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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RONALD KWAME GAINES,

Petitioner,

vs.

DWIGHT NEVEN, *et al.*,

Respondents.

2:10-cv-01367-RLH-NJK

ORDER

This closed habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's motion (#48) to alter or amend judgment under Rule 59(e). The motion was filed within the time period provided for under Rule 59.

Background

Petitioner Ronald Kwame Gaines challenged his 2006 Nevada state conviction, pursuant to a jury verdict, of attempted robbery and his adjudication as a habitual criminal, in connection with a December 23, 2005, attempted robbery. He challenged the state court judgment of conviction on direct appeal and in a state post-conviction petition. In its final decision, the Court denied the claims remaining in Grounds 11, 16, 17 and 24 on the merits and Ground 18 on the basis of procedural default.

Discussion

Ground 11

In Ground 11, petitioner alleged that he was denied effective assistance of appellate counsel when counsel failed to raise a claim of alleged prosecutorial misconduct on direct

1 appeal. Petitioner alleged that the prosecutor engaged in misconduct during oral argument
2 when he referred to Gaines needing his “next fix,” suggesting that he was a drug addict with
3 allegedly no supporting evidence in the record. Petitioner alleged that trial counsel objected
4 to the argument at his urging but that counsel thereafter either failed or refused to pursue the
5 issue on direct appeal.

6 The state supreme court held that the state district court did not err in rejecting
7 petitioner’s claims of ineffective assistance of appellate counsel on the premise that the
8 claims did not have a reasonable probability of success on appeal.

9 This Court held, following an extensive review of the relevant procedural history and
10 trial evidence, that the state supreme court’s rejection of this claim was neither contrary to nor
11 an unreasonable application of clearly established federal law. #46, at 4-11.

12 The Court noted, *inter alia*, that the state supreme court’s necessary conclusion that
13 there was not a reasonable probability of reversal under Nevada state law was the end of the
14 matter with respect to that subsidiary issue. The Supreme Court of Nevada is the final arbiter
15 of Nevada state law.

16 The Court held that the state supreme court’s determination that there was not a
17 reasonable probability of reversal also was not an objectively unreasonable application of the
18 broad generalized principle of federal due process:

19 In this case, the state supreme court’s conclusion that a
20 constitutional claim of prosecutorial misconduct would not have
21 had a reasonable probability of success on appeal did not
22 constitute an objectively unreasonable application of the broad
23 principle of due process on the underlying substantive claim. The
24 testimony at trial in fact did not distinguish between whether
25 Gaines appeared intoxicated from drugs or instead from alcohol.
26 The inference that the prosecutor sought to draw from the
27 evidence -- that he was intoxicated on drugs in an area with high
28 drug use where he had been hustling for money during the course
of the day – was neither compelled by nor refuted by the
evidence. Moreover, defense counsel was able to turn the State’s
argument back against the State by maintaining that the allegedly
unsupported reference to drug use reflected that the State was
having to desperately clutch at straws due to having a weak case.
Both defense counsel’s objection and his closing argument
apparently had some impact, as the State thereafter backtracked
and conceded that there was no direct evidence of drug
intoxication per se. In light of this give-and-take over the course

1 of the entirety of the closing arguments and the actual strength of
2 the evidence against petitioner, a conclusion that there was not
3 a reasonable probability of success on the underlying
constitutional claim on a direct appeal was not an unreasonable
application of clearly established federal law.

4 #46, at 11.

5 In the present motion, petitioner urges, first, that the state district judge failed to rule
6 clearly on trial counsel's objection to the prosecutor's argument and that this Court did not
7 mention this "misfact." He contends that appellate counsel was ineffective for failing to raise
8 the purported issue that the misconduct was never cured by the trial judge and that the judge
9 failed to give the jury an immediate curative admonishment. He relies upon federal appellate
10 decisions from federal criminal cases, which of course are not controlling on deferential
11 AEDPA review.

12 This Court directly quoted from the state court record the objection, the response, and
13 the trial court's following remark. #46, at 7. It missed no – relevant – fact. The Court had no
14 occasion to explicitly discuss an alleged failure to raise an issue on appeal that the trial court
15 allegedly failed to adequately rule on the objection and cure the prosecutorial misconduct
16 because there was no such viable claim separate and apart from an appellate claim regarding
17 the alleged prosecutorial misconduct itself. A conclusion that there was not a reasonable
18 probability of success on appeal on the claim of alleged prosecutorial misconduct negated
19 any viable argument for reversal based upon a failure to explicitly rule on the objection or
20 adequately cure the alleged misconduct. There must be misconduct before there possibly
21 need be a cure, and the conclusion that there was not a reasonable probability of success on
22 appeal on the misconduct issue wholly undercuts the entirety of Ground 11. It was not
23 ineffective assistance of appellate counsel to decline to raise the underlying substantive claim
24 on direct appeal, in all of its baseless intricacy.

25 Petitioner next urges that when the Court "explained" why the prosecution may have
26 made her statement "[t]his now has opened the doorway to Gaines to now say the
27 prosecutor's remarks were of her personal belief." Nothing in this Court's decision "opens the
28 door" for petitioner to raise claims in a motion for reconsideration that were not before the

1 Court at the time of its final decision, much less additional baseless claims. The Court
2 described the evidence that was in the trial record when the prosecutor made the argument
3 to which defense counsel objected. See #46, at 4-8. A ruling on a claim presented on the
4 pleadings does not open the door for a party to thereafter start presenting additional claims
5 after final judgment.

6 Petitioner further maintains that the evidence against him was not overwhelming and
7 that he was told by counsel not to testify. He points to the Court's recognition in the order of
8 dismissal that the victim likely was with a prostitute. He urges that "this may have led the
9 alleged victim to throw blame on Gaines as attempting to rob him in order to get the fact of
10 (him) himself breaking the law [sic]." Petitioner is rehashing old news. As this Court noted
11 in its extensive factual recital, the victim acknowledged at trial – before the jury – that his
12 newfound female friend likely was a prostitute. #46 at 4 n.2. This testimony was in the record
13 before the state courts and was explicitly noted by this Court in the order of dismissal. This
14 Court did not say that the evidence against petitioner at trial was overwhelming. It stated that
15 in light of, *inter alia*, "the actual strength of the evidence against petitioner, a conclusion that
16 there was not a reasonable probability of success on the underlying constitutional claim on
17 a direct appeal was not an unreasonable application of clearly established federal law." #46,
18 at 11. Rehashing the trial evidence – as to evidence explicitly acknowledged by the Court in
19 its prior order – does not provide a basis for post-judgment relief. Further, no claim is before
20 the Court with regard to petitioner's decision not to testify and/or what counsel recommended
21 that he do in that regard.¹

22 Finally with respect to Ground 11, the Court expressly noted in the dismissal order that
23 "[d]efense counsel's testimony acknowledg[ing] sundry points at the state court evidentiary
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26 ¹Petitioner was extensively canvassed on the record by the trial court regarding his decision. #31, Ex.
27 6, at 58-61. If petitioner instead had decided to testify, the State would have been able to establish before the
28 jury that Gaines previously had been convicted for battery with the use of a deadly weapon, robbery, and
attempt robbery. Given petitioner's prior record – including on a charge not wholly dissimilar to the charge in
this case – and given the degree of insight that petitioner has displayed in this matter, the Court would be
hard pressed to conclude that any advice to him to not testify would have been poor advice.

1 hearing also did not dictate a grant of either state or federal postconviction relief.” #46, at 29
2 n.34. The case was decided on what the record showed, not based upon any alleged
3 admission of error by former defense counsel. See also *Harrington v. Richter*, 131 S.Ct. 770,
4 790 (2011)(*Strickland* calls for an inquiry into the objective reasonableness of counsel’s
5 performance, not counsel’s subjective state of mind).

6 **Grounds 16, 17 and 18**

7 Grounds 16 through 18 all concerned the habitual criminal adjudication and thus were
8 discussed together. The three claims proceeded from, *inter alia*, a common factual premise
9 that the State failed to file certified copies of the prior judgments of conviction upon which the
10 habitual criminal adjudication was based. Petitioner presented a procedurally-defaulted
11 substantive claim in Ground 18 based upon an alleged failure to file the underlying prior
12 convictions. He further presented associated claims of ineffective assistance of trial counsel,
13 in Ground 17, and of appellate counsel, in Ground 16, for failing to pursue the substantive
14 claim in Ground 18. Petitioner needed to demonstrate ineffective assistance of appellate
15 counsel in Ground 16 in order to establish cause and prejudice to overcome the procedural
16 default of the underlying substantive claim in Ground 18.

17 All three of the prior convictions were from the same Clark County state district court
18 in which petitioner was tried, convicted and sentenced in this case. In the dismissal order,
19 the Court extensively reviewed the procedural history reflecting that the defense in the Clark
20 County prosecution had actual factual notice that the State intended to use the three Clark
21 County convictions in support of the habitual criminal adjudication, that the three Clark County
22 convictions in fact existed and were part of the record in the Clark County prosecution, and
23 that the three Clark County convictions in any event would have been readily available by,
24 *inter alia*, simple judicial notice by the very same Clark County court that issued the
25 convictions if defense counsel had raised a completely pointless contemporaneous objection
26 challenging their authenticity or manner of proof. See #46, at 12-21.

27 Petitioner, first, on a related additional claim, yet again provides extended argument
28 regarding the specifics of the documents filed by the State to pursue the habitual criminal

1 adjudication. The Court specifically discussed petitioner's argument that the State failed to
2 use the correct paperwork to seek a habitual criminal adjudication:

3 Petitioner additionally alleges, to one extent or another, in
4 Grounds 16 and 17 that appellate and trial counsel were
5 ineffective for failing to challenge the habitual criminal
6 adjudication for lack of adequate notice. This claim has even less
7 of a factual and legal basis than the claim discussed in the text.
8 Petitioner proceeds on the premise that the habitual criminal
9 adjudication was subject to reversal because the State filed a
10 notice of intent to seek habitual criminal treatment rather than an
11 amended information with a habitual criminal count. He cites no
12 apposite Nevada case law reversing based upon such an
13 *arguendo* technical state law violation in a circumstance where
14 the defendant clearly was on notice of the State's intent to seek
15 habitual criminal treatment. In Gaines' case, the state supreme
16 court's holding that there was not a reasonable probability of a
17 different outcome on appeal based upon any such *arguendo*
18 technical state law violation is the final word on that issue. The
19 Supreme Court of Nevada is the final arbiter of Nevada state law,
20 to the extent relevant to application of the *Strickland* standard to
21 a claim. The state high court further held in a related proceeding
22 that no such *arguendo* technical error deprived the district court
23 of jurisdiction under Nevada state law. #31, Ex. 62. See also
24 *Barren v. State*, 2009 WL 3191407, slip op., at *3 (Nev. 2009)(in
25 an unpublished disposition, the state supreme court rejected a
26 claim of ineffective assistance of appellate counsel premised on
27 a contention that the state district court was without jurisdiction
28 after the State filed a notice of intent rather than an amended
information). Moreover, there clearly was no basis for a viable
federal procedural due process claim on the facts presented.
Petitioner had abundant actual notice both that the State was
seeking habitual criminal treatment and that it was relying on his
prior Clark County convictions. Even if petitioner *arguendo* were
able to establish a technical state law error, a mere state law error
does not give rise to a federal due process claim in this context.
The Due Process Clause does not constitutionalize every jot and
tittle of state criminal practice. The decision in *Walker v. Deeds*,
50 F.3d 670 (9th Cir. 1995), is not to the contrary, as it pertains
to required findings, not to adequacy of notice.

22 #46, at 20-21 n.28.

23 As noted, petitioner continues to quibble with the Court's characterization of what
24 papers were filed by the State. Petitioner misses the point. The state supreme court held
25 that there was not a reasonable probability that an objection in this regard would have led to
26 a different outcome at the sentencing or on appeal. That is the end of the matter with regard
27 to the underlying state law issue because the Supreme Court of Nevada is the final arbiter of
28 Nevada state law. If petitioner has a different understanding of the underlying Nevada state

1 law – or of the effect of an *arguendo* alleged state law error in this regard – than did the state
2 supreme court, that will not secure him relief on federal habeas review. Moreover, as this
3 Court noted, the Due Process Clause otherwise does not constitutionalize every jot and tittle
4 of state criminal practice. The *Walker* decision does not establish to the contrary. Further,
5 *Walker* is a federal appellate decision, not a decision of the United States Supreme Court.
6 The Supreme Court of Nevada was not bound by *Walker* in considering whether there was
7 a reasonable probability of success on the underlying constitutional claim.

8 This Court fully understood the basis for petitioner’s claims in this regard – that trial and
9 appellate counsel failed to raise an issue regarding the State’s alleged failure to file the
10 correct paperwork to seek a habitual criminal adjudication. The Court simply rejected
11 petitioner’s claims under well-established principles of deferential review under AEDPA. The
12 state supreme court’s determination that there was not a reasonable probability of a different
13 outcome if counsel had raised the alleged error at sentencing or on appeal was neither
14 contrary to nor an objectively unreasonable application of clearly established federal law as
15 determined by the United States Supreme Court.²

16 Petitioner next urges that federal habeas counsel should be appointed because the
17 Court is relying on the respondents’ word that the three Clark County judgments of conviction
18 were in the evidence vault. The Court’s dismissal order was not based upon any bare
19 assertion by respondents. #46, at 16-17 & n.25, 18 & 21 n.29. Moreover, the actual existence
20 and presence of the prior judgments of conviction was only one of multiple independently
21 viable bases for rejecting petitioner’s claims. #46, at 17-21. Over and above the existing state

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23 ²Defense counsel’s recollection – or lack thereof – later at the state post-conviction evidentiary
24 hearing as to what was in the record at the time, what he did or did not look for, and whether he would have
25 had a tactical reason for not looking does not establish that the state courts’ rejection of these grounds was
26 an objectively unreasonable application of *Strickland*. The prior discussion in the dismissal order instead
27 addressed what was material to consideration of the claim on federal habeas review. The Court has not
28 overlooked anything in the state court record material to the claim. The Court alluded to all of the immaterial
points relied upon by petitioner in its concluding footnote in the dismissal order. See #46, at 29 n.34. After
twenty-nine pages of written reasons, the Court saw no utility to further expressly running down every
additional rabbit hole as to the numerous question-begging subsidiary arguments presented by petitioner –
including those based upon supposed concessions by trial counsel at the state post-conviction evidentiary
hearing.

1 court record materials fully supporting the state court factual finding that the convictions
2 existed and were properly of record in the proceeding, this Court additionally had the
3 respondents file copies of the judgments of conviction certified by the state district court clerk.
4 The Court did so because of petitioner's repeated baseless assertions that the convictions
5 did not exist and/or were not properly presented to the state district court for the habitual
6 criminal adjudication. Petitioner's continuing bare assertion that the prior Clark County
7 convictions were not adequately of record for the Clark County criminal adjudication – despite
8 the state court factual finding and record to the contrary – does not remotely justify appointing
9 federal habeas counsel to pursue a fool's errand.

10 Petitioner next maintains that the Court engaged in speculation when it stated the
11 following:

12 Fourth, even if this Court were to assume, *arguendo*, that
13 the state court record at the time of the habitual criminal
14 adjudication was deficient for lack of certified copies of the
15 judgments of conviction, Gaines indisputably cannot demonstrate
16 a reasonable probability that a contemporaneous objection by trial
17 counsel would have changed the outcome in the state
18 proceedings. The salient point here is that all of the prior
19 convictions were Nevada convictions from the same state district
20 court that was conducting the habitual criminal adjudication. The
21 situation thus was wholly unlike one involving prior out-of-state
22 convictions. With an out-of-state conviction, the State would have
23 been unable to immediately rectify any *arguendo* deficiency in the
24 proof of the convictions. In contrast, with Nevada convictions
25 from the Eighth Judicial District Court, the State would have
26 needed – if there were a deficiency in the first instance – only to
27 have the clerk of that court, with a deputy clerk available in the
28 courtroom, certify that the judgments of conviction were true and
authentic. Thus, even if there had been a defect in the technical
manner of proof of the convictions and a contemporaneous
challenge had been raised on that basis, the *arguendo* defect
would have been subject to immediate remediation by the State
– further assuming, *arguendo*, that the state district court did not
simply take judicial notice of its own prior suit records.

24 In this regard, petitioner urges that a contemporaneous
25 objection would have preserved a viable claim of error for appeal
26 that would have resulted in his sentence being vacated and a
27 remand for resentencing. Petitioner fails to apprehend the
28 practical focus of the *Strickland* prejudice inquiry. There is not a
reasonable probability that any such *arguendo* deficiency would
have survived to a direct appeal in the first place. Trial counsel
did not object to the prior convictions or their manner of proof at
the proceeding because there was absolutely no question that the

1 prior convictions existed and no question that the convictions
2 provided a valid basis for a habitual criminal adjudication. Any
3 identification of any purported technical deficiency in the State's
4 manner of presenting the prior convictions – from the very same
5 court and as to which there was no true question as to either their
6 existence or validity – simply would have resulted in immediate
7 remediation of the alleged technical deficiency. Petitioner's bare
8 speculation that an objection to the manner of proof would have
9 been ignored, in a situation involving prior convictions from the
10 same court subject to ready and immediate proof in that court,
11 and thereby lead to a viable appeal claim does not establish
12 prejudice under *Strickland*. An *arguendo* failure to raise an
13 essentially pointless technical objection capable of immediate
14 remediation does not constitute ineffective assistance of counsel
15 under the *Strickland* standard. The Sixth Amendment's
16 requirement of effective assistance of counsel instead is directed
17 to matters of substance that result in prejudice.

18 #46, at 18-20.

19 Petitioner urges that the Court's discussion was based upon speculation because the
20 judge was not mandated to sentence him as a habitual criminal. Petitioner thus necessarily
21 posits that if counsel had objected to the adequacy of the proof of the judgments of conviction
22 and the clerk then had certified copies of the judgments for the record, the same sentencing
23 judge that in fact adjudicated him a habitual criminal – relying on, *inter alia*, exactly the same
24 prior criminal history – then reasonably probably would have not adjudicated him a habitual
25 criminal. That is what petitioner must demonstrate to overturn the adjudication under
26 *Strickland*; and petitioner, not this Court, had the burden of proof on his claims. Petitioner's
27 bare supposition not only is based on unbridled speculation – it flies in the face of reality. The
28 *Strickland* prejudice standard is intended to eliminate precisely this sort of claim that has no
basis in remote possibility, much less reasonable probability.

29 **Ground 24**

30 In the portion of Ground 24 that remained,³ petitioner alleged that he was denied
31 effective assistance when trial counsel failed to request an instruction on the offense of
32 battery as a “theory of defense” instruction rather than requesting such an instruction as a
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34 ³Petitioner dismissed the claim of ineffective assistance of appellate counsel in federal Ground 24
35 after the Court held that the claim was unexhausted. See ## 38 & 41.

1 lesser included or related offense. Petitioner maintained that this would have allowed him to
2 argue a “theory of defense” that he committed only battery in a fight with the victim rather than
3 an attempted robbery, on the premise that he did not attempt to take the victim’s wallet. He
4 contended that had trial counsel requested the instruction as a “theory of defense” instruction,
5 the state supreme court would have reversed for a failure to give the instruction.

6 The Court is not persuaded by petitioner’s contention, yet again, that it misunderstood
7 petitioner’s claim. The Court understood the claim and properly denied it on deferential
8 review in extensive reasons. See #46, at 21-25.

9 Petitioner’s relies upon decisions from federal criminal cases regarding theory-of-
10 defense instructions. These decisions were not binding on the Supreme Court of Nevada
11 when it rejected petitioner’s claim. The state supreme court was bound neither by federal
12 appellate decisions nor by even Supreme Court decisions that applied non-constitutional law
13 in federal criminal proceedings, such as *Matthews v. United States*, 485 U.S. 58 (1988). Nor
14 was the state supreme court bound by circuit decisions decided under pre-AEDPA law, such
15 as *Conde v. Henry*, 198 F.3d 734 (9th Cir. 1999).

16 To the extent that Gaines disagrees with the state supreme court’s resolution of the
17 underlying Nevada state law issues, that, again, does not provide a basis for federal habeas
18 relief. The Supreme Court of Nevada is the final arbiter of Nevada state law, and if it rules
19 adversely to petitioner on an underlying state law issue, that is the end of that matter.
20 Petitioner contends that this Court should override the state supreme court’s construction of
21 N.R.S. 175.161(3) and instead apply the provision allegedly consistently with case law
22 regarding theory-of-defense instructions in federal criminal cases. That is a losing argument.
23 The state court’s ruling as to the application of N.R.S. 175.161(3) is the final word on that
24 matter.

25 Finally, once again, counsel’s alleged concessions years later at a state post-conviction
26 evidentiary hearing do not carry the day for petitioner on the claim. *Richter, supra*.

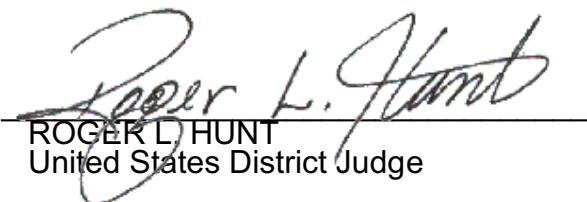
27 Following review of the present motion, the Court is even more firmly convinced that
28 petitioner’s claims were correctly rejected and that he presents no COA-worthy issue.

1 IT THEREFORE IS ORDERED that petitioner's motion (#48) to alter or amend
2 judgment is DENIED.

3 IT FURTHER IS ORDERED that, to the extent required in this procedural context, a
4 certificate of appealability is DENIED as to the denial of petitioner's motion for Rule 59 relief.
5 See also #46, at 25-29 (assigned reasons in the dismissal order for denying a certificate of
6 appealability).

7 DATED: April 1, 2014.

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ROGER L HUNT
United States District Judge