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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHARLES LEE RANDOLPH,
Petitioner,
v.
WILLIAM GITTERE, *et al.*,
Respondents.

Case No. 3:08-cv-00650-LRH-CBC
ORDER

Introduction

This action is a petition for writ of habeas corpus by Charles Lee Randolph, a Nevada prisoner sentenced to death. The case is before the Court with respect to a motion to dismiss filed by the respondents. In the motion to dismiss, the respondents assert that several of the claims in Randolph's amended habeas petition are barred by the statute of limitations, unexhausted, or procedurally defaulted. The Court will grant the motion to dismiss in part and deny it in part, will dismiss one of Randolph's claims, and will set a schedule for the respondents to file an answer, responding to the remainder of Randolph's claims.

Background

In its opinion on Randolph's direct appeal, the Nevada Supreme Court described the factual background of this case as follows:

On May 5, 1998, John Shivell was working the graveyard shift as a security guard at an apartment complex in Las Vegas. Shivell was in a guard shack at the gated entrance of the complex. Directly to the west was the parking lot of Doc Holliday's, a bar. Around 1:00 a.m. he heard a sound from the parking lot "like a, a short barking, laugh." Shivell saw two men enter a car and drive out of the parking lot. As the car passed by on the street, he identified it as an older model Cadillac with an opera window. Shivell telephoned Doc Holliday's, but no one answered. He then called the Las Vegas Metropolitan Police Department (LVMPD).

1 LVMPD officers arrived about ten minutes later and found the bar
2 locked. After the manager of the bar arrived to open the bar, officers
3 entered Doc Holliday's around 2:00 a.m. They discovered the body of
4 Shelly Lokken, the bartender, in the cooler. Lokken's wrists were bound by
5 handcuffs.

6 Dr. Giles Green performed the autopsy on Lokken's body. Red
7 marks on her wrists indicated that she was still alive when she was
8 handcuffed. She had been shot twice in the head. The first gunshot
9 entered Lokken's right cheek below her eye and exited below her left ear.
10 The shot broke off part of her epiglottis, and she inhaled blood into her
11 lungs. The second gunshot entered the back of her head on the right side
12 and exited above her left eyebrow. This shot was instantaneously fatal.

13 The blood pooled around Lokken's head and upper body at the
14 crime scene was consistent with her having first been shot while she was
15 upright on her knees. The blood flowed down toward the face from the
16 wound at the back of her head, indicating that she had fallen to the floor
17 by the time of the second shot. A bullet impact site in the concrete floor
18 was consistent with this scenario. Police also found in the cooler a nine-
19 millimeter bullet casing, the copper jacket and lead portion from a spent
20 bullet, and a bullet impact site in the wall.

21 The bar's cash register was empty of money. The drawer below the
22 register, which served as a gaming bank, was also empty. Inside the office
23 a videocassette recorder (VCR) and multiplexer had been taken from the
24 security surveillance system. The bottom part of a safe in the office was
25 unlocked and open. Lokken had the keys to the safe when she began her
26 shift. Missing from the safe was a green bank bag containing about
27 \$3,500.00. A total of \$4,629.00 was taken from the bar.

28 The afternoon following the crimes, police responded to a 911 call
from two women at a Las Vegas motel. The women told police that they
had spent the night with two men who they thought were involved in the
murder at Doc Holliday's. One of the men was still at the motel. Police
went to the room occupied by the man, Tyrone Garner, and questioned
him. Garner said that he had loaned his car to someone. Police found a
set of keys to the car in the room, and Garner gave them permission to
take the keys and search the car if they found it. The car was soon located
a few blocks away; it matched the description of the car seen leaving
Doc Holliday's early that morning. A VCR and multiplexer were found in its
trunk. Police also found a nine-millimeter semiautomatic pistol in the trunk.
Testing showed that the pistol had fired the bullet casing and fragments
recovered from Doc. Holliday's.

A multiplexer takes images from multiple cameras and
simultaneously records them on one videotape. The recovered VCR
contained a surveillance videotape with input from several cameras at
Doc Holliday's. A tape showing the view from each camera in succession
was made. The tape was shown to Adell Thompson, among others.
Thompson was the general manager of Herman's Barbecue, which
operated the kitchen at Doc Holliday's. The tape showed a man whom
Thompson identified as appellant Randolph. Randolph had worked at the
kitchen for two or three weeks just prior to the crimes.

1 The doors to the bar were always locked during the graveyard shift
2 at Doc Holliday's. A customer had to press a button to seek entry at the
3 front door, and the bartender could see the customer on a monitor linked
4 to the video surveillance system. The bartender could then decide whether
5 to "buzz" a customer in.

6 The surveillance tape contained about nine minutes of footage
7 relevant to the crimes at Doc Holliday's. Lokken let Randolph into the bar
8 around 12:56 a.m. He entered alone, and the tape showed no one else in
9 the bar except Lokken. Randolph sat down at the bar for a short time, then
10 stood up, reached in his waistband, and pulled out a gun. He climbed over
11 the bar and jumped down in front of Lokken. She raised her arms up, and
12 Randolph moved her out of camera view. The tape did not show Lokken
13 again, but Randolph came in and out of view several times. Around 1:00
14 a.m., he opened the cash register. A view of the bar also showed
15 occasional flashes of light emanating from beyond the camera view.
16 These flashes were attributable to the opening of the door to the
17 kitchen/office area, which was better lit than the bar, as Randolph went in
18 or out that door. The tape went black just before 1:05 a.m.

19 Acting on an anonymous tip, LVMPD officers apprehended
20 Randolph on May 8, 1998. As detectives drove Randolph to their office, he
21 asked why he was in custody. The detectives said they were investigating
22 the shooting at Doc Holliday's, and Randolph denied knowing anything
23 about that. When told that he appeared on the surveillance tape, he
24 became quiet and said he would tell the detectives what he knew. At the
25 office, Randolph gave a voluntary recorded statement.

26 Randolph admitted that he had been on a cocaine binge before the
27 shooting, that he ran out of money and wanted more drugs, and that
28 Garner drove him to Doc Holliday's so he could steal money to buy more
29 drugs. He admitted that he took money from the safe and the cash
30 register, abut said he did not know about Lokken's murder. He claimed
31 that he let Garner into the bar through the backdoor to the kitchen.
32 According to Randolph, Garner wore a mask, had a gun and handcuffs,
33 put the handcuffs on Lokken, and took her to the cooler. Randolph said
34 that he left the building and heard a muffled gunshot and Garner then
35 came out.

36 Randolph's account was not always coherent or consistent., e.g.,
37 he first admitted and later denied having a gun, and he first said he "didn't
38 even hear" and later said he heard a muffled shot. No videotape or
39 physical evidence supported Randolph's claim that Garner was ever
40 inside the bar.

41 The jury found Randolph guilty of first-degree murder with use of a
42 deadly weapon and four other offenses.

43 During the penalty phase, the State presented evidence of
44 Randolph's prior criminal history. It also called Lokken's mother and
45 brother, who gave victim impact testimony. Randolph called a forensic
46 psychiatrist, who testified regarding Randolph's personality, abuse that he
47 suffered growing up, his individual and family history of substance abuse,
48 and the effect of his intensive use of crack cocaine. Randolph's wife and
49 stepdaughter testified on his behalf, and Randolph testified in allocution.

1 The jurors found three aggravating circumstances, that the murder
2 was committed: during the commission of a burglary, during the
3 commission of a robbery, and to avoid or prevent a lawful arrest. As a
4 mitigating circumstance, they found that Randolph committed the murder
5 while under the influence of extreme mental or emotional disturbance.
6 Finding that the aggravating circumstances outweighed the mitigating, the
7 jurors imposed a sentence of death. [Footnote: Garner was tried
8 separately, convicted, and sentenced to lengthy terms in prison. See
9 *Garner v. State*, 116 Nev. 770, 6 P.3d 1013 (2000), *cert. denied*, 121 S.Ct.
10 1376 (2001).]

11 Opinion, Exh. 88 (ECF No. 42-3), pp. 2-5 (opinion published as *Randolph v. State*,
12 117 Nev. 970, 36 P.3d 424 (2001)). The judgment of conviction was filed on
13 April 14, 2000. See Judgment of Conviction, Exh. 35 (ECF No. 39-25).

14 Randolph appealed, and the Nevada Supreme Court affirmed the judgment
15 of conviction on December 14, 2001. See Appellant's Opening Brief, Exh. 85
16 (ECF No. 41-25) and Exh. 136 (ECF No. 48-1); Appellant's Reply Brief, Exh. 87 (ECF
17 No. 42-2); Opinion, Exh. 88 (ECF No. 42-3). The Nevada Supreme Court denied
18 Randolph's petition for rehearing on February 22, 2002. See Petition for Rehearing,
19 Exh. 92 (ECF No. 42-7); Order Denying Rehearing, Ex. 93 (ECF No. 42-8). The United
20 States Supreme Court denied Randolph's petition for writ of certiorari on October 7,
21 2002. See *Randolph v. Nevada*, 537 U.S. 845 (2002). The Nevada Supreme Court's
22 remittitur was issued on October 17, 2002. See Remittitur, Exh. 95 (ECF No. 42-10).

23 On January 10, 2003, Randolph filed a *pro se* petition for writ of habeas
24 corpus in state court. See Petition for Writ of Habeas Corpus (Post-Conviction),
25 Exh. 43 (ECF No. 40-8). After counsel was appointed for Randolph, Randolph filed a
26 supplemental petition. See Supplemental Petition for Writ of Habeas Corpus
27 (Post-Conviction), Exh. 46 (ECF No. 40-10); Points and Authorities in Support of
28 Petition (and Supplemental Petition) for Writ of Habeas Corpus (Post-Conviction),
Exh. 47 (ECF No. 40-12); Reply, Exh. 49 (ECF No. 40-14). Subsequently, Randolph
further supplemented his petition to add an additional claim. See Supplemental Motion
in Support of Writ of Habeas Corpus (Post-Conviction), Exh. 50 (ECF No. 40-15); Reply,
Exh. 53 (ECF No. 40-18). The court held an evidentiary hearing on October 6, 2005.
See Transcript of Evidentiary Hearing, Exh. 54 (ECF No. 40-19). The court denied

1 Randolph's petition in an order filed on January 30, 2006. See Findings of Fact,
2 Conclusions of Law and Order, Exh. 55 (ECF No. 40-20). Randolph appealed, and on
3 March 13, 2008, the Nevada Supreme Court affirmed the denial of his petition. See
4 Appellant's Opening Brief, Exh. 97 (ECF No. 42-12); Appellant's Supplemental Brief,
5 Exh. 104 (ECF No. 42-19); Appellant's Supplemental Reply Brief, Exh. 106
6 (ECF No. 42-21); Order of Affirmance, Exh. 107 (ECF No. 42-22). The Nevada
7 Supreme Court's remittitur was issued on April 8, 2008. See Remittitur, Exh. 108
8 (ECF No. 42-23).

9 Randolph initiated this federal habeas corpus action, by filing a *pro se* habeas
10 petition, on December 12, 2008 (ECF No. 2). The Court appointed counsel for
11 Randolph. See Order entered February 24, 2009 (ECF No. 9); Notice of Appearance of
12 Counsel (ECF No. 10). Then, Randolph and the respondents agreed to a stay of this
13 action pending Randolph's further exhaustion of claims in state court, and the Court
14 approved that stipulation and stayed the case on April 15, 2009. See Stipulation (ECF
15 No. 13); Order entered April 15, 2009 (ECF No. 14).

16 Randolph initiated a second state habeas action on April 7, 2009. See Petition for
17 Writ of Habeas Corpus (Post-Conviction), Exh. 65 (ECF No. 41-5). The state district
18 court heard argument of the parties regarding that petition on November 30, 2010. See
19 Transcript of Proceedings, November 30, 2010, Exh. 78 (ECF No. 41-18). The court
20 denied Randolph's petition in an order filed on February 9, 2011. See Findings of Fact,
21 Conclusions of Law and Order, Exh. 79 (ECF No. 41-19). Randolph appealed. See
22 Appellant's Opening Brief, Exh. 114 (ECF No. 43-4); Appellant's Reply Brief, Exh. 116
23 (ECF No. 43-6). The Nevada Supreme Court affirmed the denial of Randolph's petition
24 on January 24, 2014. See Order of Affirmance, Exh. 117 (ECF No. 43-7). The Nevada
25 Supreme Court denied rehearing on July 25, 2017. See Order Denying Rehearing, Exh.
26 133 (ECF No. 43-23).

27 The stay of this action was lifted on September 11, 2017 (ECF No. 36). On
28 November 17, 2017, Randolph filed an amended habeas petition, which is now the

1 operative petition in this case, (ECF No. 37). Randolph's amended petition asserts the
2 following claims:

3 1. Randolph's federal constitutional rights were violated as a
4 result of prosecutorial misconduct, because the prosecutor made an
5 argument to the jury mischaracterizing "reasonable doubt." Amended
6 Petition (ECF No. 37), pp. 18-26.

7 2. Randolph's federal constitutional rights were violated as a
8 result of erroneous jury instructions concerning aiding and abetting and
9 vicarious co-conspirator liability. *Id.* at 27-37.

10 3. Randolph's federal constitutional rights were violated as a
11 result of "jury instructions which unconstitutionally offered invalid
12 alternative theories of guilt." *Id.* at 38-40.

13 4. Randolph's federal constitutional rights were violated as a
14 result of judicial bias. *Id.* at 41-50.

15 5. Randolph's federal constitutional rights were violated as a
16 result of "jury instructions which failed to properly define the elements of
17 deliberate and premeditated First-Degree Murder." *Id.* at 51-55.

18 6. Randolph's federal constitutional rights were violated as a
19 result of "jury instructions which unfairly and improperly changed and
20 vastly expanded the State's theories of alleged guilt, with mere hours of
21 legal notice." *Id.* at 56-59.

22 7. Randolph's federal constitutional rights were violated
23 because "during the trial, Charles Randolph's thoughts and judgment were
24 clouded by State-administered psychotropic medication," and because his
25 trial counsel were ineffective for failing to raise this issue. *Id.* at 60-64.

26 8. Randolph's federal constitutional rights were violated
27 because "Mr. Randolph's statements at trial and the trial Judge's 'cavass'
28 of Mr. Randolph were legally and factually inadequate and ineffective to
constitute an admission of guilt." *Id.* at 65-73.

9. Randolph's federal constitutional rights were violated as a
result of ineffective assistance of counsel on his direct appeal. *Id.* at 74-
83.

10. Randolph's federal constitutional rights were violated as a
result of ineffective assistance of trial counsel. *Id.* at 84-89.

11. Randolph's federal constitutional rights were violated
because he is actually innocent of the death penalty. *Id.* at 90-91.

12. Randolph's federal constitutional rights were violated
because "the Nevada Supreme Court engaged in improper appellate fact-
finding and resentencing (deemed "reweighing") after striking two of the
three aggravating circumstances found by the jury." *Id.* at 92-97.

1 13. Randolph's federal constitutional rights were violated
2 because "the jury's death determination was legally and factually
3 inadequate, and was made without any legal standards or any jury finding
4 of *mens rea*." *Id.* at 98-100.

5 14. Randolph's federal constitutional rights were violated as a
6 result of the cumulative effect of the errors. *Id.* at 101-03.

7 The respondents filed a motion to dismiss Randolph's amended petition on
8 March 23, 2018 (ECF No. 47). In their motion to dismiss, Respondents argue that
9 various claims in Randolph's amended habeas are untimely, not cognizable,
10 unexhausted in state court, and procedurally defaulted. On May 23, 2018, Randolph
11 filed an opposition to the motion to dismiss (ECF No. 50). Respondents filed a reply on
12 July 23, 2018 (ECF No. 57).

13 Procedural Default

14 The Law Regarding Procedural Defaults

15 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
16 to comply with the State's procedural requirements in presenting his claims is barred by
17 the adequate and independent state ground doctrine from obtaining a writ of habeas
18 corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in
19 those cases in which a state prisoner fails to exhaust state remedies, a habeas
20 petitioner who has failed to meet the State's procedural requirements for presenting his
21 federal claims has deprived the state courts of an opportunity to address those claims in
22 the first instance."). Where such a procedural default constitutes an adequate and
23 independent state ground for denial of habeas corpus, the default may be excused only
24 if "a constitutional violation has probably resulted in the conviction of one who is actually
25 innocent," or if the prisoner demonstrates cause for the default and prejudice resulting
26 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

27 To demonstrate cause for a procedural default, the petitioner must "show that
28 some objective factor external to the defense impeded" his efforts to comply with the
state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
impediment must have prevented the petitioner from raising the claim. *See McCleskey*

1 v. *Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
2 bears “the burden of showing not merely that the errors [complained of] constituted a
3 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
4 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
5 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
6 (1982).

7 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
8 assistance of post-conviction counsel may serve as cause, to overcome the procedural
9 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
10 Court noted that it had previously held, in *Coleman v. Thompson*, 501 U.S. 722, 746-47
11 (1991), that “an attorney’s negligence in a postconviction proceeding does not establish
12 cause” to excuse a procedural default. *Martinez*, 566 U.S. at 15. The *Martinez* Court,
13 however, “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate
14 assistance of counsel at initial-review collateral proceedings may establish cause for a
15 prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. The
16 Court described “initial-review collateral proceedings” as “collateral proceedings which
17 provide the first occasion to raise a claim of ineffective assistance at trial.” *Id.* at 8.

18 Adequacy of State Procedural Rules

19 NRS §§ 34.726 and 34.800 – Statute of Limitations and Laches

20 Randolph argues that NRS § 34.726, the state statute of limitations, and NRS
21 § 34.800, the state laches rule, were not adequate to support application of the
22 procedural default doctrine. See Opposition to Motion to Dismiss (ECF No. 50),
23 pp. 14-19.

24 A state procedural rule is “adequate” if it was “clear, consistently applied, and
25 well-established at the time of the petitioner’s purported default.” *Calderon v. United*
26 *States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal
27 quotation marks omitted); see also *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (state
28 procedural rule adequate if “firmly established and regularly followed by the time as of

1 which it is to be applied” (citation and internal quotation marks omitted)); *Lambright v.*
2 *Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001). However, state courts’ exercise of
3 discretion in isolated cases does not necessarily render procedural rules inadequate.
4 See *Walker v. Martin*, 562 U.S. 307, 319-21 (2011) (rule not automatically inadequate
5 “upon a showing of seeming inconsistencies;” state court must be allowed discretion “to
6 avoid the harsh results that sometimes attend consistent application of an unyielding
7 rule”); see also *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009) (“[A] discretionary rule can
8 be ‘firmly established’ and ‘regularly followed’ -- even if the appropriate exercise of
9 discretion may permit consideration of a federal claim in some cases but not others.”).

10 In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003), the court of appeals
11 established a burden-shifting test for analyzing adequacy. Under *Bennett*, the State
12 carries the initial burden of pleading “the existence of an independent and adequate
13 state procedural ground as an affirmative defense.” *Bennett*, 322 F.3d at 586. The
14 burden then shifts to the petitioner “to place that defense in issue,” which the petitioner
15 may do “by asserting specific factual allegations that demonstrate the inadequacy of the
16 state procedure, including citation to authority demonstrating inconsistent application of
17 the rule.” *Id.* If the petitioner meets this burden, “the ultimate burden” of proving the
18 adequacy of the procedural rule rests with the State, which must demonstrate “that the
19 state procedural rule has been regularly and consistently applied in habeas actions.” *Id.*;
20 see also *King v. Lamarque*, 464 F.3d 963, 966-67 (9th Cir. 2006).

21 The respondents meet their initial burden by asserting that NRS §§ 34.726 and
22 34.800 constituted independent and adequate state procedural grounds for the Nevada
23 Supreme Court’s rulings. See Motion to Dismiss (ECF No. 47), pp. 13-14; see also
24 *Bennett*, 322 F.3d at 586. In response, Randolph argues that NRS §§ 34.726 and
25 34.800 were inadequate. See Opposition to Motion to Dismiss (ECF No. 50), pp. 14-19.
26 The Court determines that Randolph has not shown these rules to be inadequate.

27 The Ninth Circuit Court of Appeals has repeatedly held NRS § 34.726 and NRS §
28 34.800 to be adequate to support application of the procedural default defense. See

1 *Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996); see also *High v. Ignacio*,
2 408 F.3d 585, 590 (9th Cir. 2005); *Collier v. Bayer*, 408 F.3d 1279, 1285 (9th Cir. 2005);
3 *Loveland v. Hatcher*, 231 F.3d 640, 642-63 (9th Cir. 2000). The court of appeals has
4 never ruled either of these Nevada procedural rules to be inadequate. Randolph does
5 not show NRS § 34.726 or NRS § 34.800 to be other than clear, consistently applied
6 and well-established at the time of his alleged defaults.

7 NRS § 34.810 – Successive Petitions

8 The respondents meet their initial burden by asserting that NRS § 34.810
9 constituted an independent and adequate state procedural ground for the Nevada
10 Supreme Court’s rulings. See Motion to Dismiss (ECF No. 47), pp. 13-14; see also
11 *Bennett*, 322 F.3d at 586. In response, Randolph argues that NRS § 34.810 was
12 inadequate. See Opposition to Motion to Dismiss (ECF No. 50), pp.14-19.

13 The Ninth Circuit Court of Appeals has held NRS § 34.810 to be inadequate to
14 support application of the procedural default defense. See, e.g., *Valerio v. Crawford*,
15 306 F.3d 742, 776-78 (9th Cir. 2002). In the face of that ruling, the respondents do not
16 show that as of 2001, when Randolph’s direct appeal was completed, the state courts
17 regularly and consistently applied § 34.810 in habeas cases. See *Riley v. McDaniel*,
18 786 F.3d 719, 722-23 (9th Cir. 2015). Therefore, for the purpose of this order, the Court
19 does not consider § 34.810 to be adequate to support application of the procedural
20 default doctrine.

21 Independence of Application of State Procedural Rules

22 “[T]he independent state grounds doctrine bars the federal courts from
23 reconsidering the issue in the context of habeas corpus review as long as the state
24 court explicitly invokes a state procedural bar rule as a separate basis for its decision.”
25 *Moran v. McDaniel*, 80 F.3d 1261, 1269 (1996), quoting *McKenna v. McDaniel*, 65 F.3d
26 1483, 1488 (9th Cir. 1995). So long as the state court clearly indicates that its decision
27 rests on independent and adequate state grounds, federal review of the claim is
28

1 precluded. See *Siripongs v. Calderon*, 35 F.3d 1308, 1317 (9th Cir.1994), *cert. denied*,
2 513 U.S. 1183 (1995).

3 Randolph argues that the state courts' reliance on state procedural rules to bar
4 his claims in state court was not independent of federal law and, therefore, cannot
5 support application of the procedural default doctrine in this case. See Opposition to
6 Motion to Dismiss (ECF No. 50), pp. 13-14. The Court finds that argument to be without
7 merit. Randolph does not point to any application of a state procedural rule, in state
8 court, that was dependent upon federal law.

9 Anticipatory Procedural Default

10 The Supreme Court has recognized that under certain circumstances it may be
11 appropriate for a federal court to anticipate the state-law procedural bar of an
12 unexhausted claim, and to treat such a claim as subject to the procedural default
13 doctrine. "An unexhausted claim will be procedurally defaulted, if state procedural rules
14 would now bar the petitioner from bringing the claim in state court." *Dickens v. Ryan*,
15 740 F.3d 1302, 1317 (9th Cir. 2014) (citing *Coleman*, 501 U.S. at 731).

16 In light of the procedural history of this case, and, in particular, the rulings of the
17 state courts in Randolph's second state habeas action, this Court determines that any
18 unexhausted claims would be ruled procedurally barred in state court if Randolph were
19 to again return to state court to attempt to exhaust those claims. Therefore, the
20 anticipatory default doctrine applies to Randolph's unexhausted claims, and the Court
21 considers those claims to be technically exhausted but subject to the procedural default
22 doctrine. See *Dickens*, 740 F.3d at 1317.

23 Claim-by-Claim Analysis

24 Claim 1

25 In Claim 1, Randolph claims that his federal constitutional rights were violated as
26 a result of prosecutorial misconduct, because the prosecutor made an argument to the
27 jury mischaracterizing "reasonable doubt." Amended Petition (ECF No. 37), pp. 18-26.

28

1 Respondents argue that parts of this claim are unexhausted in state court, and
2 therefore now procedurally defaulted. See Motion to Dismiss (ECF No. 47), pp. 15-17;
3 see also *Dickens*, 740 F.3d at 1317. The Court finds this argument by the respondents
4 to be without merit. The petitioner asserted this claim on his direct appeal. See
5 Appellant’s Opening Brief, Exh. 85 (ECF No. 41-25), pp. 28-32; Appellant’s Reply Brief,
6 Exh. 87 (ECF No. 42-2), pp. 4-6. The Nevada Supreme Court ruled on the claim on its
7 merits. See Opinion, Exh. 88 (ECF No. 42-3), pp. 8-12.

8 The Court will deny the motion to dismiss with respect to Claim 1.

9 Claim 2

10 In Claim 2, Randolph claims that his federal constitutional rights were violated as
11 a result of erroneous jury instructions concerning aiding and abetting and vicarious
12 co-conspirator liability. Amended Petition (ECF No. 37), pp. 27-37.

13 Respondents argue –accurately, in the Court’s view – that this claim was first
14 raised in state court in Randolph’s first state habeas action but was ruled procedurally
15 barred by the Nevada Supreme Court, under NRS § 34.810, because it was not
16 presented on Randolph’s direct appeal. See Order of Affirmance, Exh. 107 (ECF No.
17 42-22), p. 5 n.12. As is discussed above, however, the Court determines that
18 NRS § 34.810 is inadequate to support application of the procedural default doctrine in
19 this case.

20 Therefore, the Court will deny Respondents’ motion to dismiss with respect to
21 Claim 2.

22 Claim 3

23 In Claim 3, Randolph claims that his federal constitutional rights were violated as
24 a result of “jury instructions which unconstitutionally offered invalid alternative theories
25 of guilt.” Amended Petition (ECF No. 37), pp. 38-40.

26 Here again, Respondents point out that this claim was first raised in state court in
27 Randolph’s first state habeas action but was ruled procedurally barred by the Nevada
28 Supreme Court under NRS § 34.810 because it was not presented on Randolph’s direct

1 appeal. See Order of Affirmance, Exh. 107 (ECF No. 42-22), p. 5 n.12. Again, the Court
2 determines that NRS § 34.810 is inadequate to support application of the procedural
3 default doctrine in this case.

4 The Court will, therefore, deny Respondents' motion to dismiss with respect to
5 Claim 3.

6 Claim 4

7 In Claim 4, Randolph claims that his federal constitutional rights were violated as
8 a result of judicial bias. Amended Petition (ECF No. 37), pp. 41-50.

9 Respondents argue that parts of this claim are unexhausted in state court, and
10 therefore now procedurally defaulted. See Motion to Dismiss (ECF No. 47), pp. 18-19;
11 *see also Dickens*, 740 F.3d at 1317. The Court finds this argument to be without merit.
12 The petitioner asserted this claim on his direct appeal. See Appellant's Opening Brief,
13 Exh. 85 (ECF No. 41-25), pp. 40-44 (page 40 is at Exh. 136 (ECF No. 48-1));
14 Appellant's Reply Brief, Exh. 87 (ECF No. 42-2), pp. 6-7. The Nevada Supreme Court
15 ruled on the claim on its merits. See Opinion, Exh. 88 (ECF No. 42-3), pp. 13-14.

16 The Court will deny the motion to dismiss with respect to Claim 4.

17 Claim 5

18 In Claim 5, Randolph claims that his federal constitutional rights were violated as
19 a result of "jury instructions which failed to properly define the elements of deliberate
20 and premeditated First-Degree Murder." Amended Petition (ECF No. 37), pp. 51-55.

21 Respondents argue that parts of this claim are unexhausted in state court, and
22 therefore now procedurally defaulted. See Motion to Dismiss (ECF No. 47), pp. 19-20;
23 *see also Dickens*, 740 F.3d at 1317. The Court finds this argument to be without merit.
24 The petitioner asserted this claim on his direct appeal. See Appellant's Opening Brief,
25 Exh. 85 (ECF No. 41-25), pp. 32-35. The Nevada Supreme Court ruled on the claim on
26 its merits. See Opinion, Exh. 88 (ECF No. 42-3), pp. 15-16.

27 The Court will deny the motion to dismiss with respect to Claim 5.

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1 Claim 6

2 In Claim 6, Randolph claims that his federal constitutional rights were violated as
3 a result of “jury instructions which unfairly and improperly changed and vastly expanded
4 the State’s theories of alleged guilt, with mere hours of legal notice.” Amended Petition
5 (ECF No. 37), pp. 56-59.

6 Respondents argue that this claim is, in part, unexhausted in state court and
7 therefore now procedurally defaulted. See Motion to Dismiss (ECF No. 47), pp. 20-21;
8 *see also Dickens*, 740 F.3d at 1317. The Court finds this argument to be without merit.
9 The petitioner asserted this claim on his direct appeal. See Appellant’s Opening Brief,
10 Exh. 85 (ECF No. 41-25), pp. 19-27; Appellant’s Reply Brief, Exh. 87 (ECF No. 42-2),
11 pp. 1-4. The Nevada Supreme Court ruled on the claim on its merits. See Opinion,
12 Exh. 88 (ECF No. 42-3), pp.5-8.

13 The Court will deny the motion to dismiss with respect to Claim 6.

14 Claim 7

15 In Claim 7, Randolph claims that his federal constitutional rights were violated
16 because “during the trial, Charles Randolph’s thoughts and judgment were clouded by
17 State-administered psychotropic medication,” and because his trial counsel were
18 ineffective for failing to raise this issue. Amended Petition (ECF No. 37), pp. 60-64.

19 Respondents argue that Claim 7 is procedurally defaulted. See Motion to Dismiss
20 (ECF No. 47), pp. 21-22.

21 Regarding the substantive part of Claim 7 – the claim that Randolph was
22 rendered incompetent during his trial by psychotropic medication – Randolph raised
23 such a claim in state court in his second state habeas action, and the Nevada Supreme
24 Court ruled the claim to be procedurally barred by NRS §§ 34.726, 34.800 and 34.810.
25 See Order of Affirmance, Exh. 117 (ECF No. 43-7), pp. 3-4. As is discussed above,
26 NRS §§ 34.726 and 34.800 are adequate to support application of the procedural
27 default doctrine. The Court determines, however, that Randolph could possibly show
28 cause and prejudice relative to this procedural default by showing ineffective assistance

1 of his counsel on his direct appeal. See Amended Petition (ECF No. 37), pp. 74-83
2 (Claim 9, claiming ineffective assistance of appellate counsel). The Court determines
3 further that this issue, whether Randolph can show cause and prejudice relative to the
4 substantive part of Claim 7, will be better addressed, in conjunction with the merits of
5 the claim, after Respondents file an answer, and Randolph files a reply. The Court will,
6 therefore, deny the motion to dismiss with respect to the substantive part of Claim 7,
7 without prejudice to Respondents asserting the procedural default defense to the claim
8 in their answer.

9 Turning to the claim of ineffective assistance of trial counsel in Claim 7, Randolph
10 asserted such a claim on the appeal in his first state habeas action, and the Nevada
11 Supreme Court denied the claim, stating that “Randolph did not describe these claims in
12 detail or explain any prejudice from alleged deficiencies,” and that the state district court
13 properly denied the claim on that ground. See Order of Affirmance, Exh. 107 (ECF No.
14 42-22), p. 6. Here, Randolph may be able to show cause and prejudice for the default,
15 under *Martinez v. Ryan*, 566 U.S. 1 (2012), by showing that his counsel in the state
16 district court proceedings in his first state habeas action was ineffective for failing to
17 present the claim in the more detailed manner in which he now presents it in this Court.
18 Here too, though, the Court determines that this issue, whether Randolph can show
19 cause and prejudice relative to the ineffective assistance of trial counsel part of Claim 7,
20 will be better addressed, in conjunction with the merits of the claim, after Respondents
21 file an answer, and Randolph files a reply. The Court will, therefore, deny the motion to
22 dismiss with respect to the ineffective assistance of trial counsel part of Claim 7, without
23 prejudice to Respondents asserting the procedural default defense to the claim in their
24 answer.

25 Claim 8

26 In Claim 8, Randolph claims that his federal constitutional rights were violated
27 because “Mr. Randolph’s statements at trial and the trial Judge’s ‘canvass’ of
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1 Mr. Randolph were legally and factually inadequate and ineffective to constitute an
2 admission of guilt.” Amended Petition (ECF No. 37), pp. 65-73.

3 Randolph raised such a claim in state court in his second state habeas action,
4 and the Nevada Supreme Court ruled the claim to be procedurally barred by NRS §§
5 34.726, 34.800 and 34.810. See Order of Affirmance, Exh. 117 (ECF No. 43-7), pp. 3-4.
6 NRS §§ 34.726 and 34.800 are adequate to support application of the procedural
7 default doctrine. The Court determines, however, that Randolph could possibly show
8 cause and prejudice relative to this procedural default by showing that his counsel on
9 his direct appeal was ineffective. See Amended Petition (ECF No. 37), pp. 74-83 (Claim
10 9, claiming ineffective assistance of appellate counsel). The Court determines further,
11 however, that this issue will be better addressed, in conjunction with the merits of the
12 claim, after Respondents file an answer, and Randolph files a reply. The Court will,
13 therefore, deny the motion to dismiss with respect to Claim 8, without prejudice to
14 Respondents asserting the procedural default defense to the claim in their answer.

15 Claim 9

16 In Claim 9, Randolph claims that his federal constitutional rights were violated as
17 a result of ineffective assistance of counsel on his direct appeal. Amended Petition
18 (ECF No. 37), pp. 74-83.

19 Randolph asserted claims of ineffective assistance of his appellate counsel on
20 the appeals in both his first and second state habeas actions. See Appellant’s Opening
21 Brief, Exh. 97 (ECF No. 42-12), pp. 40-46; Appellant’s Opening Brief, Exh.114 (ECF No.
22 43-4), pp. 50-52. In his first state habeas action, the Nevada Supreme Court appears to
23 have denied the claim without any discussion. See Order of Affirmance, Exh. 107 (ECF
24 No. 42-22). Respondents do not show this claim to be procedurally defaulted.

25 In addition to their procedural default argument, Respondents argue that part of
26 Claim 9 – the claim of ineffective assistance of appellate counsel for failing to assert on
27 direct appeal the claim that the prosecution mischaracterized “reasonable doubt”
28 – is barred by the one-year statute of limitations that is applicable to this case. See

1 28 U.S.C. § 2244(d). However, Respondents do not dispute that Randolph's original
2 *pro se* petition in this case was timely filed (see Motion to Dismiss (ECF No. 47), p. 14),
3 and claims in an amended habeas petition relate back to the original petition, under
4 Federal Rule of Civil Procedure 15(c), for purposes of the statute of limitations analysis,
5 if they arise out of a common core of operative facts uniting the claims in the original
6 and amended petitions. See *Mayle v. Felix*, 545 U.S. 644, 659 (2005). The Court
7 determines that all of Claim 9 relates back to claims in Randolph's original petition
8 (ECF No. 2). Claim 9 – in its entirety -- is not barred by the statute of limitations.

9 The Court will deny the motion to dismiss with respect to Claim 9.

10 Claim 10

11 In Claim 10, Randolph claims that his federal constitutional rights were violated
12 as a result of ineffective assistance of trial counsel. Amended Petition (ECF No. 37),
13 pp. 84-89.

14 Respondents argue that Claim 10, is, in whole or in part, procedurally
15 defaulted. However, Randolph may be able to show cause and prejudice for any
16 procedural default of any part of Claim 10 under *Martinez v. Ryan*, 566 U.S. 1 (2012),
17 by showing that his counsel in the state district court proceedings in his first state
18 habeas action was ineffective. This issue, though, will be better addressed, in
19 conjunction with the merits of the claim, after Respondents file an answer, and
20 Randolph files a reply. The Court will, therefore, deny the motion to dismiss with respect
21 to Claim 10, without prejudice to Respondents asserting the procedural default defense
22 to the claim in their answer.

23 Claim 11

24 In Claim 11, Randolph claims that his federal constitutional rights were violated
25 because he is actually innocent of the death penalty. Amended Petition (ECF No. 37),
26 pp. 90-91.

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1 Respondents contend that Claim 11 is procedurally defaulted and is not
2 cognizable in this federal habeas corpus action at any rate. See Motion to Dismiss (ECF
3 No. 47), p. 28.

4 In response, Randolph clarifies that his claim of actual innocence of the death
5 penalty is not asserted as a freestanding claim for habeas corpus relief but is only
6 asserted as a means of overcoming any procedural default of his other claims. See
7 Opposition to Motion to Dismiss (ECF No. 50), pp. 32-33.

8 In view of Randolph's explanation of this part of his amended petition, the Court
9 will grant Respondents' motion to dismiss with respect to Claim 11 and will dismiss the
10 claim. The dismissal of Claim 11 is without prejudice to Randolph asserting alleged
11 actual innocence of the death penalty as a means of overcoming any procedural default
12 of any of his other claims.

13 Claim 12

14 In Claim 12, Randolph claims that his federal constitutional rights were violated
15 because "the Nevada Supreme Court engaged in improper appellate fact-finding and
16 resentencing (deemed 'reweighing') after striking two of the three aggravating
17 circumstances found by the jury." Amended Petition (ECF No. 37), pp. 92-97.

18 Respondents argue that Claim 12 is procedurally defaulted. See Motion to
19 Dismiss (ECF No. 47), pp. 28-29. Randolph responds, arguing that he can overcome
20 any procedural default of this claim by showing cause and prejudice based on his
21 contention that the claim did not arise until the Nevada Supreme Court ruled on the
22 appeal in his first state habeas action, and based on his alleged actual innocence of the
23 death penalty. See Opposition to Motion to Dismiss (ECF No. 50), p. 32. The Court
24 determines that these issues will be better addressed, in conjunction with the merits of
25 the claim, after Respondents file an answer, and Randolph files a reply. The Court will,
26 therefore, deny the motion to dismiss with respect to Claim 12, without prejudice to
27 Respondents asserting the procedural default defense to the claim in their answer.

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Claim 13

In Claim 13, Randolph claims that his federal constitutional rights were violated because “the jury’s death determination was legally and factually inadequate, and was made without any legal standards or any jury finding of *mens rea*.” Amended Petition (ECF No. 37), pp. 98-100.

Respondents argue that Claim 13 is procedurally defaulted. See Motion to Dismiss (ECF No. 47), pp. 29-30. This claim is closely related to Claim 12, both as a matter of substance and with respect to their procedural history. The Court, therefore, will treat it in the same manner as Claim 12. That is, the Court will deny the motion to dismiss with respect to Claim 13, without prejudice to Respondents asserting the procedural default defense to the claim in their answer.

Claim 14

The respondents do not appear to make any argument that Claim 14, Randolph’s cumulative error claim, should be dismissed. Therefore, the motion to dismiss will be denied with respect to Claim 14.

IT IS THEREFORE ORDERED that Respondents’ Motion to Partially Dismiss Amended Petition for Writ of Habeas Corpus (ECF No. 47) is **GRANTED IN PART AND DENIED IN PART**. Claim 11 of Petitioner’s amended habeas petition is dismissed.

IT IS FURTHER ORDERED that Respondents shall, within 120 days from the date of this order, file an answer, responding to the remaining claims in Petitioner’s amended habeas petition (Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14).

IT IS FURTHER ORDERED that, in all other respects, the schedule for further proceedings set forth in the order entered September 11, 2017 (ECF No. 36) will remain in effect.

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IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 25(d), William Gittere is substituted for Timothy Filson as the respondent warden. The Clerk of the Court shall update the docket for this case to reflect this change.

DATED this 25th day of February, 2019.



LARRY R. HICKS,
UNITED STATES DISTRICT JUDGE