 538 (2006) (regarding
20 evidence to be considered). “Based on this total record, the court must make a
21 ‘probabilistic determination about what reasonable, properly instructed jurors would do.’”
22 *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329). “The Court’s function is not
23 to make an independent factual determination about what likely occurred, but rather to
24 assess the likely impact of the evidence on reasonable jurors.” *Id.* Meeting this standard
25 “raise[s] sufficient doubt about [the petitioner’s] guilt to undermine confidence in the
26 result of the trial without the assurance that the trial was untainted by constitutional
27 error,” warranting “a review of the merits of the constitutional claims[.]” *Schlup*, 513 U.S.
28 at 317.

1 Jackson asserts his claim of actual innocence as both a substantive claim—in his
2 Sub-Ground 6—and as a means to attempt to overcome procedural defaults.

3 Jackson's claim of actual innocence is as follows, in its entirety:

4 In violation of Petitioner's right of Due Process, as guaranteed by
5 the United States Constitution, and the Fifth and Fourteenth Amendments,
6 Petitioner was convicted of Attempting to Murder Marquell Scott, who was
7 NOT present at the scene of the crime, intent was then transferred from
8 Mr. Scott to victims named in Counts 2, 4 and 6. See *Schlupp v. Delo*, 513
9 U.S. 298 (1995); *Murray v. Carrier*, 477 U.S. 478; *Pellegrini v. State*, 34 P
10 3d. 519.

11 On April 27th, 2018, Marquell Scott recorded a statement on video
12 at an interview conducted by counsel. This was the first statement of
13 testimony ever given by Scott in this entire case. Scott testified that he
14 was not present during the shooting that occurred in front of Margaritaville
15 on August 19, 2007 but learned about it after the fact. See
16 Exhibit 4B.

17 The fact that Marquell Scott was absent on the day of the shooting
18 makes it impossible that he was the target of Attempted Murder by the
19 Petitioner. This pertinent fact also dictates that there can be no
20 transferring of intent from Scott to O'Dale (Count 2), Tate (Count 4) and
21 Cutting (Count 6).

22 To establish actual innocence, Petitioner must demonstrate that,
23 "in light of all the evidence, it is more likely than not that no reasonable
24 juror would have convicted him." *Schlupp v. Delo*, at 327–28 (quoting
25 *Friendly*, "Is Innocence Relevant? Collateral Attack on Criminal
26 Judgments," 38 V. Chi. L. Rev. 142, 160 (1970)).

27 The only evidence presented to the jury connecting Scott to this
28 case was the Grand Jury testimony of Eric Pratt. Pratt offered the
following testimony before the Grand Jury.

"I think I heard him say he was aiming at Quell, Marquell." See
Exhibit 1C42:24.

Not only was Pratt's statement uncertain ("I think"); at his June
23, 2014 Pre-trial Deposition he testified that the Petitioner did not make
the statement. See Exhibit D28: 14–21.

However, had Marquell Scott himself been ordered by the State to
testify he would have informed the trial jury that he was not present, this
would have nullified Pratt's Grand Jury account, and no reasonable juror
would have convicted the Petitioner of Attempting to Murder someone
who wasn't even present during the shooting. Nor could intent be
transferred from Scott to O'Dale (Count 2), Tate (Count 4) and Cutting
(Count 6). Trial Counsel was ineffective for failure to investigate and
interview Scott. See *U.S. v. Bagley*, 473 U.S. 667 (1985); *Napoe v.*
Illinois, 360 U.S. 264 (1959).

Petition for Writ of Habeas Corpus (ECF No. 7), pp. 23–24.

1 Jackson makes no showing that the alleged 2018 statement of Marquell Scott is
2 new evidence within the meaning of *Schlup*. “New” evidence is “relevant evidence that
3 was either excluded or unavailable at trial.” *Schlup*, 513 U.S. at 327–28.

4 Furthermore, Jackson’s theory is not one of factual innocence; it is a theory of
5 legal innocence. And, moreover, it is a theory of legal innocence based on Nevada law.
6 The Nevada Court of Appeals’ conclusion that Marquell Scott’s statement would not
7 necessarily undermine the showing of transferred intent (see Order of Affirmance, Exh.
8 365, p. 2 (ECF No. 19-30, p. 3)), is a conclusion of state law, and the state court’s ruling
9 on that point is authoritative and beyond the scope of this federal habeas corpus action.
10 See *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“[S]tate court’s interpretation of state
11 law, including one announced on direct appeal of the challenged conviction, binds a
12 federal court sitting in habeas corpus.”) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68
13 (1991)); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

14 In short, the alleged declaration of Marquell Scott is not new evidence, and, at
15 any rate, it does not show Jackson to be factually innocent. The Court determines that
16 Jackson does not make a showing of actual innocence sufficient to overcome the
17 procedural default of any claim. And, furthermore, because Jackson does not set
18 forth a viable claim of actual innocence, his substantive actual innocence claim in
19 Sub-Ground 6 will be dismissed.

20 Ground 1

21 In Ground 1, Jackson claims that the Nevada Court of Appeals ignored his
22 second direct appeal when ruling that his state habeas petition was untimely filed.
23 Petition for Writ of Habeas Corpus (ECF No. 7), pp. 13–14. This does not state a viable
24 claim for federal habeas corpus relief. See *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th
25 Cir. 1989) (per curiam) (errors in state post-conviction proceedings are not cognizable in
26 federal habeas corpus action); *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998)
27 (“federal habeas relief is not available to redress alleged procedural errors in state post-
28

1 conviction proceedings”), *overruled on other grounds by Martinez v. Ryan*, 566 U.S. 1
2 (2012). Ground 1 will be dismissed as not cognizable in this action.

3 Ground 2

4 In Ground 2, Jackson claims that his trial and appellate counsel were ineffective
5 for not investigating, and failing to assert, claims that he identifies in “Sub-Grounds 1
6 through 12.” Petition for Writ of Habeas Corpus (ECF No. 7), pp. 14–15. Specifically,
7 Jackson claims his trial counsel was ineffective for not asserting the claims in Sub-
8 Grounds 1–5 and for not investigating the claim in Sub-Ground 6, and he claims his
9 appellate counsel was ineffective for not asserting the claims in Sub-Grounds 1–5 and
10 7–11, and for not investigating the claim in Sub-Ground 6. *See id.* at 15.

11 Jackson’s claims of ineffective assistance of counsel are subject to the
12 procedural default doctrine, because his *pro se* state habeas action was barred by the
13 state statute of limitations. *See* Order of Affirmance, Exh. 365 (ECF No. 19-30).

14 With regard to Jackson’s claims of ineffective assistance of trial counsel, the
15 Court determines that Jackson may be able to overcome the procedural defaults of
16 those claims, under *Martinez*, if he can establish that they are “substantial” claims. *See*
17 *Martinez*, 566 U.S. at 17 (“Where, under state law, claims of ineffective assistance of
18 trial counsel must be raised in an initial-review collateral proceeding, a procedural
19 default will not bar a federal habeas court from hearing a substantial claim of ineffective
20 assistance at trial if, in the initial review collateral proceeding, there was no counsel or
21 counsel in that proceeding was ineffective.”). The Court determines, though, that the
22 question of the procedural default of those claims will be better resolved after
23 Respondents file an answer and Jackson files a reply, and the merits of the claims are
24 before the Court. The Court will, therefore, deny Respondents’ motion to dismiss with
25 respect to the claims of ineffective assistance of trial counsel in Ground 2, without
26 prejudice to Respondents asserting the procedural default defense to those claims in
27 their answer.
28

1 *Martinez* does not apply to claims of ineffective assistance of appellate counsel.
2 *See Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) (declining to expand the *Martinez*
3 exception to claims of ineffective assistance of appellate counsel). Jackson does not
4 suggest that he has any means to overcome the procedural default of his claims of
5 ineffective assistance of appellate counsel. Therefore, Respondents' motion to dismiss
6 will be granted with respect to the claims of ineffective assistance of appellate counsel
7 in Ground 2, and those claims will be dismissed.

8 Sub-Grounds 1, 2, 3, 5, 7, 8, 11 and 12

9 In Sub-Grounds 1, 2, 3, 5, 7, 8, 11 and 12, Jackson makes claims that he did not
10 assert in state court or that he asserted in state court only in his state habeas petition
11 (Exh. 334 (ECF No. 18-44), which was ruled by the Nevada Court of Appeals to be
12 barred by the state statute of limitations. *See* Order of Affirmance, Exh. 365 (ECF No.
13 19-30). Therefore, Sub-Grounds 1, 2, 3, 5, 7, 8, 11 and 12 are procedurally defaulted.
14 Respondents' motion to dismiss will be granted as to these claims and they will be
15 dismissed. The dismissal of these claims—and the dismissal of Sub-Ground 6—does
16 not affect the denial of the motion to dismiss with respect to related claims of ineffective
17 assistance of trial counsel in Ground 2.

18 Sub-Ground 4

19 In Sub-Ground 4, Jackson claims that, in violation of his federal constitutional
20 rights, including the Double Jeopardy Clause, the indictment charged the same offense
21 in Counts 2, 4 and 6. Petition for Writ of Habeas Corpus (ECF No. 7), pp. 19–21.
22 Jackson asserted a similar claim on the appeal concerning his second motion to correct
23 illegal sentence (*see* Appellant's Opening Brief, Exh. 316, pp. 25–29 (ECF No. 18-26,
24 pp. 26–30); Appellant's Reply Brief, Exh. 333, pp. 2–4, 9–12 (ECF No. 18-43, pp. 3–5,
25 10–13), and the Nevada Court of Appeals ruled on the claim on its merits. *See* Order of
26 Affirmance, Exh. 344 (ECF No. 19-9). The Court determines that Sub-Ground 4 is
27 exhausted and not procedurally defaulted. The Court will deny the motion to dismiss
28 with respect to Sub-Ground 4.

1 Sub-Ground 9

2 In Sub-Ground 9, Jackson claims that, in violation of his federal constitutional
3 rights, the prosecution failed to preserve and disclose evidence favorable to him.
4 Petition for Writ of Habeas Corpus (ECF No. 7), pp. 44–47. Specifically, Jackson claims
5 the prosecution failed to disclose: “[f]ootage of two identically dressed individuals that
6 match a description of the shooter; bullet cores removed from the victims that were fired
7 from a different gun than the one removed from the scene[;] an impounded cell phone
8 that proves Petitioner never made calls concerning a firearm[;] and proof that Pratt was
9 induced to falsely implicate the Petitioner.” *Id.* at 47.

10 In state court, on his first direct appeal, Jackson made a claim that the
11 prosecution failed to disclose exculpatory evidence. See Fast Track Statement, Exh.
12 165, pp. 13–15 (ECF No. 15-25, pp. 14–16). There, Jackson described as follows the
13 material allegedly withheld by the prosecution:

14 The State was obligated to turn over all notes, audio and video
15 recordings, statements, transcriptions and the like regarding witness Eric
16 Pratt. Pratt was interviewed on August 20, 27 and 28, 2007 by the Las
17 Vegas Metropolitan Police Department regarding the instant matter.
18 Nothing regarding these meeting[s] was [ever] produced. Moreover,
19 Detective Maholick was allegedly the lead detective on this case and
20 appeared on Americas Most Wanted regarding the appellant. However,
21 his name was never even mentioned in any discovery. The State’s
22 discovery abuses should have resulted in the dismissal of the indictment
23 in its entirety.

24 *Id.* at 15 (ECF No. 15-25, p. 16).

25 Comparing Jackson’s claim in this case to the claim he asserted in state court,
26 the Court determines that Sub-Ground 9 was exhausted on Jackson’s first direct
27 appeal, and is not procedurally defaulted, to the extent that it is based on the
28 prosecution’s alleged non-disclosure of statements of Eric Pratt. Beyond that,
29 Sub-Ground 9 is procedurally defaulted and will be dismissed.

30 Sub-Ground 10

31 Jackson’s Sub-Ground 10 includes a cumulative error claim, in which he claims
32 that his federal constitutional rights were violated as a result of the cumulative effect of

1 the errors alleged elsewhere in his petition. See Petition for Writ of Habeas Corpus
2 (ECF No. 7), p. 61. In addition, in Sub-Ground 10, Jackson asserts claims that are not
3 asserted elsewhere in his petition.

4 The claim in Sub-Ground 10 that Jackson's rights were violated as a result of the
5 cumulative effect of errors alleged elsewhere in his petition and not dismissed in this
6 order is not procedurally defaulted. However, Sub-Ground 10 is procedurally defaulted,
7 and will be dismissed, to the extent the cumulative error claim is based on claims
8 asserted elsewhere in Jackson's petition but dismissed in this order. Additionally, the
9 Court determines that the claims asserted in Sub-Ground 10 that are found nowhere
10 else in Jackson's petition were not presented in state court; those claims are
11 procedurally defaulted, and that part of Sub-Ground 10 will also be dismissed.

12 IV. Conclusion

13 **IT IS THEREFORE HEREBY ORDERED** that Respondents' Motion to Dismiss
14 (ECF No. 11) is **GRANTED IN PART AND DENIED IN PART**. The Motion to Dismiss is
15 granted as to the following claims in the Petition for Writ of Habeas Corpus (ECF No. 7),
16 and these claims are dismissed:

- 17 - Ground 1;
- 18 - the claims of ineffective assistance of appellate counsel in Ground 2;
- 19 - Sub-Grounds 1, 2, 3, 5, 7, 8, 11 and 12;
- 20 - Sub-Ground 6;
- 21 - Sub-Ground 9, to extent based on alleged non-disclosure of material other
22 than statements of Eric Pratt; and
- 23 - Sub-Ground 10, to the extent based on claims dismissed in this order
24 and/or based on claims not asserted elsewhere in the petition

25 ///

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1 The Motion to Dismiss is denied as to the following claims in the Petition for Writ of
2 Habeas Corpus (ECF No. 7):

- 3 - the claims of ineffective assistance of trial counsel in Ground 2;
- 4 - Sub-Ground 4;
- 5 - Sub-Ground 9, to the extent based on alleged non-disclosure of
6 statements of Eric Pratt;
- 7 - Sub-Ground 10, to the extent based on the cumulative effect of errors
8 alleged elsewhere in the petition and not dismissed.

9 **IT IS FURTHER ORDERED** that Respondents will have 90 days from the date of
10 this order to file an answer, responding to Petitioner's remaining claims (those claims
11 not dismissed in this order). Petitioner will then have 90 days to file a reply to
12 Respondents' answer (this extends from 60 to 90 days the time for the reply set forth in
13 the scheduling order in this case (ECF No. 6)).

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15 DATED THIS 30 day of September, 2021.

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KENT J. DAWSON,
19 UNITED STATES DISTRICT JUDGE
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