

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WILLIAM CASTILLO,

Petitioner - Appellant,

v.

JEREMY BEAN; AARON FORD,

Respondents - Appellees.

No. 19-99003

D.C. No. 2:04-cv-
00868-RCJ-GWF

OPINION

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding

Argued and Submitted March 24, 2026
Pasadena, California

October 2, 2026

Before: Johnnie B. Rawlinson, Kenneth K. Lee, and
Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Mendoza

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed in part and reversed in part the district court's judgment denying William Castillo's second amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 in which Castillo attacks his Nevada conviction and death sentence for murder, and remanded for further proceedings.

The district court certified four claims for appeal and sought a certificate of appealability for two others claims.

In the first certified claim, Castillo argued that he is entitled to equitable tolling of the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act based upon uncertainty regarding the operation of Federal Rule of Civil Procedure 15(c) (concerning relation back) before the decision in *Mayle v. Felix*, 545 U.S. 644 (2005); and the district court's scheduling orders. The panel held that Castillo's first and second amended federal habeas petitions were untimely, and that equitable tolling sufficient to render the first or second amended § 2254 petition timely is not warranted. *Mayle v. Felix* does not fully correct the timeliness issue, and nothing indicates that counsel engaged in egregious conduct amounting to an extraordinary circumstance. Castillo did not allege any potential or actual conflict beyond the mere fact of the untimely first amended petition, and even if Castillo had demonstrated an extraordinary circumstance, Castillo did not show diligence

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

in pursuing his first amended petition. The district court did not abuse its discretion in denying an evidentiary hearing on the equitable tolling issues.

In the second certified claim, Castillo argued that his procedural default of his trial ineffective assistance of counsel claims should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). The panel held that this case falls within the narrow class of cases where attorney error in state post-conviction relief (PCR) proceedings excuses a defendant's state law procedural default. The panel therefore reversed the district court's contrary ruling. The panel explained that this case is controlled by *Hogan v. Bean*, 140 F.4th 1001 (9th Cir. 2025), which held that where state law requires trial ineffective assistance claims to be brought in state PCR proceedings in the first instance (as opposed to bringing the claim on direct review), a claim of ineffective state PCR counsel is akin to a claim of ineffective direct-appeal counsel. The consequences of the default are no different: no state court will ever review the trial ineffective assistance of counsel claim. *Martinez's* "cause" requirement can be demonstrated by showing that first PCR counsel "impeded or obstructed" a petitioner from complying with state procedures. Because the district court is best positioned to evaluate Castillo's claims, the panel remanded the two claims that survive the timeliness issue for further proceedings.

In the third certified claim, Castillo argued that his constitutional right to effective assistance of counsel was violated because trial counsel failed to investigate and present a mental state defense in the guilt phase. The panel disagreed with Castillo that his trial counsel rendered ineffective assistance by failing to present a neuropsychologist to testify at the guilty phase in support of

a diminished capacity defense or to pursue a mental state defense. Nor was there a reasonable likelihood that the jury would have accepted evidence that Castillo was legally insane at the time of the crimes or that such evidence would have changed the culpability finding at the guilt phase. Castillo did not demonstrate that he can meet the requirements for an evidentiary hearing.

In the fourth certified claim, Castillo argued that Nevada's lethal injection scheme violates the Eighth Amendment's prohibition against cruel and unusual punishment as applied. The panel held that to obtain relief on this claim, Castillo must bring it in an action under 42 U.S.C. § 1983, and that the challenge also fails because it is not ripe.

The panel declined to expand the certificate of appealability to include two claims: (1) that Castillo is entitled to relation back under *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020) (en banc); and (2) that cumulative guilt and penalty proceeding errors render his conviction and sentence unconstitutional.

COUNSEL

Stacy M. Newman (argued), David Anthony, Brad D. Levenson, and Ellesse Henderson, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Heather D. Procter (argued), Chief Deputy Attorney General; Aaron D. Ford, Nevada Attorney General; Office

of the Nevada Attorney General, Carson City, Nevada; for Respondents-Appellees.

OPINION

MENDOZA, JR., Circuit Judge:

In 1996, William Castillo was sentenced to death for the murder of Isabelle Berndt. The Nevada Supreme Court affirmed Castillo's conviction and sentence on direct review, and he was denied state post-conviction relief. Castillo now appeals the denial of his second amended petition for a writ of habeas corpus.

We affirm the district court's judgment on most of the issues. But we part ways on whether Castillo's case falls within the narrow class of cases where attorney error in state post-conviction relief proceedings excuses a defendant's state law procedural default. We hold that it does, reverse the district court's contrary ruling, and remand for further proceedings consistent with this opinion.

I.

A. Guilt and Penalty Proceedings for the Murder of Isabelle Berndt

In November 1995, William Castillo lived and worked as a roofer in Las Vegas, Nevada. He took a job reroofing the residence of 86-year-old Isabelle Berndt. While cleaning the site, Castillo discovered a key to the home. He told another roofing employee that he planned to return at a later date, at night.

On December 16, 1995, Castillo and a friend left their shared apartment at about 6:00 p.m., returning in the morning with a VCR, a box containing silverware, and a bag containing knit booties. The pair departed again a few minutes later, returning after about twenty minutes. Castillo and the friend informed Castillo's girlfriend that they had committed a robbery and stolen several items. They also stated that Castillo hit a sleeping person with a tire iron he had brought into the house. Further, the two recounted that they had returned to the residence to burn it down, out of fear that they had left incriminating fingerprints on the walls.

That same morning, Berndt's neighbors notified the fire department when they saw her residence ablaze. Firefighters found Berndt's body inside. Investigators concluded that two fires had been intentionally set, and the coroner concluded that Berndt had suffered injuries consistent with blows from a crowbar or tire iron. Police later searched Castillo's apartment and recovered the VCR, silverware, and knit booties, all of which Berndt's daughter identified as missing from her mother's home. Officers arrested Castillo for murder.

Castillo waived his *Miranda* rights. Though he first denied stealing the items, he later confessed to the robbery, killing Berndt, and burning down her home. He pleaded not guilty on all counts, and a jury trial commenced in Nevada state district court in August 1996. The defense did not put on a case in chief. Following deliberations, the jury convicted Castillo of conspiracy to commit burglary and/or robbery, burglary, robbery of a victim sixty-five years or older, first-degree murder with use of a deadly weapon, conspiracy to commit burglary and arson, and first-degree arson.

At the penalty phase of Castillo's trial, the State presented witnesses who testified about Castillo's juvenile history and prior criminal record. It also introduced victim impact evidence through testimony by Berndt's daughter and Berndt's granddaughters.

The defense first presented testimony from a neuropsychologist, Dr. Lewis Etcoff, who concluded that neglect and severe abuse in Castillo's childhood had left him severely disturbed, emotionally and behaviorally. Based on tests and a review of treatment records, Dr. Etcoff diagnosed Castillo with a reactive attachment disorder from childhood and attention-deficit/hyperactivity disorder ("ADHD"). Other defense witnesses included a correctional officer, a juvenile facility counselor, Castillo's girlfriend, and Castillo's mother. At the conclusion of the hearing, Castillo read an unsworn statement to the jury, expressing his regret and remorse for his conduct.

The jury found four aggravating circumstances and three mitigating circumstances and determined that the aggravating circumstances outweighed the mitigating circumstances. It therefore returned a verdict of death. The trial court sentenced Castillo to consecutive terms on all counts, including the death sentence.

B. Appellate and Post-Conviction Procedural History

Castillo appealed his conviction and sentence to the Nevada Supreme Court, which affirmed the judgment of the state district court. *Castillo v. State of Nevada*, 956 P.2d 103 (Nev. 1998) (per curiam). The United States Supreme Court denied review. *Castillo v. Nevada*, 526 U.S. 1031 (1999). The Nevada Supreme Court then issued remittitur on April 28, 1999.

On April 2, 1999, Castillo filed his first state post-conviction relief (“PCR”) petition pro se. The trial court appointed counsel, Christopher Oram, to supplement the petition. Following an evidentiary hearing limited to Castillo’s claims of ineffective assistance of counsel and supplemental briefing, the court denied the petition. Oram filed an appeal to the Nevada Supreme Court, which affirmed the denial of post-conviction relief. *Castillo v. State*, 131 P.3d 589 (Nev. 2004). The United States Supreme Court denied review on October 4, 2004. *Castillo v. Nevada*, 543 U.S. 879 (2004).

On June 22, 2004, Castillo filed a petition for writ of habeas corpus pro se with the United States District Court for the District of Nevada. In the section indicating the grounds for appeal, Castillo stated: “I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Constitutional Rights, by incorporating herein the Constitutional claims contained in Exhibits 1 through 4 attached hereto.” Exhibits 1 through 4 were his opening and reply briefs on direct appeal and in support of his § 2254 petition. On July 7, 2004, upon Castillo’s motion to proceed *in forma pauperis*, the district court appointed the Federal Public Defender for the District of Nevada (“FPD”) to represent Castillo.

In July 2007, Castillo informed the FPD that he did not wish for them to file anything further on his behalf. He then moved to voluntarily dismiss his federal habeas proceedings. In his affidavit to the court, Castillo cited “his extensive reflection and great consideration of [his] life, the lack of any possibility for a normal life in the future, and the lack of any actual or substantial constitutional claims to be presented to [the] court for review.” The district court granted Castillo’s request without prejudice, indicating that it would retain

Castillo's federal public defender appointment through the completion of his execution. The Nevada Supreme Court set Castillo's execution for October 2008.

The week of the execution, the Nevada Supreme Court stayed all warrants of execution, including Castillo's, pending the United States Supreme Court's decision in *Baze v. Rees*, 551 U.S. 1192 (2007) (order granting certiorari),¹ which concerned whether the three-drug lethal injection protocol was unconstitutional. On May 7, 2008, Castillo moved to reopen his case and reinstate his petition for a writ of habeas corpus. The district court granted the motion.

On December 15, 2008, the FPD filed an amended § 2254 petition in district court on Castillo's behalf. The FPD then filed a second state PCR petition in Nevada trial court on September 18, 2009. The court dismissed this petition, concluding that it was untimely and could not overcome Nevada's bar against successive petitions. *See* Nev. Rev. Stat. § 34.726; Nev. Rev. Stat. § 34.810(2). The Nevada Supreme Court affirmed. *Castillo v. State*, No. 56176, 2013 WL 3833276 (July 18, 2013).

During the pendency of these state court proceedings, federal district court proceedings had been stayed. The federal district court reopened proceedings in January 2014, and Castillo filed his second amended petition on May 19, 2014. In an order issued on March 2, 2016, the court

¹ The Supreme Court ultimately issued a plurality opinion in *Baze*. 553 U.S. 35 (2008). Seven justices agreed that the protocol at issue did not violate the Eighth Amendment. *Id.* at 61–63, 87 (Kennedy, J., concurring), 94 (Thomas, J., concurring), 113 (Breyer, J., concurring). The opinion “cleared any legal obstacle to use of the most common three-drug protocol” to carry out the death penalty. *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (discussing *Baze*).

dismissed most of Castillo's claims as either barred by the statute of limitations or barred by the doctrine of procedural default, or both.

Castillo twice sought reconsideration of the court's statute of limitations and procedural default determinations. The district court denied his requests, explaining that they were untimely and that Castillo had not shown how reconsideration was warranted. However, the court granted a certificate of appealability with regards to four issues: (1) whether Castillo is entitled to equitable tolling based upon the uncertainty regarding the operation of Federal Rule of Civil Procedure 15(c) before the decision in *Mayle v. Felix*, 545 U.S. 644 (2005), and the district court's scheduling orders; (2) whether the procedural default of Castillo's trial ineffective assistance of counsel claims should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012); (3) whether Castillo's constitutional right to effective assistance of counsel was violated because trial counsel failed to present a psychological defense in the guilt phase of his trial; and (4) whether Castillo's as-applied challenge to the constitutionality of lethal injection as a method of execution is cognizable in this habeas action. This appeal followed.

II.

A. Scope of Review

Castillo has briefed six claims. The district court certified four for appeal. We address the certified claims in Part III. Castillo seeks a certificate of appealability for two other claims: (1) whether he "is entitled to relation back under *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020) (en banc)"; and (2) "[w]hether cumulative error of guilt and

penalty proceeding errors prejudiced [him] and rendered his conviction and sentence unconstitutional.”

We may not review Castillo’s uncertified claims unless we grant a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). We treat Castillo’s briefing of his uncertified issues as an application for a certificate of appealability. Fed. R. App. P. 22(b)(1)–(2); Ninth Cir. R. 22-1(e); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *McGill v. Shinn*, 16 F.4th 666, 678 (9th Cir. 2021). We may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For reasons we will explain in Part IV, we deny a certificate of appealability as to both of Castillo’s uncertified claims.

B. Standard of Review

We have jurisdiction under 28 U.S.C. § 2253. We review the district court’s denial of a habeas petition de novo. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). “If the facts underlying a claim for equitable tolling are undisputed, the question of whether the statute of limitations should be equitably tolled is also reviewed de novo.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). We otherwise review findings of fact made by the district court for clear error. *Id.* Finally, we review the district court’s conclusion that a claim is procedurally defaulted de novo. *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011).

Our review of Castillo’s claims is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104–132, 110 Stat. 1214. Under

AEDPA, habeas relief may not be granted unless the state court's decision:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2); *see Harrington v. Richter*, 562 U.S. 86, 97–98 (2011).

Section 2254(d), as amended by AEDPA, sets forth a “highly deferential standard.” *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)). Habeas corpus is “not a substitute for ordinary error correction through appeal,” but rather a “guard against extreme malfunctions in the state criminal justice systems.” *Harrington*, 562 U.S. at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). “[A] state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 103.

When deciding whether an evidentiary hearing should be granted, a court “must consider whether such a hearing could enable an applicant to prove the petition’s factual

allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The court must consider the deferential standards prescribed by § 2254. *Id.*

III.

A. Certified Claim One: Equitable Tolling

AEDPA imposes a fixed time limit for collateral attacks on a judgment of conviction in federal court. Section 2244(d)(1) provides: “A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.” Section 2244(d)(2) provides that “[t]he time during which a properly filed application for State post-conviction . . . review . . . is pending shall not be counted” against the one-year period.

So, our first task is to determine when the statute of limitations ran here. We then address Castillo’s arguments regarding equitable tolling.

1. Castillo’s first and second amended federal habeas petitions were untimely.

Castillo’s conviction became final on March 22, 1999, when the United States Supreme Court denied his petition for a writ of certiorari. *See Castillo*, 526 U.S. 1031. The one-year limitations period for Castillo’s federal habeas petition began running on that date. Castillo filed his first state PCR petition eleven days later, on April 2, 1999. That petition was properly filed and tolled the limitations period under 28 U.S.C. § 2244(d)(2). This left 354 days on the clock. Castillo’s first state post-conviction action concluded on October 27, 2004, when the Nevada Supreme Court issued its remittitur after affirming the denial of relief in

Castillo's action. The limitations period resumed running on that date. So without any equitable tolling, the one-year limitations period ran out 354 days later, on October 16, 2005.

Before that deadline, on June 22, 2004, Castillo mailed his original pro se habeas petition to the district court for filing. The parties do not dispute that the petition was timely filed on that date. See *Houston v. Lack*, 487 U.S. 266, 274–76 (1988) (adopting mailbox rule to determine date of filing of notice of appeal). The FPD was appointed to represent Castillo on July 7, 2004. Castillo filed his first amended petition on December 15, 2008—1,156 days after the limitations period expired. He filed his second amended petition on May 19, 2014—3,137 days after the limitations period expired. There is no tolling for the pendency of a federal habeas petition. *Duncan v. Walker*, 533 U.S. 167, 172, 181–82 (2001). Castillo's first and second amended federal habeas petitions were thus untimely unless the equitable tolling doctrine applies.

Castillo champions two arguments as to why the doctrine applies: first, the scheduling orders from the district court were misleading and did not reference the AEDPA statute of limitations, and Castillo relied on those to his detriment. Second, the deficient performance by his federal habeas counsel caused the untimely filing. We examine the strength of these contentions in turn.

2. *Mayle v. Felix* does not fully correct the timeliness issue with Castillo's first and second amended federal habeas petitions.

Castillo argues that he is entitled to equitable tolling because the scheduling orders from the district court were misleading. He explains that the district court waited until

May 31, 2005, to issue the initial scheduling order and argues that it is nonsensical that the court would have set the deadline for an amended petition after the AEDPA statute of limitations expired if the court believed that limit applied.

But even if we agree with Castillo's argument, it only entitles him to equitable tolling up to June 23, 2005, when the Supreme Court refined the contours of the relation-back doctrine in *Mayle*. Castillo is correct that Ninth Circuit law was previously unsettled regarding the breadth and scope of when claims in an amendment relate back to an original petition. See *Williams v. Filson*, 908 F.3d 546, 560 (9th Cir. 2018). Before *Mayle* was decided, there was "no reason to suspect that Rule 15(c) would pose an obstacle to consideration of newly added claims in an amended petition." *Id.* Under the Ninth Circuit's broad construction of Rule 15(c), "habeas practitioners reasonably assumed that newly added claims would relate back to the original petition so long as the claims arose out of the same trial and conviction challenged in the original petition." *Id.* So Castillo's counsel may have reasonably believed that they could add new claims in an otherwise untimely § 2254 petition so long as they satisfied Rule 15(c).

However, the Supreme Court clarified in *Mayle* that claims in untimely amendments to a § 2254 petition would not relate back or escape AEDPA's time limits unless they were the same in time and type as a timely-filed claim. *Id.* at 561. At that point, Castillo and his counsel were forewarned that they needed to file an amendment with any new claims that did not meet that standard. Assuming that Castillo was entitled to equitable tolling until *Mayle* issued on June 23, 2005, he would have had 354 days left on the AEDPA calendar, which would have expired without additional tolling on June 12, 2006. Yet counsel waited

more than three years to file the first amended § 2254 petition and more than four years to file the second. In other words, neither petition can be salvaged, absent some other analytical vehicle warranting equitable tolling.

3. Habeas counsel's performance does not warrant equitable tolling for the time period after *Mayle*.

Next, Castillo argues that, after *Mayle*, he should be accorded equitable tolling because his habeas counsel rendered deficient performance in failing to timely file an amended petition. He acknowledges on appeal that the record is decisively silent as to the reason for this blunder. Castillo contends, however, that it was erroneous for the district court to conclude that the delay was merely negligence.

As we know, the one-year statute of limitations for filing a habeas petition may be equitably tolled if “extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time.” *Spitsyn*, 345 F.3d at 799 (citation modified). This is a “fact-specific inquiry” that requires a petitioner to show “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.* (quoting *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001)); *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), *superseded by statute on other grounds*).

“Extraordinary circumstances” do not include “ordinary” attorney negligence. See *Spitsyn*, 345 F.3d at 800. For example, in *Frye*, we concluded that “the miscalculation of the limitations period by Frye’s counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling.” 273

F.3d at 1146; *see also Miranda v. Castro*, 292 F.3d 1063, 1068 (9th Cir. 2002) (same).

But sufficiently egregious attorney conduct *is* included as an extraordinary circumstance. *Spitsyn*, 345 F.3d at 800. In *Spitsyn*, a non-capital case, the petitioner’s counsel “completely failed to prepare and file a petition” despite having nearly a full year to do so. *Id.* at 801. Counsel further failed to return the petitioner’s file for more than two months after the deadline passed. *Id.* Our sister circuits have similarly applied equitable tolling in cases where counsel failed to file a federal habeas petition. *E.g., Baldayaque v. United States*, 338 F.3d 145, 152–53 (2d Cir. 2003) (noting counsel also did no legal research on petitioner’s case and never spoke to or met petitioner); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (noting counsel also failed to update petitioner of court proceedings and refused to remove herself as appointed counsel, thus preventing petitioner from “moving his case forward”), *overruled in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002).

But as Castillo concedes, the record is simply silent as to why counsel failed to meet the deadline to file an amended § 2254 petition in his case. All of the cases that Castillo relies on reference more extreme circumstances of attorney incompetence that are not present in this case. There is no indication that counsel failed to respond to communications, refused to timely return files or otherwise prevented work from being done on the case, or neglected to file a timely initial petition at all. *See Holland*, 560 U.S. at 631; *Spitsyn*, 345 F.3d at 800–02; *see also Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 163 F.3d 530, 541 (9th Cir. 1998) (stating that petitioner’s alleged mental incompetency justified equitable tolling, “at least until a reasonable period of time has elapsed after the district court makes a competency

determination”), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003). Put another way, nothing indicates that counsel’s conduct constituted anything more than lack of oversight and garden-variety negligence.

Castillo also challenges the district court’s refusal to appoint separate, conflict-free counsel to investigate why the FPD failed to timely file an amended § 2254 petition. He suggests that the FPD could now be conflicted in any such investigation because they would have to argue against their own professional reputation. Castillo cites for support *Christeson v. Roper*, where the Supreme Court determined that the district court erred in failing to appoint substitute counsel. 574 U.S. 373, 375–76 (2015). Key in *Christeson* were the facts that the attorneys failed to meet with the petitioner until well after the initial petition was due and that a legal ethics expert had opined that counsel’s behavior constituted abandonment. *Id.* at 374–75. The Court reasoned that substitution of counsel is warranted “when it is in the interests of justice,” particularly “when an attorney’s interest in avoiding damage to his own reputation is at odds with his client’s strongest argument—*i.e.*, that his attorneys had abandoned him.” *Id.* at 377–78. (citation modified). In *Christeson*’s case, his counsel’s arguments “manifestly served their own professional and reputational interests” and were so “directly and concededly contrary to their client’s interest” that substitution of counsel was warranted. *Id.* at 379.

Here, there is none of that. Castillo has not alleged any potential or actual conflict beyond the mere fact of the untimely first amended § 2254 petition. Again, the record does not show that he was abandoned by counsel. And the FPD did acknowledge their own errors in the opening brief filed in this appeal, which indicates that they were not so

concerned with the potential damage to their professional reputation.

Even if Castillo's counsel had performed deficiently in the untimely filing of his first and second amended § 2254 petitions, so as to constitute an extraordinary circumstance, Castillo has not shown his diligence in pursuing his first amended § 2254 petition. *See Holland*, 560 U.S. at 653 (reiterating that a petitioner need not show "maximum feasible diligence," but rather "reasonable diligence" (quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008))). He does not allege ignored or rebuffed efforts to communicate with counsel regarding the status of his petition. His only defense is that he timely filed his original pro se § 2254 petition before the state court proceedings concluded.

We also note that Castillo moved for voluntary dismissal of his federal habeas proceedings in 2007. The district court granted his request. Then on May 7, 2008, Castillo moved to reopen his case and reinstate his petition for a writ of habeas corpus. On May 14, 2008, the district court granted the motion and stayed execution. The FPD filed the first amended § 2254 petition on December 15, 2008, seven months after proceedings were reopened. On the record before us, there is no evidence that Castillo pressed the FPD to file an amended petition before he voluntarily dismissed the case or after the original § 2254 petition was reinstated. Thus, equitable tolling sufficient to render the first or second amended § 2254 petition timely is not warranted.

4. An evidentiary hearing is not warranted in this instance.

The record is sufficiently developed to determine that Castillo failed to demonstrate extraordinary circumstances

or diligence sufficient to render the first and second amended petitions timely. *See Roberts v. Marshall*, 627 F.3d 768, 771–73 (9th Cir. 2010) (determining that district court did not abuse its discretion in denying evidentiary hearing where record was sufficiently developed to deny claim, notwithstanding petitioner’s assertions); *Orthel v. Yates*, 795 F.3d 935, 939–41 (9th Cir. 2015) (applying *Roberts*). Thus, the district court did not abuse its discretion in denying an evidentiary hearing on the equitable tolling issues.

Both the State and Castillo agree that only two *Martinez* claims survive the timeliness issue: Claim Eight (II)(A), pertaining to the admission of testimony from Berndt’s daughter, and Claim Eleven, pertaining to the applicability of the deadly weapon enhancement statute. The remaining question is whether these claims were procedurally defaulted.

B. Certified Claim Two: The *Martinez* Issues

Castillo’s *Martinez* argument has more traction. Federal courts are generally not allowed under AEDPA to consider claims that were “not presented to the state courts consistent with the State’s own procedural rules.” *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (citation modified). However, the Supreme Court has carved out an exception to this procedural default when a federal habeas petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Establishing cause requires a petitioner to show some “external impediment” to compliance with state procedure. *Id.* at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 492

(1986)). “A factor is external to the defense if it cannot fairly be attributed to the prisoner.” *Davila v. Davis*, 582 U.S. 521, 528 (2017) (internal quotation marks omitted). “Attorney ignorance or inadvertence” generally is not sufficient. *See Coleman*, 501 U.S. at 753; *Martinez*, 566 U.S. at 8. This is because “the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation.” *Coleman*, 501 U.S. at 753. Importantly, though, “[a]ttorney error that constitutes ineffective assistance of counsel is cause.” *Id.* at 753–54. This is because the Sixth Amendment imputes to the State responsibility for any procedural default that occurs as a result of ineffective assistance of counsel. *Id.* at 754. Yet, there is no constitutional right to counsel in state PCR proceedings. *Id.* at 756–57; *Shinn*, 596 U.S. at 383. And in proceedings where there is no constitutional right to counsel, there can be no corresponding Sixth Amendment right to effective assistance of counsel. So usually, even egregious attorney error in seeking state post-conviction relief does not establish cause. *See Davila*, 582 U.S. at 524.

Importantly, *Martinez* sets forth a narrow exception for attorney ignorance and inadvertence in initial-review collateral proceedings. 566 U.S. at 9. In *Martinez*, the Supreme Court explained that “[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.” *Id.* at 10. So, where state law requires trial ineffective assistance claims to be brought in state PCR proceedings in the first instance (as opposed to bringing the claim on direct review), “a claim of ineffective state PCR counsel is akin to a claim of ineffective direct-appeal counsel.” *Hogan v. Bean*, 140 F.4th 1001, 1027 (9th Cir. 2025); *see also Hogan v. Bean*, 174 F.4th 700 (9th Cir. 2026) (denying rehearing en banc).

To jumpstart a stalled ineffective assistance claim, a petitioner must satisfy four factors under *Martinez*:

(1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (citation modified) (quoting *Martinez*, 566 U.S. at 13–14).

Here, the district court concluded that *Martinez* did not excuse Castillo’s procedurally defaulted claims. It first distinguished *Martinez* as having established an exception to Arizona’s second-or-successive procedural bars, whereas Nevada courts enforced a timeliness bar to dismiss Castillo’s claims. *See Nev. Rev. Stat. § 34.726*. The district court put weight on the fact that Castillo delayed filing his second state PCR petition by more than ten years after his direct appeal concluded, and almost five years after proceedings on his first PCR petition concluded. Second, the district court reasoned that a considerable amount of time elapsed between Castillo’s state PCR petitions, such that any alleged ineffectiveness of his first state habeas counsel could not, “[a]s a matter of equity,” serve as cause for the procedural default of his ineffective assistance of counsel claims in his

second petition. The district court explained that because Oram represented Castillo until late 2004, “only part of the time over which the statute of limitations default occurred,” the ineffective assistance of that counsel could not explain the remaining five years of delay in bringing the second state PCR petition claims.

Our decision in *Hogan* controls here. There, the petitioner did not raise his trial ineffective assistance claims until his third state PCR petition. 140 F.4th at 1013–14. Nevada courts dismissed the claims as successive under Nevada Revised Statute (“NRS”) § 34.810 and untimely under NRS § 34.726. *Hogan v. State*, No. 54011, 2012 WL 204641, at *1 (Nev. Jan. 20, 2012). Following the state proceedings, the federal district court reopened proceedings. *Hogan v. Baker*, No. 2:97–cv–00927, 2014 WL 1093111 (D. Nev. Mar. 19, 2014). It dismissed the majority of Hogan’s claims as procedurally defaulted for two reasons: (1) the procedural default in *Martinez* was based on a state court rule barring successive petitions, whereas the procedural default in Hogan’s case was based on a time limitation imposed by Nevada law; and (2) there was “insufficient causal connection between the alleged ineffective assistance of Hogan’s first post-conviction counsel and the procedural default” at issue in the case. *Id.* at *9. The district court explained that even if Hogan’s attorney during his first state habeas action was ineffective, that attorney concluded representation when the Nevada Supreme Court affirmed the state district court’s denial of his first habeas petition. *Id.* Hogan was subsequently represented by other counsel, so ineffective assistance of his first habeas attorney could not “function as cause for the procedural default of claims raised in Hogan’s third and fourth state habeas actions.” *Id.*

We disagreed. We first clarified that *Martinez* may apply to procedural defaults based on state timeliness rules, in addition to defaults based on successive petitions. *Hogan*, 140 F.4th at 1028 (stating that *Martinez* “did not limit the types of procedural default that initial-review [ineffective assistance of counsel] may excuse”). We emphasized that the point of the exception is to “ensure that meritorious claims of trial error receive review by at least one state or federal court.” *Id.* (quoting *Davila*, 582 U.S. at 532). We reiterate now that while “true that *Martinez* involved a successive-petition prohibition, . . . the consequence of the default there is no different from a case in which a lawyer who waits too long to raise the trial [ineffective assistance of counsel] claim: ‘no state court will ever review’ the trial [ineffective assistance of counsel] claim.” *Id.* (quoting *Davila*, 582 U.S. at 532).

We also made clear in *Hogan* that *Martinez*’s “cause” requirement does not mean “proximate causation,” but “‘good cause,’ as in, ‘[a] legally sufficient reason’ for ‘why a request should be granted.’” *Id.* at 1029 (alteration in original) (quoting Black’s Law Dictionary (12th ed. 2024)). There must be “*some* logical connection between the postconviction [ineffective assistance of counsel] and the procedural default to satisfy *Martinez*,” but that connection can be demonstrated by showing that first PCR counsel “impeded or obstructed” a petitioner from complying with state procedures. *Id.* (quoting *Martinez*, 566 U.S. at 13). That is exactly what happened here. “Even if [Castillo’s] second lawyer had raised the relevant trial [ineffective assistance] claims in his second PCR petition, his claims would still be procedurally defaulted under Nevada law” precluding the filing of second or successive petitions. *See id.*

The State counters that *Martinez* should not apply here because Nevada has guaranteed a statutory right to counsel in first-post-conviction challenges since 1983. *See Nev. Rev. Stat. § 34.820(1)(a)* (“If a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner’s judgment of conviction or sentence, the court shall . . . [a]ppoint counsel to represent the petitioner . . .”). In its view, this means a petitioner can assert post-conviction ineffective assistance of counsel as cause to excuse the state procedural bar and have the claim effectively heard at the state level, so long as the petitioner does so within a “reasonable time.” It suggests that Nevada’s statutory setup simply is not what *Martinez* was worried about.

We are unconvinced. Both cases that the State marshals for support predated *Martinez*. *See Hathaway v. State*, 71 P.3d 503, 506 (Nev. 2003); *Crump v. Warden, Nev. State Prison*, 934 P.2d 247, 253 (Nev. 1997). The Supreme Court is perfectly capable of carving out an exception for states, like Nevada, where a right to counsel is recognized in initial capital post-conviction proceedings. But it did not do so in *Martinez*. And in *Hogan*, we specifically cited a number of Nevada Supreme Court cases explicitly stating that *Martinez* did not alter the court’s “prior decisions that a petitioner has no constitutional right to post-conviction counsel and that post-conviction counsel’s performance does not constitute good cause to excuse . . . procedural bars.” 140 F.4th at 1030 (omission in original) (quoting *Brown v. McDaniel*, 331 P.3d 867, 869 (Nev. 2014)).

We therefore conclude that *Martinez* may give Castillo a viable road to travel. Because the district court is best positioned to evaluate his claims, we remand the two claims that survive the timeliness issue to the district court for

further proceedings consistent with this opinion and the guidelines set forth in *Hogan*. See *id.* at 1032–34.

C. Certified Claim Three: Failure to Further Investigate and Present a Mental State Defense

Castillo next advances two arguments that ultimately buckle: (1) trial counsel was ineffective in failing to present Dr. Etcoff at the guilt phase to testify in support of a diminished capacity defense; and (2) the district court erred in concluding that the evidence Castillo presented in his second amended federal petition would have been insufficient to show ineffective assistance of trial counsel because the evidence of diminished capacity would have been outweighed by the damage to the defense his counsel put forward.

Under AEDPA, habeas relief may not be granted unless the state court’s decision was: (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [Supreme Court]”; or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); *Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019). To obtain relief on a claim in federal court, a petitioner must demonstrate that the state court’s ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103; see also *Fauber v. Davis*, 43 F.4th 987, 996–97 (9th Cir. 2022) (holding that the state court decision was “merely wrong or even clear error” is not enough).

Nevada courts apply the *M’Naghten* test for legal insanity. *Miller v. State*, 911 P.2d 1183, 1185–86 (Nev. 1996) (stating that the diminished capacity defense is

unavailable in Nevada). “To prove a defendant is insane under the *M’Naghten* test, the defense must show that the defendant labors under such a mental defect that the defendant cannot understand the nature of his actions, or cannot tell the difference between right and wrong,” thus negating the mens rea requirement. *Id.*

We first disagree with Castillo that his trial counsel, David Schieck, rendered ineffective assistance by failing to present Dr. Etcoff during the guilt phase or pursue a mental state defense. Castillo raised a version of this claim in his first state PCR action. At the evidentiary hearing before the trial court on the claim, Schieck testified that he “didn’t see any diminished capacity defense that the jury would accept.” He also explained that aspects of Castillo’s background likely would have been more damaging than helpful in the guilt phase. The record shows that Schieck retained Dr. Etcoff to review Castillo’s records, conduct a clinical interview, and provide a psychological evaluation of Castillo’s behavior. Dr. Etcoff recognized that Castillo suffered from childhood neglect, abuse, and constant changes to his environment (notably, he was placed in twenty different homes and facilities within the first eight years of his life), all of which left him unable to “form a normal attachment to an adult.” Dr. Etcoff diagnosed Castillo with ADHD, a reactive attachment disorder, and a conduct disorder.

But during the penalty phase, Dr. Etcoff testified: “[Castillo is] bright enough I.Q.-wise that he probably did know after he did something that it was wrong. . . . [A]fter awhile, he certainly knew right from wrong but had a hard time doing right.” Dr. Etcoff added that this behavior was partly attributable to “lack of impulse control” and partly attributable to the abuse Castillo suffered from his stepfather

and uncle. Dr. Etkoff also confirmed that Castillo did not have a disorder that rendered him unable to learn or develop skills to work. And he indicated that Castillo's testing showed that he is "a bright young man with good academic skills also." This testimony would have undermined Castillo's entire defense. Choosing this strategy was not incompetence—it was a calculated move.

Castillo argues that Schieck's explanation for his failure to investigate and assert a psychological defense "was uninformed and not strategic." He describes multiple facts that Schieck should have uncovered, including the impact of Castillo's PTSD on his ability to regulate or control his behaviors and his processing disorder. But Castillo misses the point. These facts would not have satisfied Castillo's burden of showing that he could not understand the nature of his actions or tell the difference between right or wrong. *See also Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (recognizing that persons with mental disorders "frequently know the difference between right and wrong and are competent to stand trial").

Castillo's additional arguments on appeal fare no better. It is immaterial whether Schieck circumscribed Dr. Etkoff's ability to give a full and accurate diagnosis by failing to provide him with additional background records. Schieck was entitled to rely on the opinions of an expert in deciding whether to pursue an insanity defense, and a failure to provide the expert with certain background records does not constitute a deficiency where the expert does not request them. *See Hendricks v. Calderon*, 70 F.3d 1032, 1037–39 (9th Cir. 1995) (non-penalty phase context). Schieck also did not need to push Dr. Etkoff for additional evaluations and neuropsychological testing. Once he retained Dr. Etkoff, he could have reasonably relied on the expert's decisions

regarding what testing was to be performed and the conclusions drawn from testing. See *Crittenden v. Ayers*, 624 F.3d 943, 966 (9th Cir. 2010) (“Attorneys are entitled to rely on the opinions of properly selected, adequately informed and well-qualified experts.”).

Nor is there a reasonable likelihood that the jury would have accepted evidence that Castillo was legally insane at the time of the crimes or that such evidence would have changed the culpability finding at the guilt phase. In *Wong v. Belmontes*, the Supreme Court declined to find ineffective assistance of counsel where there was no reasonable likelihood that the jury would have returned a different verdict if presented with additional mitigating evidence. 558 U.S. 15, 24–25 (2009). There, the Court dismissed the argument that the jury should have been informed of the defendant’s “extended bout with rheumatic fever, which led to emotional instability, impulsivity, and impairment of the neurophysiological mechanisms involved in planning and reasoning”—the defendant had already put on substantial mitigating evidence, and the evidence regarding the “cold, calculated nature of the . . . murder and [defendant’s] subsequent bragging about it would have served as a powerful counterpoint.” *Id.*

A similar conclusion is warranted here. Dr. Etcoff explained that Castillo was “very open” in discussing the night he murdered Berndt. When Castillo found the key to Berndt’s house, he told a coworker that he intended to return later, at night. He did so weeks later, stealing several items and beating Berndt repeatedly with a tire iron that he had brought. Later that same night, he returned to set the house on fire to destroy any evidence. Castillo later confessed his actions to his girlfriend, a coworker, the police, and Dr. Etcoff, without ever suggesting that he did not know what he

was doing on the night of the murder. These facts likely would have strongly countered any evidence that Castillo was so impaired from his ADHD or other mental impairments that he did not understand the nature of what he was doing or that what he was doing was wrong.

Accordingly, it is possible that trial counsel made a reasonable tactical decision that a mental state defense was not viable based on his experience, investigation, and Dr. Etcoff's opinions as to Castillo's mental state. *See Harrington*, 562 U.S. at 106 (holding that the situations are rare "in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach" (citation modified)). Second-guessing trial counsel's tactics risks confusing legal certainty with hindsight in disguise. We conclude that Castillo did not receive ineffective assistance of counsel because counsel failed to raise a mental state defense during the guilt phase. We also conclude that Castillo did not demonstrate that he can meet the requirements for an evidentiary hearing. 28 U.S.C. § 2254(e)(2); *Hampton v. Shinn*, 143 F.4th 1047, 1076 (9th Cir. 2025); *McLaughlin v. Oliver*, 95 F.4th 1239, 1250 (9th Cir. 2024).

D. Certified Claim Four: As-Applied Challenge to the Constitutionality of Nevada's Lethal Injection Scheme

Castillo argues that Nevada's lethal injection scheme violates the Eighth Amendment's prohibition against cruel and unusual punishment as applied. This argument fails.

We first stress that we have a duty to make sure that challenges are brought the right way. Different mechanisms exist to allow a petitioner to assert the "unconstitutional treatment at the hands of state officials." *Nance v. Ward*,

597 U.S. 159, 167 (2022) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)). But the federal habeas statute and 42 U.S.C. § 1983 contain different procedural requirements, and the scope of § 1983 is considerably broader than that of 28 U.S.C. § 2254. *Id.* The first question is whether an as-applied challenge to a state’s execution drug protocol is more appropriately raised in a civil action under § 1983 or in a federal habeas action under § 2254. Key to this determination is “whether a claim challenges the validity of a conviction or sentence.” *Id.* For example, habeas actions may include an inmate’s petition “to overturn his death sentence, thus preventing the State from executing him,” and actions that “*necessarily* imply the invalidity of his conviction or sentence.” *Id.* (emphasis added) (quoting *Heck*, 512 U.S. at 487). By contrast, § 1983 cases may include prison-conditions claims, which “do[] not go to the validity of a conviction or sentence.” *Id.* at 168.

The Supreme Court has twice indicated that method-of-execution claims fall on the § 1983 side of the line. In both *Nelson v. Campbell*, 541 U.S. 637 (2004), and *Hill v. McDonough*, 547 U.S. 573 (2006), which involved challenges to a state’s lethal-injection protocol, the Court explained that the petitioners had shown that alternative procedures were available.² *See Nance*, 597 U.S. at 168 (discussing *Nelson* and *Hill*). The presence of alternatives meant that granting the petitioner relief would not “*necessarily* prevent the State from carrying out” the executions. *Id.* (citation modified). Each petitioner “had

² This was despite the fact that these cases predated the formal requirement that a method-of-execution claim propose an alternative method of execution. *Bucklew v. Precythe*, 587 U.S. 119, 141 (2019); *Glossip*, 576 U.S. at 877–80 (discussing *Baze*, 553 U.S. at 52, 61).

asked only for a change in implementing the death penalty, and an order granting that relief would not prevent the State from executing him. So the claims could proceed under § 1983.” *Id.* at 168–69.

Though Castillo’s case also predates the alternative method-of-execution requirement, Castillo *did* recognize an acceptable alternative method of execution: in his second amended § 2254 petition, he argued that Nevada’s lethal injection protocol created an unacceptable risk of severe pain because it lacked safeguards to ensure that the inmate is rendered unconscious, in contrast with the lethal injection protocol proposed by Kentucky (which was accepted in *Baze*). Though Nevada has not adopted Kentucky’s protocol, the Supreme Court has held that a proposed alternative method of execution need not be one currently approved by a state because the state could always approve legislation adopting the alternative method. *Id.* at 170. Thus, to obtain relief on this claim, Castillo must bring this challenge in a § 1983 petition.

Castillo’s challenge also fails because it is not ripe. “A method-of-execution challenge is not ripe when the respondent state has no protocol that can be implemented at the time of the challenge.” *Floyd v. Filson*, 949 F.3d 1128, 1152 (9th Cir. 2020). Castillo concedes that Nevada does not possess an essential drug in either of its approved lethal injection protocols. Because Castillo did not raise his as-applied challenge in the right petition and because his factual admissions demonstrate that the challenge is not ripe, the district court was within its discretion to deny an evidentiary hearing. *See Schriro*, 550 U.S. at 474 (concluding that petitioner could not be granted federal habeas relief even if granted an evidentiary hearing because district court did not

abuse its discretion in concluding that he could not overcome § 2254(d)(2)’s bar).

IV.

Our attention turns finally to the two uncertified issues: (1) whether Castillo is entitled to relation back under *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020) (en banc); and (2) whether cumulative guilt and penalty proceeding errors prejudice Castillo and render his conviction and sentence unconstitutional. We may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Here, however, neither uncertified issue has cleared the bar for a constitutional claim.

A. Uncertified Claim One: Relation Back

We first consider Castillo’s relation-back argument. Federal Rule of Civil Procedure 15(c)(1)(B) provides that an otherwise untimely amended pleading “relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” This process looks first at the claims alleged in the amended petition and the core facts underlying those claims, and then at whether the body of the original petition and its exhibits set forth or attempt to set forth a corresponding factual basis. *Ross*, 950 F.3d at 1167.

The facts in the original and amended petitions do not need to be stated in the same level of detail. *Id.* at 1168. And so long as the claims rely on the same factual circumstances, a claim may relate back even if the amended petition presents a different legal theory. *Id.* at 1167–68. But “[i]f an exhibit to the original petition includes facts unrelated to

the grounds for relief asserted in that petition, those facts were not ‘attempted to be set out’ in that petition and cannot form a basis for relation back.” *Id.* at 1168.

Castillo argues that the following claims in his first amended § 2254 petition should relate back: Claims One (II)(A) (ineffective assistance of counsel for failing to present mitigation evidence in the penalty phase) and Seventeen (categorical exclusion from eligibility from death penalty due to alleged incompetency); Claims Three (I)(B), (I)(C), and (II)(B) (ineffective assistance of counsel related to failure to challenge jury instructions); and Claims One (II)(B), Four, and Five (ineffective assistance of counsel for failing to object in the penalty phase to admission of juvenile bad acts).

With regards to Claim One (II)(A) and Seventeen, Castillo argues that he raised his claim about trial counsel’s failure to offer psychological evidence to the jury in his state post-conviction proceedings. But the claim Castillo raised in those proceedings concerned the guilt phase, not the penalty phase. Because that claim and the one he raised in his first amended § 2254 petition concern different phases of trial and the use of evidence for different purposes, the claims do not involve the same transaction or occurrence. *Hebner v. McGrath*, 543 F.3d 1133, 1138–39 (9th Cir. 2008) (holding that untimely amendment claim did not relate back to timely claim where two claims involved separate transactions at different stages of trial). Claim Seventeen also does not relate back to a timely claim in the original § 2254 petition.

With regards to Claims Three (I)(B), (I)(C), and (II)(B), Castillo argues that because he challenged the same jury instructions in his state habeas proceedings and first

amended § 2254 petition, these claims should relate back. But Castillo's sole claim in state habeas proceedings referencing these instructions was a broad challenge to Nevada's death penalty scheme, not specific claims of jury instruction error. Castillo does not point to any actual claim in his timely original § 2254 petition discussing the jury instructions. Accordingly, the passing reference to these jury instructions as part of an unrelated state habeas claim does not raise the same transaction or occurrence underlying the first amended § 2254 petition claims of jury instruction error and related ineffective assistance of counsel.

Finally, with regards to Claims One (II)(B), Four, and Five, Castillo again argues only that he alleged related claims in his state habeas proceedings. He does not point to a related claim in his original § 2254 petition. This is insufficient to allow for relation back. Castillo therefore has not made a substantial showing of the denial of a constitutional right as to relation back, and we decline to issue a certificate of appealability as to this claim.

B. Uncertified Claim Two: Cumulative Error

At this time, Castillo has not demonstrated multiple constitutional errors that cumulatively warrant reversal. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011); *cf. Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (“[E]ven if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal.” (citation modified)). We thus also decline to issue a certificate of appealability as to this claim.

V.

For the foregoing reasons, we reverse the district court's judgment as to Claims Eight (II)(A) and Eleven and remand for further proceedings consistent with this opinion. We affirm on all other claims.

AFFIRMED in part and **REVERSED** and **REMANDED** in part.