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**UNITED STATES DISTRICT COURT**

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**DISTRICT OF NEVADA**

8

9 JESSICA BARRAZA,

10       Petitioner,

2:14-cv-01185-APG-PAL

11 vs.

**ORDER**12 J. GENTRY, *et al.*,

13       Respondents.

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16 Introduction

17       This action is a petition for writ of habeas corpus by Jessica Barraza, who was convicted of  
18 second degree murder in a Nevada court and is serving a prison sentence on that conviction. The  
19 action is before this Court with respect to the merits of the claims remaining in Barraza's habeas  
20 petition. The Court will deny the petition.

21 Background

22       Barraza was convicted, on November 2, 2007, in Nevada's Eighth Judicial District Court, in  
23 Clark County, of second degree murder with use of a deadly weapon. *See* Judgment of Conviction,  
24 Exhibit 1 (ECF No. 11-1). She was sentenced to life in prison with the possibility of parole after 10  
25 years for the murder, and a consecutive term of life in prison with the possibility of parole after 10  
26 years for the use of a deadly weapon. *See id.*

1           The Nevada Supreme Court affirmed the judgment of conviction on August 3, 2009. *See*  
2 Order of Affirmance, Exhibit 2 (ECF No. 11-2). The Nevada Supreme Court then denied Barraza's  
3 petitions for rehearing and en banc reconsideration. *See* Petition for Rehearing, Exhibit 95 (ECF  
4 No. 34-11); Order Denying Rehearing, Exhibit 96 (ECF No. 34-12); Petition for En Banc  
5 Reconsideration, Exhibit 97 (ECF No. 34-13); Order Denying En Banc Reconsideration, Exhibit 100  
6 (ECF No. 34-16). The United States Supreme Court denied Barraza's petition for writ of certiorari.  
7 *See* Notice of Denial of Petition for Writ of Certiorari, Exhibit 103 (ECF No. 35-3).

8           On August 19, 2010, Barraza filed a post-conviction petition for writ of habeas corpus in the  
9 state district court. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 106 (ECF No.  
10 35-6). Counsel was appointed for Barraza, and, with counsel, Barraza filed a supplemental habeas  
11 petition. *See* Supplemental Post-Conviction Petition for Writ of Habeas Corpus, Exhibit 110 (ECF  
12 No. 35-10). The state district court denied the petition in a written order on November 26, 2012.  
13 *See* Findings of Fact, Conclusions of Law and Order, Exhibit 116 (ECF No. 35-16). Barraza  
14 appealed, and the Nevada Supreme Court affirmed on March 12, 2014. *See* Order of Affirmance,  
15 Exhibit 127 (ECF No. 36-11).

16           This Court received Barraza's federal habeas petition, along with three briefs in support of  
17 the petition, initiating this action *pro se*, on July 18, 2014 (ECF Nos. 1, 1-1, 1-2, and 1-3). Barraza's  
18 petition asserts the following 13 claims:

- 19           1. Barraza's trial counsel was ineffective, in violation of her federal  
20 constitutional rights, for failing to object to an improper jury instruction  
21 pertaining to the deadly weapon enhancement. *See* Petition for Writ of  
22 Habeas Corpus (ECF No. 1), pp. 3-4; Brief in Support of Writ of Habeas  
23 Corpus (ECF No. 1-1), pp. 16-26; Supplemental Brief One in Support of Writ  
24 of Habeas Corpus (ECF No. 1-2), pp. 4-9.
- 25           2. Barraza's trial counsel was ineffective, in violation of her federal  
26 constitutional rights, for failing to object to an improper jury instruction  
pertaining to involuntary and voluntary manslaughter. *See* Petition for Writ  
of Habeas Corpus, pp. 5-6; Brief in Support of Writ of Habeas Corpus, pp. 27-  
38; Supplemental Brief One in Support of Writ of Habeas Corpus, pp. 9-14;  
Supplemental Brief Two in Support of Writ of Habeas Corpus (ECF No. 1-2),  
pp. 25-37.

- 1           3.       Barraza’s trial counsel was ineffective, in violation of her federal  
2           constitutional rights, for failing to object to an improper jury instruction  
3           pertaining to voluntary manslaughter. *See* Petition for Writ of Habeas  
              Corpus, pp. 7-8; Brief in Support of Writ of Habeas Corpus, pp. 39-45;  
              Supplemental Brief One in Support of Writ of Habeas Corpus, pp. 14-18.
- 4           4.       Barraza’s trial counsel was ineffective, in violation of her federal  
5           constitutional rights, for failing to object to improper witness testimony. *See*  
6           Petition for Writ of Habeas Corpus, pp. 9-10; Brief in Support of Writ of  
              Habeas Corpus, pp. 45-53; Supplemental Brief One in Support of Writ of  
              Habeas Corpus, pp. 18-20.
- 7           5.       The state district court violated Barraza’s federal constitutional rights by  
8           denying her an evidentiary hearing on her post-conviction petition for writ of  
9           habeas corpus. *See* Petition for Writ of Habeas Corpus, pp. 11-12; Brief in  
              Support of Writ of Habeas Corpus, pp. 54-58; Supplemental Brief One in  
              Support of Writ of Habeas Corpus, pp. 20-21.
- 10          6.       The state district court violated Barraza’s federal constitutional rights by  
11          finding that claims made in her post-conviction petition for writ of habeas  
12          corpus were barred by the law of the case doctrine. *See* Petition for Writ of  
              Habeas Corpus, pp. 13-14; Brief in Support of Writ of Habeas Corpus, pp. 58-  
              64; Supplemental Brief One in Support of Writ of Habeas Corpus, pp. 22-23.
- 13          7.       Barraza’s appellate counsel was ineffective, in violation of her federal  
14          constitutional rights, regarding jury instruction 15 and instructions on  
15          voluntary manslaughter. *See* Petition for Writ of Habeas Corpus, pp. 15-16;  
              Brief in Support of Writ of Habeas Corpus, pp. 64-65.
- 16          8.       Barraza’s federal constitutional rights were violated because “[t]he State  
17          commented on Barraza’s decision not to testify while addressing an  
18          evidentiary objection to testimony presented by defense counsel.” *See*  
19          Petition for Writ of Habeas Corpus, pp. 17-18; Supplemental Brief Two in  
20          Support of Writ of Habeas Corpus, pp. 10-12.
- 21          9.       Barraza’s federal constitutional rights were violated because the trial court  
22          “permitted the State to ask questions concerning uncharged misconduct  
23          allegedly committed by Barraza without establishing the admissibility of such  
24          evidence at a *Petrocelli* Hearing, and no cautionary instruction was given.”  
              *See* Petition for Writ of Habeas Corpus, pp. 19-20; Supplemental Brief Two in  
              Support of Writ of Habeas Corpus, pp. 12-15.
- 25          10.       Barraza’s federal constitutional rights were violated because “[t]he State  
26          presented victim impact evidence during the guilt phase of the trial for the  
              purposes of invoking sympathy and emotional responses from jurors.” *See*  
              Petition for Writ of Habeas Corpus, pp. 21-22; Supplemental Brief Two in  
              Support of Writ of Habeas Corpus, pp. 15-17.

- 1           11.     Barraza’s federal constitutional rights were violated because a detective “gave  
2           extensive testimony concerning his beliefs as to Barraza’s truthfulness, mental  
3           state and other factual matters that should have been properly left to the jury  
4           for its determination.” *See* Petition for Writ of Habeas Corpus, pp. 23-24;  
5           Supplemental Brief Two in Support of Writ of Habeas Corpus, pp. 17-20.  
6           12.     Barraza’s federal constitutional rights were violated because evidence was  
7           admitted at trial concerning statements made by an individual in response to  
8           questions asked by a police officer, though the individual was not subject to  
9           confrontation or cross-examination. *See* Petition for Writ of Habeas Corpus,  
10          pp. 25-26; Supplemental Brief Two in Support of Writ of Habeas Corpus, pp.  
11          20-25.  
12          13.     Barraza’s federal constitutional rights were violated because she was not  
13          sentenced under the amended version of NRS 193.165. *See* Petition for Writ  
14          of Habeas Corpus, pp. 27-28; Supplemental Brief Two in Support of Writ of  
15          Habeas Corpus, pp. 43-49.

16           On December 1, 2015, respondents filed a motion to dismiss (ECF No. 4), arguing that  
17           Barraza had not complied with Rule 2 of the Rules Governing Section 2254 Cases in the United  
18           States District Courts, and that her petition was vague. The Court denied that motion, and directed  
19           respondents to further respond to Barraza’s petition. *See* Order entered June 2, 2015 (ECF No. 9).

20           On July 14, 2015, respondents filed a second motion to dismiss (ECF No. 10), asserting that  
21           various of the claims in Barraza’s petition fail to state a claim upon which relief could be granted.  
22           On December 11, 2015, the Court granted that motion in part and denied it in part. *See* Order  
23           entered December 11, 2015 (ECF No. 18). The Court dismissed Claims 5, 6 and 9, because they do  
24           not state claims upon which relief could be granted in this federal habeas corpus action. *See id.*

25           On February 9, 2016, respondents filed an answer, responding to Barraza’s remaining claims  
26           (ECF No. 19).

          Barraza then filed a motion for appointment of counsel, which was denied (ECF Nos. 21,  
22           23), and a “Motion for Transcripts at State Expense,” which was granted (ECF Nos. 24, 25). The  
23           Court ordered respondents to expand the record. *See* Order entered April 20, 2016 (ECF No. 25). In  
24           accordance with the Court’s order, on May 19, 2016, respondents filed several volumes of exhibits,  
25           representing the state-court record (ECF Nos. 26-32, 34-36).

1 Also on May 19, 2016, counsel -- apparently retained by Barraza -- appeared for Barraza.  
2 See Notice of Appearance of Counsel (ECF No. 33).

3 On September 23, 2016, Barraza filed a reply to respondents' answer (ECF No. 39).

4 On June 19, 2017, the Court ordered the respondents to further expand the record, by filing  
5 as an exhibit a copy of the video recording of Barraza's statement to the police, which was admitted  
6 into evidence at her trial as State's Exhibit 32. See Order entered June 19, 2017 (ECF No. 40); see  
7 also Transcript of Trial, August 22, 2007, Exhibit 71, pp. 115-16 (ECF No. 30-1, pp. 116-17).  
8 Respondents complied with that order on July 10, 2017, by filing a copy of the video recording of  
9 Barraza's statement to the police. See Notice of Manual Filing (ECF No. 41).

10 Discussion

11 Standard of Review

12 28 U.S.C. § 2254(d) sets forth the standard of review applicable in this case under the  
13 Antiterrorism and Effective Death Penalty Act (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,

1 694 (2002)). A state court decision is an unreasonable application of clearly established Supreme  
2 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct  
3 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that  
4 principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at  
5 413). The “unreasonable application” clause requires the state court decision to be more than  
6 incorrect or erroneous; the state court’s application of clearly established law must be objectively  
7 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

8         The Supreme Court has instructed that “[a] state court’s determination that a claim lacks  
9 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness  
10 of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v.*  
11 *Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a strong case for  
12 relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 102 (citing  
13 *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing  
14 standard as “a difficult to meet” and “highly deferential standard for evaluating state-court rulings,  
15 which demands that state-court decisions be given the benefit of the doubt” (internal quotation  
16 marks and citations omitted)).

17         “[W]hen a state court issues an order that summarily rejects without discussion all the claims  
18 raised by a defendant, including a federal claim that the defendant subsequently presses in a federal  
19 habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim  
20 was adjudicated on the merits.” *Johnson v. Williams*, 133 S. Ct. 1088, 1091 (2013) (citing  
21 *Harrington*, 562 U.S. at 99.). When the state court has denied a federal constitutional claim on the  
22 merits without explanation -- as is the case with respect to many of the claims asserted by Barraza --  
23 the federal habeas court “must determine what arguments or theories supported or ... could have  
24 supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists  
25 could disagree that those arguments or theories are inconsistent with the holding in a prior decision  
26 of [the United States Supreme Court].” *Harrington*, 562 U.S. at 102.

1           Claim 1

2           In Claim 1, Barraza claims that her trial counsel was ineffective, in violation of her federal  
3 constitutional rights, for failing to object to an improper jury instruction pertaining to the deadly  
4 weapon enhancement. *See* Petition for Writ of Habeas Corpus (ECF No. 1), pp. 3-4; Brief in  
5 Support of Writ of Habeas Corpus (ECF No. 1-1), pp. 16-26; Supplemental Brief One in Support of  
6 Writ of Habeas Corpus (ECF No. 1-2), pp. 4-9. In essence, Barraza claims that the trial court  
7 usurped the jury’s role as fact-finder by instructing the jury that a knife is a deadly weapon as a  
8 matter of law, and that her trial counsel should have objected. *See id.*

9           On her direct appeal, Barraza asserted a related claim: that the trial court usurped the jury’s  
10 role as fact-finder by instructing the jury that a knife is a deadly weapon (*see* Appellant’s Opening  
11 Brief, Exhibit 91, pp. 37-43 (ECF No. 34-7, pp. 49-55)). The Nevada Supreme Court ruled on that  
12 claim as follows:

13                   The district court’s deadly weapon instruction read as follows:

14                               “Deadly weapon” means any instrument which, if used in the  
15 ordinary manner contemplated by its design and construction, will or  
is likely to cause bodily harm or death.

16                               You are instructed that a knife is a deadly weapon.

17           Barraza contends that this instruction improperly removed from the jury’s  
18 consideration the factual issue of whether the particular knife used in this case  
19 qualifies as a deadly weapon. Barraza did not raise this objection at trial. On appeal,  
20 we thus review her challenge to this instruction for plain error. *Gaxiola v. State*, 121  
21 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (noting that, while the failure to object to  
a jury instruction at trial generally precludes appellate review, this court may address  
an erroneous instruction if the error was plain and affected the defendants’ substantial  
rights).

22   \*   \*   \*

23           The district court based its deadly weapon instruction on the definitions  
24 provided in NRS 193.165(6), Nevada’s deadly weapon enhancement statute. NRS  
25 193.165(6)(b) defines deadly weapon to mean “[a]ny weapon, device, instrument,  
26 material or substance which, under the circumstances in which it is used, attempted to  
be used or threatened to be used, is readily capable of causing substantial bodily harm  
or death.” Citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), Barraza argues  
that whether a knife qualifies as a deadly weapon presents a question of fact that the  
jury must resolve under all circumstances, such that instructing the jury as a matter of

1 law that the knife used to kill the victim in this case was a deadly weapon amounted  
2 to plain error.

3 We disagree for three reasons. First, the error is not as clear under current law  
4 as Barraza asserts. *Compare Hernandez v. State*, 118 Nev. 513, 528 n.31, 50 P.3d  
5 1100, 1111 n.31 (2002) (citing *Steese v. State*, 114 Nev. 479, 499, 960 P.2d 321, 334  
6 (1998) and *Thomas v. State*, 114 Nev. 1127, 1146, 967 P.2d 1111, 1123 (1998) and  
7 noting with apparent approval the instructions they reviewed with respect to certain  
8 knives being deadly weapons as a matter of law) *with Knight v. State*, 116 Nev. 140,  
9 147, 993 P.2d 67, 72 (2000) (noting in a related context that “the determination of  
10 whether a common steak knife is a dangerous or deadly weapon is a question of fact  
11 for the jury” but finding the instructional error harmless). Second, the knife Barraza  
12 used to kill the victim in this case was a butterfly knife which when closed, conceals  
13 its blade and when opened has hand-guards that lock the blade in place and prevent  
14 the wielder’s hand from slipping onto the blade if used to stab. While not dispositive,  
15 these are characteristic of knives that qualify as deadly weapons. *See Knight*, 116  
16 Nev. at 146, 993 P.2d at 72. Third, the deadly properties of this particular knife in  
17 this particular case, given the knife’s construction and the mortal stab wounds it was  
18 used to inflict, were neither contested, nor seriously open to contest (which may  
19 explain Barraza’s failure to object to the instruction in the district court). *See State v.*  
20 *Graham*, 650 S.E.2d 639, 648 (N.C. App. 2007) (upholding conviction in a case in  
21 which the jury was instructed a particular knife was a deadly weapon given the  
22 uncontroverted evidence that the knife was used to inflict severe life-threatening  
23 injuries). Under these circumstances, the error, if any, in the jury instruction was  
24 harmless beyond a reasonable doubt. *State v. Donk*, 181 P.3d 508, 511-12 (Idaho Ct.  
25 App. 2007) (canvassing cases and noting that failure to submit a sentencing  
26 enhancement to the jury may constitute harmless error where, as here, the record  
establishes the elements of the enhancement with overwhelming evidence).

16 Order of Affirmance, Exhibit 2, pp. 2-4 (ECF No. 11-2, pp. 3-5).

17 In her state habeas action, Barraza asserted the claim addressed here: that her trial counsel  
18 was ineffective for failing to object to the deadly-weapon instruction. On the appeal in Barraza’s  
19 state habeas action, the Nevada Supreme Court ruled on that claim as follows:

20 ... [A]ppellant argues that her trial counsel was ineffective for failing to object  
21 when the district court instructed the jury that a knife is a deadly weapon and when  
22 the State referred to that instruction in its closing argument. Appellant fails to  
23 demonstrate that she was prejudiced. Appellant fails to demonstrate a reasonable  
24 probability of a different outcome at trial had counsel objected to the instruction or to  
25 the State’s reference to the instruction as the evidence demonstrated that appellant  
26 intentionally used the knife in a deadly and dangerous manner, as she stabbed the  
victim causing the victim to die. *See NRS 193.165(6)(b); see also Barraza v. State*,  
Docket No. 50623 (Order of Affirmance, August 3, 2009). Therefore, the district  
court did not err in denying this claim without conducting an evidentiary hearing.

26 Order of Affirmance, Exhibit 127, p. 2 (ECF No. 36-11, p. 3).



1           In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two  
2 prong test for claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the  
3 defense attorney’s representation “fell below an objective standard of reasonableness,” and (2) that  
4 the attorney’s deficient performance prejudiced the defendant such that “there is a reasonable  
5 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
6 been different.” *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective  
7 assistance of counsel must apply a “strong presumption” that counsel’s representation was within the  
8 “wide range” of reasonable professional assistance. *Id.* at 689. The petitioner’s burden is to show  
9 “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the  
10 defendant by the Sixth Amendment.” *Id.* at 687. And, to establish prejudice under *Strickland*, it is  
11 not enough for the habeas petitioner “to show that the errors had some conceivable effect on the  
12 outcome of the proceeding.” *Id.* at 693.

13           Where a state court has adjudicated a claim of ineffective assistance of counsel under  
14 *Strickland*, establishing that the decision was unreasonable under the AEDPA is especially difficult.  
15 *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court instructed:

16           The standards created by *Strickland* and § 2254(d) are both highly deferential,  
17 [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct.  
18 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is  
19 “doubly” so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland*  
20 standard is a general one, so the range of reasonable applications is substantial. 556  
21 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger  
22 of equating unreasonableness under *Strickland* with unreasonableness under §  
23 2254(d). When  
24 § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The  
25 question is whether there is any reasonable argument that counsel satisfied  
26 *Strickland*’s deferential standard.

27 *Harrington*, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994-95 (9th Cir. 2010)  
28 (acknowledging the double deference required for state court adjudications of *Strickland* claims).

29           The Nevada Supreme Court’s ruling on this claim was reasonable. At trial, it was beyond  
30 any reasonable dispute that Barraza stabbed Wilkins with a knife, and that Wilkins died as a result of  
31 that stabbing. *See, e.g.*, Testimony of Renee Manuel, Trial Transcript, August 21, 2017, Exhibit 70,

1 pp. 54-56 (ECF No. 29-1, pp. 55-57) (eyewitness testified she saw Barraza stab Wilkins with a  
2 knife); Testimony of Araceli Flores, Trial Transcript, August 21, 2017, Exhibit 70, pp. 97-101 (ECF  
3 No. 29-1, pp. 98-102) (eyewitness testified she saw Barraza stab Wilkins with a knife); Testimony of  
4 Lary Simms, Trial Transcript, August 21, 2017, Exhibit 70, pp. 36-37 (ECF No. 29-1, pp. 37-38)  
5 (autopsy revealed that Wilkins died from stab wound to the abdomen). Furthermore, undisputed  
6 evidence at trial showed that the stab wound that killed Wilkins passed all the way through her liver  
7 and damaged a blood vessel on the back side of the liver. *See* Testimony of Lary Simms, Trial  
8 Transcript, August 21, 2017, Exhibit 70, pp. 20-21 (ECF No. 29-1, pp. 21-22).

9         In light of the evidence, and taking into consideration the Nevada Supreme Court's ruling on  
10 the substantive issue on Barraza's direct appeal (albeit on plain error review), this Court determines  
11 that it was reasonable for the state supreme court to conclude that any objection by Barraza's trial  
12 counsel, with respect to the jury instruction regarding use of a deadly weapon, would not have  
13 changed the outcome of Barraza's trial.

14         The state court ruling was not contrary to, or an unreasonable application of, clearly  
15 established federal law as determined by the Supreme Court, nor was it based on an unreasonable  
16 determination of the facts in light of the evidence. The Court will deny habeas corpus relief with  
17 respect to Claim 1.

18         Claims 2, 3 and 7

19         In Claims 2, 3 and 7, Barraza claims that her constitutional rights were violated, on account  
20 of ineffective assistance of her trial and appellate counsel with respect to instructions given to the  
21 jury regarding manslaughter and murder. Specifically, in Claim 2, Barraza claims that her trial  
22 counsel was ineffective for failing to object to a jury instruction that improperly allowed the jury to  
23 find that she committed second degree murder without a finding of malice aforethought. *See*  
24 Petition for Writ of Habeas Corpus, pp. 5-6; Brief in Support of Writ of Habeas Corpus, pp. 27-38;  
25 Supplemental Brief One in Support of Writ of Habeas Corpus, pp. 9-14; Supplemental Brief Two in  
26 Support of Writ of Habeas Corpus (ECF No. 1-2), pp. 25-37. In Claim 3, Barraza claims that her

1 trial counsel was ineffective for failing to request a jury instruction that accurately set forth the  
2 State's burden to prove the absence of heat of passion in order to convict her of second degree  
3 murder. *See* Petition for Writ of Habeas Corpus, pp. 7-8; Brief in Support of Writ of Habeas  
4 Corpus, pp. 39-45; Supplemental Brief One in Support of Writ of Habeas Corpus, pp. 14-18. And,  
5 in  
6 Claim 7, Barraza claims that her appellate counsel was ineffective in not raising these issues on her  
7 direct appeal. *See* Petition for Writ of Habeas Corpus, pp. 15-16; Brief in Support of Writ of Habeas  
8 Corpus, pp. 64-65.

9 Barraza asserted these claims in her state habeas corpus action, and, on the appeal in that  
10 action, the Nevada Supreme Court ruled as follows:

11 ... [A]ppellant argues that her trial counsel was ineffective for failing to object  
12 to instruction 15, which she asserts improperly instructed the jury regarding voluntary  
13 and involuntary manslaughter. Appellant argues that the instruction improperly  
14 allowed the jury to convict appellant without finding that she acted with malice and  
15 that the instruction relieved the State from its burden to prove malice. Appellant also  
16 argues that counsel was ineffective for failing to object when the State referred to the  
17 challenged instruction in its closing argument in a confusing manner. Appellant fails  
18 to demonstrate that her counsel's performance was deficient or that she was  
19 prejudiced. The challenged instruction was a recitation of NRS 200.070, which  
20 defines involuntary manslaughter. Moreover, additional instructions correctly  
21 instructed the jury regarding voluntary manslaughter, malice, and the State's burden  
22 of proving the charges beyond a reasonable doubt. *See* NRS 175.211; NRS 200.020;  
23 NRS 200.040; NRS 200.050; NRS 200.060. As jury instructions are meant to be read  
24 together, *see Butler v. State*, 120 Nev. 879, 903, 102 P.3d 71, 88 (2004), and the  
25 additional instructions correctly informed the jury regarding the challenged topics,  
26 appellant fails to demonstrate that her counsel was objectively unreasonable for  
declining to object to instruction 15 on these bases. In addition, counsel objected to  
the challenged statements made by the State in closing arguments and the objection  
was sustained. Appellant fails to demonstrate a reasonable probability of a different  
outcome at trial had counsel objected to the challenged instruction as there was  
substantial evidence presented that appellant acted with malice when stabbing the  
victim. *See Keys v. State*, 104 Nev. 736, 738, 766 P.2d 270, 271-72 (1988).  
Therefore, the district court did not err in denying this claim without conducting an  
evidentiary hearing.

... [A]ppellant argues that her trial counsel was ineffective for failing to argue  
that instruction 15 erroneously permitted the jury to find her guilty based upon a  
misapplication of second-degree-felony-murder doctrine. Appellant also argues that  
counsel should have explained the second-degree-felony-murder doctrine to the jury  
in closing arguments. Appellant fails to demonstrate that her counsel's performance  
was deficient or that she was prejudiced. The challenged instruction correctly  
defined involuntary manslaughter. *See* NRS 200.070. Moreover, as acknowledged

1 by appellant, there was no reference at trial by either party to second-degree felony  
2 murder. As the challenged instruction was a correct statement of the law and second-  
3 degree felony murder was not espoused as a theory of liability by the State, appellant  
4 fails to demonstrate objectively reasonable counsel would have objected to the  
5 challenged instruction on the basis that it could lead to a misapplication of a doctrine  
6 not discussed in the instruction and not discussed at trial. Appellant also fails to  
7 demonstrate that objectively reasonable counsel would have attempted to explain  
8 second-degree felony murder in closing arguments under these circumstances.  
9 Appellant fails to demonstrate a reasonable probability of a different outcome at trial  
10 had she objected to instruction 15 on this basis as there was substantial evidence that  
11 she committed second-degree murder, especially in light of appellant's own  
12 statements indicating she stabbed the victim in retaliation for verbal insults.  
13 Therefore, the district court did not err in denying this claim without conducting an  
14 evidentiary hearing.

15 ... [A]ppellant argues that her trial counsel was ineffective for failing to argue  
16 that the second-degree murder instruction was improper as the theory espoused in the  
17 instruction was not noticed. Appellant fails to demonstrate either deficiency or  
18 prejudice. Appellant fails to demonstrate that she did not receive notice of the State's  
19 theory of second-degree murder as the information provided a plain and concise  
20 statement of the essential facts as well as a citation to the statutes discussing the  
21 crime of murder with the use of a deadly weapon. *See* NRS 173.075, NRS 193.165;  
22 NRS 200.010; NRS 200.030. Therefore, the district court did not err in denying this  
23 claim without conducting an evidentiary hearing.

24 ... [A]ppellant argues that her counsel was ineffective for failing to request a  
25 voluntary manslaughter instruction informing the jury that it was the State's burden  
26 to prove the absence of heat of passion. Appellant fails to demonstrate that her  
27 counsel's performance was deficient or that she was prejudiced. As stated  
28 previously, the district court properly instructed the jury regarding voluntary  
29 manslaughter and the State's burden to prove the charges beyond a reasonable doubt.  
30 *See* NRS 175.211; NRS 200.040; NRS 200.050; NRS 200.060. As jury instructions  
31 are meant to be read together, *see Butler*, 120 Nev. at 903, 102 P.3d at 88, appellant  
32 fails to demonstrate that her counsel was objectively unreasonable for failing to  
33 request an additional instruction regarding proof of the absence of heat of passion.  
34 Appellant fails to demonstrate a reasonable probability of a different outcome at trial  
35 had counsel requested a specific instruction regarding proof of the absence of heat of  
36 passion ... caused by a serious and highly provoking injury, or attempted injury,  
37 sufficient to excite such passion in a reasonable person." *Allen v. State*, 98 Nev. 354,  
38 356, 647 P.2d 389, 390-91 (1982). Therefore, the district court did not err in denying  
39 this claim without conducting an evidentiary hearing.

40 \* \* \*

41 Appellant argues that her appellate counsel was ineffective for failing to  
42 "federalize" claims regarding the ... voluntary manslaughter instructions on direct  
43 appeal, and thereby failed to preserve these claims for federal court review.  
44 Appellant fails to demonstrate that her counsel's performance was deficient or that  
45 she was prejudiced. Appellant fails to demonstrate that she would have gained a  
46 more favorable standard of review on direct appeal had her appellate counsel raised  
47 arguments under federal laws. *See Browning v. State*, 120 Nev. 347, 365, 91 P.3d 39,  
48 52 (2004). Appellant fails to demonstrate a reasonable likelihood of success on

1 appeal had counsel raised further arguments based upon federal laws. Therefore, the  
2 district court did not err in denying this claim without conducting an evidentiary  
3 hearing.

4 Order of Affirmance, Exhibit 127, pp. 2-6 (ECF No. 36-11, pp. 3-7).

5 The Nevada Supreme Court decision regarding these claims was reasonable. As the Nevada  
6 Supreme Court ruled, when read in their entirety, the jury instructions given at Barraza's trial  
7 informed the jury that the State carried the burden of proving all the elements of second degree  
8 murder -- including malice aforethought and the absence of heat of passion -- beyond a reasonable  
9 doubt. *See* Jury Instructions, Exhibit 75 (ECF No. 31-4), Instructions 5, 6, 11, 12, 13, 15A and 26.  
10 To the extent that the Nevada Supreme Court ruled that, as a matter of Nevada state law, the jury  
11 instructions were accurate, that ruling is authoritative and binding in this federal habeas corpus  
12 action. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal  
13 habeas court to reexamine state-court determinations on state law questions. In conducting habeas  
14 review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or  
15 treaties of the United States.”); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“[A] state  
16 court's interpretation of state law ... binds a federal court sitting in habeas corpus.”). Barraza does  
17 not show that her counsel erred in not asserting any federal basis for an objection to the jury  
18 instructions that were given, or supporting the giving of any different jury instruction.

19 Furthermore, even if, arguably, Barraza's counsel should have objected to the instructions, or  
20 should have offered some other instruction, regarding murder and manslaughter, there was strong  
21 evidence that Barraza killed Wilkins with malice aforethought and in the absence of heat of passion,  
22 and it was reasonable of the state courts to find that Barraza was not prejudiced. Renee Manuel was  
23 an eyewitness; she testified that she saw Barraza, using a knife, slash Wilkins on her arm and then  
24 stab her on her side. *See* Testimony of Renee Manuel, Trial Transcript, August 21, 2017, Exhibit  
25 70, pp. 54-56, 64-66, 69-70 (ECF No. 29-1, pp. 55-57, 65-67, 70-71). Manuel testified that, while  
26 Barraza was attacking Wilkins with a knife, Wilkins was moving back, away from Barraza, not

1 fighting back, attempting to defend herself, and saying “stop.” *See id.* at 55-56 (ECF No. 29-1,  
2 pp. 56-57). Manuel testified that she did not observe Wilkins with a knife. *See id.* at 84-85 (ECF  
3 No. 29-1, pp. 85-86). Araceli Flores was the other eyewitness to the stabbing; she testified that she  
4 observed Barraza take out a knife from behind her back, cut Wilkins on the hand, and then stab her.  
5 *See* Testimony of Araceli Flores, Trial Transcript, August 21, 2017, Exhibit 70, pp. 98-100 (ECF  
6 No. 29-1, pp. 99-101). Flores also testified that she did not see Wilkins with a knife. *See id.* at 103-  
7 04 (ECF No. 29-1, pp. 104-05). Flores testified that when Barraza was attacking Wilkins with a  
8 knife, Wilkins was backing away from Barraza, and was saying “I’m joking, I’m joking.” *Id.* at 100,  
9 104 (ECF No. 29-1, pp. 101, 105). After she was stabbed, before she died, Wilkins said to a police  
10 officer: “I can’t believe the bitch stabbed me. I can’t believe she did this.” *See* Testimony of  
11 Kenneth Mead, Trial Transcript, August 21, 2007, Exhibit 70, p. 127 (ECF No. 29-1, p. 128). Also,  
12 Flores testified, as follows, about what Barraza did after she stabbed Wilkins:

13 Q. What did Jessica do after she stabbed Crystal?

14 A. She asked for the bicycle of a kid who was there and took off.

15 Q. Okay. If I use the word “dap,” do you know what that means?

16 A. What do you mean?

17 Q. Okay. I’m going to show you, and you tell me if you know what this  
18 means. Okay? If two people do this -- which is touching hands together -- what does  
this mean?

19 A. That’s a greeting.

20 Q. Okay. Did Jessica do this to you as she was leaving on the bike?

21 A. Yes.

22 Q. And that’s just like a greeting like hello, goodbye?

23 A. Yes.

24 Q. Okay. And is it like a good greeting? Does it have good  
25 connotations? Bad connotations?

26 A. It’s just a greeting like you would with any friend. That’s just how we  
say hello.

1 *Id.* at 101 (ECF No. 29-1, p. 102). After the stabbing, Barraza did not render aid or call for police or  
2 medical help; rather, she “dapped” with her friend and fled from the scene. Barraza was not located  
3 and arrested until five days later, on August 11, 2005. *See* Testimony of Robert Plummer, Trial  
4 Transcript, August 22, 2007, Exhibit 71, pp. 76-78 (ECF No. 30-1, pp. 77-79); Testimony of Ronald  
5 Rasmussen, Trial Transcript, August 23, 2007, Exhibit 72, pp. 15-17 (ECF No. 31-1, pp. 16-18).  
6 When Barraza was located by police on August 11, 2005, she ran, and the police had to chase her in  
7 order to apprehend and arrest her. *See* Testimony of Robert Plummer, Trial Transcript, August 22,  
8 2007, Exhibit 71, pp. 76-78 (ECF No. 30-1, pp. 77-79).

9       When interviewed by a police officer after her arrest, Barraza did not claim that the stabbing  
10 was in self-defense, and she did not describe any provocation that would give rise to heat of passion.  
11 *See* Video Recording, State’s Exhibit 32 (manually filed on July 10, 2017). Barraza did not claim  
12 that Wilkins threatened her with a knife, or in any other manner. *See id.* Rather, Barraza explained  
13 that Wilkins had been annoying and disrespecting her, and she “just wanted to scare her,” but  
14 Wilkins would not back off and stop bothering her. *See id.*

15       The evidence at trial firmly supported a finding of malice on the part of Barraza, and a  
16 finding that Barraza acted in the absence of heat of passion. In light of the strong evidence, the  
17 Nevada Supreme Court reasonably concluded that any shortcoming of Barraza’s trial and appellate  
18 counsel, vis-a-vis the jury instructions regarding murder and manslaughter, was without prejudice to  
19 Barraza. There is no reasonable probability that, but for any arguable error by trial counsel, the  
20 result of Barraza’s trial would have been different. There is no reasonable probability that had  
21 Barraza’s appellate counsel raised these issues on her direct appeal, the result of the appeal would  
22 have been different.

23       The state courts’ rulings on these claims were not contrary to, or an unreasonable application  
24 of, clearly established federal law as determined by the Supreme Court, and were not based on an  
25 unreasonable determination of the facts in light of the evidence. This Court will deny habeas corpus  
26 relief with respect to Claims 2, 3 and 7.

1           Claims 4 and 11

2           In Claim 4, Barraza claims that her trial counsel was ineffective, in violation of her federal  
3 constitutional rights, for failing to object to improper witness testimony. *See* Petition for Writ of  
4 Habeas Corpus, pp. 9-10; Brief in Support of Writ of Habeas Corpus, pp. 45-53; Supplemental Brief  
5 One in Support of Writ of Habeas Corpus, pp. 18-20. In particular, Barraza claims that her trial  
6 counsel should have objected to testimony of Detective McNett. *See id.* In Claim 11, Barraza  
7 claims that her federal constitutional rights were violated because the detective “gave extensive  
8 testimony concerning his beliefs as to Barraza’s truthfulness, mental state and other factual matters  
9 that should have been properly left to the jury for its determination.” *See* Petition for Writ of Habeas  
10 Corpus, pp. 23-24; Supplemental Brief Two in Support of Writ of Habeas Corpus, pp. 17-20.

11           On her direct appeal, Barraza asserted the related claim that the trial court erred in admitting  
12 the testimony of Officer McNett, and the Nevada Supreme Court denied that claim without  
13 discussion. *See* Appellant’s Opening Brief, Exhibit 91, pp. 17-20 (ECF No. 34-7, pp. 29-32); Order  
14 of Affirmance, Exhibit 2, p. 1 n.1 (ECF No. 11-2, p. 2).

15           In her state habeas action, Barraza asserted the claim of ineffective assistance of her trial  
16 counsel, and, on the appeal in that action, the Nevada Supreme Court ruled as follows:

17                   ... [A]ppellant argues that her counsel was ineffective for failing to object  
18 when a State’s witness commented on her truthfulness and her state of mind during a  
19 police interrogation. Appellant fails to demonstrate that her trial counsel’s  
20 performance was deficient or that she was prejudiced. The challenged testimony was  
21 considered on direct appeal and this court concluded that the underlying claim was  
22 without merit. *Barraza v. State*, Docket No. 50623 (Order of Affirmance, August 3,  
23 2009). Given the substantial evidence of appellant’s guilt, including appellant’s own  
24 statements that she stabbed the victim because she could not allow a person to talk to  
25 her in such a disrespectful manner, appellant fails to demonstrate a reasonable  
26 probability of a different outcome at trial had counsel objected to the challenged  
statements. Therefore, the district court did not err in denying this claim without  
conducting an evidentiary hearing.

24           Order of Affirmance, Exhibit 127, pp. 5-6 (ECF No. 36-11, pp. 6-7).

25           The trial testimony at issue here is testimony of Mark McNett, a detective with the Las  
26 Vegas Metropolitan Police Department who interviewed Barraza after she was arrested, regarding



1 the interview, the techniques he used in conducting it, and his beliefs that Barraza was not truthful in  
2 the interview. *See* Testimony of Mark McNett, Trial Transcript, August 22, 2007, Exhibit 71, pp.  
3 97-104, 116-25, 153-59 (ECF No. 30-1, pp. 98-105, 117-26, 154-60).

4 The Nevada Supreme Court's ruling, on Barraza's direct appeal, that McNett's testimony  
5 was not improper as a matter of state law, is authoritative and binding in this federal habeas corpus  
6 action. *See Estelle*, 502 U.S. at 67-68; *Bradshaw*, 546 U.S. at 76. And, in light of that ruling, it is  
7 plain that Barraza's trial counsel was not ineffective for failing to object to McNett's testimony on  
8 state-law grounds, and there was no prejudice to Barraza as a result of his failure to do so.

9 Barraza does not make a serious argument that McNett's testimony violated her federal  
10 constitutional rights, and this Court determines that it did not. "It is well settled that a state court's  
11 evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state  
12 proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha*, 194 F.3d 971,  
13 977-78 (9th Cir. 1999). To show that improper admission of evidence violated her due process  
14 rights, the federal habeas petitioner must demonstrate that the admission of the challenged evidence  
15 "offends some principle of justice so rooted in the traditions and conscience of our people as to be  
16 ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977) (internal citations and  
17 quotations omitted); *see also Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). Barraza does not make a  
18 showing approaching this standard.

19 Under the deferential standard of review mandated by the AEDPA, the Nevada Supreme  
20 Court's denial of Barraza's due process claim regarding McNett's testimony is not contrary to or an  
21 unreasonable application of clearly established federal law and was not based on an unreasonable  
22 determination of the facts. Barraza does not show that the Supreme Court has ever expressly held it  
23 to be a violation of a defendant's due process rights for a police officer to testify that he felt a  
24 suspect was lying in an interview, or that any ruling of the Supreme Court must reasonably be read  
25 to lead to such a conclusion in this case. Because there is no showing that McNett's testimony was  
26 improper under state law, or as a matter of federal constitutional law, Barraza cannot demonstrate

1 that her trial counsel was ineffective for failing to object to McNett's testimony, or that she was  
2 prejudiced. The Court will deny habeas corpus relief with respect to Claims 4 and 11.

3 Claim 8

4 In Claim 8, Barraza claims that her federal constitutional rights were violated because "[t]he  
5 State commented on Barraza's decision not to testify while addressing an evidentiary objection to  
6 testimony presented by defense counsel." *See* Petition for Writ of Habeas Corpus, pp. 17-18;  
7 Supplemental Brief Two in Support of Writ of Habeas Corpus, pp. 10-12.

8 The comment at issue in this claim occurred in the following exchange in the presence of the  
9 jury during the testimony of police officer Ronald Rasmussen, in the defense case, regarding  
10 statements made to him by Barraza after her arrest:

11 Q. Okay. And at some point in the patrol car, did she give you what's  
12 known as an unsolicited statement?

13 A. Yes. [S]he did, sir.

14 Q. And could you --

15 MS. BRIERLY [prosecutor]: Objection. Hearsay.

16 THE COURT: Whose statement?

17 MR. PATRICK [defense counsel]: I asked him if she gave him a statement.  
I didn't ask what she said.

18 MS. BRIERLY: Relevance. Objection, relevance.

19 MR. PATRICK: Well, Judge, this whole line of questioning is going -- is a  
20 prior consistent statement, rebutting Officer -- Detective McNett's allegations of  
recent fabrications in her denial.

21 THE COURT: Okay.

22 MR. PATRICK: It's all relevant.

23 THE COURT: It's overruled. Go ahead. Ask the question again.

24 BY MR. PATRICK:

25 Q. Sir, could you kind of explain to the jury what an unsolicited statement  
26 is?

1           A.     An unsolicited statement is when they voluntarily talk to you. You don't ask  
2           them any questions, they just give up information on their own volition, own free will.

3           Q.     And do you remember what she said to you?

4           MS. BRIERLY: Objection. Hearsay.

5           MR. PATRICK: Judge, it's prior consistent statement, rebutting Detective  
6           McNett's statements that it -- she had recent fabrications when she talked to him and  
7           that she was in denial.

8           MS. BRIERLY: That wasn't Detective McNett's statement. *There is no*  
9           *testimony to be inconsistent. Ms. Barraza hasn't taken the stand as of yet.*

10          THE COURT: But we watched her video.

11          MR. PATRICK: That's right.

12          MS. BRIERLY: There is no inconsistent statement at this point.

13          Trial Transcript, August 23, 2007, Exhibit 72, pp. 17-19 (ECF No. 31-1, pp. 18-20) (emphasis  
14          added).

15          Barraza moved for a mistrial based on the above-quoted comment. *See* Trial Transcript,  
16          August 23, 2007, Exhibit 72, pp. 65-68 (ECF No. 31-1, pp. 66-69). The trial court denied that  
17          motion. *See id.* Barraza's counsel stated that the defense did not wish for the trial court to give a  
18          curative instruction to the jury. *See id.*

19          Barraza asserted this claim on her direct appeal, and the Nevada Supreme Court denied the  
20          claim without discussion. *See* Appellant's Opening Brief, Exhibit 91, pp. 10-12 (ECF No. 34-7, pp.  
21          22-24; Order of Affirmance, Exhibit 2, p. 1 n.1 (ECF No. 11-2, p. 2).

22          Barraza cites *Griffin v. California*, 380 U.S. 609 (1965), in support of this claim. *See*  
23          Petition for Writ of Habeas Corpus, pp. 17-18; Supplemental Brief Two in Support of Writ of  
24          Habeas Corpus, pp. 10-12; Reply (ECF No. 39), pp. 26-29. In *Griffin*, the Supreme Court held that a  
25          prosecutor violates the defendant's privilege against self-incrimination, under the Fifth and  
26          Fourteenth Amendments, if the prosecutor makes a comment that is "manifestly intended to call  
27          attention to the defendant's failure to testify, or is of such a character that the jury would naturally  
28          and necessarily take it to be a comment on the failure to testify." *Cook v. Schriro*, 538 F.3d 1000,

1 1021 (9th Cir. 2008) (as amended) (citation omitted); *see also United States v. Gray*, 876 F.2d 1411,  
2 1416 (9th Cir. 1989). In *Griffin*, the defendant did not testify on the issue of guilt, and the trial court  
3 instructed the jury that it could make certain inferences based on the defendant's failure to testify,  
4 and, in addition, the prosecutor argued extensively to the jury about the defendant's failure to testify.  
5 *See Griffin*, 380 U.S. at 610-11.

6 Barraza has not shown, beyond any possibility for fairminded disagreement, that the  
7 prosecution committed *Griffin* error in her case. The comments of the prosecutor in this case were  
8 nothing like those in *Griffin*. In this case, the prosecutor did not comment directly about Barraza's  
9 failure to testify. In fact, the prosecutor's comments were not directed to the jury at all. The  
10 prosecutor's comments were, rather, apparently good-faith argument, directed to the trial court, with  
11 respect to an evidentiary issue. The comments in question were made before the jury knew whether  
12 or not Barraza would testify. The comments included no statement or suggestion that the jury could  
13 infer guilt if Barraza did not testify. Moreover, the brief comments were made in passing and were  
14 not emphasized. The Nevada Supreme Court could reasonably have determined that there was no  
15 *Griffin* error, because the prosecutor's remarks were not manifestly intended to call attention to  
16 Barraza's decision whether or not to testify, and were not of such a character that the jury would  
17 naturally and necessarily take them to be a comment on her decision whether or not to testify.

18 Furthermore, even assuming the jury understood the prosecutor's remarks as a comment on  
19 Barraza's decision whether or not to testify, there was no prejudice, given the strong evidence of  
20 Barraza's guilt (discussed above, with respect to Claims 2, 3 and 7). *Griffin* error is not structural  
21 error, and warrants habeas relief only if it was not harmless, meaning that it had a "substantial and  
22 injurious effect or influence in determining the jury's verdict." *Cook*, 538 F.3d at 1019 (citing  
23 *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)); *see also Hovey v. Ayers*, 458 F.3d 892, 912  
24 (9th Cir. 2006) (*Griffin* error is not harmless where the comment at issue "is extensive, where an  
25 inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is  
26 evidence that could have supported acquittal"). In this case, the comments complained of were

1 isolated, brief and fleeting, they did not include any statement or suggestion that the jury could infer  
2 guilt if Barraza did not testify, and there was strong evidence of Barraza’s guilt. Moreover, the trial  
3 court instructed the jury that Barraza had a constitutional right not to testify, that the jury could not  
4 draw any inference of guilt from the fact that she did not testify, and that the jury should not discuss  
5 Barraza’s decision not to testify or allow it to enter into their deliberations in any way. *See* Jury  
6 Instructions, Exhibit 75 (ECF No. 31-4), Instruction 27. Under the circumstances in this case, the  
7 Nevada Supreme Court could reasonably have determined that any possible *Griffin* error was  
8 harmless.

9 The Nevada Supreme Court’s ruling on this claim was not contrary to, or an unreasonable  
10 application of, *Griffin*, or any other Supreme Court precedent, and was not based on an unreasonable  
11 determination of the facts in light of the evidence. The Court will deny habeas corpus relief with  
12 respect to Claim 8.

13 Claim 10

14 In Claim 10, Barraza claims that her federal constitutional rights were violated because  
15 “[t]he State presented victim impact evidence during the guilt phase of the trial for the purposes of  
16 invoking sympathy and emotional responses from jurors.” *See* Petition for Writ of Habeas Corpus,  
17 pp. 21-22; Supplemental Brief Two in Support of Writ of Habeas Corpus, pp. 15-17.

18 Barraza asserted this claim on her direct appeal. *See* Appellant’s Opening Brief, Exhibit 91,  
19 pp. 15-17 (ECF No. 34-7, pp. 27-29). The Nevada Supreme Court denied the claim without  
20 discussion. *See* Order of Affirmance, Exhibit 2, p. 1 n.1 (ECF No. 11-2, p. 2).

21 The evidence at issue in this claim is the testimony of Kelly Hershberger, who was Wilkins’  
22 foster mother. Hershberger’s testimony was as follows:

23 Q. Hi Ms. Hershberger. [Where] are you from?

24 A. I’m from Ohio. Small town of Delphos.

25 Q. Are you familiar with Crystal Wilkins?

26 A. Yes.

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Q. How are you familiar with Crystal?

A. She was my foster daughter.

Q. When did she become your foster daughter?

A. She [came] to our home when she was 15 1/2.

Q. How long did she stay with you?

MR. SCHIECK [defense counsel]: Objection. Relevance, Your Honor. What's the relevance?

MS. BRIERLY [prosecutor]: The relevance is Ms. Hershberger knows the victim in this case. She knows what -- if she's right-handed or left-handed, and she know -- she can identify the victim, and that's relevant in this case.

THE COURT: Okay. Go ahead.

THE WITNESS: I'm sorry.

BY MS. BRIERLY:

Q. How did -- how long did she stay with you?

A. She left our home two months before she turned 19.

Q. So that would be five years? Four years?

A. Four years. Close to four years.

Q. And -- she stayed with you that entire time?

A. Yes. Even though the county did --

MR SCHIECK: Objection, Your Honor. This is not relevant to the issues that they said they were going to ask her about.

THE COURT: And, and it isn't. So I'm going to sustain that objection, and ask that you move on.

MS. BRIERLY: Okay, Judge.

THE COURT: So don't answer that, and wait for the next question please.

BY MS. BRIERLY:

Q. Are you familiar with whether -- what hand -- did you see Crystal go to school?

A. Yes.

1 Q. And did you see here do homework?

2 A. Yes.

3 Q. And did you see her write and so on?

4 A. Yes.

5 Q. And did you see what hand she wrote with?

6 A. She was right-handed.

7 Q. Okay.

8 \* \* \*

9 Q. I wanted to show you, Ms. Hershberger, what's been marked as State's  
10 proposed Exhibit 31.

11 \* \* \*

12 Q. I'm gonna ask you if you recognize the person in that photograph.

13 A. It's Crystal.

14 Q. Did you take that photograph?

15 A. Yes.

16 Q. And how old was she in that photograph?

17 A. I believe it was her 18th birthday?

18 Q. Is that a true and accurate depiction of her?

19 A. Yes.

20 Testimony of Kelly Hershberger, Trial Transcript, August 22, 2007, Exhibit 71, pp. 83-85 (ECF No.  
21 30-1, pp. 84-86); *see also* Trial Transcript, August 22, 2007, pp. 109-13 (discussion regarding  
22 objection to this testimony).

23 This claim is meritless. The only Supreme Court precedent cited by Barraza in support of  
24 this claim is *Old Chief v. United States*, 519 U.S. 172 (1997), which is inapposite. *Old Chief* was a  
25 federal criminal case. The evidentiary issue decided by the Supreme Court in that case was  
26 governed by the Federal Rules of Evidence, Rule 403 in particular. *See Old Chief*, 519 U.S. at 178-

1 92. There

2  
3 was no issue in *Old Chief* regarding whether admission of any evidence violated the defendant's  
4 federal constitutional right to due process of law, and the Court did not address any such issue.

5 "It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for  
6 federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due  
7 process." *Spivey*, 194 F.3d at 977-78. To show that improper admission of evidence violated her  
8 due process rights, Barraza must demonstrate that the admission of the challenged evidence "offends  
9 some principle of justice so rooted in the traditions and conscience of our people as to be ranked as  
10 fundamental." *Patterson*, 432 U.S. at 202. Barraza makes no attempt to show that the Nevada  
11 Supreme Court's ruling, denying relief on this claim, was an unreasonable application of these  
12 federal constitutional principles. This Court determines that it was not. The admission of  
13 Hershberger's testimony, and through that testimony a photograph of the victim, did not render  
14 Barraza's trial fundamentally unfair.

15 The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable  
16 application of, Supreme Court precedent, and was not based on an unreasonable determination of the  
17 facts in light of the evidence. The Court will deny habeas corpus relief with respect to Claim 10.

18 Claim 12

19 In Claim 12, Barraza claims that her federal constitutional rights were violated because  
20 evidence was admitted at trial concerning statements made by the victim, Crystal Wilkins, before her  
21 death, in response to questions asked by a police officer, though Wilkins was not subject to  
22 confrontation or cross-examination. *See* Petition for Writ of Habeas Corpus, pp. 25-26;  
23 Supplemental Brief Two in Support of Writ of Habeas Corpus, pp. 20-25.

24 Barraza made a motion before trial to suppress evidence of Wilkins' statements. *See* Motion  
25 to Suppress, Exhibit 16 (ECF No. 26-12). The trial court denied that motion. *See* Order, Exhibit 40  
26 (ECF No. 27-10). Barraza then filed a petition for writ of mandamus or prohibition in the Nevada



1 Supreme Court, seeking to prevent testimony regarding the statements made by Wilkins.  
2 *See* Petition for Writ of Mandamus or Prohibition, Exhibit 41 (ECF No. 27-11). The Nevada  
3 Supreme Court denied that petition. *See* Order Denying Petition and Motion for Stay, Exhibit 47  
4 (ECF No. 27-17).

5 At trial, Barraza's counsel objected to admission of the testimony regarding statements made  
6 by Wilkins before she died, but that testimony was admitted over Barraza's objections. *See*  
7 Testimony of Kenneth Mead, Trial Transcript, August 21, 2007, Exhibit 70, p. 127 (ECF No. 29-1,  
8 p. 128).

9 The testimony at issue here is the testimony of Kenneth Mead, a detective with the Las  
10 Vegas Metropolitan Police Department, who responded to the scene of the stabbing. Mead testified,  
11 as follows, about what Wilkins said to him when he found her, after the stabbing, at the Silver  
12 Saddle Saloon in Las Vegas:

13 Q. And she [Crystal Wilkins] responded?

14 A. She did.

15 Q. What did she say?

16 A. I asked her name. She told me her name was Crystal. I asked her if  
17 she knew where she was at, and she told me she was at the Silver Saddle. I asked her  
18 what happened and she stated I can't believe the bitch stabbed me. I can't believe she  
19 did this. I asked her if she know who -- if she knew who did this, and she told me the  
20 girl's name was Jessica. I asked her her last name and she said Parraza or Barraza. I  
21 asked her again, and again she said Parraza or Barraza. So I took it to mean one of  
those two. She told me that -- the only thing she could recall her wearing was a red  
tank top. And she just kept repeating to me, my god, you can't believe how much  
this hurts. You can't believe how much my stomach hurts. So I tried to comfort her,  
and, like I said, when I arrived the fire department was arriving at the same time so I  
backed off and let them handle the medical care.

22 Testimony of Kenneth Mead, Trial Transcript, August 21, 2007, Exhibit 70, pp. 127-28 (ECF No.  
23 29-1, pp. 128-29).

24 On her direct appeal, Barraza asserted a claim that her constitutional rights were violated on  
25 account of the admission of this testimony. *See* Appellant's Opening Brief, Exhibit 91, pp. 20-25  
26 (ECF No. 34-7, pp. 32-37). The Nevada Supreme Court denied the claim without discussion. *See*

1 Order of Affirmance, Exhibit 2, p. 1 n.1 (ECF No. 11-2, p. 2).

2  
3 In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that  
4 the Confrontation Clause of the Sixth Amendment bars the admission of out-of-court “testimonial”  
5 statements except when the declarant is unavailable and the defendant had a prior opportunity to  
6 cross-examine the declarant. See *Crawford*, 541 U.S. at 53-54. The Supreme Court reasoned that  
7 the Confrontation Clause was “most naturally read as a reference to the right of confrontation at  
8 common law, admitting only those exceptions established at the time of founding.” *Id.* at 54. The  
9 Supreme Court noted that at common law there was an exception to the hearsay rule allowing  
10 admission of dying declarations in criminal cases, even where the dying declarations were  
11 testimonial. *Id.* at 56 n. 6. The Supreme Court, however, declined to decide whether the Sixth  
12 Amendment incorporates the exception for testimonial dying declarations. *Id.*

13 The Supreme Court has not clearly established that admission of a testimonial dying  
14 declaration violates the Confrontation Clause. See *Michigan v. Bryant*, 562 U.S. 344, 351 n. 1  
15 (2011); *Crawford*, 541 U.S. 36, 56 n. 6 (declining to decide whether the Confrontation Clause  
16 “incorporates an exception for testimonial dying declarations”). Therefore, Barraza does not show  
17 that the Nevada Supreme Court’s decision, denying relief on this claim, was contrary to, or an  
18 unreasonable application of, *Crawford*, or any other clearly established Supreme Court precedent, or  
19 that it was unreasonable in light of the evidence. The Court will deny relief on Claim 12.

20 Claim 13

21 In Claim 13, Barraza claims that her federal constitutional rights were violated because she  
22 was not sentenced under the amended version of NRS 193.165. See Petition for Writ of Habeas  
23 Corpus, pp. 27-28; Supplemental Brief Two in Support of Writ of Habeas Corpus, pp. 43-49. NRS  
24 193.165 governs the sentence enhancement for use of a deadly weapon. Barraza concedes that the  
25 amended version of that statute, which she claims should have been applied in her case, became  
26 effective on July 1, 2007, almost two years after she killed Wilkins, but before she was tried. See

1 Reply, p. 39, lines 21-22 (“It went into effect on July 1, 2007.”).

2  
3 Before her sentencing, Barraza submitted to the trial court a brief in support of application of  
4 amended NRS 193.165. *See* Defendant’s Brief, Exhibit 80 (ECF No. 32-5). The State filed an  
5 opposition to that motion. *See* State’s Opposition, Exhibit 82 (ECF No. 32-7). The parties  
6 presented argument, and the court denied the motion. *See* Transcript of Sentencing, October 25,  
7 2007, Exhibit 85, pp. 2-4 (ECF No. 34-1, pp. 3-5).

8 On her direct appeal, Barraza asserted a claim that her constitutional rights were violated  
9 because the trial court did not sentence her under amended NRS 193.165. *See* Appellant’s Opening  
10 Brief, Exhibit 91, pp. 43-49 (ECF No. 34-7, pp. 55-61). The Nevada Supreme Court denied the  
11 claim without discussion. *See* Order of Affirmance, Exhibit 2, p. 1 n.1 (ECF No. 11-2, p. 2).

12 This claim is without merit. The Nevada Supreme Court’s construction of NRS 193.165,  
13 concluding that the amendments to that statute did not apply to a defendant who committed her  
14 crime almost two years before the amended version of the statute went into effect, is a matter of state  
15 law, beyond the scope of this federal habeas review. *See Estelle*, 502 U.S. at 67-68 (“[I]t is not the  
16 province of a federal habeas court to reexamine state-court determinations on state law questions. In  
17 conducting habeas review, a federal court is limited to deciding whether a conviction violated the  
18 Constitution, laws, or treaties of the United States.”); *see also Bradshaw*, 546 U.S. at 76 (“[A] state  
19 court’s interpretation of state law ... binds a federal court sitting in habeas corpus.”). Barraza makes  
20 no colorable argument that the Nevada Supreme Court’s construction of NRS 193.165 in this  
21 manner violated her federal constitutional rights, or that the ruling of the Nevada Supreme Court  
22 was contrary to, or an unreasonable application of, any clearly established Supreme Court precedent,  
23 or that it was unreasonable in light of the evidence. The Court will deny relief on Claim 13.

24 Certificate of Appealability

25 The standard for issuance of a certificate of appealability calls for a “substantial showing  
26 of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court has interpreted

1 28 U.S.C. § 2253(c) as follows:

2

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

6 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79  
7 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*,  
8 537 U.S. 322 (2003). The Court stated in that case:

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

14 *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). The Court has considered each of  
15 Barraza's claims with respect to whether they satisfy the standard for issuance of a certificate of  
16 appeal, and determines that none of them do. The Court will deny Barraza a certificate of  
17 appealability.

18 **IT IS THEREFORE ORDERED** that the Petition for Writ of Habeas Corpus in this case  
19 (ECF No. 1) is **DENIED**.

20 **IT IS FURTHER ORDERED** that petitioner is denied a certificate of appealability.

21 **IT IS FURTHER ORDERED** that the Clerk of the Court shall **ENTER JUDGMENT**  
22 **ACCORDINGLY**.

23 Dated: August 2, 2017.

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UNITED STATES DISTRICT JUDGE