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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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9 RON BRADY, JR.,

10 Petitioner,

2:11-cv-00846-JCM-CWH

11 vs.

ORDER12 BRIAN E. WILLIAMS, *et al.*,

13 Respondents.

14 _____/

15

16 Introduction

17 This habeas corpus action is brought by Ron Brady, Jr., a Nevada prisoner serving prison
18 sentences after being convicted of soliciting the murder of Anthony Gross, Megan Pierson Foley, and
19 Jeremy Foley, witnesses in a high-profile Las Vegas murder case known as the “Titus-Ryan case.”
20 Brady’s federal habeas corpus petition is before the court on its merits. The court will deny the
21 petition, and will deny Brady a certificate of appealability.

22 Procedural History and Factual Background

23 On March 5, 2007, Brady was indicted in Clark County, Nevada, on three counts of
24 solicitation to commit murder. Exhibit 5.

25 Brady filed a pre-trial state habeas petition, in which he alleged that hearsay evidence was
26 improperly admitted in the grand jury proceedings, that the State failed to preserve certain evidence,

1 and that the State failed to disclose certain evidence. Exhibit 13.¹ After a hearing on June 12, 2007,
2 the state district court denied the petition. Exhibits 15, 16.

3 Before trial, Brady filed two motions to compel the production of exculpatory documents and
4 other discovery material. Exhibits 17, 18, 19, 20, 24, 26, 27. The court ordered the parties to
5 exchange discovery pursuant to statute, and granted, in part, the second motion to compel. Exhibits
6 18, 20, 36. Brady also filed motions in limine and motions to suppress evidence. Exhibits 25, 37,
7 39. The court denied those motions. Exhibits 1, 36, 48.

8 Brady's jury trial was conducted between January 28 and February 5, 2008. *See* Exhibit 1.
9 The first witness called by the prosecution was Robert Wilson, a Las Vegas Metropolitan Police
10 Department (LVMPD) detective. Exhibit 48, pp. 101-33. Detective Wilson testified that he and
11 Detective Dean O'Kelley investigated the Titus-Ryan case, in which well-known bodybuilders
12 Craig Titus and Kelly Ryan were charged with murdering their personal assistant, Melissa James. *Id.*
13 at 102-19. Detective Wilson testified that Anthony Gross, Megan Pierson Foley, and Jeremy Foley
14 were witnesses in that case. *Id.* at 110-14. Detective Wilson testified that, ultimately, he and
15 Detective O'Kelley also investigated Brady's solicitation of murder case. *Id.* at 119.

16 The next witness to testify was Rich Forbus, a lieutenant with LVMPD who worked
17 in the classification unit at the Clark County Detention Center (CCDC). Exhibit 48, pp. 135-89.
18 Lt. Forbus testified that an inmate named Deen Cassim was housed in housing unit 2-M from August
19 29, 2005, until June 19, 2006. *Id.* at 145-47. Lt. Forbus also testified that Brady, in jail on previous
20 criminal charges, was housed in housing unit 2-M, and had ample opportunity for contact with
21 Cassim, beginning on March 3, 2006. *Id.* at 147-51. Prior to being moved to housing unit 2-M,
22 according to Lt. Forbus, Brady had been housed in housing unit 7-B. *Id.* at 149. Lt. Forbus testified
23 that Craig Titus had also been housed in housing unit 7-B, and that Brady and Titus were housed
24 together in that unit from February 13 to March 3, 2006. *Id.* at 151-54.

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26 ¹ In this order, the exhibits referred to by exhibit number, in the form "Exhibit ____," are those
filed by respondents and found in the electronic record at ECF Nos. 20 through 27.

1 The prosecution then called Theresa Fragola as a witness.² Exhibit 48, pp. 190-217. Fragola
2 testified that she dated Brady in early 2006. *Id.* at 191-92. She testified that she was dating Brady in
3 April and May, 2006, when Brady was released from jail. *Id.* at 192. She testified that Brady talked
4 to her about his time in jail, and that he was particularly excited about befriending Titus. *Id.* Fragola
5 testified that Brady talked to her about the details of Titus' murder case. *Id.* Fragola testified that
6 Brady spoke to Titus on the telephone on a daily basis. *Id.* at 193-94. Fragola testified that Brady
7 also spoke with another CCDC prisoner on a regular basis, but she did not know that prisoner's
8 name and never spoke to him on the telephone. *Id.* at 194. Regarding Brady's telephone calls with
9 that prisoner, Fragola testified as follows:

10 Q. After the Defendant talked to that person – after the Defendant talked
11 to that other person that you never talked to, did the Defendant tell you what their
conversations were about?

12 A. Yes.

13 Q. What did he tell you?

14 A. He told me that he was helping him, I guess, get a list of people
15 together that was somewhat – I guess a witness to Craig Titus' case.

16 Q. Did he tell you why he was getting a list of people together?

17 A. Yes.

18 Q. What did he tell you?

19 A. He told me that they were going to hire somebody to have them killed.

20 Q. Initially when he said, getting together a list of people to have some
people killed, did you take him seriously?

21 A. Not at first.

22 Q. At first what did you think?

23 A. I just -- I don't know. I thought I just -- I didn't take it seriously. I
24 didn't believe it.

25
26 ² Fragola's name is spelled in different manners in the record (in the transcript of the trial, for
example, it is spelled "Fragol" (*see* Exhibit 48, p. 190)). The court adopts the spelling used by Brady
in his habeas petition and the respondents in their answer.

1 Q. At some point did something happen that made you take it seriously?

2 A. Well, his -- yeah. He became more uptight and tense. And he even --
3 it became serious when he threatened me if I told anybody he would kill me.

4 Q. He tells you we're going to eliminate these witnesses. You see his
5 body language, he demeanor, things like that start to change?

6 A. Yes.

7 Q. At some point he makes a statement to you that if you tell anybody,
8 what's going to happen to you?

9 A. I'll be next on the list. I'll be killed.

10 Q. Did you take that seriously?

11 A. I did.

12 *Id.* at 194-96; *see also id.* at 203-04 (on cross-examination). Regarding Brady's relationship with
13 Titus, Fragola testified as follows:

14 Q. Can you describe for me how the Defendant was when he talked about
15 Craig Titus?

16 A. He talked about him like he glorified him.

17 Q. What do you mean?

18 A. Like he wanted to almost be like him maybe. Like he -- it was bizarre.
19 He was obsessed with him, I think.

20 *Id.* at 196; *see also* Exhibit 51, pp. 27-28 (testimony of Detective O'Kelley); Exhibit 52, pp. 104-06,
21 145-49 (Brady's testimony). Fragola testified that she went with Brady to a meeting with a woman,
22 and Brady gave the woman an envelope. Exhibit 48, pp. 197-202.

23 On his cross-examination of Fragola, defense counsel questioned Fragola as follows
24 regarding domestic violence between Fragola and Brady:

25 Q. Isn't it true that Mr. Brady had you arrested for hitting him over the
26 head with a bottle?

A. That's what he said, yes. He did have me arrested for that.

Q. You actually went to jail for that, didn't you?

A. I did.

1 Q. And you were actually convicted of domestic battery against
Mr. Brady, weren't you?

2 A. Yes, but they cleared it. It just got cleared a couple months ago.
3 I didn't have to attend any domestic classes or anything.

4 Q. You don't hold that against him, do you?

5 A. No. I mean -- I didn't -- I don't have it on my record.

6 THE COURT: Let her finish her answer.

7 BY MR. SCHWARZ [defense counsel]:

8 Q. If you didn't hold that against him, that he had you arrested?

9 A. Well, at the time, yeah, I was angry. Yeah, it was couple years back.
10 At that point I was angry about that, but that was three years ago.

11 Q. When did you get out of custody?

12 A. I was only in jail like 6 days.

13 Q. When was that?

14 A. That was in 2005, maybe.

15 Q. You weren't in custody as a result of that allegation as recently as 6
months ago?

16 A. Yes, because I had a warrant for it. And then I went back in and I did
17 6 days, maybe, a little over a week. Then I went to court and they cleared it.

18 Q. Did you hit him over the head with a bottle?

19 A. No.

20 Q. So he lied about it?

21 A. Yes.

22 Q. Got you arrested for domestic battery?

23 A. Yes.

24 Q. And you were upset?

25 A. Yes, at the time. That was 3 years ago.

26 *Id.* at 206-07. On his redirect examination, the prosecutor questioned Fragola as follows, regarding
the domestic violence between her and Brady:

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Q. Just so we're clear, is it your testimony that you're not here making something up against this guy because you are mad he got you arrested?

A. Right. That's not why I'm here.

Q. You understand you're under oath?

A. Yes.

Q. Did anyone ever tell you what you needed to say today?

A. No.

Q. Is it your testimony that what you just testified to is in fact the truth?

A. Yes.

Q. About the things that he said to you?

A. Yes.

Q. I want to ask you about the things he did to you. Mr. Schwarz asked you about when the allegation was made that you hit him over the head with a bottle. Remember that?

A. Yes.

Q. Would you characterize your relationship as one where a lot of drugs were used?

A. Yes.

Q. Did both of you use drugs?

A. Yes.

Q. Have you gone through treatment for that?

* * *

A. No. I just quit.

* * *

Q. Prior to March 2007, when you were in the relationship where you used drugs with the Defendant, would you characterize your relationship as violent?

A. Extremely.

Q. From your opinion of the relationship, who was the violent one in the relationship?

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A. Ron.

Q. Did Ron do anything to hurt you physically?

A. Yes.

Q. What did he do?

A. He beat me almost on a daily basis. He beat me with pipe wrenches, tire iron. He'd shock me until I was unconscious. He broke my neck. He broke my back. He ran me over with his father's vehicle, which broke my pelvis bone and my tailbone. He broke my nose. He blackened my eyes. He tied me up with duck tape and left me in a bathroom.

Q. Would you describe him as having, in your experience, a predisposition to violence?

A. Yes.

Q. Are any of those incidents you talked about documented?

A. Yes.

Q. Did you call the cops?

A. Yes.

Q. On September 14, 2004 did you call the police?

A. Yes.

Q. Did police come and see you at Desert Springs Hospital when you had cuts on your arms, bruises throughout your body, two black eyes and a swollen head?

A. Yes.

Q. Did you have to undergo medical procedures regarding the breaking of your arm and the breaking of your neck?

A. Yes.

Q. On November 10, 2005, did you call the police regarding a battery involving Mr. Brady?

A. Yes.

Q. Was that because he hit you with a closed fist to your head and upper body area?

A. Yes.

1 Q. Did doctors actually see you on that time and confirm both your nose
and your ribs were broken, in addition to the arm and neck you mentioned earlier?

2 A. Yes.

3
4 *Id.* at 207-11. The prosecutor then introduced into evidence a photograph that was taken for
5 purposes of a state-issued identification, which showed Fragola with a black eye that she testified
6 Brady gave her. *Id.* at 211-12. The prosecutor continued his redirect examination of Fragola:

7 Q. Defense asked you about whether or not you were convicted of a
8 domestic battery charge?

9 A. Yes.

10 Q. Was the Defendant ever convicted of anything like that?

11 A. Yes.

12 Q. In fact, at that time he was in jail when he met Craig Titus and Deen
Cassim what was he in jail for?

13 A. I believe at the time it was when my neck was broken.

14 Q. Did he plead guilty to that?

15 A. He did.

16 *Id.* at 212. On his re-cross examination of Fragola, defense counsel questioned her further about the
17 domestic violence between her and Brady:

18 Q. Okay, Ms. Fragol[a], you'll have to forgive me, my client broke your
19 neck?

20 A. Yes.

21 Q. And he was convicted of a misdemeanor domestic battery?

22 A. Yes.

23 Q. Okay. All right. That's great. Now you told Mr. Tomscheck [the
prosecutor] all this stuff he did, you know, that my client -- let me ask you this. He
24 broke your neck, right?

25 A. Yes.

26 Q. He broke your arm?

A. Yes.

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Q. He broke your back?

A. Yes.

Q. And were you ever treated for any of those injuries?

A. Yes.

Q. Do you have any medical records to show that your back --

A. Not on me, no. But the hospital and the police officers have them.

Q. You told Mr. Tomscheck, yes, where you went to the hospital, right?

A. Yes.

Q. If there were medical records or x-rays to show that you had broken bones, they could have been provided, yes?

A. I don't know. I'm not in charge of doing that. I'm sure they could have been.

Q. Now, was my client ever convicted of domestic battery?

A. On me or other people?

Q. On you?

A. Well, he pleaded guilty to breaking my neck, I don't know.

Q. A misdemeanor?

A. And what is your question, so that would be, yes.

Q. My question is was he threatened with any felony crime as a result of any of these allegations that you're making, to the best of your knowledge?

THE COURT: Charged with?

MR. SCHWARZ: Yes.

THE WITNESS: He got arrested on them. I don't know if they ever went through to anything or if he got off.

* * *

Q. And to the best of your knowledge he was convicted of a domestic battery misdemeanor not a felony?

A. I suppose so. I don't know.

Q. For breaking your neck?

1 A. I guess, yes.

2 *Id.* at 213-15. On his further re-direct examination of Fragola, the prosecutor questioned her as
3 follows:

4 Q. You're talking about what he was ultimately convicted of, right?

5 A. Yes.

6 Q. Would you agree with me that at some point you didn't want to testify
7 against him?

8 A. Yes.

9 Q. Why?

10 A. Because he said he would kill me.

11 Q. When he was in custody on that charge that he pled guilty to a
12 misdemeanor on are you aware that he was in fact arrested and charged with battery
with a deadly weapon with substantial bodily harm?

13 A. Yes.

14 Q. That's a felony, isn't it?

15 A. Yes.

16 Q. And he [copped] a plea to a misdemeanor?

17 A. yes.

18 Q. And part of the reason he got that plea is because you didn't want to
show up to court?

19 A. Yes.

20 Q. You had a temporary protective order against him, right?

21 A. Yes.

22 Q. You didn't want him near you?

23 A. Yes.

24 *Id.* at 215-16. On further cross-examination, defense counsel questioned Fragola as follows:

25 Q. ... Isn't it true that the reason you agreed to the deal and didn't want to
26 come testify is because you knew that my client had medical proof documenting you
didn't have any fractures?

1 A. No. And I have the x-rays at home.

2 * * *

3 Q. ... You don't harbor any animosity towards my client, do you?

4 A. No. I'm pretty much better on with my life now.

5 *Id.* at 217.

6 The day after Fragola testified, the defense filed a document entitled "Supplement
7 Discovery." Exhibit 49. That document included material that defense counsel stated was received
8 from Brady's family on the evening after Fragola testified, and that defense counsel alleged had not
9 been disclosed by the prosecution. *See* Exhibit 49, p. 1; *see also* Exhibit 50, pp. 7-8. Defense
10 counsel stated that if he had those documents before, he would have been able to use them to
11 impeach Fragola. Exhibit 50, pp. 7-8. Defense counsel requested that the State be required to re-call
12 Fragola, or that he be provided contact information so that he could call her during the defense case
13 in chief. *Id.* at 8-16. The court denied that request. *Id.* at 16-21.

14 The State's next witness was Deen Cassim. Exhibit 48, pp. 218-51; Exhibit 50, pp. 27-127.
15 Cassim testified that he was from England, that he was in Las Vegas mostly to play poker, and that
16 in Las Vegas he was arrested and charged with various crimes. *Id.* at 217-19. Ultimately, he pled
17 guilty to conspiracy to commit robbery, attempted robbery, and attempted kidnapping. *Id.* at 217-20.
18 After he pled guilty to those charges, he was housed at CCDC, where he was, in August 2005, placed
19 in housing unit 2-M. *Id.* at 221. In March 2006, Cassim met Brady in housing unit 2-M. *Id.* at 224-
20 25. Cassim testified that, at some point, Brady began talking about the Titus-Ryan case, and about
21 potential witnesses in that case. *Id.* at 227-28. Cassim testified:

22 Q. At some point does he [Brady] talk to you about a way you can help
23 him out?

24 A. Yes.

25 Q. What does he talk to you about?

26 A. Arranging for one of -- at that point one of the witnesses, to basically
not to testify. To, you know, kill him, or whack him, I guess was the word at that
point.

1 *Id.* at 228-29. Cassim testified that at first he believed Brady might be a police officer, but
2 eventually began to believe that he was not. *Id.* at 229-31. Cassim testified that he talked to Brady
3 about eliminating the witnesses, but that he was never really going to facilitate someone getting
4 killed; rather, he was thinking about going to the police. *Id.* at 231. Cassim testified that he was
5 soon talking to Brady every day for several hours each day. *Id.* at 232. Cassim testified that he told
6 his attorney and his girlfriend about his conversations with Brady. *Id.* at 233-38. Cassim testified
7 that a few days after he met Brady he was sentenced, and he received a sentence of three and a half to
8 twelve years in prison. *Id.* at 238; *see also* Exhibit 50, p. 80. Cassim testified that he decided to tell
9 his attorney to talk in depth with the prosecutor on the Titus-Ryan case about his conversations with
10 Brady, and to tell him that he would possibly work with LVMPD on the case. Exhibit 48,
11 p. 239. Cassim testified that he then spoke again to his attorney about his conversations with Brady,
12 and provided detailed information that he had not seen in the news media. *Id.* at 239-41; *see*
13 *also* Exhibit 51, pp. 81-82 (testimony of Detective O’Kelley). Cassim then received visits from
14 Detectives O’Kelley and Wilson, on March 22 and 23, 2006. Exhibit 48, pp. 241-42. In his second
15 meeting with the detectives, he told them that it was Brady who had given him information about
16 wanting to kill witnesses in the Titus-Ryan case. *Id.* at 243. Cassim testified that he never received
17 any promise from anyone that he would receive anything in return for his help on the Titus-Ryan
18 case. *Id.* at 243-45. Cassim testified that he began to work with the LVMPD, with respect to
19 Brady’s solicitation of murder. *See id.* at 245-51. By this point, Brady had been released from jail,
20 and Cassim stayed in touch with Brady by telephone. *Id.* Detective Kelley would secretly monitor
21 telephone calls between Cassim and Brady; later, some phone calls were made on a system that
22 recorded them with the knowledge of both callers, and those calls, too, were monitored by the
23 detectives. *Id.*; *see also* Exhibit 50, pp. 113-14, 123-24. Cassim testified that he and Brady agreed
24 upon code that they would use to discuss the witnesses in the Titus-Ryan case, and the plan to kill
25 them. Exhibit 48, pp. 245-47; *see also* Exhibit 50, p. 168 (testimony of Detective O’Kelley). The
26 telephone conversations between Cassim and Brady continued, almost daily, with the two discussing

1 details of the plan to kill Gross, Pierson Foley, and Foley, and with the detective listening in on those
2 conversations and with some of them recorded. Exhibit 50, pp. 28-32. Cassim and Brady had
3 hundreds of such telephone conversations. *Id.* at 118. In the course of those discussions, Cassim
4 and Brady arranged for Brady to meet with associates of Cassim -- a person referred to as "Edison,"
5 and a girlfriend or ex-girlfriend -- to deliver payment for the murders as well as information
6 identifying the witnesses to be killed. *Id.* at 32-36. Brady did not show up for the first three
7 arranged meetings, and Cassim believed that he lied about why he did not show up. *Id.* at 36-44.
8 After Brady did not show up for the third arranged meeting, Cassim called Brady and expressed
9 anger about his failures to show up. *Id.* at 45. The prosecution then asked Cassim about times when
10 Cassim suggested to Brady that he didn't have to go through with the hired killings or that there
11 might be alternative courses of action:

12 Q. As part of -- when you're playing the part, do you periodically
13 throughout these phone calls suggest to him that he doesn't have to go through with
this?

14 A. Yes.

15 Q. Do you suggest another alternative if he wants to get the job done?

16 A. Yes.

17 Q. What do you tell him he can do?

18 A. The first time I said we don't have to kill him. We can just let my
19 people from LA talk to them, maybe just pay them some money not to turn up in
court. Just -- because he said they were drug addicts, or, you know, druggies or
something.

20 Q. You give him an option of --

21 A. Not to kill them.

22 Q. What's his response to that?

23 A. No. It has to be a permanent vacation.

24 Q. At some point do you suggest someone other than yourself facilitating
25 them being killed?

26 A. Yes. I said I want to pull out of the deal. Fred is not going to deal
with you. Edison is not going to deal with you. The deal is done. I think you should

1 go to -- you know, cost you \$5,000 go to some gangsters in downtown Las Vegas and
2 something and have them do the job. It would be a lot easier for you, because dealing
with me is a lot more money.

3 Q. What was his response to that?

4 A. No, I want you to do the job, because I know it will be done
5 professionally. Doing it the other way, it wouldn't be done. The bodies would be
found.

6 Q. There had been some communication between the two of you that he
7 didn't want the bodies found?

8 A. Right.

9 * * *

10 Q. You talked to him immediately before the scheduled meeting?

11 A. Yes.

12 Q. During that conversation, did you give him options in lieu of showing
up for the meeting?

13 A. Yes.

14 Q. What did you tell him?

15 A. I told him basically about the credibility with my girlfriend. I didn't
16 want him to let her down. If he didn't have the money, be honest with me. It's okay.
I'm a cool guy. You don't have to lie to me anymore. Be honest.

17 If you don't have the money or you're scared to turn up, tell me now. You
18 don't have to turn up if you're not going to. I would rather let her know not to be
there, then be there and him not turn up.

19 Q. What was his response to that?

20 A. No, I'm turning up. I'm on my way now.

21 *Id.* at 45-49; *see also id.* at 115-20; *see also* Exhibit 51, pp. 11-16 (testimony of Detective O'Kelley).

22 After Brady's third failure to show up for the arranged meeting, Cassim gave Brady thirty days, until

23 May 18, 2006, to follow through with the plan. Exhibit 50, p. 51. They then arranged a fourth

24 meeting, on May 17, 2006. *Id.* at 53. Brady was then to meet with Cassim's girlfriend -- actually

25 undercover police officer Yasenia Yatomi -- and provide her with \$1000 in cash and identifying

26 information regarding the people to be killed. *Id.* at 54-55. That meeting did take place. *Id.* at 55-

1 57. During the meeting, Cassim was on the telephone with Brady, and Detective O'Kelley was
2 secretly monitoring the call. *Id.* Brady delivered \$500 of the agreed-upon \$1000. *Id.* There was
3 then another meeting set for two days later, May 19, 2006, and at that second meeting, again with
4 Cassim on the telephone and Detective O'Kelley secretly monitoring the call, Brady delivered
5 another \$500 to the woman purporting to be Cassim's girlfriend. *Id.* at 57-58. After those
6 meetings, according to Cassim's testimony, Cassim spoke on the telephone twice with Brady about
7 why the killings had not been done:

8 Q. Do you call him and communicate with him about whether or not it
9 has been done?

10 A. Yes.

11 Q. What do you tell him?

12 A. That it hasn't -- it hasn't been done. Fred wants to do all three the
13 same day, because soon -- if he did just one, then within 24 hours or so homicide
14 would know what's going on or assume that something is going on. Because if it was
15 a chance that Anthony Gross was found murdered, then immediately people would be
16 put into protective custody. So I said Fred wants to do all three the same day. He
17 wants to come in from LA and do the job and leave and get out.

18 * * *

19 Q. After that point in time do you then contact him again and
20 communicate a reason Fred hasn't yet carried out the hit?

21 A. Yes.

22 Q. What is that reason?

23 A. That he couldn't -- one's not the problem. He can get to one.

24 Two and three, he can't -- he can get to two and three, but two and three have
25 family around them a lot of times. So he wants to do two and three without any
26 witnesses. he can't do two and three with people around, so he hasn't don't it as yet.

Q. Do you explain to the Defendant that in this scenario Fred found
himself in, if he killed the people that were paid for to be killed he would have to kill
the witnesses as well?

A. Right.

Q. Did you explain that he'd actually have to kill six people?

1 50, pp. 160-72. Detective Kelley went on to explain how he could listen in on telephone calls
2 between Cassim and Brady, and about how some such telephone calls could be recorded. *Id.* at
3 169-72. Detective O'Kelley testified concerning the substance of several calls between Brady and
4 Cassim, between Brady and Titus, and between Brady and members of his family. *Id.* at 172-77;
5 Exhibit 51, pp. 5-60. For example:

6 Q. Is there talk between the Defendant and Deen Cassim about how the
7 hit is to be paid for?

8 A. Yes.

9 * * *

10 Q. Is there talk about how Edison is going to identify the people who are
11 to be killed?

12 A. Yes.

13 Q. How is he going to do that?

14 A. That Mr. Cassim told -- had a conversation with Mr. Brady about
15 placing a picture of Mr. Gross -- or Anthony -- and information related to him. Also
16 information related to his hang-outs -- where he hangs out.

17 Q. Identifying information and photographs?

18 A. Yes.

19 * * *

20 Q. After the first missed meeting in a monitored conversation between
21 Deen Cassim and the Defendant is there conversations about whether or not they were
22 going to continue to go through with it?

23 A. Yes.

24 Q. What does the Defendant say?

25 A. That he wanted to still get the job done. To get it done.

26 * * *

Q. During that call there is a conversation about a couple of different
topics, would you agree?

A. Yes.

Q. One of which is pictures?

1 A. Right.

2 Q. Do you have an understanding of what is meant by the conversation
3 regarding pictures?

4 A. Yes.

5 Q. What is that?

6 A. Photographs of the intended targets of the murder for hire.

7 Q. After the job is done?

8 A. Excuse me -- there was an agreement between Mr. Brady and
9 Mr. Cassim that a photograph would be taken at least of what would eventually be
10 number 1, Anthony Gross. And that would then be provided later to him as evidence
11 that the killing had taken place.

12 Q. Was it to be provided to anyone else as evidence that the killing had
13 taken place?

14 A. There was a suggestion that even in that call that Mr. Titus would be
15 provided one of those pictures, but Mr. Brady said both of those pictures should go to
16 him.

17 Exhibit 50, pp. 175-77; Exhibit 51, pp. 7, 39-40. Detective O'Kelley testified about the arranged
18 meetings between Brady and undercover agents that Brady did not show up for. Exhibit 51,
19 pp. 5-11, 16-21. And, detective O'Kelley also testified about listening in when Cassim and Brady
20 were on the telephone during the two meetings between Brady and the undercover agent that
21 occurred on May 17 and 19, 2006. Exhibit 51, pp. 43-49. Detective O'Kelley testified about a
22 telephone call between Brady and Titus on the afternoon of May 17, 2006, after Brady's first meeting
23 with the undercover agent:

24 Q. Obviously, it's your position that the intent is to eliminate witnesses in
25 the Craig Titus trial?

26 A. Yes.

Q. Does the Defendant have a conversation with Craig Titus on the
afternoon of the 17th of May after the meeting in which he discusses how what he's
done is going to effect Craig Titus' case?

A. Yes, he did.

1 Q. What did he say?

2 A. He said what he had done today was going to make sure that he got out
3 in July.

4 Exhibit 51, p. 46. Detective O'Kelley also testified about a telephone call between Brady and Titus
5 on May 20, 2006, the day after Brady's second meeting with the undercover agent:

6 Q. That call is made the day after the second drop is made?

7 A. Yes.

8 Q. At that time the Defendant believes, by talking to Deen Cassim,
9 witnesses are going to be eliminated?

10 A. Yes.

11 Q. After the second drop is complete the understanding at that point
12 between Deen Cassim and the Defendant is the job is going to be completed, correct?

12 A. Yes.

13 *Id.* at 50-51. Detective O'Kelley also testified regarding a recorded telephone call made by Brady to
14 his sister, Kim Brady, from jail, the day after he was arrested:

15 Q. Did you hear when Kim Brady asked the Defendant, is this a strong
16 case against you?

17 A. Yes.

18 Q. What is the Defendant's response?

19 A. Oh, yeah, it's strong.

20 Q. Does he say anything about the nature of the charges?

21 A. He said it's just solicitation.

22 *Id.* at 60.

23 The State rested its case (Exhibit 52, p. 84), the defense case began, and Brady testified.

24 Exhibit 52, pp. 104-213. Brady testified about meeting Titus in jail. *Id.* at 104-06 ("It's kind of
25 awesome that Craig Titus from body building magazines was in our module.... He's really an
26 interesting guy to meet.... He's cool."). Brady testified that he and Titus formulated a plan to

1 discredit witnesses against Titus by having them arrested for narcotics offenses. *Id.* at 107-09, 114.
2 Brady testified that he was then moved to housing unit 2-M, where he met Cassim, and spoke with
3 him about the Titus-Ryan case. *Id.* at 109-13. He testified that Cassim offered to help with the plan
4 to discredit witnesses, or to pay witnesses to not testify. *Id.* at 114-18. Brady testified about the calls
5 he received from Cassim after he was released from jail, and the meetings arranged with Cassim's
6 associates, claiming that the plan between them at that point, and their aim in their calls and the
7 meetings, was to pay witnesses to not testify in the Titus-Ryan case. *Id.* at 119-35. Brady testified
8 that he did not show up for the first three arranged meetings because by then he did not want to be
9 involved in the plan anymore. *Id.* at 122-28. Brady testified that he felt threatened by Cassim, and
10 was afraid to pull out of their plan to pay witnesses to not testify. *Id.* at 127-28. Brady testified that
11 the plan he had with Cassim was never to kill anyone. *Id.* at 131. He testified: "If this guy once
12 mentioned killing or harming, I would have gone straight to the police." *Id.* Brady testified that in a
13 statement he gave after his arrest, he acknowledged that he knew that Cassim was talking about
14 murdering witnesses in the Titus-Ryan case, and he attempted to explain that as follows:

15 Q. And during the recorded part of the conversation you do acknowledge,
16 do you not, that you knew that Cassim was talking about murdering these people?

17 A. After they told me that Deen Cassim said that, yeah. They were so
18 adamant about us talking about it that I said, okay. All right. That's what we're
19 talking about. Right. That's what we're talking about.

19 I mean I tried to tell them we were never discussing murder because if I had
20 known we were discussing murder, I would have come forward so fast with my
21 family 'cause I thought my family was in harm's way that I would have come forward
22 to the police and told them, this guy is, something's going on with this guy.

21 *Id.* at 140-41.

22 The next witness called by the defense was Virgil Smartwood, a corrections sergeant at
23 CCDC. Exhibit 52, pp. 213-22. Sgt. Smartwood testified about Brady's housing in isolation at
24 CCDC after he was arrested for solicitation of murder, and about inquiries he made about whether
25 there was a reason Brady should stay in such a housing classification. *Id.*

26 Next, the defense called as a witness Thomas Bachman, a narcotics detective with LVMPD.

1 Exhibit 52, pp. 223-42. Detective Bachman testified about Brady contacting LVMPD and seeking to
2 provide information to LVMPD about narcotics crimes. *Id.* Detective Bachman testified that on one
3 occasion Brady attempted to provide LVMPD information regarding an individual involved in the
4 Titus-Ryan case. *Id.* at 228-29, 238-39. He testified that nothing ever came of that, that the
5 information was generally not useful, and that Brady was “[v]ery very unreliable.” *Id.* at 228-29,
6 240-41. Detective Bachman testified about a report he prepared regarding his contacts with Brady.
7 *Id.* at 229-31.

8 The defense then called as a witness Brady’s father, Ronald Brady, Sr. Exhibit 52, pp. 243-
9 89. He testified about telephone calls between him and Cassim. *Id.* at 243-59, 285-87. The defense
10 then rested its case. *Id.* at 289-90.

11 The prosecution, in its rebuttal case, recalled Detective O’Kelley to the stand. Exhibit 54, pp.
12 15-25. Detective O’Kelley then testified about telephone conversations between Brady and his
13 father in which Ronald Brady, Sr., discussed possibilities for them to profit financially from Brady’s
14 case, either by book or movie deals, or by prosecuting a malicious prosecution action. *Id.* at 15-18.
15 Detective O’Kelley also testified about telephone conversations between Brady and his father in
16 which they discussed possible defenses in Brady’s case, including the argument that Brady was only
17 trying to discredit witnesses in the Titus-Ryan case, not have them killed. *Id.* at 18-21. Detective
18 O’Kelley’s testimony concluded the presentation of evidence at the trial. *Id.* at 25.

19 The court then gave the jury instructions, including instructions regarding the defense of
20 entrapment. *Id.* at 26-39.

21 In his closing argument, defense counsel primarily argued that the defendant had been
22 entrapped. *Id.* at 71-97.

23 On February 5, 2008, the jury returned its verdicts, finding Brady guilty of three counts of
24 solicitation to commit murder. Exhibit 55.

25
26 Following the verdict, Brady litigated motions seeking orders compelling production of

1 documents regarding Fragola, and the court granted those orders. Exhibits 57, 58, 60, 61, 62, 63, 64,
2 65, 66. On May 29, 2008, Brady filed a motion for mistrial or, in the alternative, for new trial.
3 Exhibit 67, 69, 71, 72, 73. That motion was based, in part, on Brady's discovery of information that
4 he contends refutes Fragola's testimony about the injuries Brady inflicted upon her. *Id.* The motion
5 was denied on July 24, 2008. Exhibit 77. On August 15, 2008, Brady filed, in the Nevada Supreme
6 Court, an application for writ of prohibition, or, in the alternative, writ of mandamus together with a
7 motion for stay of proceedings in the district court. Exhibits 79, 80, 81. The petition and motion for
8 stay were denied by the Nevada Supreme Court on August 15, 2008. Exhibit 82.

9 On September 2, 2008, a judgment of conviction was entered, adjudging Brady guilty of
10 three counts of solicitation to commit murder, and sentencing him as follows: on the first count,
11 48 to 150 months in prison; on the second count, 48 to 150 months in prison, to run concurrent to the
12 sentence on count one; on count three, 48 to 150 months in prison, to run consecutive to the
13 sentences on counts one and two. Exhibit 83.

14 Brady appealed. Exhibit 85. On appeal, Brady asserted: that the police used an informant to
15 illegally listen to his telephone conversations without a warrant; that the State failed to collect and
16 preserve exculpatory evidence; that the State violated the rule of *Brady v. Maryland*, 373 U.S. 83
17 (1963), by failing to provide impeachment evidence to the defense; and that there was juror
18 misconduct. In an Order of Affirmance entered on March 1, 2010, the Nevada Supreme Court
19 affirmed the judgment of the district court. Exhibit 112. Brady petitioned the Nevada Supreme
20 Court for a rehearing. Exhibit 113. That petition was denied. Exhibit 114. The Nevada Supreme
21 Court issued its remittitur on May 25, 2010. Exhibit 115.

22 On May 24, 2011, Brady filed, in this court, a petition for writ of habeas corpus pursuant to
23 28 U.S.C. § 2254 (ECF No. 1).

24

25

26

Respondents filed a motion to dismiss (ECF No. 19). On September 11, 2012, the court

1 granted that motion in part and denied it in part (ECF No. 30). The court dismissed ground I of
2 Brady's petition; the court denied the motion to dismiss with respect to ground II.

3 On October 30, 2012, respondents filed an answer (ECF No. 35), responding to the remaining
4 claim in Brady's petition, ground II. On November 30, 2012, Brady filed a reply
5 (ECF No. 40).

6 Brady's habeas petition is now before the court with respect to the merits of ground II, the
7 one claim remaining in the petition.

8 Standard of Review

9 Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254
10 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. *See Lindh v.*
11 *Murphy*, 521 U.S. 320, 336 (1997); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir.2000),
12 overruled on other grounds by *Lockyer v. Andrade*, 538 U.S. 63 (2003). 28 U.S.C. § 2254(d) sets
13 forth the primary standard of review under AEDPA:

14 An application for a writ of habeas corpus on behalf of a person in custody
15 pursuant to the judgment of a State court shall not be granted with respect to any
16 claim that was adjudicated on the merits in State court proceedings unless the
17 adjudication of the claim --

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

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

23 28 U.S.C. § 2254(d).

24 A state court decision is contrary to clearly established Supreme Court precedent, within the
25 meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set
26 forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially
indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result
different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)
(quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694

1 (2002)).

2 A state court decision is an unreasonable application of clearly established Supreme Court
3 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
4 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
5 principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S.
6 at 413). The “unreasonable application” clause requires the state court decision to be more than
7 incorrect or erroneous; the state court’s application of clearly established law must be objectively
8 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

9 The Supreme Court has further instructed that “[a] state court’s determination that a claim
10 lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
11 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786
12 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated
13 “that even a strong case for relief does not mean the state court’s contrary conclusion was
14 unreasonable.” *Id.* (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, __ U.S. __, 131
15 S.Ct. 1388, 1398 (2011) (describing the AEDPA standard as “a difficult to meet and highly
16 deferential standard for evaluating state-court rulings, which demands that state-court decisions be
17 given the benefit of the doubt” (internal quotation marks and citations omitted)).

18 The state court’s “last reasoned decision” is the ruling subject to section 2254(d) review.
19 *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). If the last reasoned state-court decision
20 adopts or substantially incorporates the reasoning from a previous state-court decision, a federal
21 habeas court may consider both decisions to ascertain the state court’s reasoning. *See Edwards v.*
22 *Lamarque*, 475 F.3d 1121, 1126 (9th Cir.2007) (en banc).

23 If the state supreme court denies a claim but provides no explanation for its ruling, the federal
24 court still affords the ruling the deference mandated by section 2254(d); in such a case, the
25
26 petitioner is entitled to federal habeas corpus relief only if “there was no reasonable basis for the

1 state court to deny relief.” *Harrington*, 131 S.Ct. at 784.

2 Analysis

3 In ground II of his habeas petition, Brady claims that the State violated his federal
4 constitutional rights, as delineated in *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing to
5 the defense information that could have been used to impeach Fragola’s testimony regarding injuries
6 Brady inflicted upon her. Petition for Writ of Habeas Corpus (ECF No. 1), pp. 6-7; *see also*
7 Memorandum in Support of Federal Habeas Corpus Relief (ECF No. 1), pp. 3-6, 56-82.

8 In *Brady*, the Supreme Court held that “[t]he suppression by the prosecution of evidence
9 favorable to an accused upon request violates due process where the evidence is material either to
10 guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373
11 U.S. at 87. *Brady* violations have three components: “The evidence at issue must be favorable to the
12 accused, either because it is exculpatory, or because it is impeaching; that evidence must have been
13 suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler*
14 *v. Greene*, 527 U.S. 263, 281-82 (1999). “The terms ‘material’ and ‘prejudicial’ are used
15 interchangeably in *Brady* cases.” *Benn v. Lambert*, 283 F.3d 1040, 1053 n.9 (9th Cir.2002)
16 (“Evidence is not ‘material’ unless it is ‘prejudicial,’ and not ‘prejudicial’ unless it is ‘material.’
17 Thus, for *Brady* purposes, the two terms have come to have the same meaning.”). Evidence is
18 material under *Brady* “when there is a reasonable probability that, had the evidence been disclosed,
19 the result of the proceeding would have been different.” *Cone v. Bell*, 556 U.S. 449, 469-70 (2009)
20 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

21 At trial, the day after Fragola testified, Brady’s counsel informed the trial court that he had
22 obtained, from Brady’s family, medical records and other documents that he believed he could have
23 used to impeach Fragola if he had been aware of them sooner, and he requested that Fragola be
24 recalled to the witness stand. In ruling on this matter, the trial court noted that the prosecution, on
25 direct examination of Fragola, did not inquire about domestic violence between Fragola and Brady.
26 Exhibit 50, pp. 16-17. The court stated: “For that reason I don’t think all that other stuff becomes

1 discovery in this case.” *Id.* The court went on to observe that, when the defense inquired, on
2 cross-examination, into the matter of the domestic violence between Fragola and Brady, that “does
3 open the door up to contextual explanations of that domestic violence.” *Id.* at 17. The court also
4 stated about the documents brought in by defense counsel:

5 I will tell you in reviewing them I do see a lot of things that would be corroborative of
6 some stuff she would say. There’s reference made to fractures of the cervical area on
7 a hospital visit. Fractures in the lumbar area on a hospital visit. Bruises, swelling in
8 areas of the head, things of that nature.”

8 *Id.* at 18-19. The court stated further: “And we’re getting -- or would be getting, if I was allowing
9 you to recall Ms. Fragol[a] -- way far afield on collateral issues to start trying whether or not
10 Mr. Brady is guilty of domestic violence against her, and whether she’s guilty or innocen[t] of
11 domestic violence against him.” *Id.* at 19. The trial court concluded:

12 For purposes of this case, the issue was her credibility in testifying. I allowed
13 you to challenge that some by bringing out -- rightfully so -- she has some animosity
14 against him because she went to jail for domestic violence. And part and parcel to
15 that was this was a domestic violence relationship on both sides of the fence. And I
16 let the State bring that out, as well.

15 I think that it [was] detrimental to the State that she’s up there using terms like
16 broken back and broken neck, and no medical records were produced. Most people
17 are thinking you break your neck or your back, we’d be seeing a little something else
18 about it then her just making these allegations.

18 So, basically where it is now is that her credibility is challenged by some
19 allegations that she did something to him and he did something to her, and it was kept
20 within that confine. And I think that’s an appropriate confine to keep it under for this
21 trial without expanding this trial out to collateral issues and going through all these
22 other things.

21 And the other problem is the family knew she was going to be a witness. If
22 they wanted you to have this documentation that they were aware of, then they should
23 have provided it long before she took the stand and testified in the way she did
24 yesterday.

23 So the only reason to recall her would be to go into things that I don’t think
24 are appropriate to go into, because they’re collateral to the issues in this [trial]. So I’ll
25 deny the request to recall her.

25 *Id.* at 19-20.

26 Brady raised the *Brady* issue on his appeal to the Nevada Supreme Court, and that court ruled

1 as follows:

2 Brady also claims that the prosecution withheld evidence it could have used to
3 impeach a witness. Under *Brady v. Maryland*, 373 U.S. 32, 87 (1963), a prosecutor
4 must disclose evidence favorable to the defense if the evidence is material to either
5 guilt or punishment. *Lay v. State*, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000)
6 (citing *Jimenez v. State*, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)). In
7 addition to exculpatory evidence, due process requires disclosure of evidence that
8 provides grounds for the defense to impeach the credibility of the State's witnesses.
9 *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). However, "*Brady* does not
10 require the State to disclose evidence which is available to the defendant from other
11 sources, including diligent investigation by the defense." *Steese v. State*, 114 Nev.
12 479, 495, 960 P.2d 321, 331 (1998).

13 We conclude that this argument lacks merit under *Steese* because the evidence
14 Brady claims the State withheld was made available by the State and was available to
15 the defense through Brady's sister.

16 Order of Affirmance, Exhibit 112, p. 5.

17 This court finds that this ruling by the Nevada Supreme Court was not contrary to, or an
18 unreasonable application of *Brady*, or any other United States Supreme Court precedent. *See*
19 28 U.S.C. § 2254(d). And, the court further finds that the state courts' factual determinations -- that
20 the subject material was made available by the State and was available to the defense through
21 Brady's sister -- were not unreasonable in light of the evidence presented in the State court
22 proceedings. *See id.*

23 When the defense raised this issue in the trial court, the day after Fragola testified, defense
24 counsel filed the "Supplement Discovery" (Exhibit 49), which included documents he claimed were
25 improperly withheld by the prosecution, and he stated:

26 Last night about 7:00 o'clock the family members of my client provided me with
documents that would have -- had I had them or had I been aware of their existence --
would have allowed me to impeach Ms. Fragol[a].

Exhibit 50, p. 7-8. Plainly, that material was in the possession of Brady's family, or at least available
to his family, and Brady never made any showing in state court that he could not have obtained that
material before Fragola testified in the same manner that he obtained it on the evening after she
testified. *See id.*; *see also* State's Opposition to Defendant's Motion for Mistrial or, in the
Alternative, Motion for New Trial, Exhibit 70, pp 8-12. The Nevada Supreme Court reasonably

1 found that the subject material “was available to the defense through Brady’s sister.” Order of
2 Affirmance, Exhibit 112, p. 5.

3 Regarding the other basis articulated by the Nevada Supreme Court for its ruling, the
4 prosecution asserted in state court that it had made available to the defense, prior to trial, documents
5 that Brady claims were withheld:

6 The medical records had been in the State’s file prior to Trial. These medical records
7 were in the file at the time the State’s file was reviewed [on] two separate occasions
8 by the Defendant’s previous counsel, Erik Ferran, Esq. These medical records were
9 in the State’s file at the time the State’s file was reviewed on numerous occasions by
the defendant’s own father, Ron Brady, Sr. These medical records were in the State’s
file when the State’s file was reviewed by the Defendant’s current counsel, Michael
Schwarz, Esq.

10 State’s Opposition to Defendant’s Motion for Mistrial or, in the Alternative, Motion for New
11 Trial, Exhibit 70, p. 5. Brady contests that assertion, but Brady did not, in state court make any
12 evidentiary showing that would render the state courts’ factual determination unreasonable.
13 The state court reasonably found that the subject material “was made available by the State.”
14 Order of Affirmance, Exhibit 112, p. 5.

15 Furthermore, this court notes the trial court’s ruling that, for the most part, the subject
16 material would have been inadmissible as evidence at any rate. *See* Exhibit 50, pp. 19-20. In a
17 federal habeas corpus action, a federal court may not review a state court’s decisions on matters of
18 admissibility of evidence under state rules. *See Winzer v. Hall*, 494 F.3d 1192, 1198 (9th Cir.2007)
19 (“State court rulings on the admissibility of evidence generally fall outside the scope of federal
20 habeas relief, which is designed only to remedy violations of federal law.”); *see also Estelle v.*
21 *McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to reexamine
22 state-court determinations on state-law questions.”). To the extent that the state courts ruled the
23 subject material to be inadmissible at trial, that ruling is beyond the reach of this court.

24 The prosecution did not question Fragola at all, in the direct examination of her, regarding
25 domestic violence between her and Brady. *See* Exhibit 48, pp. 190-202 (direct examination of
26 Fragola). It was only on Fragola’s cross-examination, by defense counsel, that Fragola was first

1 asked any question about domestic violence. *See id.* at 202-07 (cross-examination of Fragola). The
2 prosecution’s questioning of Fragola on that subject occurred during her redirect examination. *See*
3 *id.* at 207-12, 215-16 (redirect and further redirect examination of Fragola). In short, the defense
4 raised the subject.

5 The reason why the defense raised the subject of domestic violence in cross-examining
6 Fragola was to attempt to impeach her by showing that she harbored animosity against Brady
7 because he had her arrested for hitting him over the head with a bottle, and she believed that
8 accusation to be untrue. *See* Exhibit 48, pp. 206-07; *see also* Exhibit 50, pp. 14-15 (defense counsel
9 commenting on why he raised the subject of domestic abuse in cross-examining Fragola, and
10 acknowledging that he “opened the door”).

11 In response, in the redirect examination of Fragola, the prosecution elicited testimony from
12 Fragola showing that Brady had inflicted injuries upon her. *See* Exhibit 48, pp. 207-12, 215-16.
13 It is that testimony that Brady claims could have been impeached had he had the subject documents
14 when she testified. However, this court has examined those documents, and determines that, even if
15 those documents had been available for defense counsel to use at trial, their impeachment value
16 would have been minimal. The medical records and the police reports in fact reflect that Brady did
17 injure Fragola in the course of their domestic violence. *See, e.g.*, “Supplement Discovery,” Exhibit
18 49; Exhibit B in Support of Defendant’s Motion for Mistrial or, in the Alternative, Motion for New
19 Trial, Exhibit 67; Supplemental Exhibits E and F in Support of Defendant’s Motion for Mistrial or,
20 in the Alternative, Motion for New Trial, Exhibit 69. Those records do not show Brady to have
21 never injured Fragola, and they do not show Fragola to have been wholly dishonest on the stand, in
22 her redirect examination, when she claimed he had. At most, those documents would have allowed
23 some opportunity for the defense to argue about the precise extent of Fragola’s injuries. But,
24 keeping in mind the reason why the defense opened the subject of the domestic violence between
25
26 Fragola and Brady, and the nature of the responsive questioning of Fragola by the prosecution, the

1 precise extent of Fragola's injuries was of no real importance.

2 Among the documents proffered by the defense as alleged undisclosed impeachment material
3 were a notarized letter and a handwritten letter in which Fragola purported to retract accusations that
4 Brady had battered her. *See* Exhibit 49. However, on Fragola's redirect examination, she testified as
5 follows:

6 Q. Would you agree with me that at some point you didn't want to testify
7 against him?

8 A. Yes.

9 Q. Why?

10 A. Because he said he would kill me.

11 Exhibit 48, p. 215. In light of this testimony, evidence that Fragola retracted accusations that Brady
12 had harmed her would likely have been explainable, and would likely have been explainable in a
13 manner that would have further undermined Brady's defense.

14 In sum, assuming for the purpose of analysis that the subject material would have been
15 admissible at trial to impeach Fragola's testimony in her redirect examination, this court concludes
16 that the material would have had minimal, if any, impeachment value, and certainly would not have
17 been such as to raise a reasonable probability of a different result at trial. *See Cone v. Bell*, 556 U.S.
18 449, 469-70 (2009) (Evidence is material under *Brady*, and its non-disclosure is prejudicial, "when
19 there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding
20 would have been different."). Even leaving aside, for purposes of analysis, the testimony of Fragola,
21 there was overwhelming evidence establishing Brady's guilt. Cassim, the jail inmate with whom
22 Brady plotted to kill witnesses, testified in detail about the plot and his communications with Brady
23 about it; a detective listened in on telephone discussions between Cassim and Brady and testified in
24 detail about those discussions; the detective also listened in on telephone discussions between Brady
25 and members of his family, as well as between Brady and Titus, regarding the plot, and testified
26 about those discussions; several incriminating telephone conversations were recorded and the
recordings were played for the jury; the undercover agent who twice met with Brady and received

1 money from him, as well as identifying information regarding witnesses to be killed, testified
2 regarding those meetings; the jury saw video of Brady meeting with the undercover agent, and
3 delivering to her money and identifying information regarding witnesses to be killed. Against the
4 backdrop of the strong evidence against him, Brady's testimony, that his discussions with Cassim did
5 not involve a plot to kill witnesses, was patently incredible. Brady's testimony was also, to some
6 extent, in conflict with the theory of his defense, which was that he was entrapped by the police and
7 their informant into committing the offense of solicitation to commit murder. And, at any rate, the
8 entrapment defense was thoroughly undermined by the evidence, primarily the strong evidence that
9 Brady had ample opportunity to withdraw from the solicitation of murder plot.

10 So, the evidence at trial overwhelmingly showed Brady to be guilty. What little the defense could
11 have done to impeach Fragola's testimony, with the material allegedly withheld by the prosecution,
12 would have had no effect on the trial. There is, in this court's view, no possibility that the material
13 allegedly withheld from the defense in violation of *Brady* could have altered the outcome of the trial.

14 In sum, this court finds that the state courts' denial of the claim asserted by Brady as
15 ground II of his federal habeas petition was not contrary to, or an unreasonable application of, clearly
16 established federal law, as determined by the Supreme Court of the United States, and the state
17 courts' ruling was not based on an unreasonable determination of the facts in light of the evidence
18 presented. *See* 28 U.S.C. § 2254(d). Brady does not show habeas relief to be warranted. The court
19 will deny Brady's habeas petition.

20 Certificate of Appealability

21 The standard for issuance of a certificate of appealability calls for a "substantial showing
22 of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court interpreted
23 28 U.S.C. §2253(c) as follows:

24 Where a district court has rejected the constitutional claims on the merits, the
25 showing required to satisfy §2253(c) is straightforward: The petitioner must
26 demonstrate that reasonable jurists would find the district court's assessment of the
constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79

1 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*,
2 537 U.S. 322 (2003). The Court stated in that case:

3 We do not require petitioner to prove, before the issuance of a COA, that some jurists
4 would grant the petition for habeas corpus. Indeed, a claim can be debatable even
5 though every jurist of reason might agree, after the COA has been granted and the
6 case has received full consideration, that petitioner will not prevail. As we stated in
7 *Slack*, “[w]here a district court has rejected the constitutional claims on the merits, the
8 showing required to satisfy § 2253(c) is straightforward: The petitioner must
9 demonstrate that reasonable jurists would find the district court’s assessment of the
10 constitutional claims debatable or wrong.”

11 *Miller-El*, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

12 The court has considered the Brady’s claim in ground II, with respect to whether it satisfies
13 the standard for issuance of a certificate of appeal, and the court determines that it does not. The
14 court will deny Brady a certificate of appealability.

15 **IT IS THEREFORE ORDERED** that the Petition for Writ of Habeas Corpus (ECF No. 1)
16 is **DENIED**.

17 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT**
18 **ACCORDINGLY**.

19 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of appealability.

20 Dated September 30, 2014.

21 
22 UNITED STATES DISTRICT JUDGE
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