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3 **UNITED STATES DISTRICT COURT**4 **DISTRICT OF NEVADA**

5 RAFAEL REID,

Case No. 3:17-cv-00532-HDM-CLB

6 Petitioner,

7 v.

**ORDER**

8 WILLIAM GITTERE, et al.,

9 Respondents.

10 This counseled habeas petition pursuant to 28 U.S.C. § 2254  
11 comes before the court on the respondents' motion to dismiss (ECF  
12 No. 36). The petitioner, Rafael Reid ("Reid"), has opposed (ECF  
13 No. 48), and the respondents have replied (ECF No. 54).

14 **I. Procedural Background**

15 Reid challenges his 2015 Nevada state court conviction,  
16 pursuant to a guilty plea, of attempt sexual assault and robbery.  
17 (Exs. 30 & 47).<sup>1</sup> After filing, and failing to prevail on, a motion  
18 to withdraw his guilty plea in the trial court, Reid filed a direct  
19 appeal through counsel Michael Sanft. (Exs. 42-44 & 50). The Nevada  
20 Court of Appeals affirmed on May 17, 2016, and the Nevada Supreme  
21 Court issued remittitur on June 13, 2016. (Exs. 63 & 64).

22 Reid asserts that he did not learn of the decision on his  
23 direct appeal until more than a year later - on July 25, 2017. By  
24

25 <sup>1</sup> The exhibits containing the relevant state court record cited in  
26 this order are located at ECF Nos. 17, 19, 37-40 and 49-50. The  
27 court will cite to the respondents' exhibits (located at ECF Nos.  
28 37-40) by exhibit number and to the petitioner's exhibits (located  
at ECF Nos. 17, 19 and 49) by ECF number.

1 then, the deadline for filing a state court postconviction petition  
2 had passed and the deadline for a federal habeas petition was  
3 looming.

4 Reid filed the instant federal petition on August 29, 2017.  
5 The court appointed counsel, and counsel filed an amended petition  
6 on July 24, 2018. (ECF No. 16). Counsel also moved to stay and  
7 abey proceedings so that Reid could exhaust his claims through a  
8 state court postconviction petition. The court granted Reid's  
9 motion, and proceedings were stayed while Reid pursued his state  
10 court petition.

11 The state court denied Reid's petition on the grounds it was  
12 untimely, and the Nevada Court of Appeals affirmed. (Exs. 71, 79  
13 & 94). Reid subsequently returned to this court and moved to reopen  
14 proceedings and for leave to file a second amended petition. The  
15 court granted both motions. Reid filed his second amended petition  
16 on April 23, 2020. (ECF No. 32). The instant motion to dismiss  
17 followed.

## 18 **II. Timeliness**

19 The respondents argue this action should be dismissed because  
20 not one of Reid's three petitions was filed before the federal  
21 statute of limitations expired. Reid does not deny that his  
22 original and subsequent petitions were filed after the expiration  
23 of the statutory limitations period, but he asserts that he should  
24 be granted equitable tolling and that his claims otherwise then  
25 relate back to a timely filed petition.

26 The Antiterrorism and Effective Death Penalty Act ("AEDPA")  
27 amended the statutes controlling federal habeas corpus practice to  
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1 include a one-year statute of limitations on the filing of federal  
2 habeas corpus petitions. With respect to the statute of  
3 limitations, the habeas corpus statute provides in relevant part:

4 A 1-year period of limitation shall apply to an  
5 application for a writ of habeas corpus by a person in  
6 custody pursuant to the judgment of a State court. The  
7 limitation period shall run from the latest of . . . the  
8 date on which the judgment became final by the conclusion  
9 of direct review or the expiration of the time for  
10 seeking such review . . . .

11 28 U.S.C. § 2244(d) (1) (A).<sup>2</sup>

12 A claim in an amended petition that is filed after the  
13 expiration of the one-year limitation period will be timely only  
14 if the claim relates back to a timely filed claim pursuant to Rule  
15 15(c) of the Federal Rules of Civil Procedure, on the basis that  
16 the claim arises out of "the same conduct, transaction or  
17 occurrence" as the timely claim. *Mayle v. Felix*, 545 U.S. 644  
18 (2005). In *Mayle*, the Supreme Court held that habeas claims in an  
19 amended petition do not arise out of "the same conduct, transaction  
20 or occurrence" as prior timely claims merely because the claims  
21 all challenge the same trial, conviction, or sentence. 545 U.S. at  
22 655-64. Rather, under the construction of the rule approved in  
23 *Mayle*, Rule 15(c) permits relation back of habeas claims asserted  
24 in an amended petition "only when the claims added by amendment  
25 arise from the same core facts as the timely filed claims, and not  
26 when the new claims depend upon events separate in 'both time and  
27 type' from the originally raised episodes." 545 U.S. at 657. In  
28 this regard, the reviewing court looks to "the existence of a

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<sup>2</sup> Reid does not argue that any other subsection of § 2244(d) (1) applies in this case.

1 common 'core of operative facts' uniting the original and newly  
2 asserted claims." A claim that merely adds "a new legal theory  
3 tied to the same operative facts as those initially alleged" will  
4 relate back and be timely. 545 U.S. at 659 & n.5.

5 The Ninth Circuit has set forth a two-step analysis to  
6 determine whether a claim relates: (1) "determine what claims the  
7 amended petition alleges and what core facts underlie those  
8 claims"; and (2) "for each claim in the amended petition, ... look  
9 to the body of the original petition and its exhibits to see  
10 whether the original petition 'set out' or 'attempted to ... set  
11 out' a corresponding factual episode, see Fed. R. Civ. P.  
12 15(c)(1)(B)—or whether the claim is instead 'supported by facts  
13 that differ in both time and type from those the original pleading  
14 set forth,' *Mayle*, 545 U.S. at 650, 664, 125 S. Ct. 2562." *Ross v.*  
15 *Williams*, 950 F.3d 1160, 1167–68 (9th Cir. 2020). It is not  
16 required that the "facts in the original and amended petitions be  
17 stated in the same level of detail." *Id.*

18 The parties agree that Reid's federal petition was filed  
19 almost two weeks after the federal statute of limitations expired.  
20 However, Reid asserts that he was abandoned by counsel, who never  
21 advised him of the conclusion of his direct appeal. He argues he  
22 therefore be allowed equitable tolling through the filing of both  
23 the original *and* first amended petitions.

24 Equitable tolling is appropriate only if the petitioner can  
25 show that: (1) he has been pursuing his rights diligently, and (2)  
26 some extraordinary circumstance stood in his way and prevented  
27 timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). "[F]or  
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1 a litigant to demonstrate 'he has been pursuing his rights  
2 diligently,' . . . he must show that he has been reasonably  
3 diligent in pursuing his rights not only while an impediment to  
4 filing caused by an extraordinary circumstance existed, but before  
5 and after as well, up to the time of filing his claim in federal  
6 court." *Smith v. Davis*, 953 F.3d 582, 598-99 (9th Cir. 2020) (en  
7 banc).

8 "The diligence required for equitable tolling purposes is  
9 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653.

11 In determining whether reasonable diligence was  
12 exercised courts shall consider the petitioner's overall  
13 level of care and caution in light of his or her  
14 particular circumstances and be guided by decisions made  
15 in other similar cases with awareness of the fact that  
16 specific circumstances, often hard to predict in  
17 advance, could warrant special treatment in an  
18 appropriate case.

19 *Smith*, 953 F.3d at 599 (internal punctuation and citations  
20 omitted).

21 Equitable tolling is "unavailable in most cases," *Miles v.*  
22 *Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and "the threshold  
23 necessary to trigger equitable tolling is very high, lest the  
24 exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063,  
25 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d  
26 1005, 1010 (7th Cir. 2000)). The petitioner ultimately has the  
27 burden of proof on this "extraordinary exclusion." *Id.* at 1065. He  
28 accordingly must demonstrate a causal relationship between the  
extraordinary circumstance and the lateness of his filing. *E.g.*,  
*Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant*

1 *v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007).  
2 “[I]t is only when an extraordinary circumstance prevented a  
3 petitioner acting with reasonable diligence from making a timely  
4 filing that equitable tolling may be the proper remedy.” *Smith*,  
5 953 F.3d at 600.

6 Reid was sentenced on December 1, 2015. (ECF No. 45). Judgment  
7 of conviction was entered on December 7, 2015, and counsel filed  
8 a notice of appeal that same date. (ECF Nos. 47 & 48).

9 On January 12, 2016, Reid sent his attorney, Michael Sanft,  
10 a letter that asked for confirmation that his appeal had been filed  
11 and for a copy of his appeal and of the sexual assault examination  
12 report.<sup>3</sup> (ECF No. 17-2). In the letter, Reid noted that it was his  
13 second letter to Sanft, that Sanft had not responded to his first  
14 letter and that no one ever answered the phones at Sanft’s office.  
15 (*Id.*) Two weeks later, Reid sent a letter to the state court that  
16 explained he had been trying to reach his attorney with no success  
17 and requested any help the court might be able to offer in that  
18 regard. (ECF No. 17-3).

19 Five months later, on July 2, 2016, Reid sent a letter to an  
20 investigator.<sup>4</sup> (ECF No. 17-4). In the letter, Reid explained that  
21 he had been trying without success to reach Sanft and asked the  
22 investigator if he could send him a copy of the sexual assault

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24 <sup>3</sup> The respondents have not contested the authenticity of this or  
any other item of evidence submitted by the petitioner.

25 <sup>4</sup> Although neither party explains whether the investigator had  
26 worked on Reid’s case or in Sanft’s employ, the contents of the  
27 letter suggest that Reid at least believed the investigator was  
either familiar with Reid’s case or familiar enough with Sanft to  
be able to contact him.

1 exam and advise whether his appeal had been filed. Three weeks  
2 later, on July 23, 2016, Reid sent a second letter to the trial  
3 court. (ECF No. 17-5). In his letter, Reid again complained of an  
4 inability to contact Sanft and asked the trial court for help.  
5 (*Id.*) In each letter, Reid appears unaware his appeal had been  
6 decided just a few months before.

7       There is no evidence that anyone - the investigator, Sanft or  
8 the state court - responded in any fashion to Reid's requests for  
9 information. In addition, that Reid was unable to contact or obtain  
10 any response from Sanft is corroborated by accounts from several  
11 of his family members, including two who were also unable to reach  
12 Sanft on Reid's behalf during this time period. (ECF Nos. 49-1,  
13 49-2, 49-4, 49-5 & 49-6).

14       Nearly a year after sending his last letter to the state  
15 court, Reid moved to withdraw Sanft as counsel on July 17, 2017.  
16 (Ex. 65). In his motion, Reid also asked the court to order Sanft  
17 to turn over his case file. (*Id.*) On July 25, 2017, on the advice  
18 of another inmate, Reid pulled a copy of his state court docket.  
19 It was then, he claims, he finally learned that his appeal had  
20 been decided.

21       "[I]f a petitioner's attorney 'fail[s] to satisfy  
22 professional standards of care,' and if the failure contributes to  
23 the untimely filing of a federal petition, the petitioner may be  
24 entitled to equitable tolling." *Holland*, 560 U.S. at 649. An  
25 attorney's "[f]ailure to inform a client that his case has been  
26 decided, particularly where that decision implicates the client's  
27 ability to bring further proceedings and the attorney has committed  
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1 himself to informing his client of such a development, constitutes  
2 attorney abandonment" justifying equitable tolling. *Gibbs v.*  
3 *Legrand*, 767 F.3d 879, 886 (9th Cir. 2014).

4 The uncontested evidence before the court is that Sanft, who  
5 was acting as Reid's attorney and was thus receiving notice of  
6 court filings on Reid's behalf, never advised Reid that his appeal  
7 had concluded. Reid tried repeatedly to obtain initiate contact  
8 with his counsel regarding his appeal with letters to counsel, an  
9 investigator, and the trial court -- to no avail. The court  
10 therefore concludes Sanft abandoned Reid. That, coupled with the  
11 failure of any other person or entity to respond to Reid's multiple  
12 requests for information, was an extraordinary circumstance that  
13 prevented the timely filing of Reid's federal petition.

14 The court further concludes that Reid exercised reasonable  
15 diligence before, during and after the extraordinary circumstance  
16 prevented timely filing. Reid made several attempts to contact his  
17 attorney through multiple avenues - phone calls, letters to  
18 counsel, a letter to an investigator, and letters to the court. He  
19 did not send just one letter, as respondents argue. After receiving  
20 no responses during the seven-month period, Reid paused his efforts  
21 to obtain information. However, after a year of silence, Reid moved  
22 to have counsel withdrawn and his case file turned over and, on  
23 advice of another inmate, ran his docket to discover his appeal  
24 had been decided. Under the circumstances of this case, and similar  
25 to other cases, it was not unreasonable for Reid to wait a year  
26 before taking further actions to ascertain the status of his  
27 appeal. *See, e.g., Fue v. Biter*, 842 F.3d 650, 654-55 (9th Cir.

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1 2016).

2 Respondents argue that Sanft was not appointed to file a  
3 postconviction petition for Reid, but that is beside the point.  
4 Saft was responsible for alerting Reid that his appeal had been  
5 decided and it was reasonable for Reid to wait for his direct  
6 appeal to be decided before filing his state postconviction  
7 petition, *Loveland v. Hatcher*, 231 F.3d 640, 644 (9th Cir. 2000)  
8 ("If a defendant reasonably believes that his counsel is pursuing  
9 his direct appeal he most naturally will not file his own post-  
10 conviction relief petition. Indeed, a defendant could seriously  
11 prejudice his case if he were to prepare and file a habeas petition  
12 while his counsel was pursuing his direct appeal."), and to wait  
13 for his state petition to be filed before filing his federal  
14 petition. Thus, it was Sanft's failure to advise Reid of the status  
15 of his appeal that precluded Reid from timely filing his federal  
16 habeas petition.

17 Respondents also assert that the state courts' factual  
18 findings, made in connection with Reid's untimely state petition,  
19 are entitled to deference.<sup>5</sup> In affirming the dismissal of Reid's  
20 state court postconviction petition, the Nevada Court of Appeals  
21 made the following factual findings:

22 Reid did not allege that counsel affirmatively  
23 misrepresented the status of his appeal. Further, the  
24 record before this court demonstrates Reid knew how to

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25 <sup>5</sup> The state courts' legal findings are not entitled to deference  
26 in this context. See *Holland v. Florida*, 560 U.S. 631, 650 (2010)  
27 ("Equitable tolling . . . asks whether federal courts may excuse  
28 a petitioner's failure to comply with federal timing rules, an  
inquiry that does not implicate a state court's interpretation of  
state law.").

1 request information directly from both the district  
2 court and the appellate court. Reid did not explain his  
3 delay in requesting that information. Based on these  
4 facts, Reid failed to demonstrate cause for the delay.

5 (Ex. 94 at 2). First, the Court of Appeals made no finding that  
6 Sanft did not abandon Reid. Second, unaddressed by the Court of  
7 Appeals is the significance of the two letters Reid sent directly  
8 to the trial court in which he sought assistance contacting his  
9 attorney -- letters that also indicated that Reid was completely  
10 unaware of, and concerned about, the status of his appeal. Nor did  
11 the Court of Appeals address the absence of any evidence that the  
12 trial court responded to these letters, either by sending Reid a  
13 copy of the order denying his appeal or forwarding his letter to  
14 his court-appointed attorney with a directive that he contact his  
15 client. This is, in the court's opinion, the most critical evidence  
16 showing Reid exercised reasonable diligence. In sum, as this  
17 court's findings are not at odds with those made by the state  
18 courts, the deference due their factual findings does not preclude  
19 application of equitable tolling in this case.

20 Accordingly, as Reid has met both requirements for equitable  
21 tolling, the original petition -- filed two weeks after the  
22 expiration of the federal statute of limitations -- is deemed  
23 timely filed. Having so decided, the next question is whether the  
24 claims in the first amended petition may be considered timely  
25 filed.<sup>6</sup>

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26 <sup>6</sup> The second amended petition presents the same claims as those in  
27 the first amended petition. Accordingly, if the first amended  
28 petition is timely, the second amended petition - the operative  
petition in this case - is also timely.

1 Reid argues first that his first amended petition should be  
2 subject to equitable tolling on the basis that counsel relied on  
3 Ninth Circuit cases endorsing a stop-clock approach to equitable  
4 tolling when deciding when to file the amended petition. Although  
5 there is Ninth Circuit case law holding that equitable tolling may  
6 be granted when a petitioner's attorney reasonably relies on the  
7 unsettled law in deciding when to file his petition, *Williams v.*  
8 *Filson*, 908 F.3d 546, 559 (9th Cir. 2018), the court need not  
9 decide whether this law applies in the context of this case. The  
10 claims in the first amended petition may be deemed timely through  
11 application of relation-back and other equitable tolling  
12 principles.

13 The first amended petition asserts the following claims: (1)  
14 Reid's plea was not knowing and voluntary because (a) he made it  
15 without first having seen the victim's sexual assault examination  
16 report and (b) his attorney grossly mischaracterized the  
17 likelihood that he would receive probation if he pled; (2) trial  
18 counsel was ineffective on the same facts alleged in Ground One;  
19 and (3) appellate counsel was ineffective on the same facts as  
20 Ground One.

21 In his original petition, in relevant part, Reid asserts that  
22 trial counsel was ineffective because the sexual assault exam  
23 report had been withheld but counsel nevertheless failed to request  
24 a continuance of trial, which forced Reid into an unfavorable plea.  
25 (ECF No. 6 at 5). The core of operative facts supporting this  
26 ineffective assistance of counsel claim is that Reid entered his  
27 plea without the benefit of the sexual assault examination report,  
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1 which are the same operative facts underlying his claims that his  
2 plea was involuntary because it was made without the report, and  
3 that trial and appellate counsel were ineffective for the same  
4 reason. *See Nguyen v. Curry*, 736 F.3d 1287, 1296–97 (9th Cir. 2013)  
5 (holding that a claim that appellate counsel was ineffective for  
6 failing to raise double jeopardy related back to a timely raised  
7 substantive double jeopardy claim), *abrogated on other grounds by*  
8 *Davila v. Davis*, – U.S. –, 137 S. Ct. 2058 (2017). Accordingly,  
9 those parts of Grounds One, Two and Three based on the sexual  
10 assault examination report relate back to the original petition  
11 and are timely.

12 The operative facts underlying Reid’s claims that counsel  
13 ineffectively predicted that Reid would get probation, however,  
14 are not to be found in the original petition. While Reid references  
15 his motion to withdraw guilty plea, which in turn references (but  
16 is not based on) counsel’s estimate that Reid would get probation,  
17 this is insufficient for relation back purposes. First, the motion  
18 to withdraw is not attached to the petition and is not therefore  
19 considered part of the petition. Second, there is no attempt by  
20 Reid to incorporate the contents of the motion to withdraw as part  
21 of his petition. Accordingly, those parts of Grounds One, Two and  
22 Three that rely on counsel’s estimation of the likelihood of  
23 probation do not relate back to the original petition.

24 However, the court is persuaded by Reid’s alternative  
25 argument that equitable tolling should apply through the filing of  
26 his first amended petition for at least this claim on the grounds  
27 of attorney abandonment and lack of a case file. Under some  
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1 circumstances, the lack of a case file might justify equitable  
2 tolling, see *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1013 (9th  
3 Cir. 2009); *Lott v. Mueller*, 304 F.3d 918, 924-25 (9th Cir. 2002),  
4 if “the hardship caused by lack of access to [the] materials was  
5 an extraordinary circumstance that caused” the untimely filing of  
6 the federal petition. See *Waldron-Ramsey*, 556 F.3d at 1013. Counsel  
7 argues, and the respondents do not dispute, that the transcripts  
8 for Reid’s change of plea and sentencing were not available until  
9 May 2018. The court is further persuaded that the probation claim  
10 could not have been ascertained without first reviewing those  
11 transcripts. As such, the court concludes that Reid’s claims based  
12 on counsel’s advice about probation were not available until May  
13 2018 and that counsel acted diligently in preparing and filing the  
14 first amended petition asserting that claim less than three months  
15 later.

16 In sum, the court concludes that, through application of  
17 equitable tolling and relation back, the claims in the first  
18 amended petition, and by extension the second amended petition,  
19 are timely.

### 20 **III. Procedural Default**

21 The respondents argue that even if the petition is deemed  
22 timely, all of Reid’s claims are procedurally defaulted.

23 A federal court cannot review a claim “if the Nevada Supreme  
24 Court denied relief on the basis of ‘independent and adequate state  
25 procedural grounds.’” *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th  
26 Cir. 2003). In *Coleman v. Thompson*, the Supreme Court held that a  
27 state prisoner who fails to comply with the state’s procedural  
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1 requirements in presenting his claims is barred from obtaining a  
2 writ of habeas corpus in federal court by the adequate and  
3 independent state ground doctrine. *Coleman v. Thompson*, 501 U.S.  
4 722, 731-32 (1991). A state procedural bar is "adequate" if it is  
5 "clear, consistently applied, and well-established at the time of  
6 the petitioner's purported default." *Calderon v. United States*  
7 *District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996). A state  
8 procedural bar is "independent" if the state court "explicitly  
9 invokes the procedural rule as a separate basis for its decision."  
10 *Yang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). A state  
11 court's decision is not "independent" if the application of the  
12 state's default rule depends on the consideration of federal law.  
13 *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000).

14 The Nevada Court of Appeals affirmed dismissal of Reid's state  
15 postconviction petition on the grounds that it was untimely. The  
16 Ninth Circuit has held that the Nevada Supreme Court's application  
17 of the timeliness rule in § 34.726(1) is an independent and  
18 adequate state law ground for procedural default. *Moran v.*  
19 *McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996); *see also Valerio*  
20 *v. Crawford*, 306 F.3d 742, 778 (9th Cir. 2002). Accordingly, Reid's  
21 claims are procedurally defaulted.

22 A procedural default may be excused only if "a constitutional  
23 violation has probably resulted in the conviction of one who is  
24 actually innocent," or if the prisoner demonstrates cause for the  
25 default and prejudice resulting from it. *Murray v. Carrier*, 477  
26 U.S. 478, 496 (1986).

1 To demonstrate cause for a procedural default, the petitioner  
2 must "show that some objective factor external to the defense  
3 impeded" his efforts to comply with the state procedural rule.  
4 *Murray*, 477 U.S. at 488. For cause to exist, the external  
5 impediment must have prevented the petitioner from raising the  
6 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

7 With respect to the prejudice prong, the petitioner bears  
8 "the burden of showing not merely that the errors [complained of]  
9 constituted a possibility of prejudice, but that they worked to  
10 his actual and substantial disadvantage, infecting his entire  
11 [proceeding] with errors of constitutional dimension." *White v.*  
12 *Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v.*  
13 *Fraday*, 456 U.S. 152, 170 (1982)).

14 Reid asserts that the abandonment of counsel discussed above  
15 constitutes cause for the default of his claims. In *Maples v.*  
16 *Thomas*, 565 U.S. 266, 271, 289 (2012), the Supreme Court held that  
17 abandonment by counsel at a critical time for the petitioner's  
18 state postconviction petition can constitute cause to excuse a  
19 procedural default. As the court has already found, the evidence  
20 before the court supports the conclusion that Reid was abandoned  
21 by Sanft at a time critical to his state postconviction petition,  
22 *i.e.*, during the time period in which he could have filed a timely  
23 state postconviction petition in order to properly exhaust his  
24 federal claims. Sanft not only failed to advise Reid that his  
25 appeal had been decided, he utterly failed to respond to multiple  
26 attempts by Reid to contact him about the status of his case. This  
27 amounted to abandonment in the circumstances of this case and  
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1 therefore constitutes cause for the procedural default of Reid's  
2 claims.<sup>7</sup>

3 Whether Reid has suffered prejudice as a result, however, is  
4 a question that is inextricably intertwined with the merits of  
5 Reid's claims. The court will therefore defer a determination of  
6 whether Reid has suffered prejudice until the time of merits  
7 consideration.

8 **IV. Conclusion**

9 In accordance with the foregoing, IT IS THEREFORE ORDERED  
10 that the respondents' motion to dismiss (ECF No. 36) is DENIED.

11 IT IS FURTHER ORDERED that respondents shall file an answer  
12 to the second amended petition within sixty days of the date of  
13 this order. In filing the answer, respondents must comply with the  
14 requirements of Rule 5 of the Rules Governing Section 2254 Cases  
15 in the United States District Courts and shall specifically cite  
16 to and address the applicable state court written decision and  
17 state court record materials, if any, regarding each claim within  
18 the response as to that claim.

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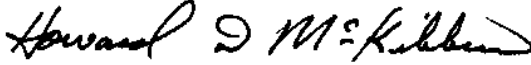
<sup>7</sup> The respondents' argument that the court must defer to the state  
25 courts' finding that no cause existed for the untimely filing of  
26 the state petition is without merit. "[T]he question whether a  
27 petitioner's procedural default is excused by cause and prejudice  
28 for purposes of federal habeas review is a federal, not state,  
question." *Visciotti v. Martel*, 862 F.3d 749, 768 n.10 (9th Cir.  
2016).



1 IT IS FURTHER ORDERED that Reid will have sixty days from  
2 service of the answer within which to file a reply.

3 IT IS SO ORDERED.

4 DATED this 22nd day of March, 2021.

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7 UNITED STATES DISTRICT JUDGE  
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