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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF NEVADA  
4

5 FERNANDO NAVARRO HERNANDEZ,

6 Petitioner,

7 v.

8 WILLIAM GITTERE, *et al.*,

9 Respondents.  
10

Case No. 3:09-cv-00545-LRH-WGC

ORDER

11  
12 Introduction

13 This action is a petition for writ of habeas corpus by Fernando Navarro  
14 Hernandez, a Nevada prisoner sentenced to death. The case is before the Court with  
15 respect to a motion to dismiss filed by the respondents. In the motion to dismiss, the  
16 respondents seek dismissal of Hernandez's Claims 30, 31 and 32, which are the three  
17 new claims in Hernandez's fifth amended habeas petition. The Court will grant the  
18 motion to dismiss in part and deny it in part. Claim 32 will be dismissed. The motion to  
19 dismiss will be denied with respect to Claims 30 and 31.

20 Background

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

23 Hernandez and Donna Hernandez were married on October 6,  
24 1991, and their daughter Ana was born in February 1996. In October  
25 1998, the marriage ended in divorce. Ana lived with Donna, but  
Hernandez was permitted custody of Ana from 8 a.m. on Wednesdays  
until 5 p.m. on Fridays.

26 Francisco Landeros rented a room from Donna from late August  
27 until mid-December 1998. He and Donna were friends but did not have a  
romantic relationship. During that time, Hernandez left insulting messages  
28 on Donna's answering machine, calling her a whore and a fool. Landeros  
testified that a couple of times Hernandez threatened to kill her.

1 In January 1999, Donna informed the Las Vegas Metropolitan  
2 Police Department (LVMPD) of a threat. She was very upset and excited,  
3 reporting that when she went to pick her daughter up from Hernandez, he  
4 said that he would "make her life very sorry" and was going to take Ana to  
5 Mexico. Donna feared for her own safety.

6 In March 1999, Landeros gave Donna a ride home from work in his  
7 pickup one evening. When they got to the house, Hernandez was there in  
8 his car and drove toward them. Landeros was forced to pull to the side of  
9 the road to avoid him. Donna activated the garage door opener, and  
10 Landeros drove into the garage. As the garage door was closing,  
11 Hernandez drove under it, causing it to open again. He got out of his car  
12 and tried to hit Landeros. Landeros grabbed and held Hernandez, who  
13 pleaded to be let go so he would not get in trouble with the police. After  
14 Landeros let Hernandez get back into his car, Hernandez threatened to kill  
15 Landeros and said "you're going to die, dogs." Late that same night,  
16 Hernandez called Donna's mother three times. He threatened to kill  
17 Donna. He also said that he had money in Mexico and was going to take  
18 Ana there to raise her because Donna was an unfit mother.

19 Immediately after these incidents, Donna obtained a protective  
20 order against Hernandez. She later had it extended until April 13, 2000. It  
21 was therefore in effect at the time of the subject offense in October of  
22 1999.

23 About two weeks before Hernandez killed Donna, he told a friend  
24 that he wanted to kill her, their daughter, and himself. He was intoxicated  
25 at the time.

26 Around 7 a.m. on October 6, 1999, LVMPD Officer David Swoboda  
27 was driving an unmarked police car south on Highway 95 towards  
28 Laughlin, Nevada. A car passed him going well over the speed limit.  
Swoboda turned on his red lights and gave chase. The car reached a  
speed of 96 miles per hour and traveled about eight miles before  
Swoboda was able to pull it over. Hernandez, who was driving the car, got  
out. He was crying, raised his hands, and said, "just shoot me, just kill  
me." He walked around the car to the passenger side and said, "I'm sorry,  
baby." Because of his unusual behavior, Swoboda handcuffed him and  
placed him in front of the police car.

Swoboda went to Hernandez's car, where Ana sat in a car seat in  
the back, crying. He tried to calm her and then returned to Hernandez and  
obtained his driver's license. He noticed that Hernandez had cuts on his  
face and hand and asked him what happened. Hernandez said that he  
had fought with his ex-wife. Swoboda learned through his police computer  
of Donna's protective order against Hernandez, so Swoboda suspected a  
domestic violence situation and requested that officers be sent to Donna's  
home.

LVMPD Detective Tom Allen arrived at the scene of the  
confrontation with Hernandez. Swoboda left Allen with Hernandez and  
returned to Ana. He noticed a blood stain on the seat near her. She was  
still crying and said, "daddy hurt mommy real bad."

1 Hernandez smelled of alcohol and admitted to drinking three beers.  
2 He failed a horizontal gaze nystagmus test administered by Detective  
3 Allen and was placed under arrest. Swoboda put him in his police car.  
4 Hernandez alternated between calm and almost hysterical moments. He  
5 asked to kiss Ana goodbye. Allen brought her to him, Hernandez kissed  
6 her, and Allen took her away. Hernandez began crying and said, "I killed  
7 them" and "I killed her." Swoboda advised Hernandez of his Miranda  
8 rights, and Hernandez continued to say, "I killed them" and "I killed her."

9 Detective Allen found some children's clothing and underwear in  
10 Hernandez's car and noticed bloodstains on the pajamas that Ana was  
11 wearing. Allen eventually took her to his vehicle where she told him that  
12 her father had hurt her mother on the stairs. Ana also told him that she  
13 and her father were going to Mexico.

14 Hernandez was driven to the police facility in Laughlin, and analysis  
15 of his breath showed blood alcohol levels of 0.165 and 0.154 percent. He  
16 was then driven to the Clark County Detention Center. During the drive he  
17 acted erratically, sometimes yelling and crying. At one point he tried to  
18 jump out of the moving vehicle. He stated that his life was over and asked  
19 the police officer to shoot him. After Hernandez was in the booking area at  
20 the jail, he began to hit the back of his head against the concrete wall  
21 behind the bench he was sitting on and had to be restrained. Property  
22 taken from Hernandez included, among other things, a ring from his right  
23 hand and over \$1,000 in cash.

24 LVMPD officers went to Donna's residence, broke open the door,  
25 and found her body lying on the stairs. There was blood all over the body  
26 and the walls by the stairs, and a broken knife lay nearby. There was no  
27 sign of forced entry (other than by the police), and the home otherwise  
28 appeared undisturbed. A crime scene analyst found blood elsewhere in  
the house, including around the kitchen sink. The broken knife by Donna's  
body was a kitchen knife with a seven-and-a-half-inch serrated blade.  
Another analyst identified a palm print taken from the knife as  
Hernandez's. DNA analysis of the blood found at the crime scene showed  
it to be both Donna's and Hernandez's. Donna's blood was also found on  
Ana's pajamas and on the ring taken from Hernandez.

1 The autopsy showed that the cause of Donna's death was  
2 strangulation, with significant contributing conditions including multiple  
3 stab and slash wounds and blunt head trauma. Some of the bruises on  
4 Donna's neck were caused by fingers and others by an object such as a  
5 foot or knife placed against her neck. She suffered numerous contusions  
6 on her body and face and numerous defensive slash wounds on her  
7 hands. A stab wound in the area of her heart pierced her left lung, striking  
8 a rib in the back; stab wounds to each side of her neck penetrated into the  
9 area of the carotid arteries. It appeared that Hernandez was able to inflict  
10 these three major wounds to such vital areas because Donna had ceased  
11 to struggle against the attack. Finally, the autopsy revealed the tip of the  
12 handle of a dinner knife protruding from her vagina. The knife had been  
13 thrust to the left of the cervix, perforating the vaginal wall and penetrating  
14 into the abdominal cavity. This last wound caused minimal hemorrhaging  
15 and likely occurred after Donna's death.

16 Hernandez presented the following evidence. In April 1999 he  
17 alleged to Child Protective Services (CPS) that Landeros was sexually

1 molesting Ana. However, an investigation proved the allegation  
groundless.

2 The director of Ana's preschool testified that a couple of days  
3 before Donna's murder she saw Donna and Hernandez together at the  
preschool. She was surprised because she knew that they did not get  
4 along. She did not know whether they had driven there in the same car.  
The director said that Hernandez usually picked Ana up on Wednesdays,  
5 but occasionally, if Donna called first to give the preschool her approval,  
he picked her up on a different day.

6 Nelly Hernandez, a friend of Hernandez's, testified that she helped  
him with translations during his divorce and custody proceedings.  
7 Hernandez was upset because he still wanted to be married and have his  
family together. He was also upset when he filed his complaint with CPS  
8 against Landeros. After Hernandez's arrest, Nelly went to his house to  
gather his belongings. She did not see any blood or signs that he had  
9 been packing, and she recovered his passport and Ana's birth certificate  
from the house. Another friend, Juan Trillo, testified that in the month  
10 before Donna's murder, Hernandez repeatedly said that he was trying to  
get Donna back. Trillo saw them together in Hernandez's car a couple of  
11 times. Trillo also went with Nelly to gather Hernandez's belongings and  
saw no blood or indications that he had been packing. Hernandez's  
12 neighbor testified that he had seen Donna at Hernandez's house a few  
times in the afternoon, but he could give no dates.

13  
14 The prosecution and defense stipulated that the caller ID on  
Donna's telephone showed that a call was received from Hernandez's  
15 phone at 9:32 p.m. on October 5, 1999.

16 In rebuttal, the prosecution presented videotape of family court  
proceedings involving Donna and Hernandez in November 1998, soon  
17 after their divorce. In the proceedings, Hernandez expressed his desire to  
take Ana on vacation to Mexico. Donna told the court, "He tells me all the  
18 time that I'm a bad mother, and he's going to take my child away from me.  
I'm afraid of him."

19 On July 14, 2000, the jury returned verdicts finding Hernandez  
20 guilty of burglary while in possession of a weapon, first-degree murder  
with use of a deadly weapon, second-degree kidnapping, and unlawful  
21 sexual penetration of a dead human body.

22 During the penalty phase, the State presented victim impact  
evidence through the testimony of Donna's mother and brother and Ana's  
23 therapist. The evidence showed that Donna's murder had severely  
affected her brother, sister, mother, and father, but Ana had been  
24 particularly traumatized and would likely require therapy until she was  
sixteen to eighteen years old. Hernandez called a number of witnesses,  
25 including his brother, an employer, and friends and fellow workers.  
According to their testimony, he held multiple jobs, was hard-working, was  
26 polite and friendly, and was a loving and devoted father. Hernandez spoke  
in allocution.

27 At the end of the penalty phase, the jury found three aggravating  
28 circumstances: Hernandez subjected the victim to nonconsensual sexual  
penetration immediately before, during, or immediately after the

1 commission of the murder; the murder was committed while Hernandez  
2 was engaged in the commission of a burglary; and the murder involved  
3 the torture and/or mutilation of the victim. Seven mitigating circumstances  
4 were found: Hernandez had no significant history of prior criminal activity;  
5 he committed the murder while under the influence of extreme mental or  
6 emotional disturbance; he had accepted responsibility for the crime; he  
7 had expressed remorse for the crime; he was intoxicated at the time of the  
8 crime; he had been gainfully employed throughout his adult life; and he  
9 spared the life of his daughter even though he had threatened to kill her.  
10 The jury found that the aggravating circumstances outweighed the  
11 mitigating and returned a verdict of death.

12 *Hernandez v. State*, 118 Nev. 513, 517-20, 50 P.3d 1100, 1103-06 (2002) (copy of  
13 opinion filed as Exhibit 2, at ECF No. 14-2, pp. 9-41). The judgment of conviction was  
14 filed on September 28, 2000. See Judgment of Conviction, Exh. B (ECF No. 53-3).

15 Hernandez appealed, and the Nevada Supreme Court affirmed the judgment of  
16 conviction on August 2, 2002. See *Hernandez*, 118 Nev. 513, 50 P.3d 1100 (2002). The  
17 United States Supreme Court denied certiorari on February 24, 2003. See *Hernandez v.*  
18 *Nevada*, 537 U.S. 1197 (2003).

19 Hernandez filed a petition for writ of habeas corpus in state court on  
20 March 12, 2003. See Proper Person Post-Conviction Petition for Writ of Habeas  
21 Corpus, Exh. 232 (ECF No. 117-5). After holding an evidentiary hearing, the state  
22 district court denied Hernandez's petition. See Findings of Fact, Conclusions of Law and  
23 Order, Exh. 3 (ECF No. 14-2, pp. 42-50). Hernandez appealed, and the Nevada  
24 Supreme Court affirmed the denial of the petition on October 30, 2008. See *Hernandez*  
25 *v. State*, 124 Nev. 978, 194 P.3d 1235 (2008) (copy of opinion filed as Exhibit 4, at ECF  
26 No. 14-2, pp. 51-79). The Nevada Supreme Court denied rehearing. See Order Denying  
27 Rehearing, Exh. 236 (ECF No. 117-9). The Nevada Supreme Court's remittitur was  
28 issued on February 3, 2009. See Remittitur, Exh. H (ECF No. 53-9).

Hernandez initiated this federal habeas corpus action, by filing a *pro se* habeas  
petition, on September 18, 2009 (ECF No. 1). The Court appointed counsel for  
Hernandez, and, with counsel, Hernandez filed a first amended habeas petition on  
December 21, 2009 (ECF No. 13).

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1           The respondents filed a motion to dismiss (ECF No. 52), arguing that several of  
2 the claims in the amended petition were not exhausted in state court. In response,  
3 Hernandez moved for leave to further amend his petition and for a stay of this action to  
4 allow him to return to state court to exhaust his unexhausted claims (ECF Nos. 59, 61).  
5 On May 21, 2010, the Court granted Hernandez leave to file his second amended  
6 petition and granted his motion for a stay. See Order filed May 21, 2010 (ECF No. 71).  
7 Hernandez's second amended habeas petition was filed on that date (ECF No. 72), and  
8 the action was stayed pending completion of Hernandez's second state habeas action.

9           In Hernandez's second state habeas action, the state district court denied relief  
10 on procedural grounds. See Decision, Exh. 196, p. 5 (ECF No. 98, p. 6). Hernandez  
11 appealed, and the Nevada Supreme Court affirmed on September 24, 2014, ruling that  
12 Hernandez's second state action was untimely, and that he did not show cause and  
13 prejudice to overcome the procedural bar. See Order of Affirmance, Exh. 203 (ECF No.  
14 98-7). The Nevada Supreme Court denied rehearing on November 25, 2014. See Order  
15 Denying Rehearing, Exh. 205 (ECF No. 98-9).

16           The stay of this action was lifted on February 20, 2015 (ECF No. 94). Hernandez  
17 filed a third amended petition on June 22, 2015 (ECF No. 97), and then a fourth amended  
18 petition on March 6, 2017 (ECF No. 147).

19           The respondents filed a motion to dismiss Hernandez's fourth amended petition  
20 on March 5, 2018 (ECF No. 161). Respondents argued that several claims in the fourth  
21 amended petition were barred, in whole or in part, by the procedural default doctrine.  
22 Respondents also argued that Claim 21 was not ripe for review, and that Claims 28 and  
23 29 were without merit. On February 4, 2019, the Court granted that motion to dismiss in  
24 part and denied it in part; the Court dismissed all of Claims 2 and 16 except the  
25 ineffective assistance of trial counsel claims, and Claims 7, 9, 10, 11, 13G, 14, 15 and  
26 19. See Order entered February 4, 2019 (ECF No. 184). Hernandez filed a motion for  
27 reconsideration (ECF No. 186), and the Court denied that motion on September 27,  
28 2019. See Order entered September 27, 2019 (ECF No. 218).

1 In the meantime, on July 2, 2019, Hernandez filed a motion to amend (ECF No.  
2 204), requesting leave of court to file a fifth amended habeas petition, to add three  
3 claims—Claims 30, 31 and 32—to his petition. The Court granted that motion in the  
4 September 27, 2019, order (ECF No. 218). Hernandez filed his fifth amended petition,  
5 which is now his operative petition, on October 11, 2019 (ECF No. 221).

6 On December 24, 2019, Respondents filed the motion to dismiss that is now  
7 before the Court (ECF No. 224), arguing: that Claim 30 is, in part, unexhausted and  
8 procedurally defaulted; that Claim 31 is barred by the statute of limitations, is  
9 unexhausted and procedurally defaulted, and does not state a viable claim of ineffective  
10 assistance of counsel; and that Claim 32 is barred by the statute of limitations and is  
11 unexhausted and procedurally defaulted. See Motion to Dismiss (ECF No. 224).  
12 Hernandez filed an opposition to the motion to dismiss on June 8, 2020 (ECF No. 234).  
13 Respondents replied on July 16, 2020 (ECF No. 240).

#### 14 Statute of Limitations

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

18 (1) A 1-year period of limitation shall apply to an application for a  
19 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 --

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

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

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

27 (D) the date on which the factual predicate of the  
28 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).

9 In this case, Hernandez’s conviction became final on February 24, 2003, when  
10 the United States Supreme Court denied certiorari after the Nevada Supreme Court  
11 affirmed his conviction. See *Hernandez*, 537 U.S. 1197 (2003). The AEDPA limitations  
12 period then began to run, and it ran for 16 days before Hernandez initiated his first,  
13 timely, state habeas action, resulting in statutory tolling. See Proper Person Post-  
14 Conviction Petition for Writ of Habeas Corpus, Exh. 232 (ECF No. 117-5). That action  
15 concluded on February 3, 2009, when the Nevada Supreme Court issued its remittitur  
16 after affirming the lower court’s denial of relief. See Remittitur, Exh. H (ECF No. 53-9).  
17 The limitations period then began to run again, and the remaining 349 days ran out, and  
18 the AEDPA limitations period expired, on January 18, 2010.

19 Hernandez’s original petition, filed on September 18, 2009 (ECF No. 1), and his  
20 first amended petition, filed on December 21, 2009 (ECF No. 13), were filed before the  
21 limitations period expired. His fifth amended petition, which is under consideration in this  
22 order, was filed more than nine years after the expiration of the limitations period.

23 Therefore, the question of the timeliness of the claims added in Hernandez’s fifth  
24 amended petition turns on whether those claims relate back to the filing of his original  
25 petition or his first amended petition. Under Federal Rule of Civil Procedure 15(c)(1)(B),  
26 “[a]n amendment to a pleading relates back to the date of the original pleading when ...  
27 the amendment asserts a claim or defense that arose out of the conduct, transaction, or  
28 occurrence set out—or attempted to be set out—in the original pleading[.]” In *Mayle v.*



1 *Felix*, 545 U.S. 644 (2005), the Supreme Court held, in the context of a federal habeas  
2 corpus action, that “[s]o long as the original and amended petition state claims that are  
3 tied to a common core of operative facts, relation back will be in order.” *Mayle*, 545 U.S.  
4 at 664. “An amended habeas petition ... does not relate back (and thereby escape  
5 AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts  
6 that differ in both time and type from those the original pleading set forth.” *Id.* at 650.  
7 The *Mayle* Court instructed that “conduct, transaction, or occurrence,” as used in Rule  
8 15(c), is not synonymous with “trial, conviction, or sentence.” *Id.* at 656–64.

### 9 Exhaustion and Procedural Default

10 A federal court may not grant relief on a habeas corpus claim not exhausted in  
11 state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of  
12 federal-state comity, and is designed to give state courts the initial opportunity to correct  
13 alleged constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To  
14 exhaust a claim, a petitioner must fairly present that claim to the highest available state  
15 court and must give that court the opportunity to address and resolve it. See *Duncan v.*  
16 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,  
17 10 (1992). The “fair presentation” requirement is satisfied when the claim has been  
18 presented to the highest available state court by describing the operative facts and the  
19 legal theory upon which the federal claim is based. See *Anderson v. Harless*, 459 U.S.  
20 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir.1982), *cert. denied*, 463 U.S.  
21 1212 (1983).

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

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

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 question of prejudice, the  
18 petitioner bears “the burden of showing not merely that the errors [complained of]  
19 constituted a possibility of prejudice, but that they worked to his actual and substantial  
20 disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.”  
21 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456  
22 U.S. 152, 170 (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*, 501 U.S. at 746–47, that “an  
27 attorney's negligence in a postconviction proceeding does not establish cause” to  
28 excuse a procedural default. *Martinez*, 566 U.S. at 15. The *Martinez* Court, however,

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

#### 6 Claim 30

7 In Claim 30, Hernandez claims that his federal constitutional rights were violated  
8 because his trial counsel were ineffective for conceding his guilt without his consent.  
9 See Fifth Amended Petition (ECF No. 221), pp. 229–40.

10 Respondents contend that Claim 30 is, in part, unexhausted and procedurally  
11 defaulted. See Motion to Dismiss (ECF No. 224), pp. 7–8. Respondents argue that, in  
12 the introduction to Claim 30, Hernandez states that his counsel’s concession of guilt  
13 violated his “federal constitutional guarantees of due process, equal protection, the  
14 effective assistance of counsel, a fair and impartial jury, and a reliable sentence,” and  
15 he cites “U.S. Const. Amends. V, VI, VIII & XIV,” but in state court he based his claim  
16 solely on his right to effective assistance of counsel. See *id.*; see also Fifth Amended  
17 Petition (ECF No. 221), p. 229.

18 The Court agrees that, to the extent that in federal court Hernandez adds  
19 theories to his claim, his claim is unexhausted, and because there is no indication that  
20 Hernandez could overcome the procedural bars that would now exist in state court—  
21 procedural bars based on the statute of limitations and laches, and the procedural bar  
22 applicable to successive petitions—the claim is, to the extent of the new theories,  
23 procedurally defaulted. However, it is possible that, under *Martínez*, Hernandez could  
24 overcome the procedural default by showing that his first state post-conviction counsel  
25 was ineffective for not asserting the additional theories. See *Martínez*, 566 U.S. at 9  
26 (inadequate assistance of counsel in a first state habeas action may establish cause for  
27 procedural default of a claim of ineffective assistance of trial counsel). This issue,  
28 though, is intertwined with the merits of Hernandez’s claims, such that it will be better

1 addressed in conjunction with the merits of the claims. The Court will, therefore, deny  
2 Respondents' motion to dismiss with respect to Claim 30, without prejudice to  
3 Respondents asserting the procedural default defense to that claim in their answer.

4 Claim 31

5 In Claim 31, Hernandez claims that his federal constitutional rights were violated  
6 because his trial counsel were ineffective for failing to adequately challenge the State's  
7 blood and DNA evidence. See Fifth Amended Petition (ECF No. 221), pp. 241–48. More  
8 specifically, Hernandez claims that his trial counsel sought and obtained appointment  
9 of, and funding for, a DNA analyst, but did not use that expert either to independently  
10 test blood evidence or to prepare for cross-examination of the State's DNA expert. See  
11 *id.*

12 Respondents argue in their motion to dismiss that Claim 31 is barred by the  
13 AEDPA statute of limitations because it does not relate back to any claim in  
14 Hernandez's timely original petition or first amended petition. See Motion to Dismiss  
15 (ECF No. 224), pp. 5–7. However, in his original petition, Hernandez claimed:

16 Trial Counsel Were Ineffective for Failing to Properly Challenge the  
17 State's Scientific Evidence.

18 Trial counsel never challenged the qualifications of the state's  
19 witnesses or the reliability of their testing. Trial counsel should have  
20 challenged the state's scientific evidence and required the state to prove  
21 that their experts were qualified and that their testing was accurate.  
Because they did not, constitutional procedures, standards, and protocols  
were not followed. Mr. Hernandez's rights were violated by the lack of  
standards and trustworthiness of the evidence admitted against him.

22 Petition for Writ of Habeas Corpus (ECF No. 1), p. 18. The Court determines that this  
23 claim in Hernandez's timely original petition is based on the same core of operative fact  
24 that underlies Claim 31: the alleged fact that his trial counsel failed to adequately  
25 challenge the State's scientific evidence. Claim 31 relates back to Hernandez's timely  
26 original petition and is not barred by the statute of limitations.

27 Respondents also argue that Claim 31 is unexhausted and procedurally  
28 defaulted. See Motion to Dismiss (ECF No. 224), pp. 8–9. In his first state habeas

1 action, in his briefing before the Nevada Supreme Court, Hernandez asserted a claim  
2 that was at least in part the same as Claim 31. See Appellant's Amended Opening Brief,  
3 Exh. 237, pp. 36–37 (ECF No. 117-10, pp. 44–45). Respondents, however, argue that,  
4 in state court, Hernandez did not assert all the same theories supporting the claim and  
5 did not assert the same factual bases for the claim. See Motion to Dismiss (ECF No.  
6 224), pp. 8–9. Here again, to the extent that, in federal court, Hernandez adds theories  
7 or facts to his claim, his claim may be unexhausted, and because there is no indication  
8 that Hernandez could overcome the procedural bars that would now exist in state court,  
9 the claim may be procedurally defaulted. However, here again, it is possible that, under  
10 *Martinez*, Hernandez could overcome the procedural default by showing that his first  
11 state post-conviction counsel was ineffective with respect to the presentation of the  
12 claim in state court. See *Martinez*, 566 U.S. at 9. This issue, though, is intertwined with  
13 the merits of Hernandez's claims, such that it will be better addressed in conjunction  
14 with the merits of the claims. The Court will, therefore, deny Respondents' motion to  
15 dismiss with respect to Claim 31, without prejudice to Respondents asserting the  
16 procedural default defense to that claim in their answer.

17 Respondents also argue that Claim 31 is conclusory and fails to state a viable  
18 claim of ineffective assistance of counsel. See Motion to Dismiss (ECF No. 224), pp. 9–  
19 10. This argument goes to the merits of the claim, and it, too, will be better addressed in  
20 conjunction with the merits of Hernandez's claims. The motion to dismiss will be denied  
21 with respect to Claim 31, without prejudice to Respondents making this argument in  
22 their answer.

### 23 Claim 32

24 In Claim 32, Hernandez claims that his federal constitutional rights were violated  
25 because his trial counsel were ineffective for failing to seek suppression of Hernandez's  
26 statements to the police. See Fifth Amended Petition (ECF No. 221), pp. 249–52.

27 Respondents argue in their motion to dismiss that Claim 32 is barred by the  
28 statute of limitations because it does not relate back to any claim in Hernandez's

1 original petition or first amended petition. See Motion to Dismiss (ECF No. 224), p. 7.  
2 Hernandez responds by pointing to pages 18 to 19 of his original petition, where, in a  
3 cumulative error claim, he claimed that his trial counsel “failed to file many appropriate  
4 and necessary motions,” and he argues that, under *Mayle*, Claim 32 relates back to that  
5 claim. See Opposition to Motion to Dismiss (ECF No. 234), pp. 9–10; see *also* Petition  
6 for Writ of Habeas Corpus (ECF No. 1), pp. 18–19. The shortcoming of Hernandez’s  
7 argument is that the generic claim in his original petition that his trial counsel “failed to  
8 file many appropriate and necessary motions,” lacks operative facts; Hernandez did not  
9 state what motions his trial counsel allegedly failed to file. The Court determines that  
10 Claim 32 cannot relate back to a claim including so little factual specificity.

11 Hernandez also argues that equitable tolling is warranted because Hernandez,  
12 himself, has long wanted to include a claim like Claim 32 in his petition, but his counsel  
13 have disagreed and did not include such a claim in his first amended petition. See  
14 Opposition to Motion to Dismiss (ECF No. 234), pp. 13–15. The Court disagrees that  
15 this difference of opinion between Hernandez and his counsel regarding what claims to  
16 assert amounted to an extraordinary circumstance that stood in the way of Hernandez  
17 asserting Claim 32 within the limitations period. See *Holland*, 560 U.S. at 649. The  
18 Court finds equitable tolling to be unwarranted.

19 As Claim 32 does not relate back to a timely-filed petition, and because equitable  
20 tolling relative to the claim is unwarranted, Claim 32 is barred by the statute of  
21 limitations. Respondents’ motion to dismiss will be granted, on this ground, with respect  
22 to Claim 32. Claim 32 will be dismissed.

23 Because the Court will dismiss Claim 32 on statute of limitations grounds, the  
24 Court does not reach Respondents’ argument that Claim 32 is unexhausted and  
25 procedurally defaulted.

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1 Conclusion

2 **IT IS THEREFORE HEREBY ORDERED** that Respondents' Motion to Dismiss  
3 Claims 30, 31, and 32 (ECF No. 224) is **GRANTED IN PART AND DENIED IN PART**.  
4 Claim 32 is dismissed. The motion to dismiss is denied with respect to Claims 30 and  
5 31.

6 **IT IS FURTHER ORDERED** that Respondents will have 120 days from the entry  
7 of this order to file an answer responding to the claims remaining in Petitioner's fifth  
8 amended habeas petition: 1A, 1B, 1C, 1D, 1E, 1F, the ineffective assistance of trial  
9 counsel claims in Claim 2, 3, 4, 5, 6, 8, 12, 13A, 13B, 13C, 13D, 13E, 13F, 13H, 13I,  
10 13J, 13K, 13L, 13M, the ineffective assistance of trial counsel claims in Claim 16, 17,  
11 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31. In all other respects, the schedule  
12 for further proceedings set forth in the order entered February 20, 2015 (ECF No. 94)  
13 will remain in effect.

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15 DATED this 10th day of September, 2020.

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19 LARRY R. HICKS  
20 UNITED STATES DISTRICT JUDGE  
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