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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

FABIAN FUENTES ROSAS,  
Petitioner,  
vs.  
E.K. McDANIEL, *et al.*,  
Respondents.

Case No. 3:05-cv-00490-RLH-VPC  
**ORDER**

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner represented by counsel. Before the Court is respondents' motion to dismiss the second amended petition (ECF No. 78).

**I. Procedural History**

On December 28, 1999, the State charged petitioner and his co-defendant, Michael Freed, by information with the following: Count 1, open murder with the use of a deadly weapon; Count 2, open murder with the use of a deadly weapon; Count 3, accessory to open murder (co-defendant only); Count 4, in the alternative to Count 1, principal to open murder with use of a deadly weapon; Count 5, in the alternative to Count 2, principle to open murder with use of a deadly weapon; Count 6, conspiracy to commit open murder; Count 7, robbery with the use of a deadly weapon; Count 8,

1 in the alternative to Count 7, principal to robbery; and Count 9, conspiracy to violate the Uniform  
2 Controlled Substances Act. (Exhibit 13).<sup>1</sup> Petitioner pled not guilty to all counts. (Exhibit 12).

3 On August 16, 2000, the State filed an amended criminal information against petitioner only,  
4 charging him with the following: Count 1, open murder with the use of a deadly weapon; Count 2,  
5 open murder with the use of a deadly weapon; Count 3, in the alternative to Count 1, principal to  
6 open murder with the use of a deadly weapon; Count 4, in the alternative to Count 2, principal to  
7 open murder use of a deadly weapon; Count 5, conspiracy to commit open murder; Count 6, robbery  
8 with the use of a deadly weapon; Count 7, in the alternative to Count 6, principal to robbery; and  
9 Count 8, conspiracy to violate the Uniform Controlled Substances Act. (Exhibit 59).

10 Petitioner's jury trial commenced on September 5, 2000. (Exhibit 81). The jury found  
11 petitioner guilty of Counts 1, 2, 5, 6, and 8. (Exhibits 104, 106).

12 The penalty phase commenced on September 20, 2000. (Exhibit 110). For the death of  
13 Gerald Glade Spaeth, the jury imposed a sentence of life without the possibility of parole, with an  
14 equal and consecutive term for the use of a deadly weapon. (Exhibit 111). The jury returned an  
15 identical verdict for the death of Elza Raymond Wire. (*Id.*). On October 4, 2000, the State filed a  
16 notice of habitual criminal against Rosas. (Exhibit 113).

17 The Court sentenced Rosas on November 27, 2000, as follows: On Count 1, murder in the  
18 first degree with the use of a deadly weapon, life without the possibility of parole, with an equal and  
19 consecutive term for the use of a deadly weapon; on Count 2, murder in the first degree with the use  
20 of a deadly weapon, life without the possibility of parole, with an equal and consecutive term for the  
21 use of a deadly weapon, concurrent to Count 1; on Count 5, conspiracy to commit murder, 48-120  
22 months, consecutive to Count 2; on Count 6, robbery with the use of a deadly weapon, 72-180  
23 months, with an equal and consecutive term for the use of a deadly weapon, consecutive to Count 5;  
24 and on Count 8, conspiracy to violate the Uniformed Controlled Substances Act, 24-60 months,  
25 consecutive to Count 6. (Exhibit 117). The Court also found Rosas to be a habitual criminal, and  
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27 <sup>1</sup> The exhibits referenced in this order are found in the Court's record at ECF Nos. 12-16  
28 (Exhibits 1-189), ECF No. 33 (Supplemental Exhibits 190-202), and ECF Nos. 64-65 (Exhibits 203-  
256).

1 sentenced him to 5-20 years, consecutive to Count 8. (Exhibit 117). On November 29, 2000, the  
2 court filed the judgment of conviction. (Exhibit 118).

3 Petitioner appealed from the conviction. (Exhibit 119 and 131). On December 17, 2001, the  
4 Nevada Supreme Court affirmed the conviction. (Exhibit 138). Petitioner petitioned for rehearing,  
5 which the Nevada Supreme Court denied. (Exhibits 139 and 140). The Nevada Supreme Court  
6 issued a clerical correction to its opinion. (Exhibit 140). On May 28, 2002, remittitur issued.  
7 (Exhibit 141).

8 Petitioner filed a *pro se* post-conviction habeas petition in the district court on August 26,  
9 2002. (Exhibit 147). Following appointment of post-conviction counsel, petitioner filed his first  
10 supplement to his petition on November 25, 2002. (Exhibit 156). On June 13, 2003, petitioner filed  
11 a second supplement to his petition. (Exhibit 168). Following an evidentiary hearing, the state  
12 district court denied the state habeas petition. (Exhibits 171 and 172).

13 Petitioner appealed the denial of his state post-conviction habeas petition. (Exhibit 173 and  
14 182). The Nevada Supreme Court affirmed the state district court's denial of the post-conviction  
15 petition on June 22, 2005. (Exhibit 186). On July 19, 2005, remittitur issued. (Exhibit 188).

16 On August 22, 2005, petitioner dispatched his *pro se* federal habeas petition to a correctional  
17 officer for mailing. (ECF No. 7, at p. 1). Respondents moved to dismiss the original petition. (ECF  
18 No. 11). Petitioner moved for the appointment of counsel and an evidentiary hearing. (ECF Nos.  
19 18 & 19). On March 29, 2006, the Court granted petitioner's motion for the appointment of counsel  
20 and denied respondents' motion to dismiss without prejudice. (ECF No. 22). The first amended  
21 federal petition, filed November 20, 2006, raised the following grounds for relief:

22 Ground One: Rosas was denied his rights to due process of law and a  
23 fair trial under the Fourteenth Amendment when the State prosecuted  
24 him for the Domino's murders in breach of the plea agreement  
precluding such prosecutions.

25 Ground Two: Rosas was denied his rights to due process of law and a  
26 fair trial under the Fourteenth Amendment to the United States  
27 Constitution when the prosecutor raised and impeached an alibi  
28 defense in his case in chief, thereby improperly shifting the burden of  
proof to the defendant.

Ground Three: Rosas was denied his right to the effective assistance  
of appellate counsel under the Sixth and Fourteenth Amendments to

1 the United States Constitution when counsel failed to include the  
2 prosecution's use of a peremptory challenge to exclude a Hispanic  
3 from serving on the jury in violation of Batson v. Kentucky, 476 U.S.  
4 79 (1986), as a direct appeal issue.

5 Ground Four: Rosas was denied his right to the effective assistance of  
6 trial counsel under the Sixth and Fourteenth Amendments to the  
7 United States Constitution when counsel failed to move for a change  
8 of venue after a prospective juror informed the court and counsel that  
9 Elko, Nevada's white and Mexican communities were racially split as  
10 to Rosas' guilt of the crimes charged, the former favoring convictions  
11 and the latter acquittals.

12 Ground Five: Rosas was denied his right to the effective assistance of  
13 counsel under the Sixth and Fourteenth Amendments to the United  
14 States Constitution when counsel failed to investigate (1) a leading  
15 suspect in the killings and (2) a witness who could have impeached  
16 Liana Marie Barraza and, therefore, failed to prepare a meaningful  
17 defense.

18 Ground Six: The State's failure to disclose (1) the prosecution of J.J.  
19 Arnold Horner as an ex-felon in possession of a 9MM pistol during  
20 the summer of 1997, and its consequent seizure of such 9MM pistol  
21 and destruction thereof at closure of the case and (2) the investigation  
22 of Horner for stealing dynamite and threatening various persons and  
23 institutions with it denied Rosas his rights to due process of law and  
24 a fair trial under the Fifth and Fourteenth Amendment s to the United  
25 States Constitution.

26 Ground Seven: The State's destruction of the 9MM pistol seized  
27 from J.J. Arnold Horner denied Rosas access to potentially  
28 exculpatory evidence and violated his Fifth, and Fourteenth  
Amendment rights to due process.

Ground Eight: Admission of prior bad act testimony violated  
petitioner's constitutional rights to a fair trial and due process of law  
under the Fifth, Sixth, and Fourteenth Amendments to the United  
States Constitution.

Ground Nine: Rosas was denied his due process rights under the Fifth  
and Fourteenth Amendments to the United States Constitution  
because there was insufficient evidence presented at trial to support a  
finding of guilt of the crimes charged beyond a reasonable doubt.

Ground Ten: Rosas was denied his right to the effective assistance of  
counsel under the Sixth and Fourteenth Amendments to the United  
States Constitution when counsel failed to object to the joinder of the  
controlled substances conspiracy charge (Count 9) with the previous  
eight counts concerning the Domino's pizza killings.

(ECF No. 32). On January 4, 2007, respondents moved to dismiss the first amended petition on the  
grounds that certain claims were unexhausted, certain claims were untimely because they did not  
relate back to the original petition, and certain claims were procedurally barred. (ECF No. 35). By

1 order filed September 13, 2007, this Court granted respondents' motion to dismiss in part, and  
2 denied the motion in part. (ECF No. 46). The Court ruled that the first amended petition was  
3 mixed, in that Grounds One, Four, Five, Six, Seven and Nine were unexhausted, while Grounds  
4 Two, Three, Eight, and Ten of the petition were exhausted. (*Id.*). The Court concluded that  
5 Grounds Four, Six, Seven, Eight, and Ten of the first amended petition related back to the original  
6 petition pursuant to *Mayle v. Felix*, 545 U.S. 644 (2005), and were therefore timely. (*Id.*). The  
7 Court also concluded that Grounds Two and Four were not procedurally barred from review. (*Id.*).  
8 The Court gave petitioner options for handling his unexhausted claims. (*Id.*). Petitioner filed a  
9 motion for reconsideration. (ECF No. 47). By order filed July 2, 2008, this Court denied the  
10 motion for reconsideration. (ECF No. 53). Petitioner filed a motion for a stay and abeyance  
11 pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to return to state court for the purpose of  
12 exhausted his unexhausted grounds for habeas relief. (ECF No. 56). On September 16, 2008, this  
13 Court granted petitioner's motion for a stay and abeyance. (ECF No. 61).

14 On November 3, 2008, petitioner filed a second post-conviction habeas petition in the state  
15 district court. (Exhibit 203). The State filed a motion to dismiss the petition. (Exhibit 207). The  
16 state district court held a hearing on the motion on February 3, 2010. (Exhibit 214). The parties  
17 submitted further briefing. (Exhibits 215-229). A second hearing was held on November 18, 2010  
18 in the state district court. (Exhibits 232 & 233). On January 5, 2011, the state district court filed  
19 findings of fact, conclusions of law, and order denying the petition for writ of habeas corpus.  
20 (Exhibit 237). Petitioner appealed the denial of his second post-conviction habeas petition.  
21 (Exhibits 241 & 242). On June 14, 2012, the Nevada Supreme Court issued an order affirming the  
22 denial of the second post-conviction habeas petition as procedurally barred, specifically, as  
23 untimely, successive, and abuse of the writ. (Exhibit 247). Petitioner filed a motion for rehearing.  
24 (Exhibit 248). The Nevada Supreme Court denied rehearing on February 5, 2013. (Exhibit 254).  
25 Remittitur issued on March 4, 2013. (Exhibit 255).

26 On April 17, 2013, petitioner, through counsel, filed a motion to reopen this case, his further  
27 state proceedings having concluded. (ECF No. 63). On May 7, 2013, this Court granted petitioner's  
28 motion to reopen this case and granted leave to file a second amended petition. (ECF No. 67). On

1 August 1, 2013, petitioner filed a second amended petition. (ECF No. 68). The second amended  
2 petition raises the following grounds for relief:

3 Ground One: Rosas was denied his rights to due process of law and a  
4 fair trial under the Fifth and Fourteenth Amendment when the State  
5 prosecuted him for the Domino's murders in breach of the plea  
6 agreement precluding such prosecutions. (ECF No. 68, at pp. 14-22).

7 Ground Two: Rosas was denied his rights to due process of law and a  
8 fair trial under the Fifth and Fourteenth Amendments when the district  
9 court denied his motion to dismiss the case on the grounds that the  
10 State was precluded from prosecuting Rosas due to a prior negotiated  
11 plea/polygraph agreement. (ECF No. 68, at pp. 22-31).

12 Ground Three: Rosas was denied his rights to due process of law and  
13 a fair trial under the Fifth and Fourteenth Amendments to the United  
14 States Constitution when the prosecutor raised and impeached an alibi  
15 defense in his case in chief, thereby improperly shifting the burden of  
16 proof to the defendant. (ECF No. 68, at pp. 31-34).

17 Ground Four: Rosas was denied his right to the effective assistance of  
18 appellate counsel under the Sixth and Fourteenth Amendments to the  
19 United States Constitution when counsel failed to include the  
20 prosecution's use of a peremptory challenge to exclude a Hispanic  
21 from serving on the jury in violation of *Batson v. Kentucky*, 476 U.S.  
22 79 (1986). (ECF No. 68, at pp. 34-38).

23 Ground Five: Rosas was denied his right to the effective assistance of  
24 trial counsel under the Sixth and Fourteenth Amendments to the  
25 United States Constitution when counsel failed to move for a change  
26 of venue after a prospective juror informed the court and counsel that  
27 Elko, Nevada's white and Mexican communities were racially split as  
28 to Rosas' guilt of the crimes charged, the former favoring convictions  
and the latter acquittals. (ECF No. 68, at pp. 38-40).

Ground Six: Rosas was denied his right to the effective assistance of  
trial counsel under the Sixth and Fourteenth Amendments to the  
United States Constitution when counsel failed to investigate (1) a  
leading suspect in the killings and (2) a witness who could have  
impeached Liana Marie Barraza, and therefore, failed to prepare a  
meaningful defense. (ECF No. 68, at pp. 40-43).

Ground Seven: The State's failure to disclose (1) the prosecution of  
J.J. Arnold Horner as an ex-felon in possession of a 9mm pistol  
during the summer of 1997, and its consequent seizure of such 9mm  
pistol and destruction thereof at closure of the case and (2) the  
investigation of Horner for stealing dynamite and threatening various  
persons and institutions with it denied Rosas his rights to due process  
of law and a fair trial under the Fifth and Fourteenth Amendments to  
the United States Constitution. (ECF No. 68, at pp. 43-44).

Ground Eight: Admission of prior bad act testimony violated  
petitioner's constitutional rights to a fair trial and due process of law

1 under the Fifth, Sixth, and Fourteenth Amendments to the United  
2 States Constitution. (ECF No. 68, at pp. 44-47).

3 Ground Nine: Rosas was denied his due process rights under the Fifth  
4 and Fourteenth Amendments to the United States Constitution  
5 because there was insufficient evidence presented at trial to support a  
6 finding of guilt of the crimes charged beyond a reasonable doubt.  
7 (ECF No. 68, at pp. 47-49).

8 Ground Ten: Rosas was denied his right to the effective assistance of  
9 trial counsel under the Sixth and Fourteenth Amendments to the  
10 United States Constitution when counsel failed to object to the joinder  
11 of the controlled substances conspiracy charge (Count 9) with the  
12 previous eight counts concerning the Domino's Pizza killings. (ECF  
13 No. 68, at pp. 49-50).

14 (ECF No. 68). On January 22, 2014, respondents filed a motion for leave to file excess pages (ECF  
15 No. 77) and a motion to dismiss the second amended petition (ECF No. 78). Petitioner, through  
16 counsel, filed an opposition to the motion to dismiss on April 11, 2014. (ECF No. 83).  
17 Respondents moved for an extension of time in which to file a reply. (ECF No. 84). By order filed  
18 April 21, 2014, the Court granted respondents an extension of time, up to and including May 12,  
19 2014, in which to file a reply. Respondents did not file a reply.

## 20 **II. Discussion**

21 On January 22, 2014, respondents filed a motion for leave to file a motion to dismiss in  
22 excess of thirty pages. (ECF No. 77). Good cause appearing, the motion is granted. The Court now  
23 addresses the arguments presented in the motion to dismiss and petitioner's opposition thereto.

### 24 **A. Exhaustion**

25 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has  
26 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28  
27 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his  
28 claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S.  
838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains  
unexhausted until the petitioner has given the highest available state court the opportunity to  
consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,  
386 F.3d 896, 916 (9<sup>th</sup> Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9<sup>th</sup> Cir. 1981).

1 Respondents argue that Ground Eight of the second amended petition is unexhausted.  
2 Respondents asserted this argument in their motion to dismiss the first amended petition. (ECF No.  
3 35, at pp. 21-23). In Ground Eight, petitioner claims that the trial court's admission of testimony of  
4 prior bad acts denied his rights to due process and a fair trial. (ECF No. 68, at pp. 44-47).  
5 Petitioner alleges that the trial court improperly admitted the testimony of Liana Barraza, who  
6 testified as to a conversation she had with petitioner concerning Katie Riley. (*Id.*, at p. 44).  
7 Petitioner contends that Barraza's testimony was prejudicial because it inferred that if petitioner was  
8 willing to have a woman assaulted over a drug deal, he would be capable and willing to murder, or  
9 have murdered, a man who owed him money for drugs. (*Id.*, at pp. 44-46). Petitioner lists several  
10 other instances of bad act evidence that were properly admitted against him at trial. (*Id.*, at pp. 46-  
11 47). This Court previously determined that Ground Eight was exhausted in state court. (ECF No.  
12 46, at pp. 13-14). Ground Eight was fairly presented to the Nevada Supreme Court in petitioner's  
13 opening brief on direct appeal. (Exhibit 131). Ground Eight of the second amended petition is  
14 exhausted.

15 **B. Relation-Back**

16 Respondents arguments regarding the timeliness of Grounds Five, Seven, Eight, and Ten of  
17 the second amended petition are nearly identical to the arguments made in their prior motion to  
18 dismiss these same grounds of the first amended petition.<sup>2</sup> Respondents argue that these grounds of  
19 the second amended petition do not relate back to the original petition pursuant to *Mayle v. Felix*,  
20 545 U.S. 644 (2005), and are therefore untimely filed. The Court previously ruled that all of these  
21 grounds relate back to the original petition. (ECF No. 46, at pp. 16-19). Each of these grounds of  
22 the second amended petition relate back to the original petition, as they are based on the same core  
23 of operative facts. The Court rejects respondents' argument that Grounds Five, Seven, Eight, and  
24 Ten of the second amended petition are untimely.

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27 <sup>2</sup> Grounds Five, Seven, Eight, and Ten of the second amended petition are the same as  
28 Grounds Four, Six, Eight, and Ten of the first amended petition. (ECF Nos. 32 & 68).



1           **C. Procedural Bar**

2           Respondents argue that Grounds One, Two, Five, Six, Seven, and Ten of the second  
3 amended petition were procedurally defaulted in state court and are therefore procedurally barred in  
4 this federal habeas proceeding.

5                           **1. Procedural Default Principles**

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

17           A state procedural bar is “adequate” if it is “clear, consistently applied, and well-established  
18 at the time of the petitioner’s purported default.” *Calderon v. United States District Court (Bean)*,  
19 96 F.3d 1126, 1129 (9<sup>th</sup> Cir. 1996) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9<sup>th</sup> Cir. 1994)); *see*  
20 *also King v. Lamarque*, 464 F.3d 963, 966-67 (9<sup>th</sup> Cir. 2006). A state procedural bar is  
21 “independent” if the state court “explicitly invokes the procedural rule as a separate basis for its  
22 decision.” *Vang v. Nevada*, 329 F.3d 1069, 1074 (9<sup>th</sup> Cir. 2003). A state court’s decision is not  
23 “independent” if the application of the state’s default rule depends on the consideration of federal  
24 law. *Park v. California*, 202 F.3d 1146, 1152 (9<sup>th</sup> Cir. 2000); *see also Coleman*, 501 U.S. at 735  
25 (there is no independent state ground for a state court’s application of procedural bar when the  
26 court’s reasoning rests primarily on federal law or is interwoven with federal law).

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1                                   **2. Procedural Default in State Court on Independent and Adequate State**  
2                                   **Grounds**

3                                   The claims presented in Grounds One, Two, Five, Six, Seven, and Ten were presented in the  
4 second post-conviction habeas petition filed on his return to state court while this case was stayed.  
5 (Exhibits 203-256). By order filed June 14, 2012, the Nevada Supreme Court found that the petition  
6 was untimely under Nevada state law, explicitly citing NRS 34.726(1). (Exhibit 247, at p. 1). The  
7 Nevada Supreme Court also found that the petition was successive and an abuse of the writ, citing  
8 NRS 34.810(1)(b) and NRS 34.810(2). (*Id.*). Further, the Nevada Supreme Court found that  
9 petitioner failed to show good cause to excuse his procedural defaults. (*Id.*, at pp. 2-5).

10                                  The Ninth Circuit has held that the Nevada Supreme Court’s application of the timeliness  
11 rule in NRS 34.726(1) is an independent and adequate state law ground for procedural default.  
12 *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9<sup>th</sup> Cir. 1996); *see Valerio v. Crawford*, 306 F.3d 742,  
13 778 (9<sup>th</sup> Cir. 2002). The Ninth Circuit also has held that, at least in non-capital cases, application of  
14 the abuse of the writ rule of NRS 34.810(2) is an independent and adequate state ground for  
15 procedural default. *Vang v. Nevada*, 329 F.3d 1069, 1074 (9<sup>th</sup> Cir. 2003); *Bargas v. Burns*, 179 F.3d  
16 1207, 1210-12 (9<sup>th</sup> Cir. 1999). In the instant case, this Court finds that the Nevada Supreme Court’s  
17 application of the procedural bars of NRS 34.726(1) and NRS 34.810(2) were independent and  
18 adequate grounds for the court’s dismissal of the petition. Because Grounds One, Two, Five, Six,  
19 Seven, and Ten of the second amended federal habeas petition assert the same claims made in the  
20 procedurally defaulted state court habeas petition, these claims are procedurally barred from federal  
21 review and will be dismissed with prejudice unless petitioner can show cause and prejudice to  
22 excuse the procedural bar, or that this Court’s failure to consider the defaulted claims will result in a  
23 fundamental miscarriage of justice.

24                                   **3. Cause and Prejudice/Fundamental Miscarriage of Justice**

25                                  To overcome a claim that was procedural defaulted in state court, a petitioner must establish  
26 either (1) cause for the default and prejudice attributable thereto or (2) that failure to consider the  
27 defaulted claims will result in a “fundamental miscarriage of justice.” *Harris v. Reed*, 489 U.S. 255,  
28 262 (1989) (citations omitted).

1 To prove a “fundamental miscarriage of justice,” petitioner must show that the constitutional  
2 error of which he complains “has probably resulted in the conviction of one who is actually  
3 innocent.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray v. Carrier*, 477 U.S.  
4 at 496). “Actual innocence” is established when, in light of all of the evidence, “it is more likely  
5 than not that no reasonable juror would have convicted [the petitioner].” *Bousley v. United States*,  
6 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). “[A]ctual innocence’  
7 means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. at 623.  
8 Petitioner can make a showing of “actual innocence” by presenting the court with new evidence  
9 which raises a sufficient doubt as “to undermine confidence in the result of the trial.” *Schlup v.*  
10 *Delo*, 513 U.S. at 324.

11 To demonstrate cause for a procedural default, the petitioner must “show that some objective  
12 factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*,  
13 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner  
14 from raising the claim. *See McClesky v. Zant*, 499 U.S. 467, 497 (1991). With respect to the  
15 prejudice prong, the petitioner bears “the burden of showing not merely that the errors [complained  
16 of] constituted a possibility of prejudice, but that they worked to his actual and substantial  
17 disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v.*  
18 *Lewis*, 874 F.2d 599, 603 (9<sup>th</sup> Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982). If  
19 the petitioner fails to show cause, the court need not consider whether the petitioner suffered actual  
20 prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530 n.3  
21 (9<sup>th</sup> Cir. 1988).

22 Petitioner asserts that there is cause and prejudice to excuse the procedural default of his  
23 claims. Petitioner asserts that the ineffective assistance of counsel constitutes cause and prejudice to  
24 excuse the procedural default. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012). The Court has  
25 determined that the analysis of cause and prejudice arguments in this case are closely related to the  
26 analysis on the merits of the case. Therefore, the Court will defer ruling on cause and prejudice  
27 issue until the merits are fully briefed. These issues shall be addressed in the answer and reply brief.

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1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that respondents' motion to file a pleading in excess of  
3 thirty pages (ECF No. 77), as it relates to the motion to dismiss, is **GRANTED**.

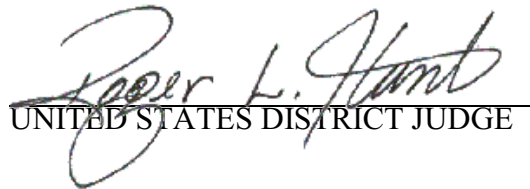
4 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (ECF No. 78) the  
5 second amended petition is **DENIED**.

6 **IT IS FURTHER ORDERED** that respondents **SHALL FILE** an answer to the second  
7 amended petition within **forty-five (45) days** of the entry of this order. The answer shall  
8 substantively address the merits of all grounds of the second amended petition. The answer shall  
9 also address cause and prejudice issues, as applicable to Grounds One, Two, Five, Six, Seven, and  
10 Ten of the second amended petition.

11 **IT IS FURTHER ORDERED** that petitioner **SHALL FILE** a reply to the answer within  
12 **forty-five (45) days** of being served with the answer. The reply shall respond to the answer and  
13 substantively address all grounds of the second amended petition. The reply shall also address cause  
14 and prejudice issues, as applicable to Grounds One, Two, Five, Six, Seven, and Ten of the second  
15 amended petition.

16 Dated this 26<sup>th</sup> day of August, 2014.

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UNITED STATES DISTRICT JUDGE