

1 **II. BACKGROUND²**

2 **A. Theft from Kohl's Department Store**

3 On December 30, 2012, Gabriel Jimenez was employed as a loss prevention
4 supervisor at Kohl's department store in Las Vegas, Nevada. (ECF No. 27-3 at 31-32.)
5 Using electronic surveillance, Jimenez saw Delapinia enter the store with another man
6 and select 20 or 25 items of merchandise without regard for price and size. (*Id.* at 32-34.)
7 Sensing this was a red flag, Jimenez left the surveillance room and waited outside the
8 store's exit until Delapinia exited "loaded with merchandise" that he had not purchased.
9 (*Id.* at 34-37.) Jimenez saw Delapinia enter a pickup truck and called 911 to report the
10 license plate number. (*Id.* at 37.) Jimenez followed the truck in his personal vehicle, and
11 at one point was parked at a red light when his rear window shattered. (*Id.* at 38-39.)
12 Jimenez said he saw Delapinia holding a revolver and a long object. (*Id.* at 39-41.) Feeling
13 threatened and intimidated by the gun, Jimenez "hit the gas and got out of there pretty
14 quick." (*Id.* at 41.) Damages included \$832.34 for the stolen merchandise and \$400 for
15 Jimenez's window replacement. (*Id.* at 43-44.) Delapinia later admitted to police that he
16 stole the merchandise, but said his friend shattered the window. (*Id.* at 167-68.)

17 **B. Kidnapping, Sexual Assault, and Robbery**

18 On January 11, 2013, Joanna Rice went out for a run at 5:00 a.m., wearing a
19 sweatsuit and gloves. (*Id.* at 106-09.) She saw a truck parked at the entrance to her
20 apartment complex, thought something was wrong, and pulled out her cell phone. (*Id.* at
21 108.) When she started to return to her apartment, the truck blocked her path and
22 Delapinia, wearing a black bandana over part of his face, jumped out of the truck, pointed
23 a gun at her, and ordered her to hand over everything in her pockets. (*Id.* at 109-10, 113-
24 14.) Rice gave him her cell phone, headphones, keys, and pocket-knife. (*Id.* at 110.)
25 Delapinia asked for money, but she had none. (*Id.*) He asked for the location of her
26

27 ²The Court makes no credibility findings or other factual findings regarding the truth
28 or falsity of the evidence from the state court. The 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
Delapinia's claims.

1 apartment, and she pointed in a general direction. (*Id.*) He then walked her into his truck
2 at gunpoint and drove to her apartment while aiming the gun at her. (*Id.* at 110-12.)
3 According to Rice, Delapinia was behind her holding a gun to her back as they walked to
4 her apartment. (*Id.* at 115.) When they reached her apartment, he handed her the keys,
5 and she opened the door. (*Id.*) He then walked Rice into the apartment, ordered her to
6 give him money, and she gave him \$460. (*Id.* at 115-17.)

7 Delapinia told Rice to get on her knees and she did, because she was afraid he
8 might shoot her. (*Id.* at 117.) She said that he told her he was doing this for his family and
9 she kept talking with him to keep him calm. (*Id.* at 118-19.) She said he asked for a hug,
10 and she gave him one because he was pointing a gun at her. (*Id.* at 119.) He told her she
11 was going to “suck his dick” and while holding the gun, he told her she was beautiful and
12 sexy, grabbed her vagina area and buttocks outside her pants, grabbed her breast,
13 inserted his penis in her mouth, and forced her to perform fellatio until he ejaculated in
14 her mouth. (*Id.* at 118-21.) Rice wiped her mouth on one of her gloves. (*Id.* at 121-22.)
15 Delapinia left some of Rice’s money, her keys, and her cell phone, and told her he would
16 return to shoot her if her apartment was lit before he drove away. (*Id.* at 123-24.)

17 As soon as Delapinia left, Rice locked the front door, locked herself in the
18 bathroom, and called police (*Id.* at 124.) She said her sexual contact with Delapinia was
19 not consensual and later identified his truck. (*Id.* at 125-26.) A Sexual Assault Nurse
20 Examiner found no physical trauma or injuries to Rice. (*Id.* at 137.) Forensic scientist
21 Kellie Gauthier discovered Rice’s glove bore semen and sperm, the sperm on the glove
22 was consistent with Delapinia’s DNA, and his DNA was consistent with a partial DNA
23 profile from a sperm fraction found on Rice’s fingernail. (*Id.* at 146-47, 151-54, 156-57.)

24 On January 12, 2013, Delapinia admitted to police that he committed the crimes
25 against Rice and Kohl’s. (*Id.* at 168-72.) In his interview, he stated that he had a falling
26 out with gang members, the gang green-lighted him, shots were fired in front of his house,
27 and gang members threatened to go after his family and shoot him in front of his mother.
28 (ECF No. 17-3 at 5, 10-12, 14, 29-32, 41-44.) The transcript of Delapinia’s police interview

1 reveals that the interviewing officer told Delapinia, “I will notify a gang detective and I’m
2 gonna ask him to meet with you and talk to you about it.” (*Id.* at 52.) According to records
3 of the Las Vegas Metropolitan Police Department, later that day, Delapinia voluntarily
4 provided statements to gang detectives, which led to arrests for unsolved and gang-
5 related armed robberies unrelated to Delapinia’s offenses. (ECF Nos. 22-21 at 2, 6-7; 22-
6 22 at 4.) Delapinia wrote an apology letter to Rice and her mother claiming he committed
7 the crimes due to the gang threats toward his family and he intended to “bring down” the
8 gang. (ECF Nos. 17-2 at 93-94; 27-3 at 173-74.)

9 **C. Guilty Plea and Initial Sentence**

10 Delapinia pleaded guilty to sexual assault with use of a deadly weapon; first-
11 degree kidnapping with use of a deadly weapon; burglary; and robbery with use of a
12 deadly weapon. (ECF Nos. 17-4 at 3, 28-24.) Delapinia agreed the State could argue for
13 any lawful sentence, including consecutive sentences. (ECF No. 28-24 at 2.) Under the
14 agreement, the sentences allowable are: (1) life with the possibility of parole at 10 years
15 for sexual assault plus 1 to 20 years for the use of a deadly weapon; (2) life with the
16 possibility of parole in 5 to 15 years for first-degree kidnapping plus a consecutive term
17 of 1 to 20 years for the use of a deadly weapon; (3) 1 to 10 years for burglary, provided
18 the minimum term of imprisonment does not exceed 40% of the maximum term of
19 imprisonment; and (4) 2 to 15 years for robbery plus a consecutive term of 1 to 15 years
20 for the use of a deadly weapon, provided the minimum term of imprisonment does not
21 exceed 40% of the maximum term of imprisonment. (*Id.* at 3-4.)

22 The Presentence Investigation Report (“PSR”) revealed that Delapinia said Child
23 Protective Services had been involved with his family for child abuse. (ECF No. 31-1 at
24 4.) He reported domestic violence between his mother and stepfather and that his
25 stepfather used drugs and physically abused him; however, he denied neglect or sexual
26 abuse. (*Id.*) He reported that he was enrolled in special education classes in elementary
27 and middle school and completed the ninth grade. (*Id.*)

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1 The PSR revealed that Delapinia admitted he started using marijuana and
2 methamphetamine daily, and alcohol twice a week, when he was 16 years old. (*Id.* at 5.)
3 He also reported occasional use of cocaine until three to four years before his arrest. (*Id.*)
4 He acknowledged his addictions, said he spent \$200 to \$300 per week on drugs, and
5 claimed all of his crimes were committed to support his addiction. (*Id.*)

6 According to the PSR, Delapinia's criminal record consisted of one prior felony
7 conviction for possession of a stolen vehicle. (*Id.* at 6.) He unsuccessfully participated in
8 the Regimental Discipline Program (Boot Camp) for that offense and was placed on
9 supervised probation. (*Id.* at 7.) He reportedly violated probation by consuming alcohol,
10 but no charges were filed, and he fulfilled the conditions of supervised probation with an
11 "honorable discharge." (*Id.*) Delapinia also had three misdemeanor convictions for
12 obstructing a police officer, non-medical possession of marijuana, and possession of
13 burglary tools. (*Id.* at 6.) At the time of the offenses at issue in this matter, there were
14 outstanding warrants for misdemeanor possession of narcotic paraphernalia, to which he
15 pleaded not guilty on December 17, 2012, and a traffic infraction. (*Id.* at 6-7.) He was also
16 "arrested, detained or cited" for a failure to appear and robbery with a deadly weapon
17 between 2005 and 2013. (*Id.* at 7.)

18 The PSR stated that Delapinia had "My Evil Ways" tattooed on the right side of his
19 head and scars on his ribs and shoulder. (*Id.* at 3.) Delapinia denied gang membership,
20 but said he socialized with a gang member, and police confirmed him as a gang-affiliate.
21 (*Id.* at 5.) The PSR reported that Delapinia told detectives he committed the crimes
22 because the gang threatened his life and said they would shoot him in front of his family
23 if he did not give them money. (*Id.* at 8.)

24 The defense presented character reference letters from six of Delapinia's female
25 family members and friends, who stated Delapinia was a good, caring, and helpful person,
26 who committed the crimes because he "fell off track" due to his abuse of
27 methamphetamine and association with "the wrong crowd." (ECF No. 28-25.)
28

1 At sentencing, defense counsel argued, *inter alia*: (1) Delapinia's prior felony
2 conviction was for attempted possession of a stolen vehicle when he was 18 years old;
3 (2) his probation violations consisted of drinking and possession of a burglary tool, but
4 probation was never revoked, and he was honorably discharged from probation; (3) he
5 had never been imprisoned; (4) he was addicted to, and using, methamphetamine when
6 he gave his statement to police; (5) he acknowledged responsibility for the crimes when
7 he spoke to police; (6) he wrote an apology letter to the victim; and (7) he chose to plead
8 guilty. (ECF No. 17-4 at 9-12.)

9 Delapinia admitted his responsibility for the crimes to the state district court. (*Id.* at
10 13.) He apologized to Rice, her family, and his own family, and said his apology was
11 sincere and from his heart. (*Id.*) He said he chose to use drugs without realizing their
12 impact and that he was a loving, kind, and respectful person, and the crimes were out of
13 character. (*Id.*) He asked the court not to take his life or family away from him. (*Id.*)

14 Joanna Rice asked the court to sentence Delapinia to the maximum sentence:

15 I can't even explain—begin to explain how this has affected my life.
16 I've lived on my own since I was 16 years old. I am the most independent
17 person. I take care of my family and friends. That morning that sense of
18 freedom and independence was taken from me. After that I couldn't be by
19 myself. I couldn't sleep unless my little brother was sitting in the room with
20 me. I had to move not once but twice. To this day, years later, I'm still on
21 medication for anxiety. I've been in and out of the hospital with panic
22 attacks, anxiety attacks. There are times where I'm afraid to leave work by
23 myself. They are times where I am afraid to drive by myself. I can't be left
24 home alone by myself because of a fear that somebody's going to come
25 after me.

26 You know, everybody has issues. Everybody has problems and a
27 past, but it's not an excuse. Drugs was not an excuse. What he made me
28 do—it's not even about him robbing me and the money, because I'm a hard
worker. I've worked my whole life and I'll make more. It's not about that.
What he made me do, to perform sexual intercourse on him, what gave him
that right? He had absolutely no right to make me do that. He had no right
to put a gun to my head. What did I ever do to him? You know, I've never
done anything wrong in my life. For somebody to just pick a random person
like that and to destroy their life, no.

1 There's no reason why he should be able to walk free. There's no
2 reason why he should be able to go home to a family. There is no reason
3 why he should be out on the streets living day to day, because I don't get to
4 live day to day as a normal person, like I was when this happened. Every
5 day I live in fear that somebody's going to come after me. I have never been
6 afraid of anybody or anything in my life and now I am. Why does he get to
7 live with his family and raise his kids when I don't get to live a normal life?

8 So, yes, I do think that he should get the max sentence. And the fact
9 that he wants to say that he was high or on drugs, it doesn't matter. That's
10 a coward. That's a coward excuse. No. He deserves the max sentence.

11 (*Id.* at 16-17.)

12 Rice's mother, Christine Rice, also asked the court to impose a maximum sentence:

13 First I would like to say that I pray to God every day that your child
14 does not endure what my child did, ever. You are a parent's worst
15 nightmare. What you did to a 22-year-old girl, the way you made her feel,
16 how scared she is, somebody that can't sleep at night, can't be going by
17 herself anywhere. You've taken something from her she could never get
18 back. And I just have to say, you mentioned drugs, drugs are a cop-out
19 answer. That's all that is is [sic] a cop-out answer. You're not a man.

20 . . .

21 I just ask that the Court imposes the maximum sentence for this man
22 so that he is unable to do this to another child, to put another person through
23 this kind of stuff that he has.

24 (*Id.* at 15.)

25 The PSR recommended the state district court sentence Delapinia to an aggregate
26 term of life imprisonment with eligibility for parole after 30 years and 4 months.³ The State
27 requested the court impose a "cumulative sentence of 41 years to life." (*Id.* at 4-7.)

28 ³The State appears to have erroneously argued to the state district court that the Department of Parole and Probation recommended an aggregate sentence of "24-and-a-third to life." (ECF No. 17-4 at 4.) The recommended sentences in the PSR were imprisonment for: (1) 10 years to life for sexual assault plus a consecutive 32 to 144 months (2 years and 8 months to 12 years) for the deadly weapon enhancement; (2) 5 to 15 years for first-degree kidnapping plus a consecutive 32 to 144 months (2 years and 8 months to 15 years) for the deadly weapon enhancement, to run consecutive to Count 1; (3) 16 to 72 months (1 year and 4 months to 6 years) for burglary, to run consecutive to the sentences for sexual assault and first-degree kidnapping; and (4) 72 to 180 months (2 years and 8 months to 15 years) for robbery plus a consecutive term of 32 to 180 months (6 to 15 years) for the deadly weapon enhancement, consecutive to all other sentences. (ECF Nos. 17-4 at 4, 31-1 at 9-10.) Thus, the aggregate recommended sentence in the PSR was 30 years and 4 months to life. (ECF No. 31-1 at 9-10.)

1 Defense counsel argued the State's recommendation was "more than what somebody
2 would get more generally for a first-degree murder charge," and asked the court to impose
3 concurrent sentences for all convictions and a sentence of 10 years to life for the sexual
4 assault plus a consecutive 12 to 30 years for the weapon enhancement. (*Id.* at 12.)

5 Before pronouncing sentence, the state district court addressed Delapinia:

6
7 THE COURT: Mr. Delapinia, I don't even know if it's—I don't even
8 know if it's worth saying anything to you. What you did in this instance is
9 horrible beyond words. This was a 22-year-old girl. I can fully appreciate the
10 joy that she takes or took in going out running. I have a daughter who is the
11 same age, who talks to me about going out where she's going to school and
12 running in the mornings and how she's getting faster. And I have to admit
13 every time she calls me I have in the back of my head, you know, her safety,
14 and the reason I have it in the back of the head is that there are people like
15 you out there.

16 I agree that drugs is a cop-out answer in this instance. It would be
17 something for me to maybe take into consideration if all you did here was
18 simply rob Ms. Rice, but, as Ms. Rice said, what you made her do was not
19 about money for drugs or using drugs. It was just pure evil violence.

20 (*Id.* at 18.) The court sentenced Delapinia (1) for sexual assault, to imprisonment for 10
21 years to life plus a consecutive term of 8 to 20 years for the deadly weapon enhancement;
22 (2) for first-degree kidnapping to imprisonment for 5 years to life plus a consecutive term
23 of 8 to 20 years for the deadly weapon enhancement; (3) for burglary to imprisonment for
24 4 to 10 years; and (4) for the robbery to imprisonment for 6 to 15 years plus a consecutive
25 term of 6 to 15 years for the deadly weapon enhancement. (ECF No. 17-5.) The first-
26 degree kidnapping sentence was consecutive to the sentence for sexual assault; the
27 burglary sentence was concurrent with the sentence for first-degree kidnapping; and the
28 sentence for robbery was consecutive to the sentence for first-degree kidnapping. (*Id.*)
The aggregate sentence was 43 years to life. (*Id.*)

Delapinia appealed his sentence claiming (1) the state district court plainly erred
by failing to articulate factual findings for the deadly weapon enhancements; (2) the
sentence was cruel and unusual; and (3) cumulative error. (ECF No. 17-6 at 5-6.) The
Nevada Supreme Court rejected the cruel and unusual punishment and cumulative error

1 claims but reversed and remanded for resentencing on the deadly weapon
2 enhancements. (ECF No. 17-8 at 3.)⁴

3 **D. Resentencing on the Enhancements**

4 A different state district court judge presided over Delapinia’s resentencing and
5 noted the Nevada Supreme Court was clear that “[t]he only thing open for remand and
6 address here today is the deadly weapon enhancement.” (ECF No. 17-10 at 5.)

7 The State asked the court to impose 8 to 20 years for the consecutive deadly
8 weapon enhancement for the sexual assault sentence; 2 to 20 years for the consecutive
9 deadly weapon enhancement for the first-degree kidnapping sentence; and 6 to 15 years
10 for the consecutive deadly weapon enhancement for the robbery sentence. (*Id.* at 6.)

11 Defense counsel requested a sentence permitting Delapinia parole eligibility in
12 28.5 years. (*Id.* at 16.) As mitigation, defense counsel argued, *inter alia*, (1) Delapinia had
13 only one prior felony conviction for attempted possession of a stolen vehicle when he was
14 18 years old; (2) he received a felony instead of a gross misdemeanor for that conviction
15 because he was unsuccessful at boot camp; (3) he was placed on probation for the felony,
16 violated twice, but received an honorable discharge from probation; and (4) since the
17 felony, he had four incidents involving striking an officer, non-medical possession of less
18 than an ounce of marijuana, possession of narcotic paraphernalia, and possession of
19 burglary tools, which was reduced to disorderly conduct. (*Id.* at 10-11.) Counsel further
20 argued Delapinia admitted he committed the crimes, used a BB gun in the crimes
21 involving Rice, and credibly denied he possessed a gun during the Kohl’s burglary. (*Id.* at
22 13-16.) Counsel argued Delapinia’s methamphetamine addiction did not excuse his
23 crimes, but it explained them. (*Id.* at 17-18.)

24 Before pronouncing resentencing on the deadly weapon enhancements, the state
25 district court stated it read the record for the initial sentencing hearing. (*Id.* at 5-6.) The
26 court noted mitigating factors included (1) Delapinia was under the influence of
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28 ⁴The Nevada Supreme Court *sua sponte* directed assignment to a different judge
“for resentencing on the weapon enhancements.” (ECF No. 17-8 at 5 n.2.)

1 methamphetamine and was a methamphetamine addict at the time of the crime; (2) he
2 immediately admitted the facts and circumstances to some degree; (3) he precluded
3 further trauma to the victim by foregoing trial; and (4) he was young at the time of his
4 earlier offenses. (*Id.* at 5-6, 19-20.)

5 On the other hand, the state district court noted (1) Delapinia had a “fairly
6 significant time frame of criminal history,” and failed to take advantage of opportunities to
7 change behavior; (2) recidivism was likely based on criminal activity in his youth; (3) there
8 was a documented impact of the crime on the victim, including her continued victimization;
9 and (4) the weapon, a BB gun, was used in a way that the victim succumbed to Delapinia’s
10 demands. (*Id.* at 20-21.) The court noted “the facts and circumstances of the crime are
11 unimaginable, frankly, to any women or to anyone to have to experience this random act
12 of violence, random act of assault.” (*Id.* at 20.)

13 After considering these aggravating and mitigating factors, the court imposed an
14 aggregate sentence of 33 years to life imprisonment, including: (1) 10 years to life for
15 sexual assault plus a consecutive 4 to 10 years for the deadly weapon enhancement; (2)
16 5 years to life for first-degree kidnapping with a consecutive 4 to 10 years for the deadly
17 weapon enhancement; (3) 4 to 10 years for burglary; and (4) 6 to 15 years for robbery
18 plus a consecutive 4 to 10 years for the deadly weapon enhancement. (*Id.* at 21-22). The
19 sentence for the first-degree kidnapping conviction is consecutive to the sentence for the
20 sexual assault conviction; the sentence for burglary is concurrent with the sentence for
21 first-degree kidnapping; and the sentence for robbery is consecutive to the sentence for
22 first-degree kidnapping. (*Id.*)

23 Delapinia did not directly appeal the amended judgment and unsuccessfully
24 challenged the judgment in state postconviction proceedings. (ECF No. 22-20.)

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1 **III. STANDARDS OF REVIEW**

2 **A. Standards for Effective-Assistance-of-Counsel**

3 On petitioner's claims of ineffective assistance of counsel, he must demonstrate
4 (1) the attorney's "representation fell below an objective standard of reasonableness[;]"
5 and (2) the attorney's deficient performance prejudiced the petitioner such that "there is
6 a reasonable probability that, but for counsel's unprofessional errors, the result of the
7 proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88,
8 694 (1984), "A reasonable probability is a probability sufficient to undermine confidence
9 in the outcome." *Id.* at 694.

10 "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it
11 promises only the right to effective assistance." *Burt v. Titlow*, 571 U.S. 12, 24 (2013).
12 Counsel can "deprive a defendant of the right to effective assistance[] simply by failing to
13 render 'adequate legal assistance[.]'" *Strickland*, 466 U.S. at 686 (quoting *Cuyler v.*
14 *Sullivan*, 446 U.S. 335, 344, 345-50 (1980)). In considering an ineffective assistance of
15 counsel claim, a court "must indulge a strong presumption that counsel's conduct falls
16 within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689
17 (citation omitted). On the performance prong, the issue is not what counsel might have
18 done differently but whether counsel's decisions were reasonable from his or her
19 perspective at the time. *Id.* at 689-90. A petitioner making an ineffective assistance claim
20 "must identify the acts or omissions of counsel that are alleged not to have been the result
21 of reasonable professional judgment." *Id.* at 690. In considering such claims, a court is
22 obligated to "determine whether, in light of all the circumstances, the identified acts or
23 omissions were outside the wide range of professionally competent assistance." *Id.* Under
24 *Strickland*, strategic choices made "after thorough investigation of law and facts relevant
25 to plausible options are virtually unchallengeable." *Id.* On the other hand, "strategic
26 choices made after less than complete investigation are reasonable precisely to the
27 extent that reasonable professional judgments support the limitations on investigation."
28 *Id.* at 690-91. It is a petitioner's burden to show "counsel made errors so serious that

1 counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.”
2 *Id.* at 687. “In any case presenting an ineffectiveness claim, the performance inquiry must
3 be whether counsel’s assistance was reasonable considering all the circumstances.” *Id.*
4 at 688.

5 Ineffective assistance of counsel during a sentencing hearing can result
6 in *Strickland* prejudice because “any amount of [additional] jail time has Sixth
7 Amendment significance.” *Lafler v. Cooper*, 566 U.S. 156, 165 (citation omitted). When
8 challenging counsel’s failure to investigate and present mitigating evidence during a
9 sentencing hearing, the “principal concern . . . is not whether counsel should have
10 presented a mitigation case[, but instead] . . . whether the investigation supporting
11 counsel’s decision not to introduce mitigating evidence . . . was itself reasonable.” *Wiggins*
12 *v. Smith*, 539 U.S. 510, 522-23 (2003) (emphasis in original).

13 **B. Standards for Evaluating Defaulted Ineffective-Assistance-of-Counsel**
14 **Claims**

15 “A federal court is precluded from reviewing a claim that has been barred by an
16 independent state procedural rule.” *Ramirez v. Ryan*, 937 F.3d 1230, 1240–41 (9th Cir.
17 2019) (citing *Martinez v. Ryan*, 566 U.S. 1, 9 (2012)), *cert. granted*, *Shinn v. Ramirez*,
18 U.S., May 17, 2021). In situations where a petitioner has “procedurally defaulted” a
19 habeas claim, federal habeas review of the claim “is barred unless the [petitioner] can
20 demonstrate cause for the default and actual prejudice as a result of the alleged violation
21 of federal law.” *Id.* at 1241 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

22 “Generally, post-conviction counsel’s ineffectiveness does not qualify as cause to
23 excuse a procedural default.” *Id.* (citing *Coleman*, 501 U.S. at 754-55.) However, in
24 *Martinez*, the Supreme Court created a narrow exception to the rule that the errors of
25 post-conviction counsel cannot provide cause for a procedural default. See 566 at 16–
26 17. According to the Supreme Court in *Martinez*, “the procedural default of a substantial
27 claim of ineffective assistance of trial counsel is excused,” where “state law requires that
28 all claims be brought in the initial collateral review proceeding and in that proceeding there

1 was no counsel or counsel was ineffective.” *Ramirez*, 937 F.3d at 1241 (citing *Martinez*,
2 566 U.S. at 17). Default may be excused under *Martinez* only when “the state collateral
3 review proceeding was the ‘initial’ review proceeding in respect to the ‘ineffective-
4 assistance-of-trial-counsel claim’; and . . . state law requires that an ‘ineffective assistance
5 of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.” *Trevino v.*
6 *Thaler*, 569 U.S. 413, 423 (2013) (second and third alterations in original) (quoting
7 *Martinez*, 566 U.S. at 14-16.) These requirements are satisfied for Nevada petitioners.
8 See *Rodney v. Filson*, 916 F.3d 1254, 1260 (9th Cir. 2019) (citing *Corbin v. State*, 892
9 P.2d 580, 582 (Nev. 1995) (citation omitted)).

10 To establish “cause” to excuse a procedural default under *Martinez*, a petitioner
11 must show that he had no counsel during postconviction proceedings or that
12 postconviction counsel was ineffective under *Strickland*. See *Ramirez*, 937 F.3d at 1241
13 (citations omitted). In this context, *Strickland* requires a petitioner to demonstrate that (1)
14 postconviction counsel’s performance was deficient, and (2) there was a reasonable
15 probability that, absent the deficient performance, the result of the postconviction
16 proceedings would have been different. *Id.* The latter prong “is necessarily connected to
17 the strength of the argument that trial counsel’s assistance was ineffective.” *Id.*

18 “To establish ‘prejudice’ under *Martinez*’s second prong of the ‘cause and
19 prejudice’ analysis, [a petitioner] must demonstrate that his underlying ineffective
20 assistance of trial counsel claim is ‘substantial.’” *Id.* (citation omitted). To show that his
21 claims are “substantial,” a petitioner must demonstrate that they have “some merit.”
22 *Martinez*, 566 U.S. at 14. A claim is “insubstantial” if “it does not have any merit or . . . is
23 wholly without factual support.” *Id.* at 16. The Supreme Court has referred to this standard
24 as the equivalent of the standard for issuance of a certificate of appealability (“COA”).
25 See *id.* Under those standards, a petitioner must make a “substantial showing of the
26 denial of a constitutional right” and show that “reasonable jurists could debate whether
27 (or, for that matter, agree that) the petition should have been resolved in a different
28 manner or that the issues presented were ‘adequate to deserve encouragement to

1 proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This standard does not
2 require a showing that the claim will succeed, only that its proper disposition could be
3 debated among reasonable jurists. See *id.* at 337-38.

4 Although the requirements of cause and prejudice are distinct, “[t]he analysis of
5 whether both cause and prejudice are established under *Martinez* will necessarily
6 overlap, ‘since each considers the strength and validity of the underlying ineffective
7 assistance claim.” *Ramirez*, 937 F.3d at 1241. On all such issues, if reached, the Court’s
8 review is *de novo*. See, e.g., *Detrich v. Ryan*, 740 F.3d 1237, 1246-48 (9th Cir. 2013) (en
9 banc); *Atwood v. Ryan*, 870 F.3d 1033, 1060 n.22 (9th Cir. 2017)

10 **IV. DISCUSSION**

11 **A. Grounds 2(b) and 4(b)—Failure to Present Mitigation Evidence**

12 Among his allegations in grounds 2(b) and 4(b), Delapinia asserts trial counsel
13 provided ineffective assistance by failing to investigate and present records evidencing
14 his assistance to authorities to support mitigation at sentencing and resentencing. (ECF
15 No. 25 at 14-18.)

16 **1. Additional Background**

17 Respondents moved to dismiss as unexhausted those portions of grounds 2(b)
18 and 4(b) in which Delapinia alleged trial counsel provided ineffective assistance by failing
19 to present Delapinia’s aid to authorities as mitigation evidence at sentencing and
20 resentencing. (ECF No. 26 at 5-7.) Respondents argued those portions of grounds 2(b)
21 and 4(b) are unexhausted because they rely on facts that were never presented to the
22 state courts as part of Delapinia’s claims that trial counsel was ineffective in failing to
23 present mitigation evidence at sentencing and resentencing. (*Id.* at 6-7.) In response,
24 Delapinia argued those portions of the claims are exhausted because the facts
25 concerning Delapinia’s assistance to authorities are related to Delapinia’s state
26 postconviction claim that trial counsel was ineffective in failing to present the contents of
27 Delapinia’s apology letter in which he stated he was forced to commit the crimes due to
28 threats from gang members. (ECF No. 35 at 3-5.) Alternatively, Delapinia argued those

1 portions of the claims are technically exhausted and procedurally defaulted, but Delapinia
2 can overcome the default under *Martinez*. (*Id.* at 5-10.) In reply, Respondents withdrew
3 their position on grounds 2(b) and 4(b) and agreed the newly alleged facts and grounds
4 for relief are similar enough to the core claims that Delapinia presented to the state courts
5 that the claims should be deemed exhausted. (ECF No. 39 at 3.) The Court accordingly
6 denied the motion to dismiss grounds 2(b) and 4(b). (ECF No. 40 at 3.)

7 **2. Cause and Prejudice Analysis**

8 Under the state and federal procedural history in this case, the portions of grounds
9 2(b) and 4(b) in which Delapinia claims trial counsel was ineffective in failing to present
10 mitigation evidence of Delapinia's assistance to authorities, are technically exhausted by
11 procedural default, subject to the question whether Delapinia can overcome the default
12 under *Martinez*. As discussed, the principal issues before the Court, in context,⁵ are: (1)
13 whether Delapinia's ineffective-assistance-of-trial counsel claim is substantial; (2) if so,
14 whether Delapinia's state post-conviction counsel was ineffective in failing to raise this
15 claim in the state district court; and (3) if so, whether, on the merits, Delapinia was denied
16 effective assistance of counsel.

17 In Nevada, a sentencing judge is afforded wide discretion in imposing
18 a sentence. See *Randell v. State*, 846 P.2d 278, 280 (Nev. 1993). "This discretion
19 enables the sentencing judge to consider a wide, largely unlimited variety of information
20 to insure that the punishment fits not only the crime, but also the individual defendant."
21 *Martinez v. State*, 961 P.2d 143, 145 (Nev. 1998) (citations omitted).

22 **a. Delapinia's claims are substantial.**

23 The Court finds the claims that trial counsel was ineffective for failing to present
24 evidence of Delapinia's assistance to authorities at sentencing and resentencing are
25

26 ⁵It is undisputed that (1) a state post-conviction proceeding in the state district court
27 was an initial-review collateral proceeding for purposes of *Martinez*, and (2) Nevada
28 procedural law sufficiently requires an inmate to present a claim of ineffective assistance
of trial counsel for the first time in that proceeding for purposes of applying the *Martinez*
rule. See *Rodney v. Filson*, 916 F.3d 1254, 1259-60 (9th Cir. 2019). See, *supra*, p. 12.

1 substantial. Defense counsel was on notice, by virtue of Delapinia's interview transcript,
2 that police told Delapinia they would arrange for him to speak with gang detectives. The
3 undisputed police records demonstrate Delapinia's assistance led to arrests for unsolved
4 and gang-related armed robberies that were unrelated to Delapinia's offenses.⁶ The state
5 court records show defense counsel did not present documents or any information
6 concerning Delapinia's assistance to authorities at sentencing or resentencing. The State
7 attorney and the PSR likewise provided no such information to the state district court. The
8 state district court did not impose minimum sentences for any of Delapinia's convictions
9 either at sentencing or resentencing. Given the broad discretion enjoyed by state district
10 courts in Nevada, documented assistance to authorities of the nature involved here could
11 have reasonably supported the imposition of a lower sentence than a state district court
12 might impose otherwise. As such, the claim that trial counsel was ineffective in
13 unreasonably failing to investigate and present documentation of assistance to
14 authorities, is substantial.

15 **b. Postconviction counsel's performance was deficient.**

16 Postconviction counsel performed deficiently because, under the circumstances,
17 it was unreasonable to forego investigation of Delapinia's conversations with gang
18 detectives as part of the state postconviction investigation into the claim that trial counsel
19 was ineffective in failing to present mitigation evidence at sentencing concerning gang
20 threats toward Delapinia. (ECF No. 22-17 at 33-37.)

21 Postconviction counsel asserted trial counsel was ineffective because counsel
22 failed to present the substance of Delapinia's apology letter to the victim in which
23 Delapinia asserted he committed the crimes in response to threats from gang members.
24 (*Id.* at 35-36.) To support the claim, postconviction counsel presented the apology letter
25 to the state district court in postconviction proceedings. (ECF No. 17-12 at 94.) In the

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27 ⁶Because Respondents do not deny the correctness of the police arrest records
28 submitted by Delapinia in support of this claim (ECF Nos. 22-21 and 22-22) or refute their
authenticity, the Court considers those records under Rule 7 of the Rules Governing 2254
Cases. *See also Triguereos v. Adams*, 658 F.3d 984, 987 (9th Cir. 2011) (taking judicial
notice of documents that are "not subject to reasonable dispute").

1 letter, Delapinia asserts gang members coerced him to commit crimes, and further stated,
2 “i [sic] swear to you and your family im [sic] bring down this gang. by [sic] all means
3 nessary [sic].” (*Id.* at 93-94.) The transcript of Delapinia’s initial interview with police
4 concerning his own offenses reveals the interviewing officer told Delapinia he would
5 arrange for him to speak with a gang detective concerning his assertions. In an affidavit,
6 postconviction counsel explained that he “didn’t investigate whether Mr. Delapinia had
7 cooperated with the police on unrelated cases and didn’t get copies of associated police
8 reports.” (ECF Nos. 17-3 at 52-53, 36-1 at 2.) Postconviction counsel “didn’t make a
9 strategic decision not to specifically include” information about Delapinia’s cooperation
10 with police, as part of the claim that trial counsel was ineffective in presenting mitigation
11 evidence at sentencing. (ECF No. 36-1 at 2.)

12 Under the circumstances, an objectively reasonable postconviction attorney,
13 whose aim was to investigate ineffective assistance of trial counsel, and in particular, trial
14 counsel’s failures to assert evidence of mitigation at sentencing, including Delapinia’s
15 claims that he committed his offenses in response to threats from gang members, would
16 have investigated whether Delapinia spoke to gang detectives. Postconviction counsel
17 was on notice that the officer who interviewed Delapinia intended to contact a gang
18 detective to talk with Delapinia about his allegations against gang members. Delapinia’s
19 repeated statements about gang threats to him and his family in statements he gave to
20 police, to probation, and in his apology letter, pointed to a distinct possibility that, given
21 an opportunity, Delapinia intended to provide information to authorities to prosecute the
22 gang members who made threats against him and his family.

23 On this record, postconviction counsel’s failure to investigate whether Delapinia
24 gave statements to gang detectives, and if so, investigate the substance of those
25 statements and present them to support the existing postconviction claim that trial counsel
26 was ineffective by failing to present mitigation evidence at sentencing, was objectively
27 unreasonable and constitutes deficient performance under *Strickland*.

28 ///

1 **c. Postconviction counsel’s performance was prejudicial.**

2 Under the circumstances, the Court also finds there is a reasonable probability
3 Delapinia would have prevailed on his postconviction *Strickland* claim had postconviction
4 counsel not unreasonably failed to investigate Delapinia’s statements to gang detectives.
5 Had postconviction counsel reasonably investigated, counsel would have discovered
6 Delapinia’s documented assistance to authorities. As discussed in greater detail below,
7 had postconviction counsel presented that documentation to support the claim that trial
8 counsel provided ineffective assistance at sentencing by failing to present mitigation
9 evidence, there is a reasonable probability the result of the postconviction proceedings
10 would have been different because the state district court has broad discretion at
11 sentencing, the state district court did not impose minimum sentences for Delapinia’s
12 convictions, and documented assistance to authorities is evidence supporting mitigation
13 at sentencing.

14 For the foregoing reasons, the Court finds Delapinia has demonstrated cause and
15 prejudice to set aside the default of that portion of grounds 2(b) and 4(b) in which he
16 claims ineffective assistance of trial counsel in failing to investigate and present police
17 records demonstrating assistance to authorities at sentencing and resentencing.

18 **3. Merits of Claim of Ineffective-Assistance-of-Trial Counsel**

19 Because Delapinia demonstrates cause and prejudice to excuse the
20 procedural default, the Court considers the claim that trial counsel was ineffective in
21 failing to investigate and present mitigation evidence of Delapinia’s assistance to
22 authorities at sentencing and resentencing, *de novo*. See *Pirtle v. Morgan*, 313 F.3d
23 1160, 1167-68 (9th Cir. 2002).

24 The Court finds trial counsel’s performance was deficient under *Strickland*. Trial
25 counsel failed to submit any information or argument at sentencing concerning
26 Delapinia’s assistance to authorities. However, the transcript of Delapinia’s interview with
27 police put trial counsel on notice that the interviewing officer would arrange for Delapinia
28 to speak with gang detectives. Given that Delapinia repeatedly stated his crimes were, at

1 least in part, motivated by gang threats toward him and his family, the officer's statement
2 that he would arrange for Delapinia to talk to a gang detective, together with Delapinia's
3 apology letter in which he stated he would do whatever was necessary to
4 "bring down" the gang that had threatened him and his family, counsel's failure to
5 investigate Delapinia's statements to gang detectives was objectively unreasonable. A
6 reasonably diligent trial attorney would have reviewed the transcript of Delapinia's
7 interview with police, discovered the interviewing officer's plan to arrange an interview
8 between Delapinia and gang detectives, and determined whether Delapinia spoke with
9 gang detectives. Had trial counsel done so, counsel would have discovered the police
10 records documenting Delapinia's assistance to authorities, which was provided on the
11 same day that Delapinia admitted his own offenses. Under the circumstances, there is no
12 conceivable reasonable strategic reason why trial counsel failed to investigate, uncover,
13 and present Delapinia's documented assistance to authorities as mitigation at sentencing
14 and resentencing. Thus, trial counsel's failure to investigate and present records of
15 Delapinia's assistance to authorities for mitigation at sentencing and resentencing
16 constituted deficient performance under *Strickland*.

17 The Court also finds trial counsel's unreasonable failure to investigate, uncover,
18 and present records demonstrating Delapinia's assistance to authorities in support of
19 mitigation at sentencing and resentencing prejudiced Delapinia under *Strickland*.
20 Documented assistance to authorities that led to the arrests for unsolved gang-related
21 armed robberies is qualitatively greater mitigation evidence than character references
22 from friends and family, a confirmed drug addiction, and apologies to the victim.
23 Documentation that Delapinia took affirmative steps to assist authorities in solving armed
24 robberies that were unrelated to his own offenses, in the context of his repeated
25 references to gang threats as a motivating force for some of his crimes and his statement
26 in his apology letter that he intended to "bring down" the gang, would have presented a
27 persuasive case for mitigation at sentencing.

28

1 Respondents contend Delapinia is not prejudiced because the convictions for
2 kidnapping and robbery are “inextricably linked to the act of sexual assault” and no
3 amount of mitigation can explain his forcing the victim into her home at gunpoint to
4 perform fellatio on him. (ECF No. 43 at 23.) However, under the circumstances, including
5 the broad discretion of the Nevada courts at sentencing and the relatively compelling
6 nature of documented assistance to authorities as a mitigation factor, there is a
7 reasonable probability the outcome of the sentencing and resentencing proceedings
8 would have been different had trial counsel not unreasonably failed to investigate and
9 present the state district court with the mitigation evidence.

10 **V. CONCLUSION**

11 It is therefore ordered that Delapinia is entitled to federal habeas corpus relief on
12 the narrow grounds contained in grounds 2(b) and 4(b) that he received ineffective
13 assistance of trial counsel at sentencing and resentencing in violation of the Sixth and
14 Fourteenth Amendments due to counsel’s failure to investigate and present evidence of
15 Delapinia’s assistance to authorities.

16 It is further ordered that the petition for a writ of habeas corpus, as amended, is
17 conditionally granted for grounds 2(b) and 4(b) on the narrow grounds that trial counsel’s
18 failure to investigate and present evidence of Delapinia’s assistance to authorities at
19 sentencing and resentencing constitutes ineffective assistance in violation of the Sixth
20 and Fourteenth Amendments, and that, accordingly, the state court judgment of
21 conviction of Petitioner Ryan L. Delapinia in No. C289201-1 in the Eighth Judicial District
22 Court for the State of Nevada hereby is vacated.

23 It is further ordered that Delapinia be resentenced within 30 days of the later of the
24 conclusion of any proceedings seeking appellate or certiorari review of the Court’s
25 judgment, if affirmed, or the expiration of the delays for seeking such appeal or review,
26 unless the state files a written election in this matter within the 30-day period to
27 resentence Delapinia and thereafter commences resentencing within 120 days following
28 the election to resentence Delapinia, subject to reasonable request for modification of the

1 time periods in the judgment by either party pursuant to Rules 59 and 60 of the Federal
2 Rules of Civil Procedure. All remaining claims are denied without prejudice as moot
3 following upon the conditional grant of the writ as set forth above.⁷

4 The Clerk of Court is directed to enter final judgment accordingly, conditionally
5 granting the petition for a writ of habeas corpus as provided above and close this case. It
6 is the Court's intention that the judgment entered pursuant to this order will be a final and
7 appealable judgment. Final judgment is entered subject to a possible later motion to
8 reopen the matter to enter an unconditional writ if then warranted, as a matter of
9 enforcement of the judgment.

13 ⁷In addition to the claims upon which the Court conditionally grants relief, Delapinia
14 alleges in ground 1 that the initial sentencing judge was biased; ground 2(a) that trial
15 counsel was ineffective in failing to request recusal of the initial sentencing judge; ground
16 2(b) that trial counsel was ineffective in failing to present as mitigation the apology letter
17 referencing gang threats, evidence supporting a bona fide drug addiction; and evidence
18 of Delapinia's violent and impoverished childhood and enrollment in special education
19 classes in grammar and middle school; ground 3 that appellate counsel was ineffective
20 in failing to request full resentencing; count 4(a) trial counsel was ineffective at
21 resentencing in failing to request full resentencing; ground 4(b) trial counsel was
22 ineffective in failing to present as mitigation the apology letter referencing gang threats,
23 evidence of a bona fide drug addiction; and evidence of Delapinia's violent and
24 impoverished childhood and enrollment in special education classes in school; ground
25 4(c) that trial counsel failed to consult with Delapinia concerning a direct appeal from the
26 judgment after resentencing and ground 5; that Delapinia's sentence constitutes cruel
27 and unusual punishment. (ECF No. 25 at 11-23.)

21 Because Delapinia is entitled to resentencing based on a narrow portion of
22 grounds 2(a) and 4(b), a determination on the remaining claims is unnecessary. See
23 *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (“[W]hen habeas is granted on a
24 conviction . . . , requiring the district court to resolve at one time all the issues raised in
25 the petition could actually delay the proceedings unnecessarily and waste the district
26 court's scarce judicial resources.”). Even if Delapinia prevailed on one or more of his
27 remaining claims, he could obtain no greater relief than that to which he already is entitled
28 on the portions of ground 2(b) and 4(b) upon which the Court grants relief in vacating the
judgment. See *id.* at 1412-13 (determining that “[a]lthough the district court did not
address the sentencing issues, these claims became moot and unnecessary to reach by
virtue of the order vacating the conviction and requiring a new trial”); *Rice v. Wood*, 44
F.3d 1396, 1402 n.10 (9th Cir. 1995), *vacated in part on other grounds*, 77 F.3d 1138 (9th
Cir. 1996) (en banc), *cert. denied*, 519 U.S. 873 (1996) (“[O]ur affirmance of the district
court's granting of the writ on one sentencing issue effectively renders unnecessary any
further consideration by the district court of the remaining penalty phase issues.”). The
Court accordingly denies Delapinia's remaining claims without prejudice as moot and
denies Delapinia a certificate of appealability relative to those claims.

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It is further ordered that a certificate of appealability is denied as reasonable jurists would not find it debatable whether the Court is correct in its procedural rulings denying Respondent's motions to dismiss for the reasons stated in ECF No. 40.

The Clerk of Court is directed to seal ECF Nos. 22-21 and 22-22.

The Clerk of Court is directed to substitute Calvin Johnson as Respondent for Respondent Brian E. Williams, Sr.

The Clerk of Court is directed to provide a copy of this order and the judgment to the Clerk of the Eighth Judicial District Court, in connection with that court's case No. C289201-1.

DATED this 22nd Day of March 2022.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE