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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JULIUS BRADFORD,

Petitioner,

v.

CALVIN JOHNSON, *et al.*,

Respondents.

Case No. 2:13-cv-01784-RFB-EJY

ORDER

I. Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Julius Bradford, an individual incarcerated at Nevada’s High Desert State Prison. Bradford is represented by appointed counsel. He is serving prison sentences that in their aggregate amount to life with the possibility of parole after forty years on convictions in Nevada’s Eighth Judicial District Court (Clark County) of murder with use of a deadly weapon and attempted robbery with use of a deadly weapon. Bradford’s second amended habeas petition is before the Court for adjudication of his claims on their merits. The Court held an evidentiary hearing relative to one of Bradford’s claims—Ground 2—and will grant Bradford relief on that claim. The Court will deny Bradford’s other claims, without prejudice, as moot.

II. Background

The following facts are as described in the Second Amended Petition:

.... On the morning of June 8, 2003, Benito Zambrano-Lopez was walking toward a grocery store near his house [in Las Vegas]. He had just over \$100 cash on him and he was wearing a watch. Tyrone Williams, a sixteen-year old, approached Mr. Zambrano-Lopez and started a fight. Two of Mr. Williams’ friends, Steven Perry, a seventeen-year old, and Mr.

1 Bradford, who had just turned eighteen, were walking nearby. At some
2 point, they both stepped in to assist Mr. Williams, who was losing the fight.
3 Soon afterward, Mr. Williams pulled out a gun and shot Mr. Zambrano-
4 Lopez four times. Mr. Bradford and Mr. Perry ran away immediately after
5 the first shot was fired, and Mr. Williams followed soon after. None of Mr.
6 Zambrano-Lopez's belongings, including the cash or his watch, were taken
7 from him. Mr. Zambrano-Lopez died the next day, and the state charged
8 Mr. Bradford with felony murder.

9 * * *

10 Only one eyewitness testified at trial. Tracy Jimenez testified that she
11 was walking down the street with her young daughter when she saw the
12 three men surround Mr. Zambrano-Lopez, hitting and kicking him. She said
13 that Mr. Zambrano-Lopez fought back to defend himself. She testified that
14 Mr. Williams then pulled out a gun and shot Mr. Zambrano-Lopez, while Mr.
15 Bradford and Mr. Perry immediately fled. At the preliminary hearing, Ms.
16 Jimenez testified she did not see the men try to take anything from Mr.
17 Zambrano-Lopez. At trial five years later, she testified that, after Mr.
18 Bradford had fled, Mr. Williams "pat[ted]" down Mr. Zambrano-Lopez's
19 body.

20 Two other state's witnesses provided equivocal testimony about
21 what they heard Mr. Williams and Mr. Perry say about the murder. Neither
22 testified that Mr. Bradford said anything about it. Chetique Vercher testified
23 that after the shooting, she was in the same house as Mr. Williams, Mr.
24 Perry, and Mr. Bradford. She testified that the crime was "supposed to be
25 robbery," but did not say that she actually heard anyone say that. She also
26 testified that she heard Mr. Perry say that Mr. Bradford had told Mr. Williams
27 to shoot Mr. Zambrano-Lopez. Nelson Rodgers, a friend of Mr. Bradford's,
28 testified he was in the house with Ms. Vercher and the others after the
shooting. Mr. Rodgers testified that he heard Mr. Perry and Mr. Williams talk
about a robbery, but that Mr. Bradford was not present during that
discussion.

.... [T]he state presented a recorded conversation between Mr.
Bradford and Ms. Vercher, which took place shortly before Mr. Bradford's
preliminary hearing. During the call, Mr. Bradford told Ms. Vercher to say
"nothing about the rees-obbery":

Look, come to court, right come to court, ah just tell them. Cuz,
don't say nothing about the rees-obbery, cuz. Don't say
nothing about that, cuz. All right. I am tell you cuz don't
because that's what they got me on. That's why they are trying
to stick me with the hezour.

Ms. Vercher testified that she understood Mr. Bradford was asking her not
to say anything about a robbery. Mr. Bradford testified that he told her not
to say anything about a robbery because there had, in fact, been no robbery,
and the state was trying to make the fight look like one. Mr. Bradford's
former counsel, Sean Sullivan, also testified at trial about the phone call,
after counsel convinced Mr. Bradford to waive the attorney-client privilege.
Mr. Sullivan testified that, just before Mr. Bradford's call to Ms. Vercher, he
met with Mr. Bradford and "broke down" the felony murder rule....

1 Ashton Parker, a jailhouse snitch who got a deal in exchange for his
2 testimony, testified about conversations he claimed he had with Mr.
3 Bradford while they were incarcerated in the same module. He testified that
4 Mr. Bradford admitted both that the crime was a robbery and that he
5 directed Mr. Williams to “smoke” Mr. Zambrano-Lopez. Mr. Parker also
6 testified that Mr. Bradford gave him a map to Ms. Vercher’s house, and
7 asked him to shoot into Ms. Vercher’s house to intimidate her. The state
8 admitted a copy of the map, and other evidence established that Mr.
9 Bradford’s fingerprints were on the map and that it matched his handwriting.

10 To counter the jailhouse informant’s allegations, the defense focused
11 on his incentive for lying — a plea deal with the state involving a closed
12 conviction....

13 Although Mr. Bradford confirmed [in his testimony at trial] that
14 neither he nor the other two men tried to rob Mr. Zambrano-Lopez, and
15 testified that he had no idea Mr. Williams intended to shoot Mr. Zambrano-
16 Lopez, his testimony on collateral issues left the jury with the impression
17 that Mr. Bradford was the type of man who deserved to go to prison.

18 Trial counsel elicited an admission that Mr. Bradford had drawn
19 the map and given it to Mr. Parker. While he denied the map actually
20 directed Mr. Parker to Ms. Vercher’s house, her address was written on it.
21 Likewise, while Mr. Bradford testified that he was actually giving Mr. Parker
22 directions to his ex-girlfriend’s house, which was near Ms. Vercher’s, he
23 also testified that he provided the directions so that Mr. Parker could rob
24 her....

25 On cross, the state elicited [evidence] that Mr. Bradford was a
26 gang member who earned his stripes by selling drugs for his gang. The
27 state also played for the jury a surveillance videotape from a 7-11 from an
28 unrelated case, which the state argued depicted Mr. Bradford using an ATM
card that he had stolen at gunpoint.

Second Am. Pet. at 2–5, ECF No. 67 (argument and citations to record omitted).

At Bradford’s first trial in 2004, the jury found him guilty of murder with use of a
deadly weapon and attempted robbery with use of a deadly weapon. On June 3, 2004,
the trial court sentenced Bradford to two consecutive life sentences for murder with use
of a deadly weapon, with parole eligibility after twenty years, and two consecutive
sentences of six years for the attempted robbery with use of a deadly weapon, with parole
eligibility after two years, to be served concurrently with the life sentences. See Judgment
of Conviction, Ex. 54, ECF No. 25-11.

Bradford appealed, and on April 18, 2006, the Nevada Supreme Court reversed
and remanded for a new trial, ruling that the trial court gave the jury improper instructions

1 regarding accomplice and co-conspirator liability as well as adoptive admissions. See
2 Order of Reversal and Remand, Ex. 60, at 2–9, ECF No. 25-17.

3 On remand, the trial court initially reappointed Sean Sullivan as Bradford’s counsel.
4 However, Sullivan notified the court that he had a conflict of interest because he was a
5 potential witness in the retrial, and he was permitted to withdraw. The court then
6 appointed another attorney, Mace Yampolsky, to represent Bradford in the retrial. See
7 Order Appointing Counsel, Ex. 63, at 2, ECF No. 25-20; Tr. of Proceedings, Ex. 65, at 2–
8 15, ECF No. 25-22; Tr. of Proceedings, Ex. 66, at 3–4, ECF No. 25-23; Order Appointing
9 Counsel, Ex. 67, at 2, ECF No. 25-24. At a pretrial hearing on July 27, 2007, Bradford
10 waived the attorney-client privilege as to the subject of Sullivan’s testimony and Sullivan
11 testified; his testimony was video recorded. See Tr. of Trial, Ex. 74, ECF No. 25-31.

12 Bradford’s retrial commenced on July 30, 2007. See Tr. of Trial, Exs. 77, 78, 82,
13 87, 90, ECF Nos. 26, 26-1, 27, 28, 28-3. Bradford was again found guilty of murder with
14 use of a deadly weapon and attempted robbery with use of a deadly weapon. See Tr. of
15 Trial, Ex. 90, at 8, ECF No. 28-3; Verdict, Ex. 94, at 2–3, ECF No. 28-7. He was again
16 sentenced to two consecutive life sentences for murder with use of a deadly weapon, with
17 parole eligibility after twenty years, and two consecutive sentences of six years in prison
18 for the attempted robbery with use of a deadly weapon, with parole eligibility after two
19 years, to be served concurrently with the life sentences. See Tr. of Sentencing Hr’g, Ex.
20 100, at 5, ECF No. 28-13; Am. J. of Conviction, Ex. 102, at 2–4, ECF No. 28-15.

21 Bradford appealed from the amended judgment, and the Nevada Supreme Court
22 affirmed on June 30, 2009. See Order of Affirmance, Ex. 111, at 2–12, ECF No. 29-4.
23 Bradford filed a petition for rehearing and a petition for en banc reconsideration, both of
24 which were denied. See Order Den. Rehearing, Ex. 113, at 2, ECF No. 29-6; Order Den.
25 En Banc Recons., Ex. 115, at 2, ECF No. 29-8.

26 Bradford then filed a Petition for Writ of Habeas Corpus in the state district court.
27 See Pet. for Writ of Habeas Corpus (Post Conviction), Ex. 123, ECF No. 29-18. The state
28 district court denied that petition on May 13, 2011. See Findings of Fact, Conclusions of

1 Law and Order, Ex. 127, at 3–9, ECF No. 29-22. Bradford appealed, and the Nevada
2 Supreme Court affirmed on July 23, 2013. See Order of Affirmance, Ex. 154, at 2–6, ECF
3 No. 34.

4 On May 4, 2012, Bradford filed a second Petition for Writ of Habeas Corpus in the
5 state district court. See Petition for Writ of Habeas Corpus (Post-Conviction), Ex. 138,
6 ECF No. 30-3. The state district court dismissed that petition on July 30, 2012, upon a
7 motion by the State, ruling Bradford’s claims to be time-barred and successive. See Order
8 Grant’g State’s Resp. and Mot. to Dismiss Def’s Pet. for Writ of Habeas Corpus (Post-
9 Conviction), Ex. 141, at 2–3, ECF No. 31-2. Bradford appealed, and the Nevada Supreme
10 Court affirmed on October 16, 2014. See Order of Affirmance, Ex. 174, at 2–6, ECF No.
11 42-3. Bradford filed a petition for rehearing, which was denied. See Order Den. Reh’g,
12 Ex. 186, at 2–3, ECF No. 62-4.

13 This Court received Bradford’s federal Petition for Writ of Habeas Corpus initiating
14 this action on September 27, 2013. ECF No. 1. On December 3, 2013, the Court
15 appointed the Federal Public Defender to represent Bradford. See ECF No. 16. With
16 counsel, Bradford filed an amended habeas petition on August 12, 2014. ECF No. 22. On
17 March 31, 2015, this action was stayed upon a motion by Bradford pending further
18 proceedings in state court. ECF No. 53.

19 Bradford filed a third state-court habeas petition on August 29, 2014. See Pet. for
20 Writ of Habeas Corpus (Post-Conviction), Ex. 172, ECF No. 42-1. The state district court
21 dismissed that petition on March 25, 2015, upon a motion by the State, ruling Bradford’s
22 claims to be time-barred. See Findings of Fact, Conclusions of Law and Order, Ex. 189,
23 at 2–9, ECF No. 62-7. Bradford appealed, and the Nevada Court of Appeals affirmed on
24 July 27, 2016. See Order of Affirmance, Ex. 197, at 2–8, ECF No. 62-15.

25 The stay of this action was lifted on January 13, 2017, ECF No. 66, and Bradford
26 filed a Second Amended Petition for Writ of Habeas Corpus, ECF No. 67, which is the
27 operative petition in this matter. In the second amended petition, Bradford asserts the
28 following grounds for relief:

1 Ground 1: Bradford's federal constitutional rights were violated because his
2 trial counsel was ineffective "for presenting inculpatory testimony from Mr.
3 Bradford's former attorney, Sean Sullivan, about a privileged conversation
4 Mr. Sullivan had with Mr. Bradford regarding the felony murder rule."

5 Ground 2: Bradford's federal constitutional rights were violated because his
6 trial counsel was ineffective "for failing to advise Mr. Bradford that he faced
7 the death penalty if he did not accept the state's plea bargain offers."

8 Ground 3: Bradford's federal constitutional rights were violated because his
9 trial counsel was ineffective for improperly advising him to testify in his own
10 defense.

11 Ground 4: Bradford's federal constitutional rights were violated because
12 "[t]he trial court improperly admitted irrelevant and prejudicial evidence that
13 Mr. Bradford was a member of the Crips gang who sold drugs to benefit his
14 gang."

15 Ground 5: Bradford's federal constitutional rights were violated because his
16 trial counsel was ineffective "for opening the door to the damaging gang
17 affiliation evidence during direct examination."

18 Ground 6: Bradford's federal constitutional rights were violated because
19 "[t]he trial court improperly admitted a videotape purportedly showing
20 Mr. Bradford using an ATM card he stole at gunpoint."

21 Ground 7: Bradford's federal constitutional rights were violated because his
22 trial counsel was ineffective "for opening the door to damaging videotape
23 evidence of an unrelated robbery during direct examination."

24 Ground 8: Bradford's federal constitutional rights were violated because
25 "[t]he trial court failed to provide the jury with a limiting instruction regarding
26 improperly admitted bad act evidence."

27 Ground 9: Bradford's federal constitutional rights were violated because his
28 trial counsel was ineffective "for failing to request a limiting instruction once
he opened the door to damaging bad act evidence."

Ground 10: Bradford's federal constitutional rights were violated because
"[t]he trial court failed to accurately describe the elements of murder with a
deadly weapon and robbery with a deadly weapon, relieving the prosecution
of its burden to prove every element of the charges beyond a reasonable
doubt."

Ground 11: Bradford's federal constitutional rights were violated because
his trial counsel was ineffective "for failing to ensure the jury received the
proper instructions regarding the meaning of 'use of deadly weapon.'"

Ground 12: Bradford's federal constitutional rights were violated because
"[t]he trial court failed to properly instruct the jury on adoptive admissions."

Ground 13: Bradford's federal constitutional rights were violated because
his trial counsel was ineffective "for failing to request an adequate
instruction on adoptive admissions."

1 Ground 14: Bradford’s federal constitutional rights were violated because
2 his trial counsel was ineffective “for failing to request and review recordings
3 of phone calls of a key prosecution witness.”

4 Ground 15: Bradford’s federal constitutional rights were violated because
5 “[t]he prosecution withheld material exculpatory evidence that a state
6 [witness] received a material benefit in exchange for his testimony.”

7 Ground 16: Bradford’s federal constitutional rights were violated because
8 “[t]here was insufficient evidence to support Mr. Bradford’s murder with a
9 deadly weapon and [attempted] robbery with a deadly weapon convictions.”

10 Ground 17: Bradford’s federal constitutional rights were violated as a result
11 of the “cumulative effect of the constitutional errors in his case.”

12 ECF No. 67 at 14–65.

13 On September 11, 2017, the Respondents filed a Motion to Dismiss, ECF No. 73,
14 and on November 27, 2017, Bradford filed a Motion for Evidentiary Hearing, ECF No. 77.
15 The Court denied both of those motions without prejudice on April 12, 2018, determining
16 that the issues raised in the Motion to Dismiss would be better considered in conjunction
17 with the merits of Bradford’s claims after Respondents filed an answer and Bradford a
18 reply. ECF No. 88.

19 The Respondents filed an Answer on March 25, 2019, ECF No. 98, and Bradford
20 filed a Reply, ECF No. 116, and a further Motion for Evidentiary Hearing, ECF No. 117,
21 on August 7, 2019. The Court granted the Motion for Evidentiary Hearing, with respect to
22 Ground 2, on May 27, 2020. ECF No. 124. The evidentiary hearing was held on June 11,
23 2021.

24 **III. Discussion**

25 **A. Procedural Default**

26 In Coleman v. Thompson the Supreme Court held that a state prisoner who fails
27 to comply with state-law procedural requirements in presenting his claims is barred by the
28 adequate and independent state ground doctrine from obtaining a writ of habeas corpus
in federal court. Coleman v. Thompson, 501 U.S. 722, 731–32 (1991) (“Just as in those
cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who
has failed to meet the State’s procedural requirements for presenting his federal claims

1 has deprived the state courts of an opportunity to address those claims in the first
2 instance.”). Where such a procedural default constitutes an adequate and independent
3 state ground for denial of habeas corpus, the default may be excused only if “a
4 constitutional violation has probably resulted in the conviction of one who is actually
5 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting
6 from it. Murray v. Carrier, 477 U.S. 478, 496 (1986).

7 In this case, on Bradford’s direct appeal, and on the appeal in his first state habeas
8 action, the Nevada Supreme Court generally ruled on his claims on their merits. See
9 Order of Affirmance, Ex. 111, ECF No. 29-4; Order of Affirmance, Ex. 154, ECF No. 34.
10 On the other hand, on the appeal in Bradford’s second state habeas action, the Nevada
11 Supreme Court ruled that Bradford’s petition was procedurally barred under state
12 procedural rules:

13 Appellant filed his petition on May 4, 2012, more than two years after
14 this court issued the remittitur from his direct appeal on December 15, 2009.
15 Bradford v. State, Docket No. 50630 (Order of Affirmance, June 30, 2009).
16 Thus, appellant’s petition was untimely filed. See NRS 34.726(1). Moreover,
17 appellant’s petition was successive because he had previously filed a post-
conviction petition for a writ of habeas corpus [footnote: Bradford v. State,
Docket No. 58529 (Order of Affirmance, July 23, 2013)], and it constituted
an abuse of the writ because he raised claims new and different from those
raised in his previous petition. See NRS 34.810(1)(b)(2); NRS 34.810(2).

18 Order of Affirmance, Ex. 174, at 1, ECF No. 42-3. The Nevada Supreme Court went on
19 to rule that Bradford did not show cause and prejudice, actual innocence, or any other
20 ground to overcome the procedural bars. See id. at 1–4. The Nevada Supreme Court,
21 therefore, affirmed the denial of Bradford’s second state habeas petition on state
22 procedural grounds. And, similarly, on the appeal in Bradford’s third state habeas action,
23 the Nevada Court of Appeals ruled Bradford’s petition to be time-barred and successive
24 under state procedural rules:

25 Appellant Julius Bradford filed his petition on August 29, 2014, more
26 than four years after issuance of the remittitur on direct appeal on December
27 15, 2009. Bradford v. State, Docket No. 50630 (Order of Affirmance, June
28 30, 2009). Thus, Bradford’s petition was untimely filed. See NRS 34.726(1).
Moreover, Bradford’s petition was successive because he had previously
filed two postconviction petitions for a writ of habeas corpus, and it
constituted an abuse of the writ as he raised claims new and different from

1 those raised in his previous petitions. [Footnote: Bradford v. State, Docket
2 No. 61559 (Order of Affirmance, October 16, 2014); Bradford v. State,
3 Docket No. 58529 (Order of Affirmance, July 23, 2013).] See NRS
4 34.810(1)(b)(2); NRS 34.810(2).

5 Order of Affirmance, Ex. 197, at 1, ECF No. 62-15. The Nevada Court of Appeals went
6 on to rule that Bradford did not show cause and prejudice, actual innocence,
7 nondisclosure of information by the State, or any other ground to overcome the procedural
8 bars. See id. at 1–7. Therefore, the Nevada Court of Appeals affirmed the denial of
9 Bradford’s third state habeas petition on state procedural grounds.

10 Consequently, claims asserted by Bradford in his second or third state habeas
11 action but not on his direct appeal or in his first state habeas action are subject to denial
12 as procedurally defaulted, unless he can overcome the procedural default.

13 A petitioner can overcome a procedural default by making a showing of cause and
14 prejudice. To demonstrate cause for a procedural default, the petitioner must “show that
15 some objective factor external to the defense impeded” his efforts to comply with the state
16 procedural rule. Murray, 477 U.S. at 488. For cause to exist, the external impediment
17 must have prevented the petitioner from raising the claim. See McCleskey v. Zant, 499
18 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden
19 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
20 but that they worked to his actual and substantial disadvantage, infecting his entire
21 [proceeding] with errors of constitutional dimension.” White v. Lewis, 874 F.2d 599, 603
22 (9th Cir. 1989) (citing United States v. Frady, 456 U.S. 152, 170 (1982)).

23 In Martinez v. Ryan, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
24 assistance of post-conviction counsel may serve as cause, to overcome the procedural
25 default of a claim of ineffective assistance of trial counsel. In Martinez, the Supreme Court
26 noted that it had previously held, in Coleman, that “an attorney’s negligence in a
27 postconviction proceeding does not establish cause” to excuse a procedural default.
28 Martinez, 566 U.S. at 15. The Martinez Court, however, “qualif[ied] Coleman by
recognizing a narrow exception: inadequate assistance of counsel at initial-review
collateral proceedings may establish cause for a prisoner’s procedural default of a claim

1 of ineffective assistance at trial.” Id. at 9. A showing of cause and prejudice under Martinez
2 consists of four elements: (1) the underlying claim must be “substantial;” (2) the “cause”
3 for the procedural default consists of there being “no counsel” or only “ineffective” counsel
4 in the state postconviction proceeding; (3) the state postconviction proceeding was the
5 “initial” collateral review proceeding where the claim could have been brought; and (4)
6 state law requires that the claim be raised in an initial collateral review proceeding, or by
7 “design and operation” such claims must be raised that way, rather than on direct appeal.
8 See Trevino v. Thaler, 569 U.S. 416, 423, 429 (2013). The failure to meet any of these
9 four prongs renders the Martinez exception unavailable to excuse a procedural default.

10 To show that a claim is “substantial” under Martinez, a petitioner must demonstrate
11 that the underlying ineffectiveness claim has “some merit.” See Martinez, 556 U.S. at 14.
12 That is, the petitioner must submit at least some evidence tending to show that trial
13 counsel performed deficiently, and that the deficient performance harmed the defense.
14 See Strickland v. Washington, 466 U.S. 668, 695–96 (1984).

15 Bradford argues that he can overcome the procedural default of his claims of
16 ineffective assistance of trial counsel—including Ground 2—under Martinez.

17 B. Standard of Review of Merits of Claims

18 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a
19 federal court may not grant a petition for a writ of habeas corpus on any claim that was
20 adjudicated on the merits in state court unless the state court decision was contrary to,
21 or involved an unreasonable application of, clearly established federal law as determined
22 by United States Supreme Court precedent, or was based on an unreasonable
23 determination of the facts in light of the evidence presented in the state-court proceeding.
24 28 U.S.C. § 2254(d). A state-court ruling is “contrary to” clearly established federal law if
25 it either applies a rule that contradicts governing Supreme Court law or reaches a result
26 that differs from the result the Supreme Court reached on “materially indistinguishable”
27 facts. See Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam). A state-court ruling is “an
28 unreasonable application” of clearly established federal law under section 2254(d) if it

1 correctly identifies the governing legal rule but unreasonably applies the rule to the facts
2 of the case. See Williams v. Taylor, 529 U.S. 362, 407–08 (2000). To obtain federal
3 habeas relief for such an “unreasonable application,” however, a petitioner must show
4 that the state court’s application of Supreme Court precedent was “objectively
5 unreasonable.” Id. at 409–10; see also Wiggins v. Smith, 539 U.S. 510, 520–21 (2003).
6 Or, in other words, habeas relief is warranted, under the “unreasonable application”
7 clause of section 2254(d), only if the state court’s ruling was “so lacking in justification
8 that there was an error well understood and comprehended in existing law beyond any
9 possibility for fairminded disagreement.” Harrington v. Richter, 562 U.S. 86, 103 (2011).

10 With respect to a claim that the state courts did not address on its merits, the
11 federal habeas court reviews such a claim de novo, rather than under the deferential
12 AEDPA standard. See, e.g., Cone v. Bell, 556 U.S. 449, 472 (2009); Stanley v. Cullen,
13 633 F.3d 852, 860 (9th Cir. 2011) (“When it is clear ... that the state court has not decided
14 an issue, we review that question de novo.”).

15 C. Ground 2

16 In Ground 2, Bradford claims that his federal constitutional rights were violated
17 because his trial counsel was ineffective “for failing to advise Mr. Bradford that he faced
18 the death penalty if he did not accept the state’s plea bargain offers.” Second Am. Pet. at
19 23–26, ECF No. 67.

20 Before the first trial in the Zambrano-Lopez case, the State offered Bradford a plea
21 deal whereby Bradford would have pleaded guilty to second-degree murder with use of a
22 deadly weapon and conspiracy to commit robbery in this case, the Zambrano-Lopez case,
23 and second-degree murder with use of a deadly weapon and conspiracy to commit
24 robbery in another case, the Limongello case, and the State would have recommended
25 concurrent prison sentences with parole possible after twenty years. See Tr. of
26 Proceedings, Ex. 49, at 13–15, ECF No. 25-6. Sean Sullivan, the attorney who
27 represented Bradford at his first trial in the Zambrano-Lopez case, advised Bradford to
28 accept the State’s offer, but Bradford declined it. See id.; Second Am. Pet. at 24, ECF

1 No. 67; Decl. of Julius Bradford, Ex. 167, at 1, ECF No. 34-13. Bradford claims, though,
2 that Sullivan did not sufficiently investigate the Limongello case before advising him about
3 the plea offer, and that Sullivan did not advise him that if he declined the offer and was
4 convicted in the Zambrano-Lopez case, the State could seek the death penalty in the
5 Limongello case and could use the conviction in the Zambrano-Lopez case as an
6 aggravating circumstance, and Bradford could be sentenced to death. See Second Am.
7 Pet. at 24–25, ECF No. 67; Decl. of Julius Bradford, Ex. 167, at 1, ECF No. 34-13.

8 Bradford went to trial in the Zambrano-Lopez case and was convicted, and later
9 he was charged with the Limongello murder, was tried in that case, and was convicted of
10 first-degree murder; the conviction in the Zambrano-Lopez case was used as an
11 aggravating circumstance in the Limongello case, and he was sentenced to death. See
12 Judgment of Conviction, Ex. 165, ECF No. 34-11. The Nevada Supreme Court
13 subsequently reversed Bradford’s conviction in the Limongello case and remanded the
14 case for a new trial; Bradford’s retrial has not yet commenced. See Order of Reversal and
15 Remand, Ex. 244, ECF No. 148-43. Bradford represents that the State is seeking the
16 death penalty at the retrial. See Notice of Intent to Seek the Death Penalty, Ex. 223, ECF
17 No. 148-22; Reply at 29, ECF No. 116. Bradford claims that, if he had been advised that
18 there was a possibility that he could be sentenced to death in the Limongello case, he
19 would have accepted the plea agreement offered by the State before the first trial in the
20 Zambrano-Lopez case. See Second Am. Pet. at 26, ECF No. 67; Decl. of Julius Bradford,
21 Ex. 167, ECF No. 34-13.

22 In Strickland, the Supreme Court propounded a two-prong test for analysis of
23 claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the
24 attorney’s representation “fell below an objective standard of reasonableness,” and (2)
25 that the attorney’s deficient performance prejudiced the defendant such that “there is a
26 reasonable probability that, but for counsel’s unprofessional errors, the result of the
27 proceeding would have been different.” Strickland, 466 U.S. at 688, 694. A court
28 considering a claim of ineffective assistance of counsel must apply a “strong presumption”

1 that counsel's representation was within the "wide range" of reasonable professional
2 assistance. Id. at 689. The petitioner's burden is to show "that counsel made errors so
3 serious that counsel was not functioning as the 'counsel' guaranteed the defendant by
4 the Sixth Amendment." Id. at 687. To establish prejudice under Strickland, it is not enough
5 for the habeas petitioner "to show that the errors had some conceivable effect on the
6 outcome of the proceeding." Id. at 693. Rather, the errors must be "so serious as to
7 deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

8 The constitutional right to effective assistance of counsel in criminal proceedings
9 extends to the plea-bargaining process. See Missouri v. Frye, 566 U.S. 134, 140–44
10 (2012); Lafler v. Cooper, 566 U.S. 156, 162 (2012). The Strickland standard applies. See
11 Lafler, 566 U.S. at 162–63. In the context of plea bargaining, with respect to the
12 performance prong of the Strickland standard, the habeas petitioner must show that his
13 trial counsel did not adequately advise him such that he had "the tools he need[ed] to
14 make an intelligent decision" regarding the plea offer. See Turner v. Calderon, 281 F.3d
15 851, 881 (9th Cir. 2002). With respect to the prejudice prong of the Strickland standard,
16 the petitioner must show "that but for the ineffective advice of counsel there is a
17 reasonable probability that the plea offer would have been presented to the court (i.e.,
18 that the defendant would have accepted the plea and the prosecution would not have
19 withdrawn it in light of intervening circumstances), that the court would have accepted its
20 terms, and that the conviction or sentence, or both, under the offer's terms would have
21 been less severe than under the judgment and sentence that in fact were imposed."
22 Lafler, 566 U.S. at 163–64.

23 Bradford raised this claim for the first time in state court in his third state habeas
24 action, see Second Am. Pet. at 23, ECF No. 67, and, as is discussed above, it was ruled
25 procedurally barred in that action. Therefore, this claim is subject to dismissal as
26 procedurally defaulted unless Bradford can show that some exception to the procedural
27 default doctrine applies. Bradford argues that he can show cause and prejudice, such as
28

1 to excuse the procedural default under Martinez, because of ineffective assistance of his
2 counsel in his first state habeas action. See Reply at 10–16, ECF No. 116.

3 The Court held an evidentiary hearing regarding this claim on June 11, 2021. At
4 the evidentiary hearing, Bradford called Sullivan to testify, and Bradford testified himself.
5 Respondents called Giancarlo Pesci to testify; Pesci was one of the prosecutors on the
6 Zambrano-Lopez case when the plea offer was extended to Bradford prior to the first trial
7 in that case.

8 Sullivan confirmed that when he represented Bradford he had not before acted as
9 first-chair defense counsel in a murder trial. Sullivan testified that when the prosecution
10 made the plea offer, seven to ten days before the first trial in the Zambrano-Lopez case,
11 he, Sullivan, was aware of the Limongello case, knew that Bradford was a suspect in that
12 case, and knew the prosecution was threatening to charge Bradford in that case. Sullivan
13 confirmed that the prosecution’s plea offer was to resolve both the Zambrano-Lopez case
14 and the Limongello case, with concurrent sentences and parole possible after twenty
15 years.

16 Before advising Bradford regarding the plea offer, Sullivan did not do any
17 investigation regarding the Limongello case, other than following it in the media and
18 having an investigator sit in on a preliminary hearing. Perhaps most importantly, Sullivan
19 testified that he did not request from the prosecution, or otherwise obtain or view, any
20 court filings in the Limongello case. Sullivan understood that he could have obtained such
21 material and that it was highly relevant to his representation of Bradford but he chose not
22 to obtain and review this crucial information. This information was crucial because at the
23 time, two defendants had been charged in the Limongello case: Aaron Daniels and
24 Natasha Barker. See Tr. of Prelim. Hearing, Ex. 203, ECF No. 148-2; see also Justice
25 Court Records, Ex. 204, ECF No. 148-3. Also at the time, the file in the Limongello case
26 included a notice of the State’s intention to seek the death penalty against Daniels. See
27 Notice of Intent to Seek Death Penalty, Ex. 205, ECF No. 148-4; see also Notice of
28 Evidence in Support of Aggravating Circumstances, Ex. 207, ECF No. 148-6. There was

1 also at the time, in the Limongello case file, material indicating that it was Daniels' position
2 that Bradford was involved in the Limongello murder, that witnesses would provide
3 evidence that Bradford shot Limongello, and that video evidence showed Bradford using
4 Limongello's ATM card shortly after his murder. See Motion for Additional Discovery, Ex.
5 208, ECF No. 148-7; Motion to Admit Evid. of Murder Committed by Julius Bradford and
6 Others, Ex. 209, ECF No. 148-8; Transcript of Proceedings, December 30, 2003, Ex. 212,
7 ECF No. 148-11. In short, it is plain from the record that even a cursory look at the court
8 file in the Limongello case, at the time when the State extended the plea offer to Bradford,
9 would have revealed that there was a significant possibility that Bradford would be
10 charged with the Limongello murder, that there was significant evidence against Bradford
11 for this murder and that the death penalty would be sought against him, but Sullivan did
12 not take the simple investigatory step of obtaining and viewing the Limongello case court
13 file before advising Bradford regarding the plea offer.

14 Sullivan admitted that he was, at the time, focused on trying his first murder trial.
15 Sullivan did speak with Bradford a few times about the prosecution's offer. He admitted,
16 however, that, while he did advise Bradford nominally to accept the prosecution's offer
17 because of the unpredictability of trial, he emphasized to a greater degree with Bradford
18 his confidence that Bradford would prevail at trial in the Zambrano-Lopez case. He
19 therefore did not review substantively and carefully the details of the prosecution's offer
20 and the consequences for Bradford if Bradford declined the offer. Significantly, when
21 Sullivan spoke with Bradford about the plea offer he did not discuss with Bradford the
22 possibility that he could face the death penalty in the Limongello case. Given his
23 inexperience at the time, Sullivan himself did not fully appreciate or understand that, if
24 Bradford did not enter the plea deal and was convicted of murder in the Zambrano-Lopez
25 case, that conviction could be used as an aggravating circumstance and the State could
26 seek the death penalty against Bradford in the Limongello case.

27 Bradford took the stand at the evidentiary hearing and testified that before the first
28 trial in the Zambrano-Lopez case, in March of 2004, the prosecution made the plea offer

1 to settle both the Zambrano-Lopez and Limongello cases. Bradford confirmed that the
2 offer was for him to plead guilty to second-degree murder in both cases, and for the State
3 to recommend sentences with parole possible after twenty years. At the time, he had just
4 turned 19 years old, and had a 9th or 10th grade education. Bradford liked Sullivan and
5 trusted him. Sullivan seemed confident about his chances in the Zambrano-Lopez case.
6 Sullivan did not talk to him about the Limongello case at all. Sullivan did not review the
7 possible charges, the evidence, or other consequences in the Limongello case for
8 Bradford if he declined the offer. Rather, Sullivan suggested that Bradford did not have
9 much to worry about with the Limongello case.

10 Sullivan advised Bradford to accept the prosecution's offer only because he was
11 young and, under the offered plea agreement, he could get out of prison while still young.
12 Sullivan did not, however, tell him what the maximum possible sentences would be if he
13 was convicted of first-degree murder in both the Zambrano-Lopez and Limongello cases.
14 Sullivan did not tell him that he could face the death penalty in the Limongello case.
15 Sullivan did not explain that a murder conviction in the Zambrano-Lopez case could be
16 used as an aggravating factor supporting imposition of the death penalty in the Limongello
17 case. In fact, Sullivan did not mention the death penalty at all in their discussions about
18 the plea offer.

19 Bradford testified credibly that if he had known that, if convicted in the Zambrano-
20 Lopez case, the State could charge him in the Limongello case and seek the death
21 penalty against him, he would have accepted the prosecution's plea offer without
22 hesitation. The Court finds Bradford's testimony to be credible.

23 Pesci was the only witness presented by the Respondents; Pesci's testimony did
24 not contradict the testimony of Bradford or Sullivan regarding the plea offer made to
25 Bradford before the first trial in the Zambrano-Lopez case. Pesci did not recall whether or
26 not Sullivan asked for materials regarding the Limongello case when the plea offer was
27 under consideration, but Pesci testified that if Sullivan had asked, he would have provided
28 him with those materials.

1 Bradford has made a compelling showing—and the Court finds—that Sullivan
2 performed unreasonably as Bradford’s counsel, because he did not sufficiently
3 investigate the Limongello case before advising Bradford regarding the State’s offer of a
4 plea agreement, and because Sullivan did not advise Bradford that the State could seek
5 the death penalty against him in the Limongello case. Sullivan did not understand, and
6 did not advise Bradford, that a conviction in the Zambrano-Lopez case could be used as
7 an aggravating circumstance in support of imposition of the death penalty in the
8 Limongello case. Sullivan did not advise Bradford about the maximum prison sentences
9 in each case, that he could face a death sentence in the Limongello case, and that
10 entering the offered plea agreement could eliminate that possibility.

11 Bradford also made a compelling showing—and the Court finds—that Bradford
12 was prejudiced by Sullivan’s unreasonable performance in that there is a reasonable
13 probability—a near certainty—that had he been advised that the State could seek the
14 death penalty against him in the Limongello case, he would have accepted the State’s
15 offer and pleaded guilty under the resulting plea agreement, the plea agreement would
16 have been presented to the court, and the court would have accepted its terms, resulting
17 in convictions of second-degree murder instead of first-degree murder, resulting in less
18 severe prison sentences, and removing the possibility of the death penalty in the
19 Limongello case. The Court finds that Bradford was unaware of the possibility of a
20 sentence of death in the Limongello case and how his conviction in the Zambrano-Lopez
21 case could make that more likely.

22 Furthermore, the Court finds that Bradford’s counsel in his state post-conviction
23 habeas action was ineffective for not asserting this claim. The plea offer was on the record
24 in this case. See Tr. of Proceedings, Ex. 49, at 13–15, ECF No. 25-6. It was unreasonable
25 for Bradford’s post-conviction counsel not to investigate the circumstances surrounding
26 the plea offer and the advice that Bradford received from Sullivan regarding it. Sullivan
27 testified that Bradford’s post-conviction counsel did not contact him to inquire about the
28 plea offer or any other aspect of the case. The Court finds that Bradford overcomes the

1 procedural default of this claim, under Martinez, allowing this Court to resolve the claim
2 de novo. The Court will grant Bradford habeas corpus relief on Ground 2.

3 The writ of habeas corpus is “at its core, an equitable remedy.” Schlup, 513 U.S.
4 at 319. The Supreme Court has instructed:

5 The writ of habeas corpus is the fundamental instrument for
6 safeguarding individual freedom against arbitrary and lawless state action.
7 Its pre-eminent role is recognized by the admonition in the Constitution that:
8 “The Privilege of the Writ of Habeas Corpus shall not be suspended * * *.”
9 U.S.Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ—its capacity
10 to reach all manner of illegal detention—its ability to cut through barriers of
11 form and procedural mazes—have always been emphasized and jealously
12 guarded by courts and lawmakers. The very nature of the writ demands that
13 it be administered with the initiative and flexibility essential to insure that
14 miscarriages of justice within its reach are surfaced and corrected.

15 Harris v. Nelson, 394 U.S. 286, 291 (1969). The equitable and flexible nature of habeas
16 corpus relief is reflected in 28 U.S.C. § 2243, which authorizes federal courts to resolve
17 habeas matters “as law and justice require.” See Hilton v. Braunskill, 481 U.S. 770, 775
18 (1987). Federal courts thus have broad authority, in the context of the unique facts and
19 circumstances of each case, to fashion a remedy tailored to the injury suffered from the
20 constitutional violation. See Braunskill, 481 U.S. at 775; Nunes v. Mueller, 350 F.3d 1045,
21 1056–57 (9th Cir. 2003). “[A]ny habeas remedy should put the defendant back in the
22 position he would have been if the Sixth Amendment violation never occurred.” Nunes,
23 350 F.3d at 1057 (quoting United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994)).

24 Here, the Court’s intention is to grant Bradford relief that will put him in the position
25 he would be in had his counsel reasonably advised him regarding the plea offer made by
26 the State prior to the first trial in the Zambrano-Lopez case, had he accepted that offer,
27 and had the trial court approved it. This Court finds that, had he not received ineffective
28 assistance of counsel, Bradford would now be convicted, upon guilty pleas, of second-
degree murder with use of a deadly weapon and conspiracy to commit robbery in both
the Zambrano-Lopez case and the Limongello case, and he would be serving concurrent
prison sentences with parole possible after twenty years. Bradford seeks to have the
Court issue a writ of habeas corpus “directing the State to reoffer him the global plea

1 deal.” Pet’s Prehearing Brief, ECF No. 150, at 28. The Court determines that the remedy
2 requested by Bradford is appropriate, and that it should be adequate, and the Court will
3 grant such relief. See Lafler, 566 U.S. at 162–75. If this relief proves to be inadequate to
4 put Bradford in the position he would be in had he not received ineffective assistance of
5 counsel, Bradford may make an appropriate motion to modify the judgment.

6 D. Bradford’s Other Claims

7 The Court determines that granting Bradford relief on Ground 2 renders moot his
8 other claims in Grounds 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17. The Court
9 further determines that addressing those claims at this time is unnecessary and would
10 only delay the grant of habeas relief to Bradford. Therefore, the Court will deny the
11 remainder of Bradford’s claims—the claims in Grounds 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,
12 13, 14, 15, 16, and 17—without prejudice, as moot.

13 E. Certificate of Appealability

14 The standard for the issuance of a certificate of appealability requires a
15 “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c). The
16 Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

17 Where a district court has rejected the constitutional claims on the
18 merits, the showing required to satisfy § 2253(c) is straightforward: The
19 petitioner must demonstrate that reasonable jurists would find the district
20 court’s assessment of the constitutional claims debatable or wrong. The
21 issue becomes somewhat more complicated where, as here, the district
22 court dismisses the petition based on procedural grounds. We hold as
23 follows: When the district court denies a habeas petition on procedural
24 grounds without reaching the prisoner’s underlying constitutional claim, a
25 COA should issue when the prisoner shows, at least, that jurists of reason
26 would find it debatable whether the petition states a valid claim of the
27 denial of a constitutional right and that jurists of reason would find it
28 debatable whether the district court was correct in its procedural ruling.

24 Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074,
25 1077–79 (9th Cir. 2000).

26 The Court finds that, with respect to the claims on which the Court denies
27 Bradford relief (without prejudice, as moot), applying the standard articulated in Slack, a
28

1 certificate of appealability is unwarranted. The Court will deny Bradford a certificate of
2 appealability relative to those claims.

3
4 **IV. Conclusion**

5 **IT IS THEREFORE ORDERED** that Petitioner's Second Amended Petition for Writ
6 of Habeas Corpus (ECF No. 67) is **GRANTED IN PART AND DENIED IN PART**.
7 Petitioner is granted relief on his claim in Ground 2 of his second amended habeas
8 petition. The Court denies relief, without prejudice, on all other claims in Petitioner's
9 second amended habeas petition, as those claims are rendered moot by the grant of relief
10 on the claim in Ground 2.

11 **IT IS FURTHER ORDERED** that Respondents shall, within 7 days from the date
12 of this order, extend to Petitioner the same plea offer that he received before his first trial
13 in the Zambrano-Lopez case and allow Petitioner at least 7 days to either accept or
14 decline that offer.

15 **IT IS FURTHER ORDERED** that Petitioner is denied a certificate of appealability
16 with respect to all claims on which the Court denies relief.

17 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter
18 judgment accordingly.

19 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil Procedure
20 25(d), Calvin Johnson is substituted for William Gittere, as the respondent warden. The
21 Clerk of the Court is directed to update the docket to reflect this change.

22
23 DATED: July 20, 2021.

24
25 

26 RICHARD F. BOULWARE, II
27 UNITED STATES DISTRICT JUDGE
28