

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PORFIRIO DUARTE-HERRERA,

Case No. 2:15-cv-01843-GMN-DJA

Petitioner,

ORDER

v.

WILLIAM HUTCHINGS,¹ et al.,

Respondents.

Porfirio Duarte-Herrera is a Nevada prisoner who was convicted of, *inter alia*, first-degree murder with the use of a deadly weapon and two counts of attempted murder with the use of a deadly weapon in two trials² concerning two bombing incidents—hereinafter “the Luxor bombing trial” and “the Home Depot bombing trial”—and is serving, *inter alia*, a life sentence without the possibility of parole. (ECF Nos. 54-6, 78-5.) Duarte-Herrera filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 64.) For the Luxor bombing trial, Duarte-Herrera alleges that the state district court violated his right to present evidence, his trial should have been severed from his co-defendant’s trial, and counsel failed to suppress his confession. For the Home Depot bombing trial, Duarte-Herrera alleges that the state district court improperly prohibited him from questioning detectives. And for both trials, Duarte-Herrera alleges that there were erroneous jury instructions given, there was insufficient evidence to support his convictions for attempted murder,

¹ The state corrections department’s inmate locator page states that Duarte-Herrera is currently incarcerated at Southern Desert Correctional Center. William Hutchings is the current warden for that facility. At the end of this order, this court directs the clerk to substitute William Hutchings as a respondent for the prior Respondent Brian Williams, pursuant to rule 25(d) of the Federal Rules of Civil Procedure.

² Rule 2(e) of the Rules Governing Section 2254 Cases permits Duarte-Herrera to challenge different judgments of conviction from the same court in the same federal petition.

1 and counsel failed to investigate his innocence. This court denies Duarte-Herrera’s habeas
2 petition, denies him a certificate of appealability, and directs the clerk of the court to enter
3 judgment accordingly.

4 **I. BACKGROUND³**

5 **A. The Luxor bombing trial⁴**

6 Caren Chali testified⁵ that on May 7, 2007, at a little past 4:00 a.m., she and her boyfriend,
7 Willebaldo Antonio Dorantes, were walking to Dorantes’ vehicle, which was parked in the Luxor
8 Hotel & Casino (hereinafter “the Luxor”) parking garage in Las Vegas, Nevada, after work. (ECF
9 No. 42-4 at 22–23, 26.) As they approached Dorantes’ vehicle, Chali saw a coffee cup on the roof
10 of the vehicle “by the driver’s side.” (*Id.* at 26.) Dorantes “made a comment that somebody had
11 left [the] coffee cup and . . . told [Chali] to get in the car.” (*Id.*) As Chali entered the front passenger
12 seat, she heard an explosion and ducked. (*Id.* at 26, 47.) Chali ran around the car and saw Dorantes
13 lying on the ground severely injured. (*Id.* at 27.) Chali was not harmed, but Dorantes died shortly
14

15 ³ This court makes no credibility findings or other factual findings regarding the truth or falsity of
16 this summary of the evidence from the state court. This court’s summary is merely a backdrop to
its consideration of the issues presented in the case. Any absence of mention of a specific piece
of evidence does not signify this court overlooked it in considering Duarte-Herrera’s claims.

17 ⁴ Duarte-Herrera was tried together with codefendant Omar Rueda-Denvers in the Luxor trial.
18 Rueda-Denvers’ federal habeas petition was conditionally granted, subject to a retrial in state court,
in Case No. 03-13-cv-00309-MMD-WGC, on a basis inapplicable to the present case.

19 ⁵ Chali’s pre-trial deposition was played for the jury. (*See* ECF No. 51-1 at 14–15.) At trial, an
20 unredacted copy of the deposition transcript was admitted as a court exhibit to make a record of
Chali’s testimony for appeal. (*Id.* at 10–12.) It is not apparent which portions of the deposition
21 reflected in the unredacted transcript were redacted from the video played to the jury. Duarte-
Herrera filed a copy of the unredacted transcript in the federal record. This copy has handwritten
22 notes in the margins. This court has not proceeded based on any speculation in that regard. This
court’s summary of Chali’s testimony instead reflects portions of her testimony in the transcript
23 that the opening statements, argument during the trial, and the closing arguments tend to reflect
were included in the video at trial. If Duarte-Herrera were to maintain that testimony referenced
herein instead was redacted, the burden would fall upon him to show via the state court record that
such deposition testimony was redacted from the video played at trial.

1 after the explosion. (*Id.* at 47; ECF No. 51 at 101.) The medical examiner testified that a large
2 fragment of metal “entered [Dorantes’] brain . . . creat[ing] a seven centimeter . . . furrow.” (ECF
3 No. 51-1 at 85, 89–90.) Dorantes’ autopsy also revealed torn skin and abrasions on his face,
4 stippling on the whites and corneas of his eyes, a mangled right hand, and missing skin on his
5 upper right arm. (*Id.* at 90, 92, 94–95.)

6 After reviewing surveillance footage of the Luxor parking garage, law enforcement created
7 a composite video of the night in question, which showed a vehicle enter the parking garage at
8 1:11 a.m. and drive around for several minutes as if “searching for something in the parking lot.”
9 (ECF No. 51 at 116, 125, 127.) At 2:37 a.m., the surveillance footage showed “that same vehicle
10 come back up onto the roof of the parking garage, . . . [and] park directly next to [Dorantes’]
11 vehicle.” (*Id.* at 127–28.) That vehicle, later identified as a 2006 Chevrolet Cobalt, was parked
12 next to Dorantes’ vehicle for “probably 20 plus seconds.” (*Id.* at 128, 131.)

13 Law enforcement asked Chali about the 2006 Cobalt, and she gave law enforcement the
14 name of her ex-boyfriend, Alexander Perez. (ECF No. 51 at 131–32.) Chali testified that she met
15 Perez in Guatemala in 2000, started dating him in 2001, and had a child with him in 2004. (ECF
16 No. 42-4 at 8, 10, 37.) Perez came to the United States in 2004 and thereafter told Chali that he
17 wanted her and their child to come to the United States. (*Id.* at 14.) Chali agreed and met Perez in
18 Las Vegas in April 2006; however, they separated 15 days after her arrival. (*Id.* at 15–17.) Chali
19 started dating Dorantes in July 2006. (*Id.* at 19.) In August 2006, Perez told Chali that he wanted
20 to get back together, but she declined, telling him that she “was already dating someone else.” (*Id.*
21 at 21.) Chali testified that she and Perez worked for a man named Omar Rueda-Denvers in Panama
22 in 2003 and that Perez later assumed Rueda-Denvers’ name. (*Id.* at 10–13.)

23

1 Law enforcement learned that the 2006 Cobalt was registered to Rosa Alfonso. (ECF No.
2 51 at 135.) Alfonso testified that she met Rueda-Denvers in March 2004, started dating him several
3 months later until December 2006, and remained friends with him thereafter. (*Id.* at 176–178, 180.)
4 Alfonso testified that Rueda-Denvers was “[v]ery good friends” with Duarte-Herrera and that
5 Rueda-Denvers and Duarte-Herrera saw each other daily in the months leading up to May 2007.
6 (*Id.* at 179.) On May 6, 2007, sometime past 11:00 p.m., Rueda-Denvers was at Alfonso’s
7 residence when he got a telephone call from Duarte-Herrera. (*Id.* at 190.) Rueda-Denvers told
8 Alfonso that he “need[ed] to go” following that telephone call. (*Id.*) On previous occasions,
9 Rueda-Denvers had conveyed to Alfonso that he felt rejected by Chali and that “he knew where
10 [Chali] worked and the hours that she worked there.” (*Id.* at 187–88.) Alfonso noticed that the
11 spare key to her Cobalt was missing on May 1, 2007. (*Id.* at 193.)

12 Law enforcement conducted an interview of Rueda-Denvers, and although he denied
13 involvement in the bombing, Rueda-Denvers admitted he drove Alfonso’s Cobalt that night and
14 that “he had gone to the Luxor . . . because he wanted to see his daughter.” (ECF No. 52 at 166,
15 226.) Rueda-Denvers also admitted he followed Chali extensively in either his vehicle or
16 Alfonso’s Cobalt and knew where Chali worked, Chali’s work schedule, that Chali was dating
17 Dorantes, and Dorantes’ vehicle. (*Id.* at 161, 183, 168; ECF No. 52-1 at 41–42.)

18 Law enforcement searched Rueda-Denvers’ vehicle and found a pair of wire cutters, a role
19 of electrical tape, an electrical current tester, various wires, and keys to Alfonso’s Cobalt. (ECF
20 Nos. 51 at 141–42; 51-1 at 108–110.) Law enforcement also found a drill bit set in Rueda-
21 Denver’s residence. (ECF No. 51-1 at 66–67, 69.) And after learning that Rueda-Denvers worked
22 maintenance at a condominium complex, law enforcement searched a maintenance shed that
23 Rueda-Denvers had access to and found “a box of 9-volt batteries.” (*Id.* at 17–18, 64.) The 9-bolt

1 batteries found in the shed were the same type and manufacturer as the battery used in the bomb.
2 (ECF No. 52 at 73.)

3 Law enforcement also conducted an interview of Duarte-Herrera, and, although he initially
4 denied any involvement, Duarte-Herrera eventually admitted “that he made a bomb” and “knew
5 that it was to go off at the Luxor,” though he denied going to the Luxor or activating the bomb.

6 (ECF No. 52 at 10.) Ultimately, Duarte-Herrera told law enforcement that although “he was
7 hesitant at first [of] . . . plac[ing] the bomb on the car . . . because it[was] not [his] problem,” he

8 placed the bomb “[n]ear the center of the roof of the car on the driver’s side,” went to a nearby gas
9 station, waited until he heard ambulance sirens, and then returned Alfonso’s Cobalt and went

10 home. (*Id.* at 132, 147–49.) Duarte-Herrera also told law enforcement that the bomb had been
11 placed in a cup, that a magnet was placed inside the cup so that it would stay on the vehicle,⁶ and

12 that the bomb was made of “[b]lack [shotgun] powder, a lightbulb . . . , [and] an old [car] switch.”

13 (*Id.* at 10–11.) Duarte-Herrera then “volunteered to draw [the bomb] out for [law enforcement].”

14 (*Id.* at 124; *see also* ECF No. 40-2 at 24.) Law enforcement searched Duarte-Herrera’s residence
15 and found, *inter alia*, a can of expanding spray foam similar to the spray foam used in the bomb,

16 a strand of Christmas tree lights that had been cut with some of the lights removed,⁷ pipe end caps
17 of a different size and manufacture than the pieces found in the bomb, and two soldering irons.

18 (ECF No. 52 at 72, 84–86, 90.)

19 Duarte-Herrera called an explosives expert, Donald Hansen. (ECF No. 52-1 at 90.) Hansen
20 testified that the bomb depicted in Duarte-Herrera’s drawing contained all the mechanisms of a

21 _____
22 ⁶ Danny Waltenbaugh, an explosives specialist for the Bureau of Alcohol, Tobacco, Firearms and
Explosives, testified that “there was a magnet recovered at the scene, but it could not be determined
that the magnet in and of itself was part of the device.” (ECF No. 52 at 16, 76.)

23 ⁷ Waltenbaugh testified that a filament from a lightbulb was used “to heat up [the] explosive
material” in the bomb. (ECF No. 52 at 92.)

1 pipe bomb: “the power source, . . . the triggering mechanism, the safe arm switch.” (*Id.* at 109.)
2 However, Hansen testified that the bomb depicted in Duarte-Herrera’s drawing “would not work
3 because the string coming through the foam would be immobilized and it would . . . negate the
4 operation of th[e] switch on top of the . . . mechanism.” (*Id.* at 101–02.)

5 A jury found Duarte-Herrera guilty of first-degree murder with the use of a deadly weapon,
6 attempted murder with the use of a deadly weapon, two counts of possession of an explosive or
7 incendiary device, and transportation or receipt of explosives for an unlawful purpose with
8 substantial bodily harm in the Luxor bombing. (ECF No. 53-3.) The Nevada Supreme Court
9 affirmed Duarte-Herrera’s judgment of conviction and the denial of his state habeas petition. (ECF
10 Nos. 55-7; 59-4.)

11 **B. The Home Depot bombing trial⁸**

12 On October 31, 2006, Ryan Wallace drove his 2006 Dodge Ram to his job at a Home Depot
13 store in Las Vegas, Nevada, and parked at the back of the parking lot. (ECF No. 77-1 at 24–26,
14 28–29.) At approximately 8:30 p.m., while still working, Wallace heard and felt a “violent”
15 explosion. (*Id.* at 30, 49.) Wallace exited the store, “saw a plume of white smoke rising,” and
16 realized that the explosion came from his truck. (*Id.* at 30.) There was significant damage to
17 Wallace’s truck from the explosion. (*Id.* at 33–35.) Wallace testified that “there was about a three-
18 inch hole in the cast iron block” that needed to be replaced, the engine and tires needed to be
19 replaced, and the fenders, hood, and radiators had damage. (*Id.* at 34–35.)

20 Special Agent Roger Martin with the Bureau of Alcohol, Tobacco, Firearms and
21 Explosives testified that a pipe bomb was placed on “the passenger front fender well” of Wallace’s
22 truck. (ECF No. 77-1 at 56, 70–71.) Special Agent Martin testified that video surveillance showed
23

⁸ Duarte-Herrera was tried alone in the Home Depot trial.

1 “a vehicle pull in across from Mr. Wallace’s” truck the night of the explosion. (ECF No. 77-2 at
2 2–3, 5.) That vehicle was parked near Wallace’s truck for four to five minutes. (*Id.* at 5.) The
3 explosion took place 15 minutes later and sent “fragments throughout the whole parking lot.” (*Id.*
4 at 6, 37.) Danny Waltenbaugh, an explosives specialist for the Bureau of Alcohol, Tobacco,
5 Firearms and Explosives, testified that the “extremely lethal” pipe bomb placed on Wallace’s truck
6 consisted of, *inter alia*, “gunpowder, . . . an electrical igniter which would be a light bulb which
7 was attached to a nine[-]volt battery and a mechanical kitchen timer.” (*Id.* at 39, 44, 51.)

8 Detective Luis Araujo with the Las Vegas Metropolitan Police Department testified
9 information led him to speak to Duarte-Herrera regarding the explosion. (ECF No. 78-1 at 6, 8.)
10 Duarte-Herrera told detectives that he placed a bomb on the passenger-side front tire of a black
11 truck in the Home Depot parking lot. (*Id.* at 17–18.) Duarte-Herrera stated that “he worked in
12 electronics[,] and he just figured” out how to build the bomb. (*Id.* at 14–15.) Duarte-Herrera
13 explained that he used a cream-colored kitchen timer, shotgun powder, batteries, and a wire to
14 make the bomb. (*Id.* at 15–16.) Duarte-Herrera set the timer for 20 minute and watched the
15 explosion from a 7-Eleven store across the street. (*Id.* at 18–19.)

16 A jury found Duarte-Herrera guilty of attempted murder with the use of a deadly weapon,
17 manufacture and/or possession of an explosive or incendiary device, malicious destruction of
18 private property, and possession of an explosive or incendiary device during the commission of a
19 felony for the Home Depot bombing. (ECF No. 78-4.) Duarte-Herrera’s conviction for possession
20 of an explosive or incendiary device during the commission of a felony was overturned on direct
21 appeal as redundant to the conviction for attempted murder with the use of a dangerous weapon.
22 (ECF No. 56-4 at 6–8.) The Nevada Supreme Court affirmed the remainder of Duarte-Herrera’s
23 judgment of conviction. (*Id.*)

1 **II. GOVERNING STANDARDS OF REVIEW**

2 **A. Antiterrorism and Effective Death Penalty Act (“AEDPA”)**

3 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus
4 cases under AEDPA:

5 An application for a writ of habeas corpus on behalf of a person in custody pursuant
6 to the judgment of a State court shall not be granted with respect to any claim that
7 was adjudicated on the merits in State court proceedings unless the adjudication of
8 the claim –

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

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

14 A state court decision is contrary to clearly established Supreme Court precedent, within the
15 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law
16 set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are
17 materially indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*, 538
18 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000), and citing *Bell v.*
19 *Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly
20 established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if the state court
21 identifies the correct governing legal principle from [the Supreme] Court’s decisions but
22 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*,
23 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state court decision to be
more than incorrect or erroneous. The state court’s application of clearly established law must be
objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409–10) (internal citation omitted).

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

10 **B. Effective assistance of counsel**

11 In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for analysis
12 of claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1) that the
13 attorney’s “representation fell below an objective standard of reasonableness,” and (2) that the
14 attorney’s deficient performance prejudiced the defendant such that “there is a reasonable
15 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
16 been different.” 466 U.S. 668, 688, 694 (1984). A court considering a claim of ineffective
17 assistance of counsel must apply a “strong presumption that counsel’s conduct falls within the
18 wide range of reasonable professional assistance.” *Id.* at 689. The petitioner’s burden is to show
19 “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed
20 the defendant by the Sixth Amendment.” *Id.* at 687. Additionally, to establish prejudice under
21 *Strickland*, it is not enough for the habeas petitioner “to show that the errors had some conceivable
22 effect on the outcome of the proceeding.” *Id.* at 693. Rather, the errors must be “so serious as to
23 deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

1 Where a state district court previously adjudicated the claim of ineffective assistance of
2 counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult.
3 *See Harrington*, 562 U.S. at 104–05. *Strickland* and § 2254(d) are each highly deferential, and
4 when the two apply in tandem, review is doubly so. *Id.* at 105; *see also Cheney v. Washington*,
5 614 F.3d 987, 995 (9th Cir. 2010). And “[w]hen § 2254(d) applies, the question is not whether
6 counsel’s actions were reasonable. The question is whether there is any reasonable argument that
7 counsel satisfied *Strickland*’s deferential standard.” *Harrington*, 562 U.S. at 105.

8 **III. DISCUSSION OF GROUNDS RELATING TO THE LUXOR BOMBING**

9 **A. Ground 1—disclosure of confidential informant**

10 In ground 1, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendment rights
11 were violated when the state district court violated his right to present evidence by denying
12 disclosure of the identity of a confidential informant who had information about his co-defendant,
13 Rueda-Denvers. (ECF No. 64 at 31.) Duarte-Herrera explains that this evidence was relevant to
14 prove that Rueda-Denvers committed the bombing alone and to disprove Rueda-Denvers’ claim
15 that he had no knowledge of how to make a bomb. (*Id.*)

16 **1. Background information**

17 According to a May 2007 report, a narcotics confidential informant told a narcotics
18 detective, *inter alia*: (1) the informant personally knew Rueda-Denvers in Guatemala by the name
19 of Caesar Augusto Chinchilla; (2) Rueda-Denvers worked as an associate with and armed
20 bodyguard for Manuel Carrillo, an alleged high level weapons and drug trafficker in Central and
21 South America; (3) the informant heard Rueda-Denvers speak to Carrillo on several occasions
22 regarding moving weapons from Guatemala to Honduras; (4) Rueda-Denvers originally was from
23 Nicaragua and went from there to Columbia where he trained with and learned weapons and

1 explosives from the Revolutionary Armed Forces of Columbia, or FARC, allegedly identified by
2 the State Department as a terrorist organization; (5) he heard Rueda-Denvers speaking in 1997-
3 1998 with “Arana,” an alleged known drug and weapons trafficker in Guatemala and Central
4 America about explosives, blowing up bridges, and FARC soldiers and commanders that they both
5 knew; and (6) Rueda-Denvers left Guatemala for the United States because he blew up a vehicle
6 with a load of narcotics and feared for his life. (ECF No. 40-3 at 2–3.) Nothing in the report
7 reflects whether and how the informant had personal knowledge of the points in items (4) and (6)
8 in the summary above.

9 On the first day of trial, Duarte-Herrera requested that the state district court order the State
10 to identify the informant so that Duarte-Herrera could use his testimony to establish that Rueda-
11 Denvers had the knowledge and capability to build a bomb in support of a defense argument that
12 Rueda-Denvers acted alone. (ECF No. 48-4 at 4–5.) Duarte-Herrera explained that he wanted to
13 get the informant’s name, talk to him, and “verify the accuracy of the report itself.” (*Id.* at 11.)
14 The trial court denied Duarte-Herrera’s requests, noting, *inter alia*: (1) the narcotics informant was
15 not a confidential informant or percipient witness for the Luxor bombing; (2) nothing indicated
16 that he had any knowledge regarding the allegations in the Luxor Bombing charges; and (3) the
17 alleged conversation regarding explosives and blowing up bridges would have occurred more than
18 ten years before the Luxor bombing. (*Id.* at 12.)

19 Later, on the eighth day of trial, Duarte-Herrera argued that Rueda-Denvers opened the
20 door to the information from the confidential informant by eliciting testimony from a detective
21 that Rueda-Denvers had never seen a bomb before. (ECF No. 52-1 at 5–6.) Duarte-Herrera argued
22 that he should be able to inquire into the detective’s investigation regarding the May 2007 report.

23

1 (*Id.* at 6.) The state district court ruled that the door had not “been opened in that regard, so [it
2 was] continuing to exclude that area of inquiry and evidence.” (*Id.* at 9.)

3 **2. State court determination**

4 In affirming Duarte-Herrera’s judgment of conviction, the Nevada Supreme Court held:

5 Duarte-Herrera contends that the district court violated his right to present
6 a defense by refusing to order the disclosure of the identity of a confidential
7 informant who had provided information about Duarte-Herrera’s codefendant,
8 Omar Rueda-Denvers. We conclude that the district court’s conclusion that the
9 confidential informant was not a material witness in the case is supported by the
10 record. *See Sheriff v. Vasile*, 96 Nev. 5, 8, 604 P.2d 809, 810 (1980) (“The identity
11 of an informant need not be disclosed where he is not a material witness, because
12 he can neither supply information constituting a defense nor rebut a necessary
13 element of an offense.”). The informant did not participate in the events giving rise
14 to the criminal charge. The record indicates that the informant’s knowledge of
15 Rueda-Denvers comes solely from a conversation he overheard regarding
16 explosives that involved Rueda-Denvers and occurred ten years prior to the instant
17 crime. While the evidence suggests that Rueda-Denvers is familiar with some
18 explosives, the informant’s testimony is not necessary to a “fair determination of
19 guilt or innocence” where Duarte-Herrera admitted to detectives that he constructed
20 the explosive. *See NRS 49.365; Vasile*, 96 Nev. at 8, 604 P.2d 810.

21 (ECF No. 55-7 at 2–3.)

22 **3. Conclusion**

23 The sole Supreme Court decision relied upon by Duarte-Herrera is *Roviaro v. United*
States, 353 U.S. 53 (1957). (*See* ECF Nos. 64 at 32–34; 98 at 2–4.) In *Roviaro*, the Supreme Court
set the standards for determining whether the disclosure of an informant’s identity is required.
Importantly, the Court rejected any “fixed rule” and instead fashioned a broad test that “balanc[es]
the public interest in protecting the flow of information against the individual’s right to prepare
his defense.” *Roviaro*, 353 U.S. at 62.

In this case, the confidential informant had information that Rueda-Denvers was
knowledgeable about explosives and had previously “bl[own] up a vehicle” (ECF No. 40-3 at 2–

1 3), which would have been beneficial evidence—if it was determined to be admissible, which was
2 unlikely given the state district court’s ruling on the eighth day of trial—for Duarte-Herrera’s
3 defense that Rueda-Denvers made and placed the bomb—notwithstanding Duarte-Herrera’s
4 confession that he made and placed the bomb. However, the Nevada Supreme Court reasonably
5 determined that the confidential informant did not amount to a material witness because he did not
6 participate in, witness, or have knowledge about the Luxor bombing. Consequently, considering
7 Duarte-Herrera’s minimal showing of relevance, Duarte-Herrera fails to demonstrate that the
8 Nevada Supreme Court’s affirmation of the state district court’s determination disallowing the
9 disclosure constituted an unreasonable application of *Roviaro*’s balancing test.

10 Further, Duarte-Herrera fails to demonstrate that this determination was materially
11 indistinguishable from, and therefore contrary to, *Roviaro* where the confidential informant was
12 the sole participant in the crime other than the accused and the only witness who could amplify or
13 contradict the testimony of government witnesses. 353 U.S. at 64–65. Accordingly, the Nevada
14 Supreme Court’s denial of Duarte-Herrera’s claim was neither contrary to, nor an unreasonable
15 application of, clearly established federal law and was not based on an unreasonable determination
16 of the facts. Duarte-Herrera is not entitled to federal habeas relief for ground 1.

17 **B. Ground 2—jury instructions**

18 In ground 2, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendment rights
19 were violated when the state district court overruled his objections to four jury instructions—Jury
20 Instruction Nos. 14, 15, 19, and 20—and denied his proffered instructions in lieu of those
21 instructions. (ECF No. 64 at 34.)

22 //

23 //

1 **1. Background information**

2 **a. Jury Instruction Nos. 14 and 15**

3 Jury Instruction No. 14 provided:

4 The prosecution is not required to present direct evidence of a defendant’s
5 state of mind as it existed during the commission of a crime and the jury may infer
6 the existence of a particular state of mind of a party or a witness from the
7 circumstances disclosed by the evidence.

7 (ECF No. 53-2 at 17.) Relatedly, Jury Instruction No. 15 provided:

8 The intention to kill may be ascertained or deduced from the facts and
9 circumstances of the killing, such as the use of a weapon calculated to produce
10 death, the manner of its use, and the attendant circumstances characterizing the act.

10 (*Id.* at 18.)

11 Duarte-Herrera joined Rueda-Denvers’ objection to Jury Instruction Nos. 14 and 15,
12 arguing that they “relieve[d] the State of their burden of proof.” (ECF No. 52-1 at 151.) Duarte-
13 Herrera also argued that Jury Instruction No. 14 was “misleading and confusing in that the jury
14 could easily interpret it to mean that the State [was] not obligated to prove the mens rea element
15 of the offense.” (ECF No. 50-2 at 5.) Duarte-Herrera alternatively requested that if Jury Instruction
16 No. 14 was given, it should include the following provision: “The State, however, must prove
17 beyond a reasonable doubt that each Defendant had the mental state required for each of the
18 offenses charged.” (*Id.*) The state district court overruled the objection, ruling that the original
19 forms of Jury Instruction Nos. 14 and 15 were “a correct statement of the law.” (ECF No. 52-1 at
20 152.)

21 **b. Jury Instruction No. 19**

22 Jury Instruction No. 19 provided:

1 the crime and refusing to give his proffered instruction concerning reasonable doubt
2 as to his state of mind. We discern no abuse of discretion. *See Crawford v. State*,
3 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (reviewing district court’s decision
4 regarding jury instructions for abuse of discretion). The given instructions were
5 legally correct and did not impermissibly reduce the burden of proof. *See Sharma*
6 *v. State*, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (observing that “intent can
7 rarely be proven by direct evidence of a defendant’s state of mind, but instead is
8 inferred by the jury from the individualized, external circumstances of the crime,
9 which are capable of proof at trial”); *Keys v. State*, 104 Nev. 736 740-41, 766 P.2d
10 270, 273 (1988) (providing that State need not prove premeditation or deliberation
11 to prove attempted murder); *Moser v. State*, 91 Nev. 809, 812, 544 P.2d 424, 426
12 (1975) (“[T]he intention to kill may be ascertained or deduced from the facts and
13 circumstances of the killing, such as the use of a weapon calculated to produce
14 death, the manner of use, and the attendant circumstances characterizing the act.”).
15 Further, the subject matter of the proffered instruction was substantially covered by
16 the given instructions. *See Earl v. State*, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031
17 (1995). The district court instructed the jury that the State bore the burden of proof
18 and gave the statutory reasonable doubt instruction. *See* NRS 175.211.

19 (ECF No. 55-7 at 3–4.)

20 3. Standard for evaluating jury instructions

21 Issues relating to jury instructions are not cognizable in federal habeas corpus unless they
22 violate due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *see also Gilmore v. Taylor*, 508
23 U.S. 333, 342 (1993) (“[W]e have never said that the possibility of a jury misapplying state law
gives rise to federal constitutional error.”). The question is ““whether the ailing instruction by
itself so infected the entire trial that the resulting conviction violates due process’, . . . not merely
whether ‘the instruction is undesirable, erroneous, or even universally condemned.’” *Henderson*
v. Kibbe, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973)).
And significantly, when reviewing a jury instruction, this court considers that jury instruction “in
the context of the instructions as a whole and the trial record.” *Estelle*, 502 U.S. at 72; *see also*
United States v. Frega, 179 F.3d 793, 806 n.16 (9th Cir. 1999) (“In reviewing jury instructions,

1 the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide
2 the jury's deliberation.”).

3 **4. Conclusion**

4 **a. Jury Instruction Nos. 14 and 15**

5 As the Nevada Supreme Court, the final arbiter of Nevada law, reasonably determined,
6 Jury Instruction Nos. 14 and 15 were accurate reflections of Nevada law. *See Sharma v. State*, 118
7 Nev. 648, 659, 56 P.3d 868, 874 (2002) (“[I]ntent can rarely be proven by direct evidence of a
8 defendant's state of mind, but instead is inferred by the jury from the individualized, external
9 circumstances of the crime, which are capable of proof at trial.”); *Moser v. State*, 91 Nev. 809,
10 812, 544 P.2d 424, 426 (1975) (“[T]he intention to kill may be ascertained or deduced from the
11 facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the
12 manner of the use, and the attendant circumstances characterizing the act.”). And Duarte-Herrera
13 fails to articulate how Jury Instruction Nos. 14 and 15 relieved the State of its burden of proof. *See*
14 *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against
15 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the
16 crime with which he is charged.”). Indeed, as the Nevada Supreme Court reasonably noted, Jury
17 Instruction No. 6 provided that “the State [has] the burden of proof beyond a reasonable doubt
18 every material element of the crime charged.” (ECF No. 53-2 at 9.) Furthermore, Jury Instructions
19 No. 14 and 15 simply provided that the State did not have to present direct evidence of his state of
20 mind; they did not relieve the State of its burden of presenting evidence altogether. Therefore,
21 Duarte-Herrera fails to demonstrate that Jury Instruction Nos. 14 and 15 were erroneous and
22 violated his right to due process. *Estelle*, 502 U.S. at 72.

23 //

1 **b. Jury Instruction No. 19**

2 Like Jury Instructions No. 14 and 15, Jury Instruction No. 19 is an accurate reflection of
3 Nevada law, as reasonably determined by the Nevada Supreme Court, the final arbiter of Nevada
4 law. *See Keys v. State*, 104 Nev. 736, 740–41, 766 P.2d 270, 273 (1988) (“Attempted murder is
5 the performance of an act or acts which tend, but fail, to kill a human being, when such acts are
6 done with express malice, namely, with the deliberate intention unlawfully to kill. This is all there
7 is to it. There is no need for the prosecution to prove any additional elements, such as, say
8 premeditation and deliberation.”). And like Jury Instructions No. 14 and 15, Duarte-Herrera fails
9 to articulate how Jury Instruction No. 19 relieved the State of their burden of proof. *See In re*
10 *Winship*, 397 U.S. at 364. Rather, the second paragraph of Jury Instruction No. 19 merely stated
11 what elements were not included in the crime of attempted murder. Thus, Duarte-Herrera fails to
12 demonstrate that Jury Instruction No. 19 was erroneous and violated his right to due process.
13 *Estelle*, 502 U.S. at 72.

14 **c. Jury Instruction No. 20**

15 Jury Instruction No. 20 provided, in relevant part, that an element of attempted murder is
16 “the intent to commit the crime.” (ECF No. 53-2 at 23.) Duarte-Herrera contends that an
17 instruction on transferred intent was needed instead. (*See* ECF No. 51-2 at 4.) “[T]he doctrine of
18 transferred intent is applicable to all crimes where an unintended victim is harmed as a result of
19 the specific intent to harm an intended victim whether or not the intended victim is injured.” *See*
20 *Ochoa v. State*, 115 Nev. 194, 200, 981 P.2d 1201, 1205 (1999). Because a transferred intent
21 instruction was only applicable regarding the attempted murder of Chali if Chali was considered
22 an unintended victim, which is not supported by the record as discussed further in ground 3, the
23 Nevada Supreme Court reasonably determined that the subject matter concerning intent necessary

1 to support a conviction for attempted murder was covered by the given instructions. As such,
2 Duarte-Herrera fails to demonstrate that Jury Instruction No. 20 was erroneously given instead of
3 his proffered instruction such that his right to due process was violated. *Estelle*, 502 U.S. at 72.

4 Because the Nevada Supreme Court's denial of Duarte-Herrera's jury instruction claims
5 was neither contrary to, nor an unreasonable application of, clearly established federal law and
6 was not based on an unreasonable determination of the facts, Duarte-Herrera is not entitled to
7 federal habeas relief for ground 2.

8 **C. Ground 3—insufficient evidence for attempted murder**

9 In ground 3, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendments
10 rights were violated because there was insufficient evidence to convict him of attempted murder.
11 (ECF No. 64 at 37.) Duarte-Herrera's claim is based on the alleged lack of evidence that he
12 intended to kill Chali or even knew that a passenger would be present when the bomb exploded.
13 (*Id.* at 38.)

14 **1. State court determination**

15 In affirming Duarte-Herrera's judgment of conviction, the Nevada Supreme Court held:

16 Duarte-Herrera argues that there was insufficient evidence of attempted
17 murder as there was no evidence that he intended to kill Caren Chali. This claim
18 lacks merit because the evidence, when viewed in the light most favorable to the
19 State, is sufficient to establish guilt beyond a reasonable doubt as determined by a
20 rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*,
21 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The jury heard evidence that Rueda-
22 Denvers had a falling out with his current girlfriend, Rosa Alfonso, and former
23 girlfriend, Chali, when Chali arrived in Las Vegas. Rueda-Denvers acknowledged
he was also aware that Chali had begun dating the victim, Willebaldo Dorantes
Antonio. Duarte-Herrera admitted to police that he constructed a bomb and
disguised it in a coffee cup. He and Rueda-Denvers travelled to the Luxor casino
parking garage and planted the bomb on Antonio's car. Based on this evidence,
particularly the evidence of motive and nature of the weapon used, we conclude
that a rational juror could reasonably find that Duarte-Herrera deliberately intended
to take Chali's life. See NRS 193.200 (intent); NRS 193.330(1) (defining attempt);
NRS 200.020(1) (defining express malice); NRS 200.030 (murder); *Sharma*, 118

1 Nev. at 659, 56 P.3d at 874 (intent is generally inferred from the circumstances of
2 the crime that are capable of proof at trial).

3 (ECF No. 55-7 at 4.)

4 **2. Standard for evaluating the sufficiency of the evidence**

5 “[T]he Due Process Clause protects the accused against conviction except upon proof
6 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
7 charged.” *In re Winship*, 397 U.S. 358, 364 (1970). A federal habeas petitioner “faces a heavy
8 burden when challenging the sufficiency of the evidence used to obtain a state conviction on
9 federal due process grounds.” *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). On direct
10 review of a sufficiency of the evidence claim, a state court must determine whether “any rational
11 trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”
12 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The evidence is to be viewed “in the light most
13 favorable to the prosecution.” *See id.* Federal habeas relief is available only if the state-court
14 determination that the evidence was sufficient to support a conviction was an “objectively
15 unreasonable” application of *Jackson*. *See Juan H.*, 408 F.3d at 1275 n.13.

16 **3. Applicable state law**

17 Sufficiency of the evidence claims are judged by the elements defined by state law.
18 *Jackson*, 443 U.S. at 324 n.16. Nevada law provides that “[a]n act done with the intent to commit
19 a crime, and tending but failing to accomplish it, is an attempt to commit that crime.” Nev. Rev.
20 Stat. § 193.330(1). And an attempt to commit murder “can only be committed with express
21 malice.” *Sharma v. State*, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002); *see also Keys v. State*, 104
22 Nev. 736, 740, 766 P.2d 270, 273 (1988) (“Attempted murder is the performance of an act or acts
23 which tend, but fail, to kill a human being, when such acts are done with express malice, namely,

1 with the deliberate intention unlawfully to kill.”); Nev. Rev. Stat. § 200.010(1) (“Murder is the
2 unlawful killing of a human being.”). “Express malice is that deliberate intention unlawfully to
3 take away the life of a fellow creature, which is manifested by external circumstances capable of
4 proof.” Nev. Rev. Stat. § 200.020(1); *see also Dearman v. State*, 93 Nev. 364, 367, 566 P.2d 407,
5 409 (1977) (“Intent to kill, as well as premeditation, may be ascertained or deduced from the facts
6 and circumstances of the killing, such as use of a weapon calculated to produce death, the manner
7 of use, and the attendant circumstances.”); Nev. Rev. Stat. § 193.200 (“Intention is manifested by
8 the circumstances connected with the perpetration of the offense.”).

9 **4. Conclusion**

10 It is true that Duarte-Herrera never met Chali. (ECF No. 42-4 at 48–49; *see also* ECF No.
11 51 at 170.) And it is also true that Danny Waltenbaugh, an explosives specialist for the Bureau of
12 Alcohol, Tobacco, Firearms and Explosives, testified that the bomb “wasn’t in the middle [of the
13 vehicle’s roof] where a person from the passenger . . . side would have naturally reached for it.”
14 (ECF No. 52 at 14, 83.)

15 However, there was evidence that (1) Rueda-Denvers felt rejected by Chali, (2) Rueda-
16 Denvers knew Chali’s work schedule and knew from his stalking that Dorantes would give Chali
17 rides home from work, (3) Rueda-Denvers and Duarte-Herrera were “very good friends,” and (4)
18 Duarte-Herrera admitted to constructing and placing the bomb. (ECF Nos. 42-4 at 21; 51 at 179,
19 187; 52 at 147, 178, 181, 183; 52-1 at 41.) And regarding the placement of the bomb, Waltenbaugh
20 also testified that bomb’s “explosion force” was “more to the sides,” the bomb was made with
21 metal pipes and end caps which were “thrown in all directions” during the explosion, a piece of
22 the pipe “ripped through the top of the vehicle . . . and . . . entered into the vehicle,” and
23 fragmentation from the explosion could have caused injuries within an approximate 300-foot

1 radius from the explosive device. (ECF No. 52 at 44–46, 50.) And Hansen, Duarte-Herrera’s
2 explosives expert, testified that he “would certainly consider that [Chali] . . . would be in the
3 danger zone” of the bomb and that she was not injured because of “pure luck,” the vehicle’s roof
4 “deflect[ing] frag[mentation] above her head,” and her short stature. (ECF No. 52-1 at 130.)
5 Viewing this evidence “in the light most favorable to the prosecution” (*Jackson*, 443 U.S. at 319),
6 the Nevada Supreme Court reasonably determined that a rational trier of fact could have found
7 beyond a reasonable doubt that Duarte-Herrera acted with an intention to kill Chali. *In re Winship*,
8 397 U.S. at 364; *Juan H.*, 408 F.3d at 1274; Nev. Rev. Stat. § 200.020(1). Accordingly, the Nevada
9 Supreme Court’s denial of Duarte-Herrera’s claim was neither contrary to, nor an unreasonable
10 application of, clearly established federal law and was not based on an unreasonable determination
11 of the facts. Duarte-Herrera is not entitled to federal habeas relief for ground 3.

12 **D. Grounds 4 and 8—joinder of defendants**

13 In ground 4, Duarte-Herrera argues that his Fifth, Sixth, and Fourteen Amendment rights
14 were violated when the state district court refused to sever his trial from Rueda-Denvers’ trial.
15 (ECF No. 64 at 39.) Duarte-Herrera argues that he was prejudiced by the misjoinder because
16 Rueda-Denvers’ statements implicated him, he suffered from media spillover demonizing Rueda-
17 Denver, he was unable to cross-examine Rueda-Denvers, and Rueda-Denvers’ counsel acted as a
18 second prosecutor. (*Id.* at 42.) Relatedly, in ground 8, Duarte-Herrera argues that his Sixth and
19 Fourteen Amendment rights were violated when his appellate counsel failed to raise the severance
20 issue in his direct appeal. (*Id.* at 45.)

21 **1. Background information**

22 Prior to trial, Duarte-Herrera moved—and later reiterated his motion—to sever his trial
23 from Rueda-Denvers’ trial. (ECF Nos. 44-3; 47-1.) The state district court denied the requests.

1 (ECF Nos. 47-5; 48-2 at 18; 49-2.) Duarte-Herrera and Rueda-Denvers each sought
2 reconsideration throughout the trial, but the state district court adhered to its rulings. (*See, e.g.*,
3 ECF Nos. 51 at 174; 52 at 145.)

4 **2. State court determination**

5 In affirming the denial of Duarte-Herrera’s state habeas petition, the Nevada Supreme
6 Court held:

7 Second, appellant contends that the district court erred by denying his claim
8 that appellant counsel was ineffective for failing to challenge the denial of his
9 motion for severance. Appellant also contends that the district court should have
10 held an evidentiary hearing on this claim. We disagree. Appellant does not point to
11 the portion of the record where his codefendant’s statements were admitted without
12 being subject to cross-examination, where he was prevented from presenting
13 evidence that would have been admissible in a separate trial, or where a specific
14 trial right was violated. *See Chartier v. State*, 124 Nev. 760, 765, 191 P.3d 1182,
15 1185 (2008). Appellant also fails to demonstrate that any prejudice resulted from
16 the joint trial. *See id.* We conclude that no relief is warranted on this claim.

17 (ECF No. 59-4 at 3.)⁹

18 **3. Conclusion**

19 In the context of joinder of federal defendants, the Supreme Court has stated: “Improper
20 joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a
21 constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth
22 Amendment right to a fair trial.” *United States v. Lane*, 474 U.S. 438, 466 n.8 (1986); *see also*
23 *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (holding that a court should grant a severance
under Federal Rule of Criminal Procedure 14 “only if there is a serious risk that a joint trial would
compromise a specific trial right of one of the defendants, or prevent the jury from making a

⁹ The respondents previously moved to dismiss ground 4 based on procedural default grounds, but this court disagreed, determining that the “substantive claim was fairly presented to the Nevada Supreme Court.” (ECF No. 83 at 6.)

1 reliable judgment about guilt or innocence”). The Ninth Circuit has declared this comment in *Lane*
2 to be dicta and held that “neither *Zafiro v. United States* nor *United State v. Lane* establish a
3 constitutional standard binding on the state requiring severance in cases where defendants present
4 mutually antagonistic defense.” *See Collins v. Runnels*, 603 F.3d 1127, 1132–33 (9th Cir. 2010);
5 *see also Runningeagle v. Ryan*, 686 F.3d 758, 774 (9th Cir. 2012) (“[T]here is no clearly
6 established federal law requiring severance of criminal trials in state court even when the
7 defendants assert mutually antagonistic defenses.”). Therefore, because there is no applicable
8 clearly established Supreme Court precedent, Duarte-Herrera has not shown that the Nevada
9 Supreme Court acted contrary to Supreme Court precedent in determining that he was not entitled
10 to relief on his severance claim. *See* 28 U.S.C. § 2254(d)(1); *see also Wright v. Van Patten*, 552
11 U.S. 120, 126 (2008) (explaining that “it cannot be said that the state court unreasonably applied
12 clearly established Federal law” when United States Supreme Court precedent “give[s] no clear
13 answer to the question presented” (internal quotation marks and alterations omitted)).

14 And regarding Duarte-Herrera’s related argument that he was prejudiced by the misjoinder
15 because Rueda-Denvers’ statements implicated him, *Bruton v. United States* provides that the
16 admission in a joint trial of a non-testifying co-defendant’s out-of-court statement that inculpat
17 the defendant violates the defendant’s right of cross-examination guaranteed by the Sixth
18 Amendment’s Confrontation Clause. 391 U.S. 123, 126 (1968). However, Duarte-Herrera fails to
19 point to the portion of the record where Rueda-Denvers’ admitted, out-of-court statements
20 allegedly inculpated him. And this court’s review of the record does not support Duarte-Herrera’s
21 contention that there was a *Bruton* error.¹⁰

22
23 ¹⁰ Detective Dean O’Kelley testified that he interviewed Rueda-Denvers on May 10, 2007, and
May 14, 2007. (ECF No. 52 at 110, 112–13.) Detective O’Kelley testified on direct examination
about Rueda-Denvers’ statements during those interviews and did not mention Duarte-Herrera.¹⁰

1 And turning to Duarte-Herrera’s ineffective-assistance-of-appellate-counsel claim,
2 because the Nevada Supreme Court determined that Duarte-Herrera “fail[ed] to demonstrate any
3 prejudice resulted from the joint trial” during Duarte-Herrera’s post-conviction proceedings,
4 Duarte-Herrera fails to demonstrate “a reasonable probability that, but for his [appellate] counsel’s
5 [alleged] unreasonable failure to” include a misjoinder ground in his direct appeal, “he would have
6 prevailed on his appeal.” *Smith v. Robbins*, 528 U.S. 259, 285 (2000); Nev. Rev. Stat. § 174.165(1)
7 (“If it appears that a defendant . . . is prejudiced by a joinder of . . . defendants in an indictment or
8 information, or by such joinder for trial together, the court may . . . grant a severance of
9 defendants.”). Accordingly, the Nevada Supreme Court’s denial of Duarte-Herrera’s ineffective-
10 assistance-of-appellate-counsel claim was neither contrary to, nor an unreasonable application of,
11 clearly established federal law and was not based on an unreasonable determination of the facts.

12 Duarte-Herrera is not entitled to federal habeas relief for grounds 4 and 8.

13 **E. Ground 5—counsel’s alleged failure to suppress the confession**

14 In ground 5, Duarte-Herrera argues that his Fifth, Sixth, and Fourteen Amendment rights
15 were violated when counsel failed to move to suppress his interview statements on grounds that
16 those statements were coerced and obtained under extreme duress. (ECF No. 64 at 42.)

17 //

18
19
20 (See *id.* at 149–185, 187–197.) The only apparent mention of Duarte-Herrera came during Rueda-
21 Denvers’ counsel’s cross-examination, where Detective O’Kelley answered in the affirmative
22 when asked if Rueda-Denvers stated that he drove to Duarte-Herrera’s residence on the night in
23 question following his initial observance of Dorantes’ vehicle at the Luxor parking garage. (*Id.* at
229–230). Moreover, Detective O’Kelley’s testimony about Rueda-Denvers’ statement even
appeared to exculpate Duarte-Herrera at one point. When Rueda-Denvers was confronted with
“the fact that on the video [Detective O’Kelley] saw the Chevy Cobalt stop next to the victim’s
car,” Detective O’Kelley testified that Rueda-Denvers replied: “I looked to see if they were there.
They were still there, then I left, I returned and I saw that they were there, then I came over to wait
for them to come out like I always did, but I’ve always done it alone.” (ECF No. 52 at 180–81.)

1 **1. State court determination**

2 In affirming the denial of Duarte-Herrera’s state habeas petition, the Nevada Supreme
3 Court held:

4 First, appellant contends that the district court erred by denying his claim
5 that trial counsel were ineffective for failing to file a motion to suppress his
6 statements to law enforcement. Appellant also contends that the district court
7 should have held an evidentiary hearing on this claim. We disagree. Although
8 appellant asserts that law enforcement threatened to deport his family unless he
9 confessed, he does not assert that he told counsel about the threats and therefore did
10 not allege sufficient facts to entitle him to relief or an evidentiary hearing. *See*
11 *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Moreover,
12 appellant does not explain how suppressing his statements would have changed the
13 outcome at trial. We conclude that no relief is warranted on this claim.

14 (ECF No. 59-4 at 2–3.)

15 **2. Conclusion**

16 The admission into evidence at trial of an involuntary statement violates a defendant’s right
17 to due process under the Fourteenth Amendment. *Lego v. Twomey*, 404 U.S. 477, 478 (1972);
18 *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (“It is now axiomatic that a defendant in a criminal
19 case is deprived of due process of law if his conviction is founded, in whole or in part, upon an
20 involuntary confession”). However, as the Nevada Supreme Court reasonably determined, Duarte-
21 Herrera failed—and still fails—to assert that counsel was aware of the alleged threats warranting
22 an argument that his statements were involuntary. *See Babbitt v. Calderon*, 151 F.3d 1170, 1174
23 (9th Cir. 1998) (“[C]ounsel is not deficient for failing to find mitigating evidence if, after a
reasonable investigation, nothing has put the counsel on notice of the existence of that evidence.”
(quoting *Matthews v. Evatt*, 105 F.3d 907, 920 (4th Cir. 1997), *abrogated on other grounds by*
Miller-El v. Dretke, 545 U.S. 231 (2005))). Duarte-Herrera contends that his false confession was
“induced by threats of deportation of [his] family” (ECF No. 64 at 44), but his transcribed law

1 enforcement interviews from May 7, 2007, and May 14, 2007, do not mention deportation. (*See*
2 ECF Nos. 40-1, 40-2.) Consequently, Duarte-Herrera fails to establish that counsel overlooked
3 the need to move to suppress his statements. *See Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1170
4 (9th Cir. 2003) (“[P]etitioner must show that (1) the overlooked motion to suppress would have
5 been meritorious and (2) there is a reasonable probability that the jury would have reached a
6 different verdict absent the introduction of the unlawful evidence.”). Accordingly, the Nevada
7 Supreme Court’s determination constituted an objectively reasonable application of *Strickland*’s
8 performance prong. 466 U.S. at 688. Duarte-Herrera is not entitled to federal habeas relief for
9 ground 5.

10 **F. Ground 9—counsel’s alleged failure to investigate innocence**

11 In ground 9, Duarte-Herrera alleges that he was denied effective assistance of counsel in
12 violation of the Sixth and Fourteenth Amendments when counsel failed to investigate actual
13 innocence. (ECF No. 64 at 47–49.)

14 **1. Background of the claim**

15 This court previously held that this ground was not exhausted and was procedurally
16 defaulted, subject to Duarte-Herrera seeking to overcome that procedural default pursuant to
17 *Martinez v. Ryan*, 566 U.S. 1 (2012). (ECF No. 83 at 7.) This court deferred consideration of that
18 issue “until the time of the merits determination.” (*Id.*)

19 Generally, to overcome a procedural default based upon the actual or projected application
20 of an adequate and independent state law procedural bar, a federal petitioner must show: (a) cause
21 for the procedural default and actual prejudice from the alleged violation of federal law; or (b) that
22 a fundamental miscarriage of justice will result in the absence of review, based on a sufficient
23 showing of actual factual innocence. *E.g., Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003).

1 Under *Martinez*, in the specific context pertinent to this case, a petitioner can demonstrate cause
2 to potentially overcome the procedural default of a claim of ineffective assistance of trial counsel
3 by demonstrating that either: (a) he had no counsel in the state postconviction proceeding in the
4 state district court; or (b) such counsel was ineffective under the standard in *Strickland v.*
5 *Washington*, 466 U.S. 668 (1984). To establish such ineffective assistance of state postconviction
6 counsel, a petitioner must demonstrate that: (a) postconviction counsel provided deficient
7 performance in failing to present the claim of ineffective assistance of trial counsel; and (b) there
8 was a reasonable probability that the result of the postconviction proceeding would have been
9 different if counsel instead had raised the claim. *E.g.*, *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th
10 Cir. 2019).

11 To demonstrate “prejudice” under *Martinez*, the petitioner must show that the defaulted
12 claim of ineffective assistance of trial counsel is a “substantial” claim. A claim is “substantial”
13 for purposes of *Martinez* if it has “some merit,” which refers to a claim that would warrant issuance
14 of a certificate of appealability. *Id.* In pertinent part, a claim would warrant issuance of a certificate
15 of appealability, and thus is “substantial” for purposes of *Martinez*, if reasonable jurists could
16 debate the proper disposition of the claim or the issue presented is adequate to deserve
17 encouragement to proceed further. This standard does not require a showing that the claim will
18 succeed, but instead only that its proper disposition could be debated among reasonable jurists. *Id.*
19 *See generally Miller-El v. Cockrell*, 537 US. 322, 336–38 (2003). In cases where the petitioner
20 was represented by state postconviction counsel, there is substantial overlap between these criteria
21 for both cause and prejudice under *Martinez* because the criteria all ultimately turn upon the
22 strength or weakness of the underlying claim of ineffective assistance of trial counsel. *See Ramirez*,
23 937 F.3d at 1241–42; *Atwood v. Ryan*, 870 F.3d 1033, 1059–60 (9th Cir. 2017).

1 The determination of whether Duarte-Herrera can overcome the procedural default of
2 ground 9 is made *de novo*. *E.g.*, *Ramirez*, 937 F.3d at 1243–44; *see also Visciotti v. Martel*, 862
3 F.3d 749, 768–69 (9th Cir. 2017). If he does so, the claim then is reviewed *de novo* on the merits.
4 *E.g.*, *Rodney v. Filson*, 916 F.3d 1254, 1258, 1262 (9th Cir. 2019); *Atwood*, 870 F.3d at 1060 n.22;
5 *Dickins v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (*en banc*).

6 **2. Factual basis of claim**

7 Duarte-Herrera relies on an affidavit executed by Rueda-Denvers two-and-a-half years
8 after the Luxor bombing trial. (*See* ECF No. 56-5.) In the affidavit, Rueda-Denvers attests, *inter*
9 *alia*, that: (a) Duarte-Herrera did not give him a bomb or any bombmaking materials; (b) the two
10 never entered the Luxor parking garage together; (c) the two did not attempt to kill Chali; (d)
11 Duarte-Herrera did not place a cup pipe bomb on the roof of Dorantes’ vehicle; (e) Rueda-Denvers
12 possessed a key to Duarte-Herrera’s home between December 20, 2006, through May 10, 2007;
13 and (f) Rueda-Denvers was manipulated and coerced by detectives into making false statements
14 when interrogated on May 14, 2007. (*Id.*)

15 **3. Conclusion**

16 In the present case, Duarte-Herrera had appointed counsel during the litigation of his state
17 postconviction petition. (*See* ECF No. 58.) To satisfy *Martinez*, Duarte-Herrera therefore must
18 establish, under the foregoing overlapping criteria, ineffective assistance of postconviction counsel
19 to establish cause as well as that ground 9 is a substantial claim in order to establish prejudice.
20 Duarte-Herrera cannot establish either ineffective assistance of postconviction counsel in failing
21 to raise ground 9 or that ground 9 is a substantial claim.

22 The underlying claim of ineffective assistance of counsel is nonsensical. Ground 9 is a
23 claim that trial counsel failed to investigate Duarte-Herrera’s actual innocence in order to develop

1 statements made by Rueda-Denvers *two-and-a-half years after the trial*. Duarte-Herrera fails to
2 articulate how trial counsel could have investigated, uncovered or developed such statements at
3 the time of the trial. Duarte-Herrera's counsel ethically could not even talk to Rueda-Denvers
4 except with his counsel's permission and with Rueda-Denvers' counsel then most assuredly being
5 present. At the time of the trial, both codefendants, through their respective counsel, very clearly
6 pursued a strategy of trying to exculpate themselves by inculpating each other. Ground 9, at
7 bottom, inherently proceeds on the unrealistic premise that if Duarte-Herrera's counsel had asked
8 Rueda-Denvers' counsel for statements from Rueda-Denvers along the lines of the affidavit before
9 trial, such statements would have been provided. There was no probability that Rueda-Denvers
10 would have abandoned his trial strategy by providing such statements, much less taken the stand
11 to provide such testimony, if Duarte-Herrera's counsel had made the inquiries Duarte-Herrera
12 argues he should have made.

13 Ground 9, the underlying claim of ineffective assistance of counsel, thus lacks merit. On
14 *Strickland's* performance prong, trial counsel's performance is assessed from counsel's
15 perspective *at the time of the trial*. *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney
16 performance requires that every effort be made to . . . evaluate the conduct from counsel's
17 perspective at the time.") Indisputably, trial counsel did not provide deficient performance by
18 failing to investigate or try to secure exculpatory statements and testimony from a codefendant (a)
19 who he ethically could not talk to in the first instance without the consent of his counsel, and (b)
20 who at the relevant time clearly was trying to inculpate rather than exculpate his client. There is
21 also not a reasonable probability that such a quixotic effort would have led to a different outcome
22 at trial.

23

1 Ground 9 is a baseless claim. State postconviction counsel did not provide ineffective
2 assistance in failing to raise such a baseless claim, and ground 9 is not a substantial claim for
3 purposes of *Martinez*. Ground 9 is therefore procedurally defaulted and does not provide a basis
4 for federal habeas relief.¹¹

5 **G. Ground 10—cumulative error**

6 In ground 10, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendments
7 rights were violated due to cumulative error. (ECF No. 64 at 49.) This court previously held that
8 ground 10 was procedurally defaulted and dismissed “to the extent it relies on claims of substantive
9 trial court error and ineffective assistance of appellate counsel.” (ECF No. 83 at 11.) This court
10 then deferred “consideration of cause and prejudice of the cumulative errors of any viable
11 ineffective assistance of trial counsel claims until the merits determination.” (*Id.*)

12 Cumulative error applies where, “although no single trial error examined in isolation is
13 sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still
14 prejudice a defendant.” *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also*
15 *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004) (explaining that the court must assess
16
17

18 ¹¹ Duarte-Herrera relies on *Schlup v. Delp*, 513 U.S. 298 (1995) in his reply. (See ECF No. 98 at
19 14.) *Schlup* would be relevant to the procedural default issue at hand, but in his opposition to the
20 motion to dismiss, Duarte-Herrera relied exclusively on *Martinez*. (ECF No. 81.) The time for
21 Duarte-Herrera to rely on *Schlup* as a basis for overcoming the procedural default was in opposing
22 the motion to dismiss. Duarte-Herrera cannot argue *Martinez* in his opposition to the motion to
23 dismiss and then come back with a non-*Martinez* argument to overcome the procedural default in
his reply. Regardless, Duarte-Herrera cannot satisfy the *Schlup* standard. In the affidavit, Rueda-
Denvers did not all accept sole responsibility while exonerating Duarte-Herrera. Rueda-Denvers
just once again changed his story and sought to exonerate himself and Duarte-Herrera. Such a
self-serving affidavit by a convicted felon does not satisfy the rigorous *Schlup* standard and
establish that, had Rueda-Denvers’ new story been presented at trial, together with the other
evidence actually presented at that trial, no rational juror would have voted to convict Duarte-
Herrera.

1 whether the aggregated errors “so infected the trial with unfairness as to make the resulting
2 conviction a denial of due process” (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

3 Because this court has determined that Duarte-Herrera failed to demonstrate that counsel
4 acted deficiently in grounds 5 and 9, there are no errors to cumulate. Accordingly, ground 10 is
5 procedurally defaulted and does not provide a basis for federal habeas relief.

6 **IV. DISCUSSION OF GROUNDS RELATING TO THE HOME DEPOT BOMBING**

7 **A. Ground 11—insufficient evidence for attempted murder**

8 In ground 11, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendments
9 rights were violated because there was insufficient evidence to convict him of attempted murder.
10 (ECF No. 64 at 50.) Duarte-Herrera’s claim is based on the alleged lack of evidence that he acted
11 with express malice and intended to kill Wallace or anyone else. (*Id.*)

12 **1. State court determination**

13 In affirming, in part, and reversing, in part, Duarte-Herrera’s judgment of conviction, the
14 Nevada Supreme Court held:

15 Appellant Porfirio Duarte-Herrera contends that insufficient evidence
16 supported his conviction for attempted murder because the State failed to present
17 any evidence that he had the specific intent to kill Ryan Wallace or anyone else.
18 We review the evidence in the light most favorable to the prosecution and determine
19 whether any rational juror could have found the essential elements of the crime
20 beyond a reasonable doubt. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573
21 (1992).

22 The jury heard testimony that Duarte-Herrera added shot taken from
23 shotgun shells to his pipe-bomb to increase its lethality, used a timer to limit control
over the bomb after it was activated, placed the bomb on Wallace’s truck while it
was parked at the Home Depot, and set the time to detonate the bomb during the
store’s business hours.

We conclude that a rational juror could reasonably infer from this evidence
that Duarte-Herrera specifically intended to kill. *See* NRS 193.200 (intent); NRS
193.330(1) (defining attempt); NRS 200.010 (defining murder); NRS 200.020(1)
(defining express malice); *Sharma v. State*, 118 Nev. 648, 659, 56 P.3d 868, 874-

1 75 (2002) (“Intent to kill . . . may be ascertained or deduced from the facts and
2 circumstances . . . such as use of a weapon calculated to produce death, the manner
3 of use, and the attendant circumstances.” (alteration and internal quotation marks
4 omitted)). It is for the jury to determine the weight and credibility to give conflicting
5 testimony, and the jury’s verdict will not be disturbed on appeal where, as here,
6 substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624
7 P.2d 20, 20 (1981).

8 (ECF No. 56-4 at 2–3.)

9 **2. Conclusion**¹²

10 It is true that Duarte-Herrera did not know Wallace. (ECF No. 77-1 at 38.) However,
11 viewing the evidence “in the light most favorable to the prosecution” (*Jackson*, 443 U.S. at 319),
12 the Nevada Supreme Court reasonably determined that a rational trier of fact could have found
13 beyond a reasonable doubt that Duarte-Herrera acted with an intention to kill. *In re Winship*, 397
14 U.S. at 364; *Juan H.*, 408 F.3d at 1274; Nev. Rev. Stat. § 200.020(1). Duarte-Herrera placed a
15 bomb on Wallace’s truck in the Home Depot parking lot during business hours while customers
16 were in the parking lot. (ECF No. 77-1 at 30, 49; ECF No. 77-2 at 7.) Explosive specialists
17 described that bomb as “extremely lethal,” as including gun powder which would “cause an
18 extreme explosion and a significant amount of damage,” and as being powerful enough to send
19 fragments traveling “about 3300 feet per second” throughout the entire parking lot. (ECF No. 77-
20 2 at 37, 48–49, 51.) Explosive specialists also testified that surveillance showed Duarte-Herrera
21 leave the scene after depositing the bomb and that once the timer on the bomb was set, there was
22 no way to stop or control the device “other than physically walking up and doing something to it.”
23 (*Id.* at 5–6, 51.) Based on this evidence, the Nevada Supreme Court’s denial of Duarte-Herrera’s
claim was neither contrary to, nor an unreasonable application of, clearly established federal law

¹² This court will not repeat the applicable standards for reviewing a sufficiency-of-the-evidence claim or the applicable Nevada state law on attempted murder, which were discussed in ground 3.

1 and was not based on an unreasonable determination of the facts. Duarte-Herrera is not entitled to
2 federal habeas relief for ground 11.

3 **B. Ground 12—prohibition from questioning detectives**

4 In ground 12, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendment
5 rights were violated when the state district court prohibited him from questioning detectives about
6 the involuntary nature of his statements. (ECF No. 64 at 52.) Duarte-Herrera elaborates that he
7 sought to question detectives about the length of his detention and multiple interviews which
8 would have shown that his will had been overborne, but the state district court disallowed this
9 questioning, ruling that it would open the door to the Luxor bombing case. (*Id.* at 53.)

10 **1. Background information**

11 At the beginning of the trial, outside the presence of the jury, Duarte-Herrera’s counsel
12 explained that Duarte-Herrera was interviewed multiple times by law enforcement “regarding both
13 incidences, the Luxor and the Home Depot” and stated he intended to reference those previous
14 interviews but did not want to “open the door” to the Luxor bombing case. (ECF No. 76-5 at 14.)
15 Counsel requested a preliminary ruling whether referencing those interviews would “open the
16 door” to the Luxor bombing case. (*Id.*) The state district court responded:

17 You’re just going to have to go along and do your case as it comes up. And I can’t
18 try and project exactly what’s going to come out and what you’re going to ask and
19 what they’re going to reply to and - - you’re just going to have to try it. I can’t tell
you what to do. I mean, it’s not for me to tell you whether or not that’s going to
open up a door. I don’t know at this point in time.

20 (*Id.* at 16.)

21 Following Detective Robert Wilson’s direct examination, Duarte-Herrera’s counsel
22 requested a conference outside the presence of the jury:

23 [Counsel]: Your Honor, the reason why I asked us to take a break is because
areas that I want to cover with Detective Wilson is he was in charge, obviously, the

1 Luxor case that we're trying to not necessarily open the door and bring into this
2 Home Depot case. And I believe according to his reports, Dr. Duarte-Herrera was
3 taken into custody I think by ICE. Actually, if I'm not mistaken, it was a mixed task
4 or whoever that went to go see Mr. Herrera, both Las Vegas Metro and federal
5 agents, but he was taken into custody on the 10th of May. I think booked into ICE
6 for immigration reasons or purposes and then later rebooked obviously under the -
7 - once statements were given regarding his involvement in other crimes under
8 Metro jurisdiction.

9 But according to Mr. - - Officer - - Detective Wilson's report, there were
10 several interviews that were conducted prior to the recorded ones where Mr.
11 Duarte-Herrera had made some admissions. The area that I want to go into
12 obviously was to bring that up to the jury that he was taken into custody several
13 days prior to - - spoken to - - I think Detective Wilson says he only gave him
14 *Miranda* four or five hours before but I believe in his statement I think he was
15 spoken to several times prior to the 15th and the 14th and I just - - I think it's relevant
16 for the jury to know - -

17 THE COURT: What happened several times before the 15th?

18 [Counsel]: Prior to the recorded statement being given. Because he was
19 spoken to and interviewed several times from my understanding of your report,
20 Detective Wilson's report, several times prior to the final recording ones where he's
21 making admissions of being involved with the bombs. And I think it goes to the
22 weight of how much weight the jury needs to give if they - - of Mr. Duarte-Herrera's
23 statement itself is the purpose why I want to inquire into that area because they - -
you know, obviously, the jury gets to determine the credibility of the statement
itself whether they want to choose to believe his confession or not his confession. I
know, you know, if it doesn't match up with some of the evidence, it's up to the
jury to say we don't think he necessarily confessed to the crime.

THE COURT: Your objection is how many times he was given *Miranda*
rights? What - -

[Counsel]: No, no not how many times he was given *Miranda* rights. I want
to get into an area - - obviously, [the prosecutor] was very specific in his direct
examination talking only about his involvement giving him the *Miranda* at the time
of the recordings giving the impression to the jury that he was taken into custody
maybe the 14th or 15th before he'd given the statements when that's not accurate.
He was actually in custody May 10th, interviewed several times that were not
recorded and then on the 14th and 15th gave statements.

THE COURT: So why don't you just - - why can't you ask him that?

[Counsel]: Well, I want to ask him that. What I'm saying is our position is
we don't feel that that opens the door of Luxor at all by inquiring into these other
interviews. I think that the State has the opposite position of that.

1 THE COURT: That he was in custody prior to an interview?
2

3

4 [Counsel]: No, that he was in custody several days prior to and interviewed
5 several times that were not recorded prior to the recorded interviews.

6 [The prosecutor]: Well, Judge, here's my position. And I think the answer
7 to this question comes down to one issue and one issue only. What's the relevance
8 of asking that question? And as [counsel] forthrightly states to this Court that why
9 they're asking that question is because tomorrow they're going to be arguing to this
10 jury and asking for an instruction from this Court about the voluntariness of
11 statements made by the Defendant to police in this case. The argument is going to
12 be that these other interviews and the length of detention before the interviews that
13 Detective Wilson has testified to, the only thing that this jury knows about the
14 interviews of this Defendant as it sits right now is two interviews; one conducted
15 by him, after he gave *Miranda*, Araujo conducted a relatively brief interview of the
16 Defendant.

17 If the argument and the relevance of those interviews without touching the
18 subject matter of them is then to argue therefore, he's badgered and that these
19 statements are not to be given the weight that they have on its face, we undoubtedly
20 do contest that that opens the door to Luxor because that's what those interviews
21 involved. In other words, what counsel wants is to make an inference that doesn't
22 exist. That would be [a] lie as based upon what the evidence is; that is, this man is
23 being badgered by multiple interviews from other agencies about this case that
weren't recorded and then all of a sudden the detectives from Metro come in, turn
on a tape recorder and bingo, bango Mr. Duarte-Herrera confesses to the Home
Depot bombing. That's an entirely misstatement of what occurred in this case and,
thus, once again I'd suggest that the answer to the question is does it open the Home
Depot - - or the Luxor door or not is what are you going to argue from it? The
answer is the 800 pound gorilla in the room about the interviews of this man in May
of 2007 was the Home Depot murder and bombing that occurred. It was an artifact
of those interviews that the Home Depot popped up and lo and behold a cold case
is now revived and they got their man.

So that's the misappropriation of - - or the misinterpretation of this evidence
in front of the jury. And how can the State rebut or answer that question? We would
be absolutely handcuffed to not mention that the interviews had nothing to do with
this case. They weren't trying to soften up the Defendant. They were about another
case.

THE COURT: Well, in essence what you're saying is there was no probably
[sic] cause to hold the Defendant and ask him any questions about anything. And
you're saying, well, you know, this is all harassment because he's had more
interviews. Well, he's had interviews on what? And you're implying that he was

1 harassed by these interviews and in essence, no probably [sic] cause even to hold
2 him.

3 [The prosecutor]: Or certainly at the least that they're going to argue that
4 these statements where he does confess that are recorded are involuntary and that's
5 a complete misstatement of the actual events in this case.

6 As counsel knows, those interviews involved the Luxor bombing and
7 murder. They weren't softening up this guy and peppering him with the Home
8 Depot until he finally broke.

9 [Counsel]: And I think that's a little bit of misstatement. Obviously, I think
10 Luxor was contained in some of those interviews but I also think that Home Depot
11 was as well because Araujo was involved in that case as well. And I know Detective
12 Wilson can clear that up. He was the one that was conducting these interviews prior
13 to him being Mirandized and prior to them being recorded.

14 THE COURT: You're not going to have your cake and eat it too here,
15 counsel. If you're going to open it up, you're going to open it up as to why he was
16 being held and why he was being interviewed and whether there was probable cause
17 to hold him and whether or not all of this then was part of this case here where - -
18 when this detective and the other detective interviewed him, it was involuntary.
19 You just can't - - you can try but if you open it up, you open it up. It's up to you to
20 devise your own strategy here as to what you're going to do and how you're going
21 to do it but if you open it up, they're entitled to contradict it.

22 (ECF No. 77-2 at 64–68.)

23 **2. State court determination**

24 In affirming, in part, and reversing, in part, Duarte-Herrera's judgment of conviction, the
25 Nevada Supreme Court held:

26 Duarte-Herrera contends that the district court violated his rights to due
27 process, a fair trial, present a defense, and confront his accusers when it ruled that
28 he could not cross-examine police detectives about the voluntariness of his
29 statements without opening the door to testimony that he was also interviewed
30 about the Luxor Hotel-Casino bombing. "We generally review a district court's
31 evidentiary rulings for an abuse of discretion. However, whether a defendant's
32 Confrontation Clause rights were violated is ultimately a question of law that must
33 be reviewed de novo." *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484
(2009) (internal citation and quotation marks omitted).

34 The record does not support Duarte-Herrera's contention that the district
35 court made a ruling. Duarte-Herrera asked the district court if he could cross-

1 examine the detectives about his in-custody status and the multiple unrecorded
2 interviews that he was subjected to. He believed that this line of questioning would
3 show that his will was overborne by repeated interviews and would support his
4 theory of defense that his statement was not made voluntarily. The district court,
5 however, recognized that this line of questioning might open the door to otherwise
6 inadmissible evidence by creating a false impression that Duarte-Herrera was being
7 held without adequate cause and was interviewed solely about the Home Depot
bombing. *See U.S. v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988) (discussing
the curative admissibility rule). The district court informed Duarte-Herrera that it
was up to him to devise his own strategy, he could try asking these questions, but,
if his cross-examination created a false impression, the State would be entitled to
present rebuttal evidence. We conclude that the district court did not abuse its
discretion or violate Duarte-Herrera’s constitutional rights in this regard.

8 (ECF No. 56-4 at 3–4.)

9 3. Conclusion

10 Duarte-Herrera had a constitutional right to present a defense. *See Chambers v. Mississippi*,
11 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence,
12 the right to a fair opportunity to defend against the State’s accusations.”); *see also Crane v.*
13 *Kentucky*, 476 U.S. 683, 690 (1986) (“[T]he Constitution [also] guarantees criminal defendants ‘a
14 meaningful opportunity to present a complete defense.’” (quoting *California v. Trombetta*, 467
15 U.S. 479, 485 (1984))). However, as the Nevada Supreme Court reasonably determined, the state
16 district court did not infringe on this right by foreclosing Duarte-Herrera from questioning
17 detectives about his earlier police interviews. The state district court initially told Duarte-Herrera
18 that it could not “tell [him] what to do,” and after hearing counsel flesh out the issue prior to
19 Detective Wilson’s cross-examination, merely advised Duarte-Herrera to “devise [his] own
20 strategy” with respect to not opening the door to the Luxor bombing case. (ECF Nos. 76-5 at 16;
21 77-2 at 68.) Accordingly, as the Nevada Supreme Court reasonably determined, the state district
22 court never ruled on the issue. As such, the Nevada Supreme Court’s denial of Duarte-Herrera’s
23 claim was neither contrary to, nor an unreasonable application of, clearly established federal law

1 and was not based on an unreasonable determination of the facts. Duarte-Herrera is not entitled to
2 federal habeas relief for ground 12.

3 **C. Ground 13—jury instructions**

4 In ground 13, Duarte-Herrera alleges that his Fifth, Sixth, and Fourteenth Amendment
5 rights were violated when the state district court erroneously overruled his objections to three jury
6 instructions—Jury Instruction Nos. 4, 15, and 17—and denied his proffered instructions in lieu of
7 those instructions. (ECF No. 64 at 54–56.)

8 **1. Background information**

9 **a. Jury Instruction No. 4**

10 Jury Instruction No. 4 provided:

11 Attempted murder is the performance of an act or acts which tend, but fail,
12 to kill a human being, when such acts are done with express malice, namely, with
the deliberate intention unlawfully to kill.

13 It is not necessary to prove the elements of premeditation and deliberation
in order to prove attempted murder.

14 (ECF No. 78-3 at 6.)

15 During jury instruction discussions, Duarte-Herrera’s counsel objected to the second
16 paragraph of Jury Instruction No. 4 on the grounds it lessened the State’s burden of proof and was
17 “confusing and misleading” because “a jury will not understand the difference between deliberate
18 intention and the deliberation.” (ECF No. 78-2 at 3.) The state district court overruled the
19 objection. (*Id.* at 4.)

20 **b. Jury Instruction No. 15**

21 Jury Instruction No. 15 provided:

22 Statements of the defendant not made in court have been admitted into
23 evidence. Before the jury may take such a statement into consideration, it must first
decide whether or not it was given voluntarily. If the jury decides the statement was
made voluntarily, it may use the statements in deliberations. If the jury decides that

1 a statement was not made voluntarily, the jury must disregard it. The State has the
2 burden of proving the voluntariness of a statement by a preponderance of the
3 evidence. This burden of proof should lead the trier of fact to find that the existence
4 of the contested fact is more probable than its nonexistence.

(ECF No. 78-3 at 20.)

5 The State and Duarte-Herrera each submitted proposed instructions concerning “the
6 voluntariness of the Defendant’s statements in this case.” (ECF No. 78-2 at 10.) Duarte-Herrera’s
7 proposed instruction provided, *inter alia*, that “an involuntary statement is one made under
8 circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained
9 will.” (*Id.* at 14.) The state district court stated that it was “going to use the State one since they
10 have to prove the voluntariness of this one also by a preponderance of the evidence.” (*Id.* at 10.)

11 **c. Jury Instruction No. 17**

12 Jury Instruction No. 17 provided:

13 The Defendant is presumed innocent until the contrary is proved. This
14 presumption places upon the State the burden of proving beyond a reasonable doubt
15 every material element of the crime charged and that the Defendant is the person
16 who committed the offense.

17 A reasonable doubt is one based on reason. It is not mere possible doubt but
18 is such a doubt as would govern or control a person in the more weighty affairs of
19 life. If the minds of the jurors, after the entire comparison and consideration of all
20 the evidence, are in such a condition that they can say they feel an abiding
21 conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be
22 reasonable must be actual, not mere possibility or speculation.

23 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled
to a verdict of not guilty.

(ECF No. 78-3 at 22.)

21 Duarte-Herrera objected to Jury Instruction No. 17, arguing that “it would require the Court
22 to instruct the jury on what a material element is,” and without a clarifying instruction, “the jury
23 would be able to speculate as to which elements were material and which were not and that could

1 lessen the State’s burden of proof.” (ECF No. 78-2 at 11.) Instead, Duarte-Herrera proposed an
2 instruction that mirrored Nevada’s presumption of innocence statute, Nev. Rev. Stat. § 175.191,
3 which omitted the “material element” language and provided: “A Defendant in a criminal action
4 is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether
5 the Defendant’s guilt is satisfactorily shown, the Defendant is entitled to be acquitted.” (*Id.*) The
6 state district court rejected Duarte-Herrera’s instruction. (*Id.* at 12.)

7 2. State court determination

8 In affirming, in part, and reversing, in part, Duarte-Herrera’s judgment of conviction, the
9 Nevada Supreme Court held:

10 Duarte-Herrera contends that the district court made three jury instruction
11 errors. “The district court has broad discretion to settle jury instructions, and this
12 court reviews the district court’s decision for an abuse of that discretion or judicial
13 error.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

14 First, Duarte-Herrera contends that the district court erred by instructing the
15 jury that “[i]t is not necessary to prove the elements of premeditation and
16 deliberation in order to prove attempted murder” because the instruction relieves
17 the State of its burden to prove each element of the offense, is confusing and
18 misleading, and is contradicted by Nevada caselaw. The State asserts that the
19 language used in this instruction was taken directly from *Keys v. State*, 104 Nev.
20 736, 740-41, 766 P.2d 270, 273 (1988), and accurately reflects current Nevada law.
21 We agree and conclude that Duarte-Herrera has not demonstrated an abuse of
22 discretion or judicial error in this regard.

23 Second, Duarte-Herrera contends that the district court erred when
instructing the jury that it must find that his statements to the police were voluntary
before they may be considered during deliberations because the instruction did not
provide guidance for determining whether a statement was given voluntarily.
Duarte-Herrera argues that part of his defense was that his statements were made
involuntarily, he had a right to have the jury instructed on his theory of defense,
and the district court should have given his proffered instruction. “A defendant in
a criminal case is entitled, upon request, to a jury instruction on his theory of the
case so long as there is some evidence, no matter how weak or incredible, to support
it.” *Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal
quotation marks and alteration omitted). Both parties proffered instructions on the
voluntariness of Duarte-Herrera’s statement, and the district court found that both
instructions were argumentative. The district court sustained Duarte-Herrera’s

1 objection to the State’s instruction, striking the instruction’s second paragraph
 2 before presenting it to the jury. Because the amended instruction accurately reflects
 3 Nevada law, *see Carlson v. State*, 84 Nev. 534, 535-36, 445 P.2d 157, 158-59
 4 (1968) (adopting the “Massachusetts Rule” and holding that “[t]he term ‘voluntary’
 carries a clear meaning, without need for further definition or explanation”), and
 properly places Duarte-Herrera’s theory of defense before the jury, *see Crawford*,
 121 Nev. at 754-55, 121 P.3d at 589, we conclude that the district court did not
 abuse its discretion in this regard.

5
 6 Third, Duarte-Herrera contends that the district court erred by instructing
 the jury that “the State [had] the burden of proving beyond a reasonable doubt every
material element of the crime charged” (emphasis added). Duarte-Herrera asserts
 7 that the instruction was confusing and reduced the State’s burden of proof because
 it did not identify the “material elements” of each charge. And he argues that
 8 *Nunnery v. State*, 127 Nev. ___, ___, 263 P.3d 235, 259-60 (2011) (upholding use
 of the “material element” language in jury instructions), was wrongly decided
 9 because it relied on prior opinions that did not specifically address the issue of
 whether a jury could be instructed to determine the “materiality” of an element of
 10 a crime. We conclude that the district court did not abuse its discretion by giving
 this instruction and reject Duarte-Herrera’s request to overrule *Nunnery*.

11
 12 (ECF No. 56-4 at 4–6.)

13 **3. Conclusion**¹³

14 **a. Jury Instruction No. 4**

15 As the Nevada Supreme Court, the final arbiter of Nevada law, reasonably determined,
 16 Jury Instruction No. 4 is an accurate reflection of Nevada law. *See Keys v. State*, 104 Nev. 736,
 17 740–41, 766 P.2d 270, 273 (1988) (“Attempted murder is the performance of an act or acts which
 18 tend, but fail, to kill a human being, when such acts are done with express malice, namely, with
 the deliberate intention unlawfully to kill. This is all there is to it. There is no need for the
 19 prosecution to prove any additional elements, such as, say premeditation and deliberation.”). And
 20 Duarte-Herrera fails to articulate how Jury Instruction No. 4 improperly relieved the State of its
 21

22
 23 ¹³ This court will not repeat the applicable standards for evaluating jury instructions, which were
 discussed in ground 2.

1 burden of proof. *See In re Winship*, 397 U.S. at 364. Therefore, Duarte-Herrera fails to
2 demonstrate that Jury Instruction No. 4 was erroneous and violated his right to due process. *Estelle*,
3 502 U.S. at 72.

4 **b. Jury Instruction No. 15**

5 Duarte-Herrera argues that the involuntariness of his confession was a part of his defense
6 at trial, so the denial of his proposed jury instruction on the issue was erroneous. (ECF No. 98 at
7 19–20). “As a general proposition a defendant is entitled to an instruction as to any recognized
8 defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *See*
9 *Mathews v. United States*, 485 U.S. 58, 63 (1988)); *see also Beardslee v. Woodford*, 358 F.3d 560,
10 577 (9th Cir. 2004) (“Failure to instruct on the defense theory of the case is reversible error if the
11 theory is legally sound and evidence in the case makes it applicable.”); *Bradley v. Duncan*, 315
12 F.3d 1091, 1099 (9th Cir. 2002) (“[T]he state court’s failure to correctly instruct the jury on the
13 defense may deprive the defendant of his due process right to a present a defense.”). Although
14 Duarte-Herrera’s instruction on the issue was not given, the state district court instructed the jury
15 on the need to evaluate the voluntariness of his confession in Jury Instruction No. 15. As the
16 Nevada Supreme Court, the final arbiter of Nevada law, reasonably determined, that instruction
17 was an accurate reflection of Nevada law. *See Carlson v. State*, 84 Nev. 534, 536, 445 P.2d 157,
18 159 (1968) (approving of a jury instruction regarding the voluntariness of a confession, explaining
19 that if the court determines a confession to be voluntary, “the jury is then instructed that it must
20 also find that the confession was voluntary before it may be considered”). And contrary to Duarte-
21 Herrera’s contention that the instruction was erroneous “because it did not give any guidance for
22 how the jury should determine if a statement was given involuntarily” (ECF No. 98 at 19), the
23 Nevada Supreme Court has determined that “[t]he term ‘voluntary’ carries a clear meaning,

1 without need for further definition or explanation.” *Carlson*, 84 Nev. at 536, 445 P.2d at 159.
 2 Therefore, Duarte-Herrera fails to demonstrate that Jury Instruction No. 15 was erroneous, violated
 3 his right to due process, or violated his right to present a defense.

4 **c. Jury Instruction No. 17**

5 “[T]he Constitution does not require that any particular form of words be used in advising
 6 the jury of the government’s burden of proof. Rather, ‘taken as a whole, the instructions [must]
 7 correctly conve[y] the concept of reasonable doubt to the jury.’” *Victor v. Nebraska*, 511 U.S. 1,
 8 5 (1994) (internal citation omitted) (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)).
 9 And importantly, the Ninth Circuit Court of Appeals evaluated a nearly identical reasonable doubt
 10 jury instruction in *Ramirez v. Hatcher*,¹⁴ and “[a]lthough [it did] not herald the Nevada instruction
 11 as exemplary, [it] conclude[d] that the overall charge left the jury with an accurate impression of
 12 the government’s heavy burden of proving guilt beyond a reasonable doubt” such that “the jury
 13 charge satisfied the requirements of due process.” 136 F.3d 1209, 1210–11, 1215 (9th Cir. 1998);
 14 *see also Nevius v. McDaniel*, 218 F.3d 940, 944 (9th Cir. 2000) (holding that the reasonable doubt
 15 jury instruction was identical to the one in *Ramirez*, so “[t]he law of this circuit thus forecloses
 16 Nevius’s claim that his reasonable doubt instruction was unconstitutional”). Because the Ninth
 17 Circuit Court of Appeals had determined that the language used in Jury Instruction No. 17 is

18
 19
 20 ¹⁴ The only difference between the reasonable doubt jury instruction provided in Duarte-Herrera’s
 21 trial and the reasonable doubt jury instruction provided in *Ramirez* was the omission of the word
 22 “substantial.” *Compare* ECF No. 78-3 at 22 (“ . . . Doubt to be reasonable, must be actual, not mere
 23 possibility or speculation.”), *with Ramirez v. Hatcher*, 136 F.3d 1209, 1210–11 (9th Cir. 1998)
 (“ . . . Doubt to be reasonable must be actual *and substantial*, not mere possibility or speculation.”)
 (emphasis added). However, because “the use of the term ‘substantial’ to describe reasonable
 doubt has been disfavored,” *Ramirez*, 136 F.3d at 1212, the reasonable doubt jury instruction
 provided in Duarte-Herrera’s trial was more acceptable than the reasonable doubt jury instruction
 in *Ramirez*.

1 constitutional, Duarte-Herrera fails to demonstrate that Jury Instruction No. 17 violated his right
2 to due process.

3 Because the Nevada Supreme Court’s denial of Duarte-Herrera’s jury instruction claims
4 was neither contrary to, nor an unreasonable application of, clearly established federal law and
5 was not based on an unreasonable determination of the facts, Duarte-Herrera is not entitled to
6 federal habeas relief for ground 13.

7 **D. Ground 17—counsel’s alleged failure to investigate innocence**

8 In ground 17, Duarte-Herrera alleges that he was denied effective assistance of counsel in
9 violation of the Sixth and Fourteenth Amendments when counsel failed to investigate actual
10 innocence. (ECF No. 64 at 59–60.) Duarte-Herrera’s claim is based on counsel’s failure to present
11 evidence that his confession was coerced. (*Id.*) Like grounds 9 and 10, this court previously held
12 that this ground was not exhausted and was procedurally defaulted, subject to Duarte-Herrera
13 overcoming that procedural default pursuant to *Martinez*. (ECF No. 83 at 7.) This court deferred
14 consideration of that issue “until the time of the merits determination.” (*Id.*) This court relies on
15 the standards previously outlined in ground 9 for overcoming a procedural default pursuant to
16 *Martinez*.

17 **1. Background information**

18 Counsel cross-examined Detective Araujo about Duarte-Herrera’s law enforcement
19 interview taking place several days after he and his two brothers were taken into custody by United
20 States Immigration and Customs Enforcement. (ECF No. 78-1 at 32.) Counsel elicited Detective
21 Araujo’s admission that he surreptitiously recorded Duarte-Herrera’s interview and that
22 surreptitiously recording a suspect is “a technique or tactic . . . use[d] to . . . make the suspect feel
23 more comfortable in order to get a statement or some kind of confession.” (*Id.* at 33.) Counsel

1 cross-examined Detective Araujo about other techniques he used to obtain a confession from
2 Duarte-Herrera, including: (1) “minimiz[ing] the event itself” by telling Duarte-Herrera “that this
3 would be a serious case if someone got hurt but since no one got hurt, only a vehicle, it’s not that
4 serious of a case,” and (2) promising to vouch for Duarte-Herrera before the judge if he did
5 something dumb and “didn’t hurt anyone.” (*Id.* at 36–37.)

6 2. **Conclusion**

7 Defense counsel has a “duty to make reasonable investigations or to make a reasonable
8 decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. This
9 investigatory duty includes investigating the defendant’s defense and evidence that demonstrates
10 factual innocence or evidence that raises sufficient doubt about the defendant’s innocence. *Hart v.*
11 *Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999); *see also Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th
12 Cir. 1994). Counsel’s cross-examination of Detective Araujo belies Duarte-Herrera’s claim that
13 counsel failed to meet these investigative duties regarding the coercive nature of his law
14 enforcement interview. Counsel cross-examined Detective Araujo about the interview taking
15 place days after Duarte-Herrera and his brothers were taken into custody by U.S. Immigration and
16 Customs Enforcement, the surreptitious recording of the interview, and the techniques used to
17 mislead Duarte-Herrera into giving a confession. Duarte-Herrera fails to articulate what further
18 coercive factors counsel should have investigated and presented to the jury. Because Duarte-
19 Herrera fails to demonstrate counsel acted deficiently pursuant to *Strickland* in investigating the
20 coercive nature of his law enforcement interview, ground 17 is a baseless claim. As such, Duarte-
21 Herrera cannot establish that ground 17 is a substantial claim for purposes of *Martinez*. Ground 9
22 is therefore procedurally defaulted and does not provide a basis for federal habeas relief.

23 //

1 **V. CERTIFICATE OF APPEALABILITY**

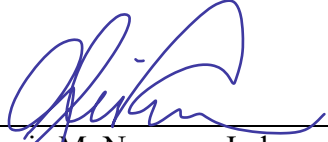
2 Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a
3 certificate of appealability (COA), so this court has evaluated the remaining claims within the
4 petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*,
5 281 F.3d 851, 864–65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only
6 when the petitioner “has made a substantial showing of the denial of a constitutional right.” For
7 claims rejected on the merits, a petitioner “must demonstrate that reasonable jurists would find the
8 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*,
9 529 U.S. 473, 484 (2000). For procedural rulings, a COA will issue only if reasonable jurists could
10 debate whether the petition states a valid claim of the denial of a constitutional right and this court’s
11 procedural ruling was correct. *Id.* Applying these standards, a COA is unwarranted.

12 **VI. CONCLUSION¹⁵**

13 In accordance with the foregoing, **IT IS THEREFORE ORDERED:**

- 14 1. The petition (ECF No. 64) is DENIED.
- 15 2. A certificate of appealability is DENIED.
- 16 3. The clerk of the court is directed to substitute William Hutchings for
17 Respondent Brian Williams, enter judgment accordingly, and close this
18 case.

19 Dated: **January 12, 2022**

20 
21 _____
Gloria M. Navarro, Judge
United States District Court

22 ¹⁵ Duarte-Herrera requests that this court conduct an evidentiary hearing. (ECF No. 64 at 62.)
23 Because this court has already determined that Duarte-Herrera is not entitled to relief and because
neither further factual development nor any evidence that may be proffered at an evidentiary
hearing would affect this court’s reasons for denying the petition, the request is denied.