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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KEVIN TYRONE RUFFIN,  
*Petitioner,*  
  
vs.  
  
DIRECTOR NEVADA DEPARTMENT  
OF CORRECTIONS, *et al.*,  
*Respondents.*

2:07-cv-00721-RLH-PAL  
  
ORDER

This represented habeas matter under 28 U.S.C. § 2254 is before the Court for a decision with regard to the remaining grounds in the second amended petition (#49).

**Background**

Petitioner Kevin Ruffin seeks to set aside his September 28, 2005, amended Nevada state court judgment of conviction, pursuant to a jury verdict in 2000, of burglary and larceny from the person with an adjudication as a habitual criminal. He is serving two concurrent life sentences with the possibility of parole after ten years.

The charges arose from two pickpocketing incidents in Las Vegas -- one on February 7, 1999, in an elevator at the Bellagio Hotel and Casino (the "Bellagio") and another on February 18, 1999, in an elevator at the New York-New York Hotel and Casino (the "New York-New York"). In the single trial, the jury hung on the Bellagio counts, and those counts later were dismissed. The jury found Ruffin guilty of the two counts arising from the New York-New York incident.



1 A state court decision is “contrary to” law clearly established by the Supreme Court only  
2 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or  
3 if the decision confronts a set of facts that are materially indistinguishable from a Supreme  
4 Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell v. Esparza*, 540  
5 U.S. 12, 15-16, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003). A state court decision is not  
6 contrary to established federal law merely because it does not cite the Supreme Court’s  
7 opinions. *Id.* Indeed, the Supreme Court has held that a state court need not even be aware  
8 of its precedents, so long as neither the reasoning nor the result of its decision contradicts  
9 them. *Id.* Moreover, “[a] federal court may not overrule a state court for simply holding a view  
10 different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous.”  
11 540 U.S. at 16, 124 S.Ct. at 11. For, at bottom, a decision that does not conflict with the  
12 reasoning or holdings of Supreme Court precedent is not contrary to clearly established  
13 federal law.

14 A decision constitutes an “unreasonable application” of clearly established federal law  
15 only if it is demonstrated that the state court’s application of Supreme Court precedent to the  
16 facts of the case was not only incorrect but “objectively unreasonable.” *E.g.*, *Mitchell*, 540  
17 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 384 F.3d 628, 638 (9<sup>th</sup> Cir. 2004).

18 To the extent that the state court’s factual findings are challenged, the “unreasonable  
19 determination of fact” clause of Section 2254(d)(2) controls on federal habeas review. *E.g.*,  
20 *Lambert v. Blodgett*, 393 F.3d 943, 972 (9<sup>th</sup> Cir. 2004). This clause requires that the federal  
21 courts “must be particularly deferential” to state court factual determinations. *Id.* The  
22 governing standard is not satisfied by a showing merely that the state court finding was  
23 “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

24 . . . . [I]n concluding that a state-court finding is unsupported by  
25 substantial evidence in the state-court record, it is not enough that  
26 we would reverse in similar circumstances if this were an appeal  
27 from a district court decision. Rather, we must be convinced that  
an appellate panel, applying the normal standards of appellate  
review, could not reasonably conclude that the finding is  
supported by the record.

28 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9<sup>th</sup> Cir. 2004); see also *Lambert*, 393 F.3d at 972.

1 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct  
2 unless rebutted by clear and convincing evidence.

3 The petitioner bears the burden of proving by a preponderance of the evidence that  
4 he is entitled to habeas relief. *Pinholster*, 131 S.Ct. at 1398.

### 5 ***Discussion***

#### 6 ***Ground 1: Batson Claim***

7 In Ground 1, petitioner presents a *Batson*<sup>3</sup> claim, alleging that the prosecution struck  
8 the sole black juror on the jury venire because of her race, denying petitioner, who also is  
9 black, equal protection of the laws in violation of the Fourteenth Amendment.<sup>4</sup>

10 Under the jury selection procedure used in the state district court, the venire consisted  
11 initially of 35 prospective jurors, who were questioned by the court collectively. The clerk  
12 thereafter called up 23 prospective jurors from the venire in a random and non-alphabetical  
13 order. The venire members then were questioned individually in open court in the presence  
14 of the rest of the venire. During both the collective and individual questioning, selected  
15 prospective jurors were excused for cause along the way based upon their responses. After  
16 23 prospective jurors had been individually questioned without being excused for cause, the  
17 State and the defense then exercised up to five peremptory challenges each. The bailiff  
18 would hand the jury venire list to one side then the other, starting with the State, until each  
19 side had either exercised or waived five peremptory challenges. The first 13 of the these 23  
20 venire members, in the order called initially, who were not struck by a peremptory challenge  
21 were seated as the jury and alternate.<sup>5</sup>

22 Ms. Avan Wilson was the sole African-American prospective juror in the venire. She  
23 was, in order, the fourth prospective juror called of those who had not been excused for cause  
24 prior to the peremptory challenges. See #35, Ex. 36, at 45-50.

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26 <sup>3</sup>*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

27 <sup>4</sup>#49, at 11-14 (second amended petition); #54, at 8-19 (reply).

28 <sup>5</sup>See, e.g., #35, Ex. 36, at 7-8, 13, 18, 21, 24 & 34; #36, Ex. 38, at 148-49.

1 After the bailiff handed the jury list with the strikes up to the bench, the state district  
2 court started reading the names of the prospective jurors who were being excused after the  
3 peremptory challenges. However, the court, apparently *sua sponte* as the transcript reads,  
4 then stopped and recessed the proceeding for a conference in chambers.<sup>6</sup>

5 The following on-the-record exchange occurred in chambers:

6 THE COURT: Okay. Mr. Hehn [for the State], there is only  
7 one African-American prospective juror on  
8 this panel and you have chosen to exercise  
a peremptory challenge on that. I have to  
have a non-racial reason or reasons --

9 MR. HEHN: Sure.

10 THE COURT: -- why you are challenging.

11 MR. HEHN: Absolutely. She stated, when she was  
12 talking with Mr. Walton [for the defense], that  
13 his face was very familiar, that I felt as  
14 though she laughed immaturely and  
15 inappropriately while he was talking with her,  
16 which indicated to me that she was trying to  
17 kind of curry favor with him. And also she  
18 stated that she had a baby sitting problem  
19 immediately after 5 o'clock, and I felt as  
20 though that would interfere with her ability to  
21 deliberate if we adjourned and they start  
22 deliberating, which would maybe take them  
23 past 5 o'clock, she would just throw an  
24 answer rather than actually deliberate.

18 THE COURT: Okay. Mr. Walton, I'm going to -- I think  
19 those are legitimate reasons and for those  
20 reasons I'm not going to preclude him from  
21 challenging her. You may put anything on  
22 the record that you wish.

21 MR. WALTON: Yes, Judge. I declare for the record that  
22 that's not a sufficient race-neutral for [sic]  
23 reason for excluding the only prospective  
24 black panel member and I'd like my  
objection to be noted for the record.

24 THE COURT: They are noted for the record. Thank you  
25 very much. That will be it.

26 #36, Ex. 38, at 149-50.

27 \_\_\_\_\_  
28 <sup>6</sup>See #35, Ex. 36, at 149.

1 The foregoing was the entirety of the argument presented in the state district court on  
2 the *Batson* issue, which appears from the transcript to have been raised *sua sponte* by the  
3 court rather than initially by the defense. Other than the conclusory statement that the State  
4 had not given a sufficient race-neutral reason, the defense did not specifically challenge the  
5 factual assertions made by the State. Nor did the defense seek to argue that other facts  
6 demonstrated that the reasons given by the State were merely pretextual.

7 The state district court thereupon reconvened the matter, excused the rest of the struck  
8 prospective jurors, and had the jury sworn. Avan Wilson was the second prospective juror  
9 of the 23 called – vis-à-vis the order in which they were called by the clerk – who was struck  
10 by a party.<sup>7</sup> The record does not reflect which side struck which prospective jurors other than  
11 Wilson. Nor does the record reflect the order in which the prospective jurors were struck as  
12 the list was passed back and forth between the State and defense. For example, the record  
13 does not reflect whether the State struck Wilson with its first, last, or an intermediate  
14 peremptory challenge. There is no suggestion in the record that counsel were required to go  
15 down the jury list in order when exercising their peremptory challenges.

16 On direct appeal, petitioner alleged that the State’s exercise of a peremptory challenge  
17 as to prospective juror Wilson deprived him of equal protection of the laws, relying on *Batson*.  
18 Petitioner contended that the State’s explanation for the strike did not present an adequate  
19 race-neutral explanation. Petitioner argued specifically:

20 Not liking how a prospective juror laughed and resorting to  
21 the non-issue of the trial going past five o’clock (which the trial  
22 judge had indicated would not happen) were nothing more than  
pretextual excuses for eliminating the only African-American from  
the jury.

23 #36. Ex. 61, at 8-9.

24 Petitioner presented no other factual basis on direct appeal for concluding that the  
25 State’s reasons were inadequate.

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28 <sup>7</sup>The only other prospective juror who was struck who preceded Wilson in the order that the 23 were  
called by the clerk was Joanne Silvernail. Compare #35, Ex. 36, at 36-40, with #36, Ex. 38, at 149.

1 The Supreme Court of Nevada rejected the claim presented to that court on the  
2 following grounds:

3  
4 . . . [A]ppellant contends that the district court erred by  
5 rejecting his objection under Batson v. Kentucky to the  
6 prosecutor's use of a peremptory challenge to strike the only  
7 African-American venireperson on the jury panel. Appellant  
8 argues that the State's explanation for the exercise of the  
9 peremptory strike was pretextual and proves purposeful  
10 discrimination. We conclude that the district court did not err and  
11 that appellant's contention is without merit.

12 Pursuant to Batson and its progeny, there is a three-step  
13 process for evaluating race-based objections to peremptory  
14 challenges: (1) the opponent of the peremptory challenge must  
15 make a prima facie showing of racial discrimination; (2) upon a  
16 prima facie showing, the proponent of the peremptory challenge  
17 has the burden of providing a race-neutral explanation; and (3) if  
18 a race-neutral explanation is tendered, the trial court must decide  
19 whether the proffered explanation is merely a pretext for  
20 purposeful discrimination. The ultimate burden of proof regarding  
21 racial motivation rests with the opponent of the strike. The trial  
22 court's decision on the question of discriminatory intent is a  
23 finding of fact to be accorded great deference on appeal.

24 We conclude that a review of the jury voir dire transcript  
25 reveals that the State adduced a sufficiently race-neutral  
26 explanation for striking the juror. The district court asked the  
27 State for an explanation for its strike, and the prosecutor  
28 responded.

[The juror] stated, when she was talking with  
[defense counsel] that his face was very familiar,  
that I felt as though she laughed immaturely and  
inappropriately while he was talking with her, which  
indicated to me that she was trying to kind of curry  
favor with him. And also she stated that she had a  
baby sitting problem immediately after 5 o'clock,  
and I felt as though that would interfere with her  
ability to deliberate if we adjourned and they start  
deliberating, which would maybe take them past 5  
o'clock, she would just throw an answer rather than  
actually deliberate.

The district court subsequently ruled that the State's peremptory  
strike was proper. Appellant failed to prove that the explanation  
was a pretext for purposeful discrimination, and therefore, we  
conclude that the district court did not err in rejecting appellant's  
objection to the strike.

#37, Ex. 69, at 1-2 (citation footnotes omitted).

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1 On federal habeas review, petitioner, among other arguments, maintained for the first  
2 time that the State's reliance upon Wilson's babysitting issue was pretextual because the  
3 State had not struck two other prospective jurors who allegedly had similar scheduling issues.  
4 The two other jurors were: (1) Lisa Scarpati, who was the prospective juror called by the clerk  
5 immediately after Wilson and the third juror on the jury in that order; and (2) Diane Hill, who  
6 was the sixteenth remaining prospective juror in the order called by the clerk who had not  
7 been excused for cause and the ninth juror on the jury in that order.<sup>8</sup> Both Scarpati and Hill  
8 were seated on the jury. In federal court, Ruffin has sought to establish that the State's  
9 reliance upon the babysitting issue was pretextual by undertaking a comparative analysis of  
10 the answers given by the struck Wilson to the answers given by Scarpati and Hill, who were  
11 not struck by either party.

12 The Court has held that the claim as presented on federal review is exhausted, while  
13 noting that the exhaustion issue is a debatable one. This holding was based upon authorities  
14 holding that reliance upon additional factual arguments not presented to the state courts does  
15 not necessarily render a claim unexhausted. The Court noted, however, the substantial  
16 tension between these authorities and *Pinholster, supra*. The Court questioned the propriety  
17 of conducting AEDPA review of a state court merits adjudication based upon factual  
18 arguments that were not presented to the state courts, particularly as to a *Batson* claim.<sup>9</sup>

19 Following the recent supplemental briefing, the Court is persuaded that under current  
20 Supreme Court and Ninth Circuit precedent, the state and federal courts are to conduct such  
21 a comparative analysis even if not specifically argued by the defendant/petitioner. *See, e.g.,*  
22 *Miller-El v. Dretke*, 545 U.S. 231, 241 & nn. 1 & 2, 125 S.Ct. 2317, 2325-26 & nn. 1 & 2, 162

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24 <sup>8</sup>The alternate was selected from among the thirteen through an essentially random process. See  
25 #36, Ex. 38, at 152. In Ruffin's case, the seventh juror of the final thirteen was selected as the alternate. Hill  
26 is listed as the tenth juror on the final jury list. #35, Ex. 37. However, Hill was the ninth of the jurors excluding  
27 the alternate.

28 <sup>9</sup>#57, at 6-7 & n. 10. *Cf. Haney v. Adams*, 641 F.3d 1168 (9<sup>th</sup> Cir. 2011)(requiring contemporaneous  
*Batson* objection so that, *inter alia*, the prosecutor may respond based upon his current perceptions and the  
trial judge can evaluate the prosecutor's demeanor and credibility similarly based upon the judge's current  
perceptions).



1 L.Ed.2d 196 (2005); *Kesser v. Cambra*, 465 F.3d 351, 361 (9<sup>th</sup> Cir. 2006)(*en banc*); see also  
2 *Miller-El*, 545 U.S. at 256 n.15, 125 S.Ct. at 2334 n.15 (related discussion). To the Court’s  
3 eye, however, substantial tension remains between the manner of conducting AEDPA review  
4 as described in *Pinholster* and precedent allowing pursuit of factual argument not raised  
5 contemporaneously in the trial court at the time of the *Batson* challenge. It is, at best,  
6 problematic in this context to address arguments and inferences drawn after the fact from a  
7 cold record, particularly if a State’s responses to what may be *post hoc* arguments then are  
8 dismissed as *post hoc* rationales.<sup>10</sup> This Court, in any event, must – and will – follow the  
9 controlling precedent cited above.

10 In all events, applying a comparative analysis, the Nevada Supreme Court’s rejection  
11 of Ruffin’s *Batson* challenge was neither contrary to nor an unreasonable application of clearly  
12 established federal law as determined by the United States Supreme Court.<sup>11</sup>

13 Ruffin contends, first, that the prosecutor’s stated concern as to Wilson’s babysitting  
14 issue was pretextual. He contends that this reason was pretextual both when viewed in  
15 isolation and when her responses are compared to the responses of jurors Hill and Scarpati.

16 Voir dire commenced at 1:50 p.m. on Tuesday, January 18, 2000. During his  
17 preliminary remarks, the presiding judge informed the venire that – due to sundry scheduling  
18 conflicts – they would go to 3:45 p.m. that Tuesday afternoon, would go from 9:00 a.m. to  
19 12:00 noon on Wednesday, would “be able to go all day Thursday, if necessary, and all day  
20 Friday, if necessary.” The judge stated, however, that “[m]y guess is we should probably be  
21 able to finish some time Thursday but I can’t promise that.” #35, Ex. 36, at 17-18.

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22  
23 <sup>10</sup>*Cf. Miller-El*, 545 U.S. at 245 n.4 & 252, 125 S.Ct. at 2328 n.4 & 2332 (dismissing arguments urged  
24 by the dissent “that the prosecution itself did not offer” at trial).

25 <sup>11</sup>The Court is not persuaded that the Nevada Supreme Court’s decision is owed no deference under  
26 the AEDPA on the premise that the state supreme court did not articulate a detailed analysis. The state high  
27 court properly stated the basic three-part inquiry under *Batson* and stated its conclusion – in response to  
28 largely conclusory argument in both the district court and on appeal – that petitioner had failed to demonstrate  
that the State’s proffered explanation was merely a pretext for purposeful discrimination. A state court need  
not articulate every twist and turn of its analysis in rejecting a claim on the merits for its decision to be subject  
to deferential AEDPA review. This conclusion applies as well to the factual determination made by the state  
high court. A factual determination does not have to be explained or justified in detail to be a reasonable one.

1 Subsequently, during the collective questioning, the judge made the following inquiry:

2 Next, this case, as I said, is expected to last three days.  
3 That will be a half-a-day today, a half-a-day tomorrow, so it could  
4 go into Friday. Is there anybody, who, for whatever reason, could  
not stay here for that period of time?

5 #35, Ex. 36, at 20.

6 Prospective jurors Diane Hill, Avan Wilson, and Lisa Scarpati, among others, but in that  
7 relative order, responded as follows:

8 THE COURT: 161. Okay. What's the problem?

9 [HILL]: I'm a catering manager at Mandalay Bay,  
10 and I'm – we have a lot of groups in this  
11 week. And it could or could not affect me,  
I'm not sure. It depends on how long it  
goes.

12 THE COURT: Well, I know the people at – some of the  
13 executives at Mandalay Bay and I'm sure  
14 they would not want you off this jury so I'm  
going to not excuse you for that reason.  
15 Okay. If I started excusing people for work  
then there's not a person sitting here, in all  
16 probability, that I shouldn't excuse. So I'm  
sure that if you had a heart attack Mandalay  
17 Bay is not going to fold nor is their catering  
department. And I'm not wishing anything  
18 bad on you. I'm just saying that I think they  
can get along without your for the next three  
days.

19 . . . . .

20 [WILSON]: Avan Wilson, badge number 146. It  
21 basically depends on the ending, when the  
day ends on Thursday. I'm a single parent  
22 so if it goes past 5 or 5:30 I'll have a  
babysitting problem for my daughter.

23 THE COURT: It won't go past 5 because we'll let out.

24 [WILSON]: Okay.

25 THE COURT: Barring something very unforeseen.

26 [WILSON]: Okay.

27 . . . . .

28

1 [SCARPATI]: I have a doctor's appointment Thursday  
2 morning at 8 o'clock.

3 THE COURT: Well, that could be changed, though,  
4 couldn't it?

5 [SCARPATI]: Should I just reschedule it?

6 THE COURT: Yes, please do. Tell them that you're  
7 serving on jury duty and if you need a note  
8 from me or anything like that, so that they  
9 don't charge you for the appointment, I  
10 assume they won't. Thank you.

11 #35, Ex. 36, at 20 & 22-23. Wilson said later in voir dire that "[a]t least by 5:30 I need to pick  
12 up my daughter." *Id.*, at 48.

13 At the very outset, petitioner's "comparative analysis" is fundamentally flawed. A  
14 prospective juror concerned about a purported conflict between jury duty and her employment  
15 is not in a similar situation as a juror concerned about a conflict between jury duty and caring  
16 for her child as a single parent. Trial courts routinely tell prospective jurors, absent special  
17 circumstances not present in Hill's situation, that a conflict between jury duty and "being  
18 needed at work" is not a valid reason for being relieved from jury duty. Trial courts routinely  
19 *release* prospective jurors where the need for a single parent to be home with a child cannot  
20 be reconciled with the requirements of jury duty. A concern about employment in no sense  
21 is the same as a single parent's concern about the need to be home with their child.<sup>12</sup>

22 Similarly, a prospective juror concerned about a conflict between a health care  
23 appointment and jury duty is not in a similar situation as Wilson was in. As happened in the  
24 present case, if the health care appointment involves a non-critical situation and can be  
25 rescheduled, the health care appointment does not provide a basis for being relieved from  
26 jury duty. In this case, Scarpati's agreement to "just reschedule" the appointment wholly  
27 eliminated that issue as a concern for her. In contrast, Wilson did not stop being a single  
28 parent with a need to be home with her child in the evening after the voir dire exchange.

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27 <sup>12</sup>The Court is cognizant that the matter at hand concerns peremptory challenges rather than being  
28 excused for cause. The difference in how these two wholly dissimilar situations are handled with respect to a  
prospective juror being excused for cause, however, emphasizes how markedly dissimilar the situations are.

1 Petitioner’s effort to lump these three entirely dissimilar situations into “the same  
2 situation” by characterizing them as “scheduling conflicts” is – completely – unpersuasive.<sup>13</sup>

3 Ruffin’s arguments focusing on Wilson in particular are no more persuasive.

4 Petitioner urges that the prosecutor “misrepresented” Wilson’s testimony when he said  
5 that she had a babysitting issue “immediately” after 5:00 o’clock. A showing neither of pretext  
6 for racial discrimination nor of an objectively unreasonable application of *Batson* is  
7 demonstrated by such minutiae. The prosecutor stated in pertinent part:

8 . . . . [S]he stated that she had a baby sitting problem immediately  
9 after 5 o’clock, and I felt as though that would interfere with her  
10 ability to deliberate if we adjourned and they start deliberating,  
which would maybe take them past 5 o’clock, she would just  
throw an answer rather than actually deliberate.

11 #36, Ex. 38, at 150. Such imprecision the next day after the completion of voir dire reflects  
12 not pretext but instead an irrelevant inexactitude. The core concern reflected by the  
13 prosecutor’s statement was that if the case went to the jury toward the end of the day and  
14 deliberations looked like they might run past the time that Wilson needed to be at home with  
15 her child, she might have a tendency to accede to a verdict. That concern by the prosecutor  
16 – as to what might happen if deliberations were to threaten to run past the time that Wilson  
17 needed to be home – had not been resolved by the trial court telling Wilson that the court  
18 would adjourn at 5:00 p.m. “[b]arring something very unforeseen.”

19 Petitioner maintains that Wilson’s concern was limited to Thursday. However,  
20 Thursday was the day that the trial judge expected the case to go to the jury.<sup>14</sup> That in fact  
21 is the day that the case ultimately *did* go to the jury.<sup>15</sup> The prosecutor’s concern was with that  
22 Wilson might accede to a verdict – on the day that the case most likely would be going to the  
23 jury, Thursday – as the time that she needed to be home with her child approached.

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24  
25 <sup>13</sup>Petitioner contends that complete similarity is not required, relying on the statement in *Miller-El* that  
26 “potential jurors are not products of a set of cookie cutters.” 545 U.S. at 247 n.6, 125 S.Ct. at 2329 n.6. Yet,  
staying with a comparable metaphor, the comparison that he seeks to draw clearly was not apples to apples.

27 <sup>14</sup>See text, *supra*, at 9.

28 <sup>15</sup>See #36, Ex. 39, at 341.

1 In this same vein, petitioner urges that Wilson never stated that making alternate  
2 arrangements for the Thursday would have presented any unusual difficulty. Yet the record  
3 does not establish that the single parent did in fact have the ability to make such  
4 arrangements. Petitioner has the burden of proof both on pretext and generally on federal  
5 habeas review. Petitioner cannot carry his burden on pretext – particularly following the  
6 conclusory arguments that he made in the state courts – based on nothing more than  
7 unbridled speculation. Petitioner never presented an actual factual record belying the State’s  
8 concern on the basis that the single parent in fact could have made suitable arrangements  
9 for the care of her child on Thursday, January 20, 2000.

10 Ruffin contends, second, that the prosecutor’s concern that Wilson thought trial  
11 counsel’s face was familiar was pretextual and, third, that the prosecutor’s concern that she  
12 laughed and was trying to curry favor with defense counsel was pretextual.

13 The Court has combined the discussion of these two contentions because Ruffin seeks  
14 to split off into two different reasons what in truth was only one stated reason. What the  
15 prosecutor stated was as follows:

16 . . . . She stated, when she was talking with Mr. Walton [for the  
17 defense], that his face was very familiar, that I felt as though she  
18 laughed immaturely and inappropriately while he was talking with  
her, which indicated to me that she was trying to kind of curry  
favor with him.

19 #36, Ex. 38, at 149-50. Compare to #35, Ex. 36, at 49 (related voir dire).

20 A concern that a prospective juror has an affinity or predisposition favoring opposing  
21 counsel is not an invalid rationale for exercising a peremptory strike. A tendency to place  
22 more credence in those for whom one has an affinity for or predisposition toward is not  
23 uncommon.

24 Here, petitioner once again urges that the prosecutor “misrepresented” the record  
25 because the prosecutor said that Wilson said that defense counsel’s face was “very familiar”  
26 whereas she only said that his face “looks familiar.” Once again, a showing neither of pretext  
27 for racial discrimination nor of an objectively unreasonable application of *Batson* is  
28 demonstrated by such minutiae.

1           Petitioner further urges that the prosecutor neither sought to strike Wilson for cause  
2 nor asked her follow up questions regarding her interaction with the defense lawyer. The  
3 State clearly did not have to seek to excuse a juror for cause in order to have a  
4 nondiscriminatory reason for exercising a peremptory strike. Expecting counsel to ask  
5 questions as to whether and why a prospective juror appeared to him to be exhibiting an  
6 affinity toward counsel and/or why she laughed would be ludicrous. Such a pointless line of  
7 inquiry would risk alienating more than just the one prospective juror in question.<sup>16</sup>

8           Further, merely because a juror arguably had other attributes that might be desirable  
9 in a juror for the State does not render the prosecutor's stated reasons for striking the juror  
10 a pretext for racial discrimination.<sup>17</sup>

11           Finally, petitioner urges that the prosecutor's statement as to Wilson's reaction to  
12 defense counsel is the only evidence that any such alleged behavior happened. A court  
13 reporter of course does not note every laugh or the inflection in a speaker's voice. Nor does  
14 a court reporter make assessments in the transcript of the personal interaction between  
15 lawyers and prospective jurors. There is a reason why a *Batson* challenge must be raised  
16 contemporaneously. The trial judge is in the best position to assess not only the prosecutor's  
17 credibility but also whether the prosecutor's stated perceptions corresponded to what actually  
18 transpired in the courtroom during voir dire. See *Haney v. Adams*, 641 F.3d 1168, 1172 (9<sup>th</sup>  
19 Cir. 2011). The trial judge in this case – who also observed the demeanor of Wilson during  
20 voir dire – accepted the prosecutor's reasons as nonpretextual, and defense counsel  
21

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22           <sup>16</sup>Such a situation clearly is distinguishable from, for example, *Kesser*, where the prosecutor  
23 reasonably could have inquired to determine whether the prospective juror's emotional response was due to  
24 her feelings about "the system" or instead due to what had happened to her daughter. See 465 F.3d at 364.

25           <sup>17</sup>Petitioner relies on the facts that Wilson was a mother of two, that she worked for the county, that  
26 she was friendly with a police officer at her church, and "most importantly," that she was a victim of a burglary  
27 – "the very crime" for which Ruffin was on trial. #54, at 17. These rather "vanilla" facts hardly establish that  
28 the State struck an otherwise solid juror for the State on the basis of race. The Court further would note that  
Ruffin's burglary was based upon entering a casino to pickpocket. Wilson was the victim of a burglary in  
which someone forcibly broke into her home. #35, Ex. 36, at 46-47. While both crimes were burglaries, the  
description of the burglary of Wilson's home as "the very crime" for which Ruffin was on trial overstates the  
case.

1 presented no specific argument at the time challenging either the prosecutor's stated  
2 assessment of Wilson's demeanor or the trial judge's finding. Merely because the court  
3 reporter did not include corroborating statements in the transcript that "juror laughed  
4 inappropriately" or "juror appeared to have an affinity for defense counsel" does not  
5 undermine the trial judge's contemporaneous assessment of the reasons stated by the  
6 prosecutor.

7 The record in this case presents nothing remotely near the compelling record of pretext  
8 that was present in *Miller-El* and the circuit cases relied upon by petitioner in his filings.  
9 Instead, after presenting only the most conclusory of arguments in the state courts, petitioner  
10 thereafter has strained through the state court record on federal habeas review trying to pull  
11 different inferences out of a sparse record. Nothing in the showing made in this Court  
12 demonstrates either that the state supreme court's rejection of the claim was contrary to or  
13 an unreasonable application of clearly established federal law or that its decision was based  
14 upon an unreasonable determination of fact.<sup>18</sup>

15 Ground 1 therefore does not provide a basis for federal habeas relief.

16 ***Ground 8: Effective Assistance of Trial Counsel – Equal Justice Jury Charge***

17 In Ground 8, petitioner alleges that he was denied effective assistance of counsel in  
18 violation of the Sixth and Fourteenth Amendments when trial counsel failed to object – at the  
19 January 2000 trial – to the final instruction given to the jury. He contends that the instruction  
20 improperly minimized the State's burden of proof, denying him constitutional guarantees of  
21 due process, equal protection, trial before an impartial jury and a reliable sentence.<sup>19</sup>

22 The final instruction, which served as a segue to closing arguments, read:

23 Now you will listen to the arguments of Counsel who will  
24 endeavor to aid you to reach a proper verdict by refreshing in  
your minds the evidence and by showing the application thereof

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26 <sup>18</sup>As the state court decision withstands review on the particularized arguments presented in federal  
27 court, it clearly withstands review on the conclusory arguments actually presented to the state courts.

28 <sup>19</sup>See # 49, at 31-32 (second amended petition); #54, at 55-58 (reply). The Court is ordering an  
evidentiary hearing as to the exhausted claims that remain in Grounds 2, 3, 5, 6 & 7. See text, *infra*, at 35-40.

1 to the law; but whatever Counsel may say, you will bear in mind  
2 that it is your duty to be governed in your deliberation by the  
3 evidence as you understand it and remember it to be and by the  
4 law as given you in these instructions, with the sole, fixed and  
5 steadfast purpose of doing equal and exact justice between the  
6 Defendant and the State of Nevada.

7 #36, Ex. 41, Instruction No. 18.

8 The jury charges otherwise contained instructions stating that the defendant was  
9 presumed to be innocent unless proved otherwise and that the State had the burden of  
10 proving every element of the crimes charged beyond a reasonable doubt.<sup>20</sup> Petitioner does  
11 not contend – in these proceedings – that these instructions failed to properly state the State’s  
12 burden to prove all of the elements of the offenses charged beyond a reasonable doubt.<sup>21</sup>  
13 The first instruction clearly directed jurors – at the very outset – that “you are not to single out  
14 any certain sentence or any individual point or instruction and ignore the others, but you are  
15 to consider all the instructions as a whole and regard each in the light of all the others.”<sup>22</sup>

16 Petitioner contends herein that Instruction No. 18 improperly minimized the State’s  
17 burden of proof when it used the phrase: “with the sole, fixed and steadfast purpose of doing  
18 equal and exact justice between the Defendant and the State of Nevada.”

19 As discussed, *infra*, as to the other claims of ineffective assistance of trial counsel, the  
20 Court reviews this claim *de novo* rather than under AEDPA deferential review because the  
21 state supreme court misstated the applicable prejudice standard. See text, *infra*, at 35-40.

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22 <sup>20</sup>#36, Ex. 41, Instruction No. 5.

23 <sup>21</sup>In the federal reply, petitioner notes the Ninth Circuit’s holding in *Ramirez v. Hatcher*, 136 F.3d 1209  
24 (9<sup>th</sup> Cir. 1998), that the reasonable doubt instruction used in this case passes constitutional muster. Petitioner  
25 maintains that the *Ramirez* panel nonetheless “was less than enthusiastic” about some of the language in the  
26 Nevada reasonable doubt instruction. #54, at 57 n.25. Even on a *de novo* review in a federal habeas matter,  
27 a federal court does not have authority to vacate a conviction based upon what the court either is or is not  
28 “enthusiastic about.” Petitioner either is – or is not – challenging the federal constitutional adequacy of the  
reasonable doubt instruction in this proceeding. No claim challenging the constitutional adequacy of the  
reasonable doubt instruction was presented in the second amended petition. Petitioner of course may not  
use the federal reply to raise such a claim for the first time, and he does not appear to be seeking to do so  
here. The constitutional adequacy of the reasonable doubt instruction in Instruction No. 5, at bottom, is not  
challenged herein.

<sup>22</sup>*Id.*, Instruction No. 1.



1 On *de novo* review, Ground 8 does not provide a basis for federal habeas relief.

2 On a claim of ineffective assistance of counsel, a petitioner must satisfy the two-  
3 pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674  
4 (1984). He must demonstrate that: (1) counsel’s performance fell below an objective standard  
5 of reasonableness; and (2) counsel’s defective performance caused actual prejudice. On the  
6 performance prong, the issue is not what counsel might have done differently but rather is  
7 whether counsel’s decisions were reasonable from his perspective at the time. The court  
8 starts from a strong presumption that counsel’s conduct fell within the wide range of  
9 reasonable conduct. On the prejudice prong, the petitioner must demonstrate a reasonable  
10 probability that, but for counsel’s unprofessional errors, the result of the proceeding would  
11 have been different. *E.g.*, *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9<sup>th</sup> Cir. 2003).

12 On the performance prong, the question is not what counsel might have done  
13 differently but rather is whether counsel’s decisions were reasonable from his perspective at  
14 the time. In this regard, the reviewing court starts from a strong presumption that counsel’s  
15 conduct fell within the wide range of reasonable conduct. *Strickland*, 466 U.S. at 689, 104  
16 S.Ct. at 2065. That is, there is a strong presumption that counsel acted for tactical reasons  
17 rather than through sheer neglect. *Pinholster*, 131 S.Ct. at 1404. The reviewing court  
18 therefore must not simply give counsel the benefit of the doubt but instead must affirmatively  
19 entertain the range of possible reasons counsel may have had for proceeding as they did.  
20 131 S.Ct. at 1407. In so doing, the reviewing court inquires into only the objective  
21 reasonableness of counsel’s performance, not counsel’s subjective state of mind. *Id.*

22 On the prejudice prong, as a general matter under *Strickland*, the petitioner must  
23 demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result  
24 of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.  
25 “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”  
26 *Id.* A reasonable probability requires a “substantial,” not just a “conceivable,” likelihood of a  
27 different result. *Pinholster*, 131 S.Ct. at 1403.

28 ////

1 In the present case, trial counsel did not render deficient performance when he did not  
2 object at the January 2000 trial to Instruction No. 18, and petitioner was not prejudiced by his  
3 decision to not challenge the instruction. Such an objection had no chance of success.

4 Such an objection clearly had no chance of success in the Nevada state courts at the  
5 time of the January 2000 trial. The Supreme Court of Nevada rejected a similar challenge to  
6 the charge in 1998 in *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). The  
7 state high court has rejected comparable challenges to the instruction multiple times  
8 thereafter.<sup>23</sup> Counsel thus would have been making an objection that was clearly and wholly  
9 foreclosed in the Nevada courts by controlling state supreme court precedent.

10 Even looking beyond the state of the law in the state courts in January 2000 to later  
11 federal review, this Court finds the underlying substantive argument unpersuasive. The  
12 instruction – even in isolation – does not lower the State’s burden of proof but instead directs  
13 the jury to provide equal and impartial justice under the law. Indicating that the parties stand  
14 equal before the court and the jury does not in any sense signify the applicable burden of  
15 proof. Jury instructions in any event are to be read as a whole, and the charges as a whole  
16 clearly instructed the jury properly as to the applicable burden of proof. Petitioner’s argument,  
17 at its very level best, is a strained one that does not demonstrate that there was a reasonable  
18 probability that, but for counsel’s failure to object to the charge, the result of the proceeding  
19 would have been different. Petitioner cites no apposite federal authority, whether on the  
20 books in January 2000 or otherwise, holding that the instruction offends the Constitution.<sup>24</sup>

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21  
22 <sup>23</sup> See, e.g., *Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004); *Leonard v. State*, 117 Nev.  
23 53, 78, 17 P.3d 397, 412-13 (2001). Petitioner suggests that the *Leonard* decision cited in the text did not  
24 contain a detailed analysis. See #54, at 56. It would appear to this Court that the *Leonard* court gave this  
25 strained argument the amount of discussion to which it was due. This Court is reviewing constitutional claims  
26 not critiquing the degree of articulation in state court decisions. The United States Supreme Court decisions  
27 cited by petitioner are inapposite, such that a detailed discussion of the cases is not necessary to reject the  
28 claim. The Court notes in passing that the language in the instruction that petitioner challenges had been  
used in Nevada courts for nearly a century, quite possibly longer, at the time of Ruffin’s trial. See *State v.*  
*Buralli*, 27 Nev. 41, 71 P. 532, 535 (1903).

<sup>24</sup>This Court previously has rejected federal habeas claims premised upon the instruction being  
(continued...)

1 On *de novo* review, Ground 8 therefore does not provide a basis for federal habeas  
2 relief. Counsel's performance was not deficient, and petitioner has not demonstrated  
3 resulting prejudice from the failure to raise the meritless objection.

4 **Ground 9: Effective Assistance of Appellate Counsel – Sufficiency of the Evidence**

5 In Ground 9, petitioner alleges that he was denied effective assistance of counsel in  
6 violation of the Sixth and Fourteenth Amendments when appellate counsel failed to argue on  
7 direct appeal that the evidence was insufficient to support a finding of the requisite intent for  
8 a burglary conviction. Petitioner maintains, in particular, that there was no evidence that he  
9 entered the New York-New York with the intent to commit a felony.<sup>25</sup>

10 Petitioner does not contend as to Ground 9 that the state supreme court failed to apply  
11 the correct standard of prejudice under *Strickland*.<sup>26</sup>

12 Petitioner contends, however, that the state supreme court's decision is accorded "less  
13 deference" under the AEDPA because the court allegedly did not articulate a "reasoned  
14 explanation" for rejecting the claim. Whatever merit this contention may have had under Ninth  
15 Circuit precedent at the time of the federal reply herein, it clearly has no merit now. In  
16 *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme  
17 Court emphatically rejected any notion that a summary rejection of a claim was entitled to less  
18 deference on AEDPA review. The Supreme Court held that "[w]here a state court's decision  
19 is unaccompanied by an explanation, the habeas petitioner's burden still must be met by  
20 showing there was no reasonable basis for the state court to deny relief." 131 S.Ct. at 784.

21 ////

22  
23 \_\_\_\_\_  
24 <sup>24</sup>(...continued)

24 unconstitutional, and it has denied a certificate of appealability on the issue. See, e.g., *Riley v. McDaniel*, No.  
25 3:01-cv-00096-RCJ-VPC, 2010 WL 3786070, slip op. at 48-49 (D. Nev., September 20, 2010)(capital case;  
appeal pending).

26 <sup>25</sup>See # 49, at 32-34 (second amended petition); #54, at 58-63 (reply).

27 <sup>26</sup>See #38, Ex. 110, at 6 (the state supreme court rejected the claim of ineffective assistance of  
28 appellate counsel because "there is no reasonable likelihood that [the underlying substantive claim] would  
have been successful on direct appeal").

1           The *Harrington* Court made it clear that satisfying this burden is every bit as difficult  
2 in a case with a summary denial as it is in a case with a fully-articulated decision:

3  
4           If this standard is difficult to meet, that is because it was  
5 meant to be. As amended by AEDPA, § 2254(d) stops short of  
6 imposing a complete bar on federal court relitigation of claims  
7 already rejected in state proceedings. *Cf. Felker v. Turpin*, 518  
8 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)  
9 (discussing AEDPA's "modified res judicata rule" under § 2244).  
10 It preserves authority to issue the writ in cases where there is no  
11 possibility fairminded jurists could disagree that the state court's  
12 decision conflicts with this Court's precedents. It goes no farther.  
13 Section 2254(d) reflects the view that habeas corpus is a "guard  
14 against extreme malfunctions in the state criminal justice  
15 systems," not a substitute for ordinary error correction through  
16 appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct.  
17 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in  
18 judgment). As a condition for obtaining habeas corpus from a  
19 federal court, a state prisoner must show that the state court's  
20 ruling on the claim being presented in federal court was so  
21 lacking in justification that there was an error well understood and  
22 comprehended in existing law beyond any possibility for  
23 fairminded disagreement.

24 131 S.Ct. at 786-87.

25           Under this standard of review, the state supreme court's rejection of this claim of  
26 ineffective assistance of appellate counsel was neither contrary to nor an unreasonable  
27 application of clearly established federal law.

28           When evaluating claims of ineffective assistance of appellate counsel, the performance  
and prejudice prongs of the *Strickland* standard substantially overlap. *E.g., Bailey v.*  
*Newland*, 263 F.3d 1022, 1028-29 (9<sup>th</sup> Cir. 2001); *Miller v. Keeney*, 882 F.2d 1428, 1434 (9<sup>th</sup>  
Cir. 1989). On the one hand, the failure to present a weak argument on appeal neither falls  
below an objective standard of competence nor causes prejudice to a petitioner for the same  
reason – because the omitted issue had little or no likelihood of success. *Id.* On the other,  
the failure to present a strong issue on appeal can both constitute deficient performance and  
cause prejudice also for the same reason – because appellate counsel failed to pursue an  
issue that had a reasonable probability of changing the outcome of the proceeding.  
Accordingly, the court looks to the merits of the omitted issue to properly address the  
ineffective assistance claim. *E.g., Moormann v. Ryan*, 628 F.3d 1102, 1106-07 (9<sup>th</sup> Cir. 2010).

1           Looking to the underlying substantive claim, a challenge on direct appeal to the  
2 sufficiency of the evidence of the requisite intent on the burglary charge would have had little  
3 or no likelihood of success on appeal.

4           On a challenge to the sufficiency of the evidence, the habeas petitioner faces a  
5 “considerable hurdle.” *Davis v. Woodford*, 333 F.3d 982, 992 (9<sup>th</sup> Cir. 2003). Under the  
6 standard announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560  
7 (1979), the jury’s verdict must stand if, after viewing the evidence in the light most favorable  
8 to the prosecution, any rational trier of fact could have found the essential elements of the  
9 offense beyond a reasonable doubt. *E.g.*, *Davis*, 333 F.3d at 992. Accordingly, the reviewing  
10 court, when faced with a record of historical facts that supports conflicting inferences, must  
11 presume that the trier of fact resolved any such conflicts in favor of the prosecution and defer  
12 to that resolution, even if the resolution by the state court trier of fact of specific conflicts does  
13 not affirmatively appear in the record. *Id.* The *Jackson* standard is applied with reference to  
14 the substantive elements of the offense as defined by state law. *E.g.*, *Davis*, 333 F.3d at 992.

15           The evidence at trial reflected that Ruffin was inside the New York-New York appearing  
16 as a well-dressed businessman – with no indication in the record that he was there in such  
17 a capacity – carrying a briefcase, which is used as a tool of the trade by pickpockets to  
18 conceal the lift.<sup>27</sup> Thereafter, when the lift apparently occurred, during the second of Ruffin’s  
19 two elevator rides with Diana Stubenrauch, Ruffin raised the briefcase – with no other  
20 apparent purpose – in a manner employed by pickpockets to conceal their action.<sup>28</sup> It is not  
21 inconceivable – in the sense that anything is possible under the sun – that perhaps Ruffin  
22 woke up that day and just decided to dress to the nines and go down to the New York-New  
23 York with a briefcase, hatching the idea to pickpocket only after he arrived. The jury,  
24 however, permissibly could draw the reasonable inference from the circumstantial evidence  
25 that he entered the New York-New York dressed that way with a briefcase so that he would

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26  
27 <sup>27</sup>#36, Ex. 38, at 172-74, 183-84 & 194 (Diana Stubenrauch); *id.*, Ex. 39, at 283-85 (Detective  
Carolyn Wolfe); *id.*, at 291-96 (Detective Ralph Ray, testifying as an expert witness).

28 <sup>28</sup>#36, Ex. 39, at 293-96 (Detective Ray).

1 blend in with the crowd and cover his actions in pursuance of a prior intent to pick pockets.  
2 On sufficiency review under *Jackson v. Virginia*, the reviewing courts must presume that the  
3 jury resolved the competing inferences in the State's favor.

4 The state supreme court's rejection of the claim of ineffective assistance of appellate  
5 counsel thus was neither contrary to nor an unreasonable application of clearly established  
6 federal law as determined by the United States Supreme Court. This Court cannot say that  
7 the state court's ruling was so lacking in justification that there was an error well understood  
8 and comprehended in existing law beyond any possibility for fairminded disagreement.

9 Ground 9 therefore does not provide a basis for federal habeas relief.<sup>29</sup>

10 ***Ground 10: Double Jeopardy Challenge to Habitual Criminal Adjudication***

11 In Ground 10, petitioner alleges that he was subjected to double jeopardy in violation  
12 of the Fifth and Fourteenth Amendments after the state supreme court vacated and  
13 remanded his original habitual criminal adjudication and sentencing for a second sentencing  
14 proceeding where he again was adjudicated a habitual criminal. The state supreme court  
15 remanded for a second sentencing proceeding because the state district court clerk was not  
16 able to locate the prior convictions from the original proceeding. Petitioner contends that  
17 there was insufficient evidence supporting the original habitual criminal adjudication and that  
18 he therefore was subjected to double jeopardy in the second sentencing proceeding.<sup>30</sup>

19 At the original sentencing proceeding, the State, indisputably, presented certified  
20 copies of New Jersey judgments of conviction reflecting 12 prior felony convictions, including  
21 convictions on multiple counts entered the same date.<sup>31</sup> The State further presented  
22 evidence from two witnesses seeking – through their combined testimony – to establish that  
23

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24 <sup>29</sup>Petitioner requests an evidentiary hearing on this issue. *Pinholster* of course forecloses such a  
25 hearing on this claim because the claim was adjudicated on the merits and is entitled to AEDPA deference.  
26 The issue in any event is one that is resolved by reference to the trial evidence. There is no issue for an  
evidentiary hearing.

27 <sup>30</sup>See # 49, at 34-39 (second amended petition); #54, at 63-65 (reply).

28 <sup>31</sup>#36, Ex. 47, at 2, lines 16-19; at 3, lines 18-20, at 4, lines 10-11; at 20, lines 20-24; and at 21, lines  
1-12. The State introduced 12 -- not 13 or a different number -- prior convictions. *Id.*

1 Ruffin was the same individual as the individual convicted in New Jersey. Convictions within  
2 the group presented were under different names or aliases.

3 Detective Ralph Ray testified, *inter alia*, that he had reviewed a “Scope” printout and  
4 a National Crime Information Center (NCIC) return. A Scope printout is a computerized  
5 criminal history information document maintained by the Las Vegas Metropolitan Police  
6 Department (“Metro”). Detective Ray testified that the Federal Bureau of Investigation (FBI)  
7 would assign an “FBI number” to an individual based upon fingerprint comparison. All  
8 convictions reported to the FBI for an individual who matched the same fingerprints then  
9 would be assigned that same FBI number. A single individual on occasion might be assigned  
10 more than one FBI number, if the link was not made initially to the individual’s prior  
11 convictions, under a different name or alias, with the same fingerprints. However, Detective  
12 Ray had not encountered any two different individuals having the same FBI number, given  
13 that the FBI number was based upon a comparison with the individual’s fingerprints.<sup>32</sup>

14 Detective Ray acknowledged that the Scope and NCIC materials were not certified  
15 documents although they were documents that were used and maintained in the normal  
16 course of business by the police department. He further acknowledged the general  
17 proposition that “[i]t’s possible for people to make mistakes.”<sup>33</sup>

18 Detective Ray did not affirmatively and explicitly testify that Ruffin was the same  
19 individual as the individual convicted in the 12 New Jersey convictions. It appears that he was  
20 called primarily as a background witness as to the significance of the FBI number on  
21 documents that were before the sentencing court and to cover other related points. The  
22 State’s next witness, Penny Mosier, provided the testimony affirmatively and explicitly linking  
23 Ruffin to the 12 New Jersey convictions.

24 Penny Mosier was an investigative specialist with Metro. Mosier compared the  
25 fingerprints from the FBI return for, *inter alia*, the 12 New Jersey convictions to Ruffin’s  
26

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27 <sup>32</sup>#36, Ex. 47, at 5-8, 9-10 & 15-16.

28 <sup>33</sup>#36, Ex. 47, at 11-16

1 fingerprints. The fingerprints matched. She accordingly concluded that Ruffin was the same  
2 individual as the individual convicted in the 12 New Jersey convictions. Mosier acknowledged  
3 that the FBI return was not a certified document.<sup>34</sup>

4 The state district court adjudicated Ruffin a habitual criminal, and no challenge to the  
5 habitual criminal adjudication was raised on direct appeal.

6 Petitioner thereafter challenged the habitual criminal adjudication in a motion to modify  
7 sentence and in his state post-conviction petition. In the motion, he maintained that the  
8 district court had relied upon uncertified and constitutionally infirm judgments of conviction.  
9 In the petition, he maintained, *inter alia*, that trial counsel had rendered ineffective assistance  
10 of counsel for not adequately challenging the judgments of conviction relied upon by the  
11 district court and that appellate counsel rendered ineffective assistance of counsel for not  
12 raising any issues challenging the habitual criminal adjudication on direct appeal.<sup>35</sup>

13 In a consolidated appeal, the Supreme Court of Nevada sought to obtain the copies  
14 of the prior judgments of conviction from the state district court clerk. The clerk, however, was  
15 not able to locate the judgments. The Supreme Court of Nevada accordingly took the  
16 following action:

17  
18 . . . . The records transmitted to this court in response to  
19 [its] directives reveal that at Ruffin's sentencing hearing the State  
20 presented the district court with copies of Ruffin's prior judgments  
21 of conviction. The records before this court, however, do not  
22 contain copies of those prior judgments of conviction. Nor does  
23 it appear that these documents are presently part of the records  
24 maintained by the clerk of the district court.

25 The Office of the Clark County Clerk has informed the  
26 clerk of this court that it is unable to locate any of these  
27 documents and is "at a loss as to what might have happened to  
28 these exhibits." The State has informed this court that it can only  
locate in its internal files some of the prior judgments of conviction  
originally presented as evidence below. Although the State has  
submitted copies of the available judgments directly to this court  
under seal, the documents have not been reviewed or  
authenticated by appellant or the district court.

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<sup>34</sup>#36, Ex. 47, at 16-19 & 21-24.

<sup>35</sup>See #38, Ex. 110, at 2.



1 Without a complete record containing copies of the prior  
2 judgments of conviction admitted into evidence and relied upon  
3 by the district court in adjudicating Ruffin a habitual criminal, we  
4 are unable to conduct a meaningful review of the district court's  
5 orders resolving the claims Ruffin presented below attacking his  
6 habitual criminal adjudication.[FN3] Under these circumstances,  
7 we have concluded that Ruffin's sentence must be vacated, and  
8 this matter must be reversed in part and remanded for a new  
9 sentencing hearing. The district court shall appoint counsel to  
10 represent Ruffin and conduct a new sentencing hearing in which  
11 the State, in its discretion, may again seek habitual criminal  
12 adjudication.[FN4] The district court shall insure that a complete  
13 and accurate record is compiled below and that all exhibits,  
14 including certified copies of all prior criminal conviction admitted  
15 or presented as evidence by the State, are properly marked and  
16 included in the record. In light of our conclusions in this respect,  
17 we dismiss as moot Ruffin's appeal . . . from the district court's  
18 order denying his motion to modify his sentence.

11 [FN3] See Lopez v. State, 105 Nev. 68, 84-85, 769  
12 P.2d 1276, 1287 (1989)(recognizing that  
13 "meaningful, effective appellate review depends  
14 upon the availability of an accurate record covering  
15 lower court proceedings relevant to the issues on  
16 appeal"); Daniel v. State, 119 Nev. \_\_\_, \_\_\_, 78  
17 P.3d 890, 897 (2003).

15 [FN4] This court's prior decisions in Crutcher v.  
16 District Court, 111 Nev.1286, 903 P.2d 823 (1995),  
17 and Robertson v. State, 109 Nev. 1086, 863 P.2d  
18 1040 (1993), overruled on other grounds by Krauss  
19 v. State, 116 Nev. 307, 998 P.2d 163 (2000), are  
20 distinguishable. Here, the State filed a timely notice  
21 of intent to seek habitual criminal adjudication and  
22 presented the district court with copies of prior  
23 judgments of conviction at Ruffin's sentencing  
24 hearing. For reasons unknown, however, these  
25 documents have been lost or misplaced through no  
26 apparent fault of the State.

21 #38, Ex. 110, at 3-4.

22 On remand, the State again sought habitual criminal adjudication, presented certified  
23 copies of judgments from 11 prior convictions at the second sentencing, and sought to  
24 incorporate the testimony and evidence presented at the first sentencing proceeding seeking  
25 to establish that Ruffin was the same individual as the individual in the prior convictions. The  
26 State represented that it instead would subpoena the witnesses again and present its  
27 evidence linking Ruffin to the prior convictions if the prior evidentiary showing was not going  
28 to be incorporated by reference. #38, Ex. 122, at 8-13.

1 Ruffin, through counsel, did not contest the State's incorporation of the evidentiary  
2 showing from the first sentencing in order to establish that he was the same individual as the  
3 individual in the prior convictions. Indeed, petitioner, through counsel, accepted the finding  
4 from the prior sentencing that he was the same individual, stated on the record that the  
5 defense did not want to have another identification hearing, and stated that the defense  
6 instead wanted to proceed forward that day on that basis. Counsel stated:

7  
8 Well, I think you did so now [*i.e.*, incorporated the  
9 evidentiary showing on identification from the prior sentencing].  
10 If the Court is willing to accept that his identification was satisfied  
11 to the extent that Judge Lehman did after Mr. Hein called several  
12 witnesses, we're prepared to go forward having determined that  
13 Mr. Ruffin was operating under certain AKAs.

14 . . . .

15 Judge, and I could just according to what you've just  
16 ordered then, my [client] for the record I just asked him if he  
17 wanted to have a request, because the Court would have to grant  
18 us that motion, a hearing similar to the one Mr. Hein filed to  
19 determine that he's actually the individual in the judgment of  
20 conviction.

21 For the record and the state I believe has been courteous  
22 in noting that Judge Lehman has already determined that fact  
23 through witnesses.

24 In light of your Honor's ruling and I have to make a clear  
25 record for appeal.

26 . . . . .

27 But for purposes of appeal, my client indicated he wanted  
28 to go forward today. *He didn't want to have a identification  
hearing.*

#38, Ex. 122, at 10 & 12-13 (emphasis added).

The defense thus did not challenge the State's identification evidence from the prior sentencing and – on the record – affirmatively made a decision to not have a hearing in which Ruffin would challenge the State's showing of identity.

Instead, the defense challenged whether a habitual criminal adjudication was appropriate due to the nature of the prior convictions – without challenging that Ruffin in fact was the individual convicted in those prior convictions. #38, Ex. 122, at 15-18.

1 On the ensuing appeal from the amended 2005 judgment of conviction, which was a  
2 direct appeal from the second judgment of conviction, petitioner contended, *inter alia*, that the  
3 second habitual criminal adjudication violated the Double Jeopardy Clause. He argued only  
4 the following specific factual basis:

5 . . . . Here, this Honorable Court issued its Order that  
6 Ruffin be re-sentenced precisely because the record was bereft  
7 of evidence that the Sate had proved Ruffin had any prior  
8 convictions at his first sentencing. . . . However, because the  
State could not permissibly prove Ruffin's prior convictions at his  
second hearing consistent with the double jeopardy clause of the  
United States Constitution, Ruffin's sentencing must be vacated.

9 #38, Ex. 142, at 6.

10 Ruffin did not articulate a specific factual argument that the Double Jeopardy Clause  
11 had been violated because the State allegedly had failed to prove that he was the same  
12 individual as the individual in the prior convictions at the first sentencing hearing.

13 The Supreme Court of Nevada rejected the claim presented to that court on the  
14 following basis:

15 . . . Ruffin contends that the district court erred by  
16 resentencing him in violation of the Double Jeopardy  
17 Clause.[FN7] Ruffin claims that the Double Jeopardy Clause bars  
18 a second sentencing hearing when the evidence presented at the  
19 first sentencing hearing was insufficient to support a habitual  
20 criminal adjudication.[FN8] However, that is not what happened  
21 here. The record reveals that sufficient evidence was presented  
22 at the first sentencing hearing to support Ruffin's habitual criminal  
23 adjudication. Thereafter, the copies of the prior judgments of  
conviction that the district court relied upon to adjudicate Ruffin a  
habitual criminal could not be found, and without them we were  
unable to conduct a meaningful review of Ruffin's habitual  
criminal adjudication claims of error. Consequently, we ordered  
a new sentencing hearing so that the district court could compile  
a complete and accurate record, to include certified copies of all  
prior criminal convictions admitted into evidence. Under these  
circumstances, the district court did not err.

24 [FN7] See U.S. Const. amend. V; Nev. Const. Art.  
25 1 § 8.

26 [FN8] Ruffin cites to Bullard v. State, 665 F.2d 1347  
27 (5<sup>th</sup> Cir. 1982), vacated, 459 U.S. 1139 (1983).

27 #38, Ex. 145, at 4-5.

28 ////

1 In federal Ground 10, petitioner alleges that he was subjected to double jeopardy in  
2 the second habitual criminal adjudication because the evidence was insufficient at the first  
3 habitual criminal adjudication. He alleges, specifically, that “[b]ecause it is based on  
4 uncertified criminal history records, Ms. Mosier’s identification testimony is insufficient under  
5 Nevada law to prove the predicate felonies necessary to enhance Ruffin to habitual criminal  
6 status.”<sup>36</sup> Petitioner contends that “[p]erhaps most illustrative of such evidence’s insufficiency  
7 is the fact that no Scope printouts, NCIC printouts or FBI returns were filed with respect to the  
8 second sentencing hearing.”<sup>37</sup> Thus, although Ruffin in truth acceded to the use of the  
9 identification evidence from the first sentencing to establish identification at the second  
10 sentencing, he now argues on federal habeas review that the evidence was insufficient at the  
11 first sentencing to establish identification because the State relied upon uncertified  
12 documents.

13 The Court will assume, *arguendo*, that Ground 10 is exhausted, although the claim  
14 presented in federal court arguably is diametrically opposed to the position taken and tactical  
15 decision made by Ruffin at the second sentencing on the identification issue.<sup>38</sup>

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17  
18 <sup>36</sup>#49, at 38.

19 <sup>37</sup>*Id.* On this point, counsel, at the very least, needs to read the state court record with more care.  
20 The state court record establishes indisputably that the State did not present such evidence at the second  
21 sentencing hearing because (a) the identification evidence from the first hearing was incorporated at the  
22 second hearing and (b) petitioner affirmatively made a decision on the record to not request a second hearing  
23 on the identification issue in lieu of the first. See text, *supra*, at 26. The suggestion that the State did not  
24 present such evidence at the second sentencing hearing as an implicit concession that such evidence was  
25 insufficient is belied by the record. Indeed, the State *incorporated the very same evidence on the point*.  
26 Counsel should assume that the Court will read the pertinent portions of the state court record. Making  
27 arguments that are directly belied by that record is, at best, unpersuasive.

28 <sup>38</sup>Respondents did not challenge the exhaustion of Ground 10. The argument could be made that  
Ground 10 as presented in federal court is exhausted because the claim does not fundamentally alter the  
claim presented to the state courts. A potential difficulty with that argument is that petitioner did not challenge  
the sufficiency of the identification evidence from the first hearing when it was used by incorporation at the  
second hearing. Thereafter, not surprisingly, given the stance taken in the state district court, petitioner did  
not articulate on appeal any specific argument that the evidence was insufficient at the first sentencing  
hearing because the identification evidence was insufficient due to the use of uncertified records. The Court,  
however, in any event assumes, *arguendo* that the claim as presented is exhausted.

1           The state supreme court's court's rejection of the double jeopardy claim was neither  
2 contrary to nor an unreasonable application of clearly established federal law as determined  
3 by the United States Supreme Court.

4           Ground 10 is subject to two fundamental flaws.

5           *First*, petitioner does not cite any apposite authority establishing that the identification  
6 evidence presented at the first sentencing hearing was insufficient because the investigative  
7 specialist relied upon uncertified documents to conclude that Ruffin's fingerprints matched the  
8 fingerprints of the individual convicted in the prior convictions. Petitioner baldly asserts that  
9 the evidence was insufficient because the identification documents were uncertified, but he  
10 does not cite any – apposite – authority holding that to be true.

11           The governing statute articulates no such requirement that any and all documents  
12 relied upon for a habitual criminal adjudication must be certified. Under N.R.S. 207.016, for  
13 the purposes of the habitual criminal statutes, "a certified copy of a felony conviction is prima  
14 facie evidence of conviction of a prior felony." N.R.S. 207.016(5). The statute does not state  
15 any requirement, however, that all other documents relied upon in the habitual criminal  
16 adjudication must be certified. The statute instead refers to the court determining "the issue  
17 of the previous conviction after hearing all relevant evidence presented." N.R.S. 207.016(3).

18           Nevada case authority further undercuts petitioner's unsupported argument that  
19 identification of the petitioner as the same individual in the prior convictions may be  
20 established only by certified documents.

21           In *Hollander v. State*, 82 Nev. 345, 418 P.2d 802 (1966), the state high court held as  
22 follows with regard to the proof of a prior conviction as a basis for a conviction for an ex-felon  
23 in possession of a firearm and a habitual criminal adjudication:

24                     Our concern, of course, is that an innocent person not be  
25                     made to suffer for the guilt of another with a similar name.  
26                     *Ordinarily, positive identity is accomplished by the presentation*  
27                     *of photographs, fingerprints, and any other available identity data.*  
28                     Circumstances in addition to the copy of the conviction should be  
                      considered. Such circumstances include uncommon surnames,  
                      identity of first names and surnames, *as well as the other factors*  
                      *of fingerprints or photographs.*

1 Here, the past conviction together with Hollander's unusual  
2 last name, identical first name, and the added weight given a  
3 conviction record of the state in which the ex-felon accusation is  
4 tried, are considered by us sufficient to justify the jury's conviction.

5 Referring now to the hearing before the court on the  
6 habitual count, *the same applications can be made*. The State  
7 introduced exemplified copies of felony convictions purporting to  
8 be those of Hollander. Five past felonies were charged of which  
9 two were admitted by him and three denied. The State contends  
10 that the record of the three prior convictions alone should be  
11 sufficient under our statute to convict the appellant of being an  
12 habitual criminal.[FN2]

13 [FN2] NRS 207.010(6). 'Presentation of an  
14 exemplified copy of a felony conviction shall be  
15 prima facie evidence of conviction of a prior felony.'

16 Some courts hold that proof of a record merely containing  
17 defendant's name is not enough to overcome the presumption of  
18 innocence. *People v. Casey*, 399 Ill. 374, 77 N.E.2d 812, 11  
19 A.L.R.2d 865 (1948). Others are satisfied that the earlier records  
20 sufficiently establish identity under the habitual criminal acts, that  
21 a properly authenticated conviction presumes identity of person  
22 as well as name. *State v. Davis*, 367 S.W.2d 517 (Mo.1963);  
23 *Buie v. State of Oklahoma*, 368 P.2d 663 (Okl.Cr.App.1962).

24 The division of authorities preponderates in favor of  
25 allowing the copies to suffice if, *as in the primary charge (that of*  
26 *being an ex-felon in possession of a firearm), further*  
27 *circumstances exist pointing to the defendant's identity of person*  
28 *and name. Here the circumstances that existed in the*  
29 *determination of guilt in the first charge were augmented by*  
30 *Hollander's admission to two of the convictions. Sometimes such*  
31 *admissions alone are sufficient to convict. State v. Wyckoff*, 27  
32 N.J.Super. 322, 99 A.2d 365 (1953); *State ex rel. Medicine Horn*  
33 *v. Jameson*, 78 S.D. 282, 100 N.W.2d 829 (1960). We also note  
34 39 Iowa L.Rev. 156 (1953-54). However, we reject that authority  
35 which considers the defendant's failure to rebut the presumption  
36 created. The responsibility of proof beyond a reasonable doubt  
37 remains with the State.

38 82 Nev. at 348-50, 418 P.2d at 804 (emphasis added).

39 *Hollander* provides no support for a conclusion that identification documents must be  
40 certified documents in order to constitute sufficient evidence for a habitual criminal  
41 adjudication in Nevada. *Hollander* instead establishes that identification may be established  
42 by fingerprints or "any other available identity data." *Hollander* is the only Nevada case cited  
43 in this regard by petitioner in the second amended petition and reply. The case clearly  
44 undercuts – not supports – his argument.

1           Petitioner has the burden of proof and of persuasion on federal habeas review. He is  
2 collaterally challenging a presumptively valid state court judgment of conviction under a  
3 “highly deferential”<sup>39</sup> standard of review. A bald supposition that a legal proposition is true  
4 does not provide a basis for overturning a presumptively valid judgment of conviction on  
5 federal habeas review. Petitioner maintains that the identification evidence was insufficient  
6 because the documents used by the investigative specialist in identifying Ruffin as the same  
7 individual by his fingerprints were not certified. The question must be asked, however:  
8 Where are the, apposite, case citations holding that the investigative specialist’s use of  
9 uncertified fingerprint documents rendered the identification evidence insufficient?<sup>40</sup>

10           Petitioner has not established that the identification evidence presented at the first  
11 sentencing hearing was insufficient to support the habitual criminal adjudication.<sup>41</sup>

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13           <sup>39</sup>*Pinholster*, 131 S.Ct. at 1398.

14           <sup>40</sup>Cases upholding a habitual criminal adjudication where certified fingerprint records were introduced  
15 would not necessarily establish that the evidence would be insufficient where uncertified fingerprint records  
16 were used. Petitioner, again, has the burden of proof and persuasion on federal habeas review. Arguments  
17 as to underlying predicate state law issues – such as the sufficiency of forms of proof on a habitual criminal  
18 adjudication – that are based on unsupported supposition rather than apposite supporting state case law are  
19 insufficient to carry the day on deferential AEDPA review.

20           <sup>41</sup>Petitioner urges that the Nevada Supreme Court’s determination on the appeal from the second  
21 adjudication that the first adjudication was supported by sufficient evidence constituted an unreasonable  
22 determination of fact under 28 U.S.C. § 2254(d)(2). This Court is not persuaded.

23           The state supreme court arguably was not even referring to the identification evidence when it made  
24 the determination. As discussed previously in the text, under a fair reading of petitioner’s state court papers,  
25 Ruffin’s insufficiency argument on the appeal from the 2005 amended judgment of conviction was addressed  
26 to an alleged absence of the certified copies of the prior judgments of conviction at the first sentencing. See  
27 text, *supra*, at 27. As to that issue, the state supreme court’s determination that the prior judgments had  
28 been presented by the State at the first adjudication but thereafter had been lost through no fault of the State  
was – amply – supported by the transcript from the first adjudication.

          In all events, if the state supreme court’s determination encompassed a determination specifically  
that the identification evidence was sufficient at the first adjudication, that determination also was amply  
supported by the transcript from the first adjudication. The loss of the copies of the judgments did not impact  
the state supreme court’s ability to review the transcript of the first hearing as to that issue.

          While petitioner suggests that the Supreme Court of Nevada could not reasonably make a finding as  
to the sufficiency of the evidence at the first hearing because of the missing copies of the prior judgments, the  
state court record clearly permitted and supported such a determination, particularly as to the identification

(continued...)

1 Second, even if this Court were to assume, *arguendo*, that the evidence from the first  
2 habitual criminal adjudication was “insufficient,” the rejection of the double jeopardy claim was  
3 neither contrary to nor an unreasonable application of clearly established federal law as  
4 determined by the United States Supreme Court.

5 Historically, the United States Supreme Court has concluded that double jeopardy  
6 protections do not apply to sentencing proceedings.<sup>42</sup> In *Bullington v. Missouri*, 451 U.S. 430,  
7 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), however, the Supreme Court held that the Double  
8 Jeopardy Clause prevented a State from again exposing a capital defendant to the death  
9 penalty following a remand for a new trial if the defendant had received a noncapital sentence  
10 in the first proceeding.

11 In *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 2250, 141 L.Ed.2d 615  
12 (1998), the Court considered “whether the Double Jeopardy Clause, which we have found  
13 applicable in the capital sentencing contest, see *Bullington* . . ., extends to noncapital  
14 sentencing proceedings.” 524 U.S. at 724, 118 S.Ct. at 2248. Significantly, *Monge*, just as  
15 does the present case, involved a habitual offender sentencing enhancement, in that case  
16 under California law. The Supreme Court held in *Monge* “that *Bullington’s* rationale is  
17 confined to the unique circumstances of capital sentencing and that the Double Jeopardy  
18 Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing  
19 context.” 524 U.S. at 734, 118 S.Ct. at 2253. The Court – repeatedly – emphasized in  
20

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21 <sup>41</sup>(...continued)

22 issue. That is, while the missing copies of the prior judgments may have precluded effective review of all of  
23 petitioner’s objections to the first habitual criminal adjudication at the time of the earlier appeal, the missing  
24 copies did not preclude a finding that the evidence was sufficient at the first hearing when the missing  
25 certified copies had been made of record. Certified copies had been presented at the first hearing but merely  
26 had been lost. The evidence would have been insufficient at the first hearing on that account only if it  
27 thereafter was established on the remand that the State in fact never had presented the requisite three or  
28 more prior convictions – such as if there in fact were no such prior convictions, under any alias, for Ruffin.  
The state court record clearly belies such a proposition.

29 The Supreme Court of Nevada otherwise is the final arbiter of the state law question of whether the  
30 form of the identification evidence presented at the first hearing was sufficient under Nevada state law.

<sup>42</sup>See, e.g., *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 2250, 141 L.Ed.2d 615 (1998).



1 *Monge* that *Bullington* was premised upon the case involving *capital* sentencing, stating that  
2 “the death penalty is unique,” that “*Bullington’s* rationale is confined to the ‘unique  
3 circumstances of a capital sentencing proceeding,’” and that “*Bullington* is an example of the  
4 heightened procedural protections accorded capital defendants.” 524 U.S. at 732-33m 118  
5 S.Ct. at 2252-53.

6 Petitioner acknowledges the holding in *Monge*, which was decided nearly nine years  
7 prior to the Nevada Supreme Court’s April 2007 decision rejecting his own double jeopardy  
8 challenge similarly to a noncapital habitual offender adjudication. He urges, however:

9  
10 The holding in *Monge*, however, depends upon a  
11 distinction between “sentencing factors” and “elements” that the  
12 Supreme Court subsequently rejected in *Apprendi v. New Jersey*,  
13 530 U.S. 466[, 120 S.Ct. 2348, 147 L.Ed.2d 435] (2000) — a  
14 case that predates Ruffin’s re-sentencing. See *United States v.*  
*Rosales*, 516 F.3d 749, 757 (9th Cir. 2008)(noting that “*Apprendi*  
undermined *Monge*”); [*United States v.*] *Blanton*, 476 F.3d [767,]  
772 [(9<sup>th</sup> Cir. 2007)] (same). Although the Supreme Court has not  
expressly overruled *Monge*, Ruffin would respectfully submit that  
it should no longer be followed.

15 #54, at 64.

16 Petitioner’s *Apprendi*-based argument collapses of its own weight. The United States  
17 Supreme Court rejected the underlying premise that habitual offender recidivism must be  
18 treated as an element of the offense in *Almendarez-Torres v. United States*, 523 U.S. 224,  
19 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), for purposes of the rule that later would be followed  
20 in *Apprendi*. While the Supreme Court called the continuing vitality of *Almendarez-Torres* into  
21 question two years later in *Apprendi*, it nonetheless remains true that *Apprendi* did not  
22 overrule *Almendarez-Torres*. Parties repeatedly have requested that the Ninth Circuit  
23 disregard *Almendarez-Torres* based upon *Apprendi* and other subsequent Supreme Court  
24 pronouncements. The Ninth Circuit repeatedly has rejected these entreaties, holding in 2000,  
25 2001, 2005, and – critically for this case – again in January 2007, that *Almendarez-Torres*  
26 remains binding law until explicitly overruled by the Supreme Court. See *United States v.*  
27 *Martinez-Rodriguez*, 472 F.3d 1087, 1092-93 (9th Cir. 2007); *United States v. Weiland*, 420  
28 F.3d 1062, 1079 n.16 (9th Cir. 2005); *United States v. Reyes-Pacheco*, 248 F.3d 942, 944-45

1 (9th Cir. 2001); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 413-14 (9th Cir. 2000).  
2 Indeed, the Ninth Circuit held as recently as April 18, 2011, that *Almendarez-Torres* has not  
3 been overruled and “remains binding authority.”<sup>43</sup>

4 The Supreme Court of Nevada clearly was not required to disregard *Monge*’s express  
5 holding that the Double Jeopardy Clause does not apply to a habitual offender adjudication  
6 on the basis of *Apprendi* when United States Supreme Court caselaw that “remains binding  
7 authority” to this day holds that the existence of prior convictions does not constitute an  
8 element of the offense under the rule followed in *Apprendi*.

9 Petitioner in essence would have the courts reviewing his double jeopardy claim refuse  
10 to follow a directly apposite United States Supreme Court decision that has not been  
11 overruled based upon an argument that itself is foreclosed by another United States Supreme  
12 Court decision that also has not been overruled. Such is not the stuff of which reversals of  
13 state convictions are made on deferential AEDPA review.

14 The Court further would note that petitioner’s premise that *Monge* turned upon a  
15 distinction between sentencing enhancements and offense elements is subject to substantial  
16 debate. Justice O’Connor’s opinion for the majority in *Monge* repeatedly stressed the point  
17 that *Bullington*’s exception to the longstanding rule that the Double Jeopardy Clause does not  
18 apply to sentencing proceedings was “confined to the ‘unique circumstances of a capital  
19 sentencing proceeding.’” If Ninth Circuit panels have read *Monge* differently in federal criminal  
20 cases that did not involve a state habitual offender enhancement, such a reading definitely  
21 is not clearly established federal law as determined by the United States Supreme Court that  
22 must be followed by a state supreme court. The Supreme Court of Nevada simply is not  
23 bound by Ninth Circuit authority.

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26 <sup>43</sup>*United States v. Valvovinos-Mendez*, 641 F.3d 1031, 1036 (9<sup>th</sup> Cir. 2011). The *Apprendi* holding  
27 itself stated that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime  
28 beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable  
doubt.” 530 U.S. at 490, 120 S.Ct. at 2362-63 (emphasis added).

1           Accordingly, for a number of reasons, there simply is no way that the Nevada Supreme  
2 Court's April 2007 rejection of petitioner's double jeopardy claim could have been either  
3 contrary to or an unreasonable application of clearly established federal law as determined  
4 by the United States Supreme Court. On federal habeas review under AEDPA, the federal  
5 court "must consider 'arguments that would otherwise justify the state court's result.'" *John-*  
6 *Charles v. California*, \_\_\_ F.3d \_\_\_, 2011 WL 2937945, slip op. at \*9 (9<sup>th</sup> Cir., July 22,  
7 2011)(quoting *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 787, 178 L.Ed.2d 624  
8 (2011). Under the directly applicable United States Supreme Court holding in *Monge* – which  
9 has not been overruled and may never be overruled on petitioner's *Apprendi* argument – the  
10 Supreme Court of Nevada simply could have rejected Ruffin's double jeopardy claim on its  
11 face. The fact that the state supreme court further concluded – with ample record support –  
12 that the habitual criminal evidence was sufficient at the first sentencing hearing only further  
13 insulates its decision from being overturned on deferential AEDPA review.

14           Petitioner's argument would not be a strained one on *de novo* review, although the  
15 Court would not be persuaded that petitioner is entitled to relief on this claim even on *de novo*  
16 review. The argument clearly cannot carry the day, however, on deferential AEDPA review  
17 "which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 131  
18 S.Ct. at 1398 (quoting prior authority).

19           Ground 10 therefore does not provide a basis for federal habeas relief.

20           ***Evidentiary Hearing as to Grounds 2, 3, 5, 6 & 7***

21           The remaining exhausted claims in Grounds 2, 3, 5, 6 and 7 present claims of  
22 ineffective assistance of trial counsel.<sup>44</sup>

23           In Ground 2, petitioner alleges in the main that he was denied effective assistance of  
24 counsel in violation of the Sixth and Fourteenth Amendments when trial counsel failed to  
25 object during voir dire to the state trial court's reference to petitioner's alias.

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28           <sup>44</sup>See #49, at 15-31 (second amended petition); #54, at 19-54 (reply); #65 (order of partial dismissal).  
Grounds 4, 11 and 12 were dismissed without prejudice in their entirety as wholly unexhausted.

1 In the exhausted portion of Ground 3 that remains, petitioner alleges in the main that  
2 he was denied effective assistance of counsel in violation of the Sixth and Fourteenth  
3 Amendments when trial counsel failed to object to references in the State's witness testimony  
4 to a videotape of an apparent pickpocket incident from the Bellagio that was ruled  
5 inadmissible late in the trial.

6 In the exhausted portion of Ground 5 that remains, petitioner alleges in the main that  
7 he was denied effective assistance of counsel in violation of the Sixth and Fourteenth  
8 Amendments when trial counsel failed to object to allegedly unreliable identification testimony  
9 by State witness Diana Stubenrauch.<sup>45</sup>

10 In Ground 6, petitioner alleges in the main that he was denied effective assistance of  
11 counsel in violation of the Sixth and Fourteenth Amendments when trial counsel failed to  
12 object to conduct any pretrial investigation regarding a Circle K videotape. According to the  
13 pleadings, the Circle K store manager, Dan Smolinski, testified that, after a charge was made  
14 on the New York-New York victim's credit card at the store, he reviewed a surveillance  
15 videotape alleged to be of the transaction. He testified that he recognized Ruffin on the  
16 videotape from prior visits to the store. Smolinski testified that he gave the videotape to the  
17 police. In the second amended petition, petitioner alleges that responses to federal discovery  
18 demonstrate that the police never obtained such a videotape. He alleges that pretrial  
19 investigation would have revealed that the videotape never existed and that Smolinski's  
20 associated testimony thus could have been excluded at trial based upon this fact.

21 In the exhausted portions of Ground 7 that remain, petitioner alleges in the main that  
22 he was denied effective assistance of counsel in violation of the Sixth and Fourteenth  
23 Amendments when trial counsel failed to conduct investigation that would have produced  
24 exculpatory evidence. Petitioner alleges, in particular, that trial counsel: (a) failed to develop  
25 any witnesses for the defense, such as a New York-New York casino bell captain who  
26

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27 <sup>45</sup>An included claim that counsel should have objected to her testimony identifying Ruffin in the New  
28 York, New York surveillance video on the basis that it was inadmissible lay opinion was dismissed following  
upon the Court's holding that the claim was unexhausted. See #65, at 1-2.

1 potentially could have disputed Diana Stubenrauch's identification of Ruffin as the black male  
2 on the elevator; and (b) failed to retain an identification expert who allegedly could have  
3 demonstrated that the identifications made by Stubenrauch, Dan Smolinski, and Dolores  
4 Harris were inherently untrustworthy.

5 The Supreme Court of Nevada rejected the corresponding claims presented on state  
6 post-conviction review on the following grounds:

7 We have carefully reviewed each of the above allegations  
8 and conclude that Ruffin *failed to show that, but for his trial*  
9 *counsel's alleged errors, the results of the trial would have been*  
10 *different.* In reaching this conclusion, we note that sufficient  
11 evidence supported Ruffin's conviction. This evidence included:  
12 the testimony of Diana Stubenrauch, the victim, who positively  
13 identified Ruffin as being on an elevator with her prior to her  
14 wallet disappearing; a security surveillance video corroborating  
Mrs. Stubenrauch's testimony; the testimony of Dan Smolinski  
linking Ruffin to the possession and attempted use of Mrs.  
Stubenrauch's credit card; and considerable other circumstantial  
evidence. We also note that this court considered the prejudicial  
impact of the jury's exposure to testimony concerning the Bellagio  
security surveillance video on direct appeal and determined that  
the issue was without merit. . . .

15 #38, Ex. 110, at 5 (emphasis added)(citation footnotes omitted).

16 The state supreme court's decision on these claims was contrary to clearly established  
17 federal law as determined by the United States Supreme Court.

18 As discussed, *supra*, a petitioner seeking to establish ineffective assistance of counsel  
19 must demonstrate both deficient performance and resulting prejudice. On the prejudice  
20 prong, under *Strickland* and its progeny, a petitioner must demonstrate a reasonable  
21 probability that, but for counsel's unprofessional errors, the result of the proceeding would  
22 have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability  
23 is a probability sufficient to undermine confidence in the outcome." *Id.* A reasonable  
24 probability requires a "substantial," not just a "conceivable," likelihood of a different result.  
25 *Pinholster*, 131 S.Ct. at 1403.

26 What a "reasonable probability" requires under *Strickland* decidedly is *not* a probability  
27 that is more probable than not. *See, e.g., Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1243  
28 (9<sup>th</sup> Cir. 2005). In the present case, the Supreme Court of Nevada applied precisely such a

1 more probable than not standard. The state high court required Ruffin to demonstrate that  
2 but for counsel's errors, "the results of the trial would have been different." Petitioner was not  
3 required under *Strickland*, however, to demonstrate that the result of his trial "would have  
4 been different" but for counsel's alleged errors. He instead was required to demonstrate a  
5 probability only "sufficient to undermine confidence in the outcome." The state supreme  
6 court's application of a more-probable-than-not prejudice standard rendered its decision  
7 contrary to clearly established Supreme Court precedent. *Cooper-Smith, supra*. This Court  
8 accordingly must review the claims of ineffective assistance of trial counsel *de novo*. *Id.*

9 The Court additionally would note that the state supreme court's reliance upon the  
10 sufficiency of the evidence as a basis for concluding that petitioner could not demonstrate  
11 prejudice begged the question as to many claims.

12 For example, Diane Stubenrauch positively identified Ruffin only as having been in the  
13 elevator. She did not see him commit an offense, and the surveillance video shows the man  
14 in the elevator only raising his briefcase. There was no direct evidence of Ruffin actually  
15 committing the crime. A key piece of confirming evidence was Dan Smolinski's testimony  
16 offered to establish that Ruffin thereafter tried to use Stubenrauch's credit card at his store.  
17 The prosecutor's closing argument emphasized the critical importance of this testimony:

18 . . . . You saw what happened, but I guess the most  
19 important part of this particular count, and the real damning piece  
20 of evidence in this particular count is not only that she identifies  
21 him, but the very next day he is identified as the person trying to  
22 use her credit card at a Circle-K store. Now that, folks, is some  
23 kind of evidence. That credit card did not fall out of the sky. That  
24 credit card was stolen out of her wallet and that wallet was stolen  
25 at New York New York, and he and she were together in that  
26 elevator at New York New York. That, ladies and gentlemen, is  
27 some strong evidence.

28 #36, Ex. 39, at 321.

29 In Ground 6, Ruffin alleges that counsel was ineffective for failing to effectively  
30 challenge Smolinski's testimony. It is no answer to this claim to state that, even if counsel  
31 rendered deficient performance, petitioner was not prejudiced by the failure to challenge this  
32 "real damning piece of evidence" because Stubenrauch positively identified Ruffin as being

1 in the elevator. This is not a case where the victim testified that she saw the crime and  
2 positively identified the defendant as the offender. She only positively identified Ruffin as a  
3 man that she observed in the elevator at a time prior to when she could not find her wallet.  
4 As the prosecutor's closing argument emphasizes, the State relied – quite heavily – on  
5 Smolinski's testimony to establish that Ruffin not only was in the elevator with the victim at the  
6 relevant time but that he in fact stole her wallet. Referring to the sufficiency of the evidence  
7 to establish a lack of resulting prejudice on this claim thus wholly begs the question, as the  
8 claim questions the admission of a central piece of evidence relied upon by the State.

9 This Court need not consider, however, whether the Nevada Supreme Court's  
10 application of *Strickland* was an objectively unreasonable one, however. The state supreme  
11 court's decision in all events was contrary to *Strickland* because the court misstated the  
12 governing standard for determining prejudice. *Cooper-Smith, supra*. As stated above, the  
13 Court thus reviews petitioner's claims of ineffective assistance of trial counsel *de novo*.

14 When a state court decision is not entitled to AEDPA deference, there is no bar to a  
15 federal evidentiary hearing on the merits under the *Pinholster* decision. See 131 S.Ct. at  
16 1401 & 1411 n. 20. Where 28 U.S.C. § 2254(d)(1) does not bar relief, the availability of an  
17 evidentiary hearing in federal court is governed by 28 U.S.C. § 2254(e)(2). *Id.*

18 Section 2254(e)(2) does not bar a federal evidentiary hearing where the petitioner  
19 diligently has sought to develop a factual record in the state courts:

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21 . . . [A] district court evidentiary hearing is not barred if a  
22 habeas petitioner made "a reasonable attempt, in light of the  
23 information available at the time, to investigate and pursue claims  
24 in state court, [by] at a minimum seek[ing] an evidentiary hearing  
25 in state court in the manner prescribed by state law." *West v.*  
26 *Ryan*, 608 F.3d 477, 484-85 (9th Cir.2010).

27 A habeas petitioner not barred from receiving an  
28 evidentiary hearing by section 2254(e)(2) is entitled to such a  
hearing if [he] (1) alleges facts that, if proven, would entitle [him]  
to relief, and (2) shows that [he] did not receive a full and fair  
hearing in state court. *Alberni v. McDaniel*, 458 F.3d 860, 873  
(9th Cir.2006); see also *Insyxiengmay v. Morgan*, 403 F.3d 657,  
669-70 (9th Cir.2005).

*Rossum v. Patrick*, 622 F.3d 1262, 1277 (9<sup>th</sup> Cir. 2010).

1 In the present case, petitioner clearly, expressly and repeatedly requested an  
2 opportunity for discovery and an evidentiary hearing in the state courts, to no avail.<sup>46</sup>  
3 Moreover, the state district court denied petitioner's request for discovery and an evidentiary  
4 hearing on the basis that N.R.S. 34.370 required petitioner to support his allegations with  
5 affidavits, evidence and other documentation.<sup>47</sup> The Supreme Court of Nevada held – in this  
6 case – that the district court erred in relying on this statute because it had no application to  
7 state post-conviction petitions filed under N.R.S. 34.720 *et seq.* The state supreme court  
8 concluded, however, that the error nonetheless was harmless because the claims were  
9 without merit for the reasons assigned by the state high court.<sup>48</sup> As discussed above, the  
10 Nevada Supreme Court's rejection of the claims of ineffective assistance of trial counsel was  
11 contrary to, and likely also an objectively unreasonable application of, *Strickland*. This Court  
12 thus is left with a holding by the Supreme Court of Nevada – the final arbiter of Nevada state  
13 law – that the state district court erred when it relied upon N.R.S. 34.370 in denying the  
14 petition without the requested evidentiary hearing. Petitioner clearly did not fail to seek to  
15 develop the factual basis for his ineffective assistance claims in the state courts, and he  
16 sought an evidentiary hearing “in the manner prescribed by state law.” The Court further  
17 concludes that petitioner otherwise has satisfied the remaining requirements for a federal  
18 evidentiary hearing stated above.

19 The Court accordingly will hold an evidentiary hearing on the exhausted claims in  
20 Grounds 2, 3, 5, 6 and 7. In this regard, even if, *arguendo*, the basis for an evidentiary  
21 hearing is stronger as to some claims than others, the Court finds that the better course would  
22 be to address the prejudice inquiry on all of the remaining claims of ineffective assistance of  
23 trial counsel only after considering the evidence presented at the hearing.

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26 <sup>46</sup>See #37, Ex. 82, at 1; *id.*, Ex. 87, at 1-2; *id.*, Ex. 88, at 1; *id.*, Ex. 89, at 3; & *id.*, Ex. 100.

27 <sup>47</sup>See #37, Ex. 89, at 4.

28 <sup>48</sup>See #38, Ex. 110, at 6-7 n.12.



1 As to the claims addressed herein, Grounds 1, 8, 9 and 10, the Court is not persuaded  
2 by petitioner's argument that *Pinholster's* holding limiting review to consideration only of the  
3 state court record may be avoided on the premise that the state court did not grant petitioner's  
4 request for an evidentiary hearing. The state courts also had summarily denied the claims  
5 without an evidentiary hearing in *Pinholster*. See 131 S.Ct. at 1396-97. The holding in  
6 *Pinholster* is that only the state court record may be considered in determining whether the  
7 state court's decision withstands review under 28 U.S.C. § 2254(d)(1). 131 S.Ct. at 1398-  
8 1401. The criteria for obtaining a federal evidentiary hearing under Section 2254(e)(2) –  
9 including the petitioner's diligence in seeking to develop the record in the state courts – do  
10 not even come into play if the state court decision withstands such review. 131 S.Ct. at 1399-  
11 1401. Ruffin's suggestion that he can avoid the holding of *Pinholster* by seeking relief instead  
12 under Section 2254(d)(2), premised upon the presence of an unreasonable determination of  
13 fact, similarly is unpersuasive. Section 2254(d)(2) even more explicitly limits review to the  
14 "evidence presented in the State court proceeding."<sup>49</sup> Ruffin's reliance upon a dissent in  
15 *Pinholster* and upon circuit authority decided prior to *Pinholster* is unpersuasive.

16 Moreover, the underlying claims in Grounds 1, 8, 9 and 10 do not lend themselves to,  
17 much less require, an evidentiary hearing for their resolution.

18 IT THEREFORE IS ORDERED that Grounds 1, 8, 9, and 10 are DISMISSED with  
19 prejudice on the merits.

20 IT FURTHER IS ORDERED that an evidentiary hearing is scheduled in this matter for  
21 10:00 a.m. on September 26, 2011, in Courtroom 6C at the Lloyd D. George  
22 Federal Courthouse, 333 Las Vegas Boulevard South, Las Vegas, Nevada, as the remaining  
23 claims in Grounds 2, 3, 5, 6 and 7. The Court will establish certain prehearing procedures  
24 and deadlines by a separate order following the issuance of this order.

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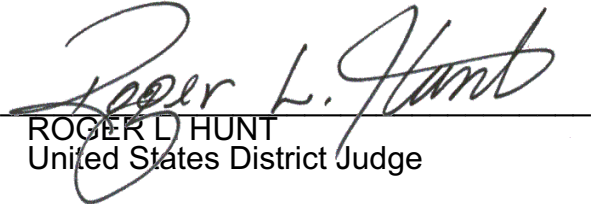
25  
26  
27 <sup>49</sup>See 131 S.Ct. at 1400 n.7 ("The additional clarity of § 2254(d)(2) on this point, however, does not  
28 detract from our view that § 2254(d)(1) *also* is plainly limited to the state-court record.") (emphasis added).  
Petitioner's underlying premise that *Pinholster* is avoided, and a federal evidentiary hearing should be held,  
simply because the state courts did not hold an evidentiary hearing is unsupported by the decision itself.

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**IT FURTHER IS ORDERED that no requests for extensions of time and/or for rescheduling of this matter will be considered except in the most compelling and unavoidable of circumstances. The Court intends to resolve this matter by entry of a final order and judgment no later than Friday, September 30, 2011.**

The Court's alternative dispute resolution procedures remain available to the parties. Counsel may file a joint request for same in the record, and the undersigned then will initiate the process for the alternative dispute resolution procedures then being made available to the parties in advance of the scheduled evidentiary hearing.

DATED: August 4, 2011.

  
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ROGER L HUNT  
United States District Judge