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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICKEY TODD MAJOR,)	
)	
Petitioner,)	3:99-cv-00237-LRH-RAM
)	
vs.)	<u>ORDER</u>
)	
E.K. McDANIEL, <i>et al.</i> ,)	
)	
Respondents.)	
	/	

This is an action on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is the amended petition, respondents’ answer and petitioner’s reply. Dockets #14, #83 and #90.

I. Procedural History

The procedural history of petitioner’s criminal and appellate proceedings is extensive, covering a period of ten years from the date of the crime in April or May of 1988 to September 10, 1990, when charges were originally filed, to 1996, when the conviction was obtained, to completion of direct appeal on September 3, 1998. Post-conviction proceedings have proceeded in and out of state and federal court from November 1998 through the present.

A. First Elko County Murder Prosecution - Case No. 5159

Petitioner was originally charged with open murder with the use of a deadly weapon for the killing of Tina Dell, in Elko County, Nevada on September 10, 1990. Exhibit 1.¹ Petitioner

¹ The exhibits referenced in this Order were filed by petitioner in support of his amended petition and are found in the clerk’s record at dockets 18-30 and 49-59.

1 raised questions of venue arguing that the proper venue was in Eureka County where the body of the
2 deceased was found. Exhibits 8. Upon stipulation, petitioner was committed to Lakes Crossing, a
3 state-run mental health facility located in Reno, Nevada, for a competency evaluation. Exhibit 21.
4 Petitioner was found competent (Exhibits 29 and 31). On February 13, 1992, after a hearing and
5 special canvass of petitioner by the court, the parties stipulated to the dismissal of the charges
6 without prejudice on the basis that new evidence had come to light. Exhibits 87, 88 and 89.
7 Petitioner specifically waived any statute of limitations for re-filing charges against him.

8 B. Eureka County Murder Prosecution - Case No. 875

9 In February, 1994, the Eureka County District Attorney (DA) filed open murder with
10 the use of a deadly weapon charges against petitioner in the killing of Tina Dell. Exhibit 95.
11 Following a preliminary hearing, petitioner was bound over to the district court on the charges.
12 Exhibits 96-97. Petitioner filed a motion for change of venue, arguing that there was insufficient
13 evidence that the crime occurred in Eureka County. Exhibit 99. He also moved to dismiss the
14 charges contending that the issue of venue had been previously litigated. Exhibit 102. On
15 September 16, 1994, following a hearing on these and various other motions, the court issued an
16 order dismissing the action without prejudice because there was no evidence that the “fatal blow” or
17 death of Tina Dell occurred in Eureka County. Exhibit 109. An appeal of this order was ultimately
18 withdrawn by the DA. Exhibits 110, 113 and 114.

19 C. Eureka County Perjury Prosecution - Case No. 876

20 Meanwhile, on April 22, 1994, petitioner was charged with perjury based on an
21 affidavit signed and attested to by petitioner that he had no history of mental health problems.
22 Exhibit 115. Following a jury trial, petitioner was convicted (Exhibit 144) and sentenced to four
23 years in prison. Exhibit 151. This conviction was reversed on appeal in 1998. Exhibit 164.

24 D. Elko County Murder Prosecution - Case No. 6218

25 In February 1995, the Elko County DA again filed charges against petitioner of open
26 murder with the use of a deadly weapon for the 1988 killing of Tina Dell. Exhibit 165. The
27 petitioner was bound over. Exhibit 176. Petitioner was represented by Matthew Stermitz. *Id.*

1 Petitioner pled not guilty on the Information filed against him in the Fourth Judicial District Court on
2 the charge of open murder. Exhibit 178.

3 A five-day jury trial commenced on March 11, 1996. Exhibits 192-197. Petitioner
4 was found guilty of first degree murder with the use of a deadly weapon on March 15, 1996. Exhibit
5 199. The state pursued a habitual criminal enhancement. Exhibit 200. The court sentenced
6 petitioner to two consecutive sentences of life without the possibility of parole. Exhibit 206.

7 E. State Appeal

8 Petitioner filed a direct appeal raising nine claims of error. Exhibit 208. While the
9 appeal was pending, with the representation of a new attorney, petitioner moved for a new trial,
10 claiming that he had just discovered that his trial counsel, Mr. Stermitz, had a conflict of interest
11 arising from his employment by the district attorney's office when the murder charges were initially
12 filed against petitioner in 1990 and because Stermitz had promised to re-open the Dell murder file
13 during an unsuccessful election campaign. Exhibit 218. The motion for a new trial was denied and
14 petitioner appealed. Exhibits 224, 225. The appeal was dismissed, with the Nevada Supreme
15 Court concluding that no actual conflict of interest existed and that counsel's representation of
16 appellant had not been deficient. Exhibit 238.

17 Petitioner's direct appeal of his conviction was dismissed on September 3, 1998, with
18 the Nevada Supreme Court concluding that none of petitioner's claims were meritorious. Exhibit
19 233.

20 F. Post-Conviction Review

21 Petitioner filed a petition for writ of habeas corpus (post-conviction) in the state
22 district court of White Pine County on November 13, 1998. Exhibit 241. Because it was filed in the
23 wrong county, the matter was transferred to Elko County. Exhibit 242. Before the state court had
24 addressed the state petition, petitioner initiated his federal action by filing a petition for writ of
25 habeas corpus pursuant to 28 U.S.C. § 2254. Docket #1. The federal petition was filed April 27,
26 1999, raising five grounds for relief. *Id.* On petitioner's motion, counsel was appointed and an
27 amended petition was filed raising nineteen grounds for relief. Docket #14.

1 merits. A federal court will not review a claim for habeas corpus relief if the state court's decision
2 rested on a state law ground that is independent of the federal question and if the ground is adequate
3 to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

4 The *Coleman* Court stated the effect of a procedural default, as follows:

5 [i]n all cases in which a state prisoner has defaulted his federal claims
6 in state court pursuant to an independent and adequate state procedural
7 rule, federal habeas review of the claims is barred unless the prisoner
8 can demonstrate cause for the default and actual prejudice as a result of
the alleged violation of federal law, or demonstrate that failure to
consider the claims will result in a fundamental miscarriage of justice.

9 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

10 To demonstrate cause to overcome a procedural default, the petitioner must be able to
11 “show that some *objective factor external to the defense* impeded” his efforts to comply with the
12 state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external
13 impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499
14 U.S. 467, 497 (1991).

15 Ineffective assistance of counsel may satisfy the cause requirement to overcome a
16 procedural default. *Murray*, 477 U.S. at 488. However, for ineffective assistance of counsel to
17 satisfy the cause requirement, the independent claim of ineffective assistance of counsel must first be
18 presented to the state courts. *Id.* at 488-89. In addition, the independent ineffective assistance of
19 counsel claim cannot serve as cause if that claim is also procedurally defaulted. *Edwards v.*
20 *Carpenter*, 529 U.S. 446, 453 (2000).

21 In order to show prejudice to overcome procedural default, petitioner bears the burden
22 . . . of showing not merely that the errors [complained of] constituted a
23 possibility of prejudice, but that they worked to his actual and
24 substantial disadvantage, infecting his entire [proceeding] with errors
of constitutional dimension.

25 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170
26 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner
27 suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d

1 528, 530 n.3 (9th Cir. 1988).

2 The court having found a procedural default as to grounds 5, and 10-14, petitioner
3 must demonstrate cause for the default and prejudice in order to obtain a review of his defaulted
4 claims on the merits. Failure to make a sufficient showing will bar the court from considering his
5 defaulted claims. *Murray*, 477 U.S. at 488.

6 Petitioner argued in opposition to the motion to dismiss that his procedural default
7 should be excused because his trial and appellate counsel had been ineffective, citing “generally” to
8 claims 17 and 18 of the amended petition. Opposition to Motion to Dismiss (docket #69), p. 9. As
9 respondents point out in their answer, the claim of ineffective assistance of trial counsel raised as
10 ground 17 offers nothing to excuse petitioner’s failure to bring the procedurally defaulted claims
11 before the Nevada Supreme Court in their proper procedural context. All the defaulted claims were
12 denied by the state high court on the basis that they were waived when petitioner failed to present
13 them on direct appeal. Exhibit 318, p. 2, n.3. Because the claims should rightfully have been raised
14 on direct appeal, it is the performance of appellate counsel that is called into question. Only ground
15 18 presents a claim of ineffective assistance of appellate counsel. That claim contends that counsel
16 should have raised the now defaulted claims and argues that failure to do so was ineffective
17 assistance. See Amended Petition (docket # 14), pp. 38-39.

18 In order to determine if petitioner can overcome the procedural bar, the court must
19 examine the merits of ground 18. Ground 18 states:

20 Petitioner’s Conviction and Sentence Are Invalid under the Constitutional
21 Guarantees of Due Process of Law, Equal Protection of the Laws, Effective
22 Assistance of Counsel and a Reliable Sentence Because Petitioner Was Not
Afforded Effective Assistance of Counsel on Appeal. U.S. Const. Amends. VI,
VIII & XIV.

23 1. Petitioner was represented on direct appeal to the Nevada
24 Supreme Court by Matthew Stermitz. The experience of counsel and the
25 available resources and time to prepare the briefing was inadequate to permit
reasonably effective assistance to be provided on appeal.

26 2. Appellate counsel failed to provide reasonably effective
27 assistance of counsel to petitioner. Appellate counsel unreasonably failed to
28 raise on appeal or completely assert all the available arguments supporting the
constitutional issues asserted in this petition as grounds one (Right to Conflict-

1 Free Counsel), five (Unqualified State Expert), ten (Reasonable Doubt Jury
2 Instruction), eleven (Premeditation and Deliberation & Malice Jury
3 Instructions), twelve (Prosecutorial Misconduct), thirteen (Prejudicial Trial
4 Atmosphere-Change of Venue), fourteen (Voluntary and Knowing Waiver of
5 Major's Right Against Self-Incrimination), and sixteen (Denial of Penalty
6 Hearing and Sentencing by Jury).

7
8 3. Appellate counsel did not have any tactical or strategic reasons
9 within the range of reasonable competence for failing to assert available
10 constitutional claims or otherwise performing reasonably in perfecting the
11 record on appeal. Counsel failed to perform with reasonable competence due
12 to the limitations on resources and time available to counsel and not for the
13 purpose of gaining a tactical or strategic benefit.

14 5.[Sic] The failure of appellate counsel to render effective
15 assistance was prejudicial in that it is reasonably probable that a more favorable
16 result would have been obtained on appeal if counsel had performed effectively
17 and the failure of appellate counsel to provide reasonably effective assistance
18 was substantially injurious to the petitioner's right to obtain fundamentally fair
19 and adequate appellate review of petitioner's conviction and sentence because
20 the claims which should have been raised are meritorious and they could not
21 have been found harmless beyond a reasonable doubt on direct appeal.
22

23 Docket # 14, p. 38.

24 In considering the merits of a claim presented in the amended petition this court is
25 bound by the provisions of 28 U.S.C. § 2254(d), which provides:

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

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

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

28 U.S.C. §2254(d).

Ineffective assistance of appellate counsel, if proved, constitutes cause for procedural
default. *Murray v. Carrier*, 477 U.S. 478, 488-92 (1985) (examining ineffective assistance of
counsel resulting in procedural default in state court). To establish prejudice based on the deficient
assistance of appellate counsel, the defendant must show that the omitted issues would have a

1 (b) Dr. Brooks' qualifications to serve as an expert witness, (c) reasonable doubt
2 instruction, (d) premeditation and deliberation and malice jury instructions, (e)
3 prosecutorial misconduct, (f) change of venue, (g) *Miranda* violations, and (h)
4 denial of sentencing by jury. As stated above, we conclude issues (a)-(g) did not
5 have a reasonable likelihood of success on appeal and (h) was rendered moot by
6 Major's successful motion to correct illegal sentence, which led to his
7 resentencing in 2005. Thus, the district court did not err in concluding that Major
8 failed to demonstrate that Stermitz's appellate representation fell below an
9 objective standard of reasonableness or omitted any issues on appeal that would
10 have had a reasonable probability of success.

11 Exhibit 318, 651-652.²

12 As discussed *infra*, petitioner has not demonstrated that the state court's rejection of
13 this claim was either contrary to clearly established federal law or an unreasonable application of that
14 law. 28 U.S.C. § 2254(d)(1). Neither has he shown that the state court made an unreasonable
15 determination of the facts in light of the evidence at trial. *Id.* Because the state court's decision as to
16 the effectiveness of appellate counsel was proper under § 2254(d)(2), this court is bound by that
17 decision and petitioner has not met his burden to show cause and prejudice to obtain review of the
18 procedurally barred claims.

19 Grounds 5 and 10-14 are procedurally barred from review by this court and shall be
20 dismissed with prejudice.

21 B. Merits Review

22 The remaining grounds for relief are eligible for a review on the merits. Those claims
23 include grounds 1-4, 6-9, 15, 17(a)-(m), 17(o)-(r), 18 and 19. As previously noted, the court's
24 review of the merits of petitioner's claims is governed by the provisions of the AEDPA³ as codified
25 at 28 U.S.C. § 2254.

26 Ground One. Major's Right to Conflict Free Counsel as Guaranteed by the United States
27 Constitution Was Violated When Matthew Stermitz Was Appointed to Represent
28 Major at Trial. U.S. Const. Amend. VI.

29 ² The Nevada Supreme Court considered and rejected the individual claims omitted from appeal,
30 including the present grounds 5 and 10-14, in the context of ineffective assistance of counsel at trial
31 claims. Exhibit 318, pp. 5-8, 12-15.

32 ³ Antiterrorism and Effective Death Penalty Act of 1996.

1 In support of this claim, petitioner reports that Stermitz had just run for election to the
2 office of Elko County District Attorney prior to being appointed to represent petitioner in the 1995-
3 96 murder prosecution against him. During the election campaign, Stermitz was said to have
4 “indicated he would review the case” of the Tina Dell murder charges if he was elected.⁴ He was not
5 elected and returned to private practice, and later was appointed to represent petitioner in defense of
6 the murder charge.

7 Petitioner further reports that his prior counsel, David Lockie, had been disqualified
8 on the basis that his law partner had been a deputy district attorney at the time of the original
9 prosecution in Elko. Petitioner argues that this same circumstance—Stermitz’s employment as a
10 deputy district attorney at the time of the first Elko murder prosecution—should have disqualified
11 Stermitz from representing him. Petitioner argues that because he was living in Colorado during the
12 election campaign, he was unaware of these facts. However, he suggests that the court, the
13 prosecutor and other officials involved in the proceedings would have been aware of this obvious
14 conflict. Petitioner contends that these facts evidence the actual conflict of interest that his counsel
15 suffered and that this conflict denied him his right to counsel as guaranteed by the Sixth Amendment.
16 He further argues this actual conflict requires no showing of prejudice.

17 The Sixth Amendment provides that a criminal defendant shall have the right to “the
18 Assistance of Counsel for his defense . . . because of the effect it has on the ability of the accused to
19 receive a fair trial.” *United States v. Cronin*, 466 U.S. 648, 658 (1984). Where a constitutional right
20 to counsel exists, there is a correlative right to representation that is free from conflicts of interest.
21 *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978).
22 And, while as a general matter, a petitioner alleging a Sixth Amendment violation must demonstrate
23 “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
24 would have been different,” *Strickland*, 466 U.S. at 694, in the case where a petitioner’s counsel had

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26 ⁴ The quoted language was extracted from the Motion for New Trial, p. 4, where it is cited as a
27 quote from a newspaper article appearing in the High Desert Advocate on March 13, 1996. Exhibit 229.
The actual quote is significantly different than as reported by petitioner.

1 an actual conflict of interest, the petitioner must show only that the conflict “actually affected the
2 adequacy of his representation.” *Cuyler*, 446 U.S. at 349-50.⁵ In determining whether there has been
3 an actual affect on the representation, petitioner must show that counsel failed to pursue some
4 “plausible alternative defense strategy or tactic,” *United States v. Wells*, 394 F.3d 725, 733 (9th Cir.
5 2005), “that counsel was influenced in his basic strategic decisions” by the conflict, *United States v.*
6 *Shwayder*, 312 F.3d 1109, 1118 (9th Cir. 2002), or that counsel would be required to undermine,
7 criticize, or attack his own work product from a previous case, *Maiden v. Bunnell*, 35 F.3d 477, 480 -
8 481 (9th Cir. 1994).

9 During his testimony at the state post-conviction hearing, counsel was questioned
10 about potential alternate defense strategies. Stermitz confirmed that petitioner’s defense was
11 innocence and that he believed arguing for a second degree murder conviction would have been
12 completely inconsistent with that strategy. Exhibit 282, pp. 62. Stermitz further testified that he did
13 not believe petitioner would have “authorized” this alternate argument and he did not want to
14 weaken the innocence claim by making any concessions as to guilt. *Id.*, pp. 63-64. When asked why
15 he did not argue the lack of evidence of deliberation or premeditation required for first degree
16 murder, counsel testified that the murder weapon was a knife and that the use of a knife was
17 evidence of deliberation, stating, “You use a knife, you stab, what the hell were you trying to do?
18 Tickle them?” *Id.* p. 62. These statements offer no support for the argument that counsel shaped his
19 defense strategy for any purpose except for the benefit of his client. Strategic decisions made by
20 counsel on the basis of the client’s instructions and the evidence available do not demonstrate a
21 conflict of interest that had an actual affect on the adequacy of the representation. Petitioner has not
22 demonstrated that counsel suffered from a conflict of interest based upon his statements made during
23 an election campaign.

24
25 ⁵ In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Supreme Court noted that its holding in *Cuyler*
26 *v. Sullivan*, was limited to the situation of joint representation. *Id.*, at 176. Whether the *Cuyler* exception
27 to the prejudice requirement of *Strickland* should apply in other situations of attorney conflict remains
28 an open question. *Id.*

1 Petitioner next argues that because counsel was employed by the district attorney's
2 office just prior to the time the original charges were filed, the representation was "substantially
3 related" to the current representation and should have required disqualification, citing *Trone v.*
4 *Smith*, 621 F.2d 994, 998 (9th Cir. 1980). In *Trone* the court held that if there was a possibility that
5 confidential information was disclosed in the previous representation that could harm the client in
6 the present representation, then a substantial relationship is presumed. *Id.* In this case the potential
7 harm fell only to the prosecution if confidential information was obtained by Stermitz while he was
8 employed as a deputy district attorney. It is impossible to imagine how information that Stermitz
9 might have obtained in preparing the case for prosecution could have been of harm to the defendant.
10 More likely it would have been used, if at all, for his benefit.

11 The Nevada Supreme Court clearly reviewed this contention in post-conviction
12 review and concluded no such conflict existed. Exhibit 238, pp. 1-2. Petitioner has not shown that
13 the state court's decision was improper under 28 U.S.C. § 2254(d) and no relief is warranted on
14 ground one.

15 Ground Two: Major Was Denied His Right to Due Process and a Fair Trial When His Jury Was
16 Prejudiced by a Juror Whose Co-worker Remarkd That the Prosecution Had
Possession of "The Knife." U.S. Const. Amends. VI & XIV.

17 Petitioner asserts in this claim that on the fourth day of trial a seated juror asked to
18 speak with the court. In a meeting with all parties present, the juror informed the court that a fellow
19 employee had discussed the case with her. She said the co-worker told her that the co-worker's
20 mother's friend found a knife and found out it was "the knife" used in Dell's murder. The juror was
21 also told that the woman had used the knife and had gotten rid of it. Exhibit 196, pp.3-5.⁶ Despite
22 counsel's repeated objection to the juror remaining on the jury, the court extracted a promise from
23 the juror to disregard the statement and to not allow it to bear any weight in her deliberations. *Id.*

24 Private communications, possibly prejudicial, between jurors and third persons, or

26 ⁶ In fact, the juror said: "The girl that I work with happens to live out at Paradise Valley, and she
27 said, 'Well, my mother has a friend who has a friend that found the knife and they found out that it was
the knife and it was the best damned knife they used and they got rid of it.'" Exhibit 196, p. 3-4.

1 witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless
2 their harmlessness is made to appear. *Mattox v. U. S.*, 146 U.S. 140, 150 (1892); *See also, Remmer v.*
3 *U.S.* 347 U.S. 227, 229 (1954) (prejudice is presumed where there is any private communication
4 between a juror and an outside party on matters related to the trial while the matter is pending.) This
5 presumption of prejudice can be overcome if, at a hearing with notice to all parties, the state makes a
6 strong showing that there was no harm to the defendant. *Id.*

7 As the petitioner acknowledges, the court, after receiving a note from the juror,
8 conducted a hearing involving the juror, the prosecutor, defense counsel. Exhibit 196, pp. 2-7. The
9 court questioned the juror and then allowed both parties to question the juror. Defense counsel then
10 moved to have the juror removed stating:

11 It's such an integral part of the case, yeah, in spite of what's been said – and I don't
12 know that the juror – but in spite of what's been said, I think it's such an integral
part of the case whether or not that really happened and, yeah, we would object.

13 Exhibit 196, p.6. The court denied the motion, having obtained the juror's assurance that she would
14 not consider the co-worker's statement for any purpose and that the information would not have any
15 weight in her deliberations. *Id.* at 7.

16 Petitioner has not shown the trial court's decision was improper. The nature of the
17 hearing indicates the court's immediate concern for the events and his careful consideration of what
18 the juror had to say. Moreover, the circumstances, together with the juror's testimony, showed that
19 the juror intended to act appropriately and honestly with the court. She brought the matter to the
20 judge's attention. She answered honestly when asked what was said. She indicated she had advised
21 the co-worker she was not to talk about the trial and had exited the room. She further stated that she
22 doubted the credibility of the co-worker.

23 When the Nevada Supreme Court considered the claim, it found it had no merit, that
24 the trial court had acted in conformance with *Isbell v. State*, 97 Nev. 222, 626 P.2d 1274 (1981) and
25 had made the proper factual determination that the communication was not prejudicial as required by
26 *Remmer, v. United States*, 347, 227 (1954). Exhibit 233, pp. 7-8. The court found that the trial
27 court's determination to retain the juror was supported by substantial evidence. *Id.*

1 Petitioner has not demonstrated that the Nevada Supreme Court’s decision was an
2 unreasonable determination of facts in light of the evidence in the record. Moreover, the court
3 correctly applied the applicable federal law. Petitioner is not entitled to relief on this claim.

4 Ground Three: Major Was Deprived of His Rights to Due Process and a Fair Trial When the
5 Prosecution Failed to Disclose Evidence Regarding the Finding of Knives.
6 U.S. Const. Amends. VI & XIV.

6 Petitioner offers these facts to support this claim: Petitioner requested the opportunity
7 to review all discoverable materials. During trial, a prosecution witness testified that she found a
8 knife in the same area where the bones had been found and that she turned the knife over to police.
9 Exhibit 192, pp. 42-43. Petitioner had not been advised of these events and, although the witness
10 had testified on three prior occasions, she had never before mentioned the knife. Exhibits 11, 96 and
11 175. Another witness also testified that there were knives missing from petitioner’s household after
12 Ms. Dell’s disappearance.

13 Based on the assumption that no knife had been found, defense counsel made an
14 opening statement highlighting that fact. Petitioner argues that the subsequent testimony to the
15 contrary was very damaging to petitioner’s case. Petitioner had based his defense on the state being
16 unable to prove that Ms. Dell’s death was caused by criminal agency. Petitioner further argues that
17 the court should have declared a mistrial following the witnesses testimony about finding the knife.
18 Petitioner acknowledges, however, that the DA claimed that the testimony was a complete surprise
19 to him. Petitioner argues that the state is responsible for the suppression of the knife evidence and
20 that because the evidence was not provided to petitioner prior to trial, the court should have granted a
21 mistrial. He further argues that denial of the motion for mistrial denied due process and a fair trial.

22 Under *Brady v. Maryland*, 373 U.S. 83 (1963), the state is obligated to provide a
23 criminal defendant with exculpatory evidence. To show a violation of this rule, petitioner must
24 demonstrate that the prosecution suppressed evidence that was favorable or exculpatory and that the
25 evidence was material. *Id.*, at 87; *see also United States v. Blasco*, 702 F.2d 1315, 1327 (11th Cir.
26 1983). Here, the evidence petitioner claims was suppressed was not exculpatory evidence. Rather, if
27 the knife had been found and turned over to police as the witness testified, and, if the knife proved to
28

1 be related to the killing, it would have been incriminating evidence, otherwise it would likely have
2 been irrelevant to the prosecution or defense. However, apart from the unanticipated testimony of
3 Ms. Brockett, the witness who reported finding the knife and turning it over to the police, no
4 evidence of the knife was presented at trial. In fact, the police officer to whom the knife was
5 reportedly submitted denied ever receiving it. Exhibit 194, pp. 145, 151.

6 The Nevada Supreme Court considered this claim on direct appeal from the judgment
7 of conviction citing to *Brady* and concluded that petitioner had failed to show that the knife was ever
8 in the prosecution's possession, and that, even if it was, petitioner had failed to show the evidence
9 was exculpatory. Exhibit 233. The Nevada Supreme Court's determination of this claim was not
10 incorrect or unreasonable within the parameters of 28 U.S.C. § 2254(d) and no relief shall be granted
11 on ground three.

12 Ground Four: Major's Conviction and the Resulting Sentence Is Invalid under the Constitutional
13 Guarantees of Due Process and a Fair Trial Due to the Absence of Evidence
14 Sufficient to Support, Beyond a Reasonable Doubt, a Factual Basis for the Necessary
15 Elements of Criminal Agency for Culpability for the Offense. U.S. Const. Amends.
16 VI, XIV.

17 Petitioner claims there was insufficient evidence presented at trial to prove beyond a
18 reasonable doubt that Ms. Dell died by a specific criminal agency or that petitioner was the person
19 responsible for her death. He contends the condition of the remains and the conditions under which
20 they existed until their discovery required a "qualified forensic anthropologist['s]" examination, and
21 that Dr. Brooks, the expert used at trial, was not qualified. Petitioner argues the only evidence at
22 trial of the criminal agency causing death came in through Dr. Brooks, suggesting that evidence
23 given via testimony of witnesses who saw a photograph of the victim lying on a bed with stab
24 wounds to her chest and apparently dead (Exhibit 194, pp. 29-30), together with statements made by
25 the petitioner himself to those testifying witnesses about the same photograph (Exhibit 194, pp. 51,
26 60; 134-145), does not qualify as evidence of the criminal agency causing death. Petitioner also
27 ignores testimonial reference to the report prepared by Dr. Birkby, which also identified perimortem
28 injuries to the skeletal remains as evidence suggesting that "knife wounds inflicted elsewhere on the
body" could be the cause of death. Exhibit 247.

1 Respondents argue that this claim does not present a federal question because the
2 issue of *corpus delicti* is a question of state law. Respondents are mistaken. Questions of the
3 sufficiency of the evidence implicate federal due process and fair trial guarantees. In determining
4 claims of insufficient evidence, the relevant question is “whether, after viewing the evidence in the
5 light most favorable to the prosecution, any rational trier of fact could have found the essential
6 elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318-319
7 (1979).

8 In considering this claim, the Nevada Supreme Court found the claim to be without
9 merit, pointing to the testimony of the state’s expert about the stab wounds as the eventual, if not
10 immediate cause of death and noting the role of the jury in determining the weight and credibility to
11 be given to witness testimony. Exhibit 233. Viewing all the evidence in a light most favorable to the
12 prosecution, this court cannot conclude that *no* rational trier of facts could have found the essential
13 element of criminal agency in the death of Tina Dell. The Nevada court’s rejection of the claim is
14 not an unreasonable determination of facts in light of the evidence. Ground four shall be denied.

15 Ground Five: Major’s Conviction and Sentence Are Invalid under the Federal Constitutional
16 Guarantees of Due Process, Equal Protection, Trial Before an Impartial Jury and a
17 Reliable Sentence Because the Testimony of the Unqualified State Expert Witness
18 Was Not Reliable and Her Conclusions Were Not Based on Approved Methods That
19 Could Be Tested by Other Experts in Her Field. U.S. Const. Amends. V, VI, VIII &
20 XIV.

21 This ground is procedurally defaulted.

22 Ground Six: Major’s Conviction and Sentence Are Invalid under the Federal Constitutional
23 Guarantees of Due Process and a Fair Trial Because the Court Refused to Admit The
24 Results of Major’s Polygraph Test. U.S. Const. Amends. VI & XIV.

25 Petitioner claims the results of his polygraph should have been admitted at trial.
26 Petitioner contends that because he signed a broad release at the time of his polygraph examination
27 that provided for its dissemination to “any and all persons involved in the investigation and/or
28 prosecution of the above case, my lawyer, the courts when deemed appropriate by competent judicial
authority and my parents or legal guardian if I am under 18 years of age” there was a stipulation for
its admission. Exhibit 212, pp. 14-16. Petitioner argues the document is a contract with the state,

1 which thus implicates petitioner's due process rights.⁷ Petitioner further represents that the report of
2 the polygraph test administered by an employee of the Nevada Division of Investigation, indicates
3 his truthfulness in denying that he killed or stabbed Tina Dell. Petitioner contends he has a
4 constitutional right to present this exculpatory evidence and argues it was the only way he could
5 rebut the allegations of the prosecution that had relied upon petitioner's statements to police as
6 evidence of his guilt.

7 A defendant's right to present relevant evidence is subject to reasonable restrictions to
8 accommodate other legitimate interests in the criminal trial process. *U.S. v. Scheffer*, 523 U.S. 303,
9 303 (1998). Such reasonable restrictions include the exclusion of unreliable evidence such as
10 polygraph tests. *Id.* at 309. Generally, the question of the admissibility of evidence is a question of
11 state law. *Lisenba v. California*, 314 U.S. 219, 228 (1941). Under Nevada law, polygraph evidence
12 can be considered reliable if properly administered by a qualified expert who can then be subjected
13 to cross-examination on the testing and its results. *Corbett v. State*, 94 Nev. 643, 584 P.2d 704
14 (1978). The Nevada Supreme Court considered this claim and rejected it, finding that the polygraph
15 test was reasonably excluded because petitioner had not presented evidence to supports the test's
16 reliability, such as the qualification of the examiner or the quality of the testing procedures. Exhibit
17 233.

18 The Nevada Supreme Court's rejection of this claim was not contrary to or an
19 unreasonable application of clearly established federal law. Neither was it an unreasonable
20 determination of the facts. No relief is warranted on this claim.

21 Ground Seven: Major's Conviction and Sentence Are Invalid under the Federal Constitutional
22 Guarantees of Due Process and a Fair Trial Because the Court Refused to
23 Allow the Defense's Proposed Jury Instructions. U.S. Const. Amends. VI &
 XIV.

24 Petitioner complains that the trial court rejected three proposed jury instructions: (1)
25 Proposed Instruction "A" advising the jury that it could find petitioner guilty of manslaughter if they

26 ⁷ The document referenced by petitioner is not provided in the record. There is no indication that
27 it was signed by any agent of the state so as to make it binding upon the state in terms of contract law.

1 had reasonable doubt whether the crime was murder or manslaughter; (2) Proposed Instruction “B”
2 defining the concept of proximate cause of death as “a cause which, in natural and continuous
3 sequence, produced the death, and without which the death would not have occurred;” and (3)
4 Proposed Instruction “C” which set forth the defense of voluntary intoxication.

5 Petitioner notes the instructions were denied because the court believed them to be
6 covered by other instructions, a point petitioner disputes. Petitioner further argues that the court’s
7 instructions were not a correct statement of the law, did not contain the instruction sought or denied
8 petitioner an instruction on his theory of defense.

9 To prevail on this claim, the petitioner must demonstrate that the erroneous
10 instructions were so prejudicial that they “support a collateral attack on the constitutional validity of
11 a state court’s judgment.” *Henderson v. Kibbe* 431 U.S. 145, 154 (1977). This burden is greater
12 than that required to establish plain error on direct appeal. *Id.* The question for this court is
13 “whether the ailing instructions by themselves so infected the entire trial that the resulting conviction
14 violates due process.” *Id.* quoting *Cupp v. Naughten*, 414 U.S.141, 147 (1973).

15 Petitioner’s Proposed Instruction A stated:

16 If you are satisfied beyond a reasonable doubt that the killing was unlawful, but
17 you have a reasonable doubt whether the crime is murder or manslaughter, you
must give the defendant the benefit of the doubt and find it to be manslaughter.

18 Exhibit 249.

19 The instruction offered to the jury by the court, which otherwise covered the subject,
20 provides:

21 If you believe from the evidence beyond a reasonable doubt that the
22 Defendant is guilty of Murder, and there is in your minds a reasonable doubt as to
which of the two degrees he is guilty, he must be convicted of the lower of such
degrees which is Murder of the Second Degree.

23 Should you find that the Defendant did not commit Murder of either the
24 First or Second degree but believe beyond a reasonable doubt that he is
responsible for the homicide, you must determine if that killing was manslaughter.

25 Exhibit 198, Jury Instruction 12. Petitioner relies on *Crawford v. State*, 121 Nev. 744, 121 P. 3d
26 582 (2005) to argue that the court was required to give his proffered instruction to remind the jury
27 that it cannot convict the defendant if proof of a particular elements of the crime is lacking, because,
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1 “[j]urors should neither be expected to be legal experts nor make legal inferences with respect to the
2 meaning of the law.” *Id.* at 753-754, 121 P.3d at 588. In *Crawford*, the defendant had introduced
3 evidence to support a defense of voluntary manslaughter and the trial court denied a specific
4 instruction that the burden is on the state to prove that the defendant did not act in the heat of passion
5 with the requisite legal provocation. *Id.* at 754, 121 P.3d at 589.

6 Here, the jury was instructed properly and the proposed instruction offered nothing
7 that could not be taken from the instruction that was given. Petitioner has not met his burden to show
8 this instruction infected the entire trial that his conviction violates due process. *Henderson v. Kibbe*,
9 431 U.S. at 154.

10 Next, petitioner argues the court improperly denied his instruction on proximate
11 cause. The Involuntary Manslaughter instruction given to jurors reads:

12 Involuntary Manslaughter is the killing of a human being, without any
13 intent to do so, in the commission of an unlawful act or a lawful act which
14 probably might produce such a consequence in an unlawful manner; but where the
15 involuntary killing occurs in the commission of an unlawful act, which, in its
16 consequences, naturally tends to destroy the life of a human being, or is
17 committed in the prosecution of a felonious intent, the offense is Murder.

18 Exhibit 198, Jury Instruction 14. Proposed Instruction B instructed the jury that

19 To constitute [murder] [or] [manslaughter] there must be, in addition to the death
20 of a human being, an unlawful act which was a proximate cause of that death. A
21 proximate cause of a death is a cause which, in natural and continual sequence,
22 produces the death, and without which the death would not have occurred.

23 Exhibit 249. Although the proposed instruction defines proximate cause concisely, petitioner has not
24 shown that the instruction given fails to inform the jury of the elements and circumstances necessary
25 to a finding of involuntary manslaughter.

26 As to Proposed Instruction “C,” petitioner argues his constitutional rights were
27 violated when the court refused to give a jury instruction on his theory of defense - voluntary
28 intoxication. Petitioner’s instruction reads:

If you find that a defendant, while unconscious as a result of voluntary
intoxication, killed another human being without intent to kill and without malice
aforethought, the crime is involuntary manslaughter.

When a person voluntarily induces his own intoxication to the point of
unconsciousness, he assumes the risk that while unconscious he will commit acts

1 inherently dangerous to human life or safety. Under such circumstances, the law
2 implies criminal negligence.

3 Exhibit 249.

4 Instead, the trial court offered Jury Instruction no. 16. Exhibit 198. The Nevada
5 Supreme Court determined that his instruction was an inaccurate statement of Nevada law. NRS
6 193.220 outlines when voluntary intoxication can be considered in determining criminal liability.

7 The statute provides:

8 No act committed by a person while in a state of voluntary intoxication shall be
9 deemed less criminal by reason of his condition, but whenever the actual existence
10 of any particular purpose, motive, or intent is a necessary element to constitute a
particular species or degree of crime, the fact of his intoxication may be taken into
consideration in determining the purpose, motive or intent.

11 This was the exact language set forth in Jury Instruction no. 16. Thus, petitioner's proposed
12 instruction was correctly rejected by the trial court. The Nevada Supreme Court's consideration and
13 rejection of ground seven was appropriate within the parameters of 28 U.S.C. §2254(d) and cannot
14 be revisited by this court.

15 Ground Eight: Major's Sentence Is Invalid Under the Federal Constitutional Guarantees of
16 Due Process, Equal Protection, and a Reliable Sentence Because the Court
17 Abused its Discretion in Sentencing Him to a Term of Two Life Sentences
Without Parole. U.S. Const. Amends. V, VI & VIII.

18 This ground for relief is moot and has been abandoned by petitioner (docket #90, p.
19 30).

20 Ground Nine: Major's Conviction and Sentence Are Invalid under the Federal Constitutional
21 Guarantees of Due Process, a Fair Trial and the Right to Testify in His Own
22 Defense Because the Court Failed to Advise Him of His Right to Testify at
Trial. U.S. Const. Amends. V, VI, & VIII.

23 Neither party cites to any United States Supreme Court case law which outlines a
24 criminal defendant's right to be advised by the court of his right to testify or not at his criminal trial.
25 Respondents contend that the issue is an open question and that this forecloses any relief for
26 petitioner under 28 U.S.C. § 2254.

27 Petitioner relies on *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) to support his
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1 argument that the waiver of a constitutional right must be shown on the record to have been knowing
2 and competently made and that it is the court’s responsibility to ensure the waiver is proper. *In*
3 *Johnson v. Zerbst*, the petitioner was convicted and sentenced without counsel and without a record
4 that he knowingly and intelligently waived the right to have counsel. *Id.* A different issue is
5 presented here.

6 While the Fifth Amendment clearly provides that a defendant cannot be compelled to
7 testify in his own defense, that is not petitioner’s claim. Petitioner was not forced to testify. Rather,
8 he complains that the court did not inform him that he could testify. He does not complain that he
9 did not know he could testify. Such a complaint would be disingenuous at the least, as he was fully
10 canvassed by the court and did testify at his trial on a charge of perjury. *See* Exhibit 145, pp. 269-
11 330.

12 No United States Supreme Court precedent exists upon which petitioner can rightly
13 rely to overcome the decision of the Nevada Supreme Court. As noted in its order dismissing appeal,
14 in *Phillips v. State*, 105 Nev. 631, 782 P. 2d 381 (1989), Nevada declined to adopt any affirmative
15 requirement that the court canvass a criminal defendant on his right to testify. Thus, petitioner has
16 not demonstrated that his federal constitutional rights have been violated and no relief is warranted
17 on ground nine of this amended petition.

18 Grounds Ten-Fourteen: These grounds were procedurally defaulted in state court.

19 Ground Fifteen: Petitioner’s Rights to Equal Protection, Due Process and a Fair Trial Were
20 Violated When the State Was Allowed to Participate in the Ex Parte
Application for an Investigator and Expert Fees.

21 Petitioner complains that his ex parte application for fees for an investigator was
22 improperly published to the State which then participated in the hearing on his application.
23 Respondents point out that the application for fees referenced by petitioner, exhibit 181, was not
24 labeled as “ex parte” and was served on the state by petitioner. *Id.* Moreover, according to the
25 appellate briefs (Exhibits 215 and 302), neither the application itself, or the matters revealed at the
26 hearing in the presence of the prosecutor revealed any work product or confidential defense strategies
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1 guidelines for attorney performance beyond generalized duties, including the duty of loyalty, the duty
2 to avoid conflicts of interest, the duty to advocate the defendant's cause, and the duty to
3 communicate with the client over the course of the prosecution. *Id.*

4 Construing the Sixth Amendment to guarantee not effective counsel *per se*, but rather
5 a fair proceeding with a reliable outcome, the *Strickland* Court concluded that demonstrating that
6 counsel fell below an objective standard of reasonableness alone is insufficient to warrant a finding
7 of ineffective assistance. In order to satisfy *Strickland's* second prong, the defendant must show that
8 the attorney's sub-par performance prejudiced the defense. *Id.* at 691-92. The Court defined
9 reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* at
10 694. Bearing these standards in mind, the court reviews petitioner's claim of ineffective assistance
11 of counsel at trial.

12 Petitioner attributes the following alleged injuries to counsel's lack of preparation,
13 skill and experience:

14 *Petitioner's statements to police and admitted at trial.*

- 15 (a) Counsel failed to investigate and present expert testimony about petitioner's
16 physical and psychological condition and his obvious intoxication by drugs in
17 relation to the statements petitioner gave officials during the investigation of
18 the offense. Petitioner contends he had indications of significant drug abuse
19 which started at an early age. Counsel's failure to suppress the statements
20 under the Fifth Amendment was ineffective assistance of counsel.
- 21 (b) Defense counsel unreasonably failed to take steps to prevent or minimize the
22 harmful effects of the presentation to the jury of petitioner's statements to
23 police, which were the subject of extensive examination at trial. Defense
24 counsel must not have read or simply did not understand these statements.
25 Nor did defense counsel make reasonable objections to the testimony
26 presented concerning these statements when the prosecutor repeatedly referred
27 to them during his closing arguments. Had such steps been taken it is
28 reasonably probable that a different result would have occurred at trial.
- (r) Defense counsel unreasonably failed to file a motion to suppress to exclude
the interviews and statement petitioner made to law enforcement in the
absence of a voluntary, knowing and intelligent waiver of his constitutional
rights. These interviews and statements formed the basis for the state's
closing argument. Had defense counsel filed the appropriate motions it is
probable that petitioner would have received a more favorable verdict.

The state's investigation of the Tina Dell disappearance and murder continued for a

1 period of approximately eight years, from 1988 until petitioner was finally tried and convicted in
2 1996. Petitioner spoke with investigators numerous times. Petitioner's claim that counsel should
3 have investigated and suppressed statements made by petitioner to police during the investigation is
4 too broad and does not identify specifically what statements were made when or how the
5 circumstances surrounding the statement would warrant their suppression. Conclusory allegations
6 not supported by a statement of specific facts do not warrant habeas corpus relief. *Jones v. Gomez*,
7 66 F.3d 199, 205 (9th Cir. 1995), *cert. denied*, 517 U.S. 1143 (1996). Nothing in the petition or in
8 petitioner's reply to the answer identifies the statements to which it refers or explains the
9 circumstances under which they were given. Rather, petitioner cites to the record to instances where
10 the state made reference to the statement in arguing that they were incriminating. Because the
11 specifics about the statements are missing, this court need not grant relief. However, because the
12 Nevada Supreme Court considered the claims, its decision and reasoning shall be considered.

13 Counsel has an obligation to conduct a thorough investigation. *Williams v. Taylor*,
14 529 U.S. 362 (2000). Counsel's judgment and decisions about the nature and extent of investigation
15 are entitled to great deference and must be judged based on the information known at the time, rather
16 than from the perspective of hindsight. *See Strickland*, 466 U.S. at 689. "[C]ounsel has a duty to
17 make reasonable investigations or to make a reasonable decision that makes particular investigations
18 unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly
19 assessed for reasonableness in all the circumstances, applying a heavy measure of deference to
20 counsel's judgments." *Id.* at 691.

21 The Nevada Supreme Court applied the *Strickland* standard in its review of
22 petitioner's ineffective assistance of counsel claims. Exhibit 318, p. 4. It also gave proper deference
23 to the district court's findings of fact derived from the evidentiary hearing it conducted into these
24 claims. *Id.* According to the Nevada Supreme Court and the transcripts of that hearing, the
25 petitioner's statements were made voluntarily and were generally initiated with police by petitioner.
26 Additionally, he was not in a custodial setting, having been interviewed in his home in Colorado
27 with his wife present in the next room. When he was interviewed in Elko, his attorney was present.

1 *Id.* at 5-6. Counsel testified that he had no basis to move to suppress the statements and that arguing
2 that petitioner’s drug abuse might have contributed to some of the statements he made was
3 inconsistent with the defense theory of innocence, making it a strategic decision. Exhibit 282, pp.
4 93-101. The state court rightly concluded that counsel was not ineffective in this regard.

5 *Jury voir dire, trial publicity and venue*

- 6 (c) Trial counsel unreasonably failed to conduct adequate voir dire of the
7 prospective jurors on the effect of community pressure and publicity regarding
8 petitioner’s case.
- 9 (f) Defense counsel unreasonably failed to move for a change of venue, despite
10 the highly prejudicial trial atmosphere.
- 11 (q) Defense counsel unreasonably failed to object to the prejudicial atmosphere in
12 which the trial took place, and failed to file a motion to have the venue
13 changed to a less prejudicial location.

14 Petitioner argues that counsel should have brought out that pre-trial publicity had
15 negatively impacted the jury pool which made it impossible for petitioner to obtain a fair and
16 unbiased jury and a fair trial because of public sentiment against petitioner. Petitioner further argues
17 that the “overwhelming” pre-trial publicity “in all probability” led many of the prospective jurors to
18 form the opinion that petitioner was guilty. Reply, p. 52. He suggests that counsel should have
19 questioned the potential jurors to bring out that their ability to consider all the possible verdicts was
20 impaired by the strength of community sentiment about the case.

21 While pretrial publicity alone can render a trial inherently unfair, to make a sufficient
22 showing that this occurred in petitioner’s case, the publicity must have been recent, inflammatory
23 and accusatory so as to impair the jury’s impartiality. *Murphy v. Florida*, 421 U.S. 794, 802 (1975);
24 *U.S. v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001). Petitioner has not identified any juror that expressed
25 a prejudice or pre-determined bias in the case. Neither has he identified what publicity, save
26 counsel’s own election campaign statement of an intent to review the case, there was in the
27 community to taint the jury pool.

28 The criminal trial took place some eight years after the disappearance and death of the
victim. Additionally, while in the first prosecution in 1991, the state suggested that the jury pool

1 exclude citizens of Carlin “because of the size of the community of Carlin and the nature of this
2 case” (exhibit 70, p. 2.), counsel did not believe pre-trial publicity tainted the jury pool for the trial in
3 1996. Exhibit 282, pp. 100-201. The Nevada Supreme Court affirmed the district court’s denial of
4 relief on this claim noting that petitioner had failed to show that counsel’s performance was
5 deficient. Petitioner’s arguments to this court are no more persuasive and do not warrant relief.

6 *Juror Out-of-Court Discussions*

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8 (d) Trial counsel failed to effectively examine a juror regarding whether that juror
9 had discussed inadmissible and inflammatory information with other
community members during the trial and whether or not she would impart that
information to other jurors.

10 During trial, a juror informed the court of a communication she had with a co-worker.
11 The court called the parties into chambers and interviewed the juror about what had occurred and
12 allowed each party to question the juror to ensure that she could and would disregard what she had
13 been told and that she would not allow the conversation to interfere with her ability to weigh the
14 evidence at trial in making her determination. Exhibit 193. Petitioner now contends that his counsel
15 failed to adequately question the juror about whether she would share the information with other
16 jurors.

17 During the hearing, counsel questioned Juror Winder specifically as follows:

18 Q. Will you consider that in your deliberations?

19 A. No.

20 Q. Why do you think you will not consider that?

21 A, Because I haven’t considered it so far. Only thing I can consider is what I
22 have, the facts that I have now, what has been presented to me.

23 Q. *Is that something you feel you will share with the other jurors?*

24 A. No.

25 Q. Do you believe this person, what this person said?

26 A. With Rebecca, no. You never know what to believe or not to believe.

27 Q. I have nothing further.

1 Exhibit 198, p. 5 (emphasis added.) Thus, the claim is belied by the record. Counsel did question
2 the juror about her plans to discuss the matter with other jurors. Further, the court emphasized in the
3 juror's presence the importance of not considering the information and not sharing it with other
4 jurors. *Id.* p. 7. Petitioner cannot show that counsel failed as claimed and cannot show that he was
5 prejudiced. As the Nevada Supreme Court noted, petitioner has not demonstrated that further
6 questioning of the juror would have had any impact to his benefit. Exhibit 318, p. 8. No relief is
7 warranted on this claim.

8 *Reasonable Doubt, Malice Aforethought and Premeditation Jury Instructions*

- 9 (e) Trial counsel unreasonably failed to object to the court's instructions on
10 reasonable doubt, malice aforethought and premeditation, which petitioner
11 argues are improper and unconstitutional.
- 12 (o) Defense counsel unreasonably failed to object to the reasonable doubt
13 instruction given by the court which minimized the burden of the prosecution
14 in proving petitioner's guilty beyond a reasonable doubt. Defense counsel
15 unreasonably failed to object to the premeditation and deliberation and the
16 malice instructions given during trial which minimized the state's burden of
17 proof.

18 Petitioner offers no specifics or legal analysis to support subparts (e) and (o) above,
19 although petitioner argues the merits of the instructions themselves in grounds ten and eleven of the
20 amended petition - grounds that were procedurally defaulted. Respondents point out that the
21 reasonable doubt instruction is specified by statute, that the claim has been continually rejected by
22 the Nevada Supreme Court, and that the Ninth Circuit has upheld the instruction since its decision in
23 *Ramirez v. Hatcher*, 136 F.3d 1209, 1210-1211 (9th Cir. 1998), *cert denied*, 525 U.S. 067 (1998).
24 Respondents argue that petitioner's continued pursuit of this claim is not in good faith and is
25 frivolous.

26 The Nevada Supreme Court upheld denial of relief on these claims in the context of
27 his ineffective assistance of counsel claims on post-conviction review. Petitioner has not
28 demonstrated that the decision was at odds with United States Supreme Court precedent as required
under 28 U.S.C. § 2254(d).

1 he had not demonstrated that “further or earlier voir dire would have changed the outcome of the
2 trial.” Exhibit 318, pp. 10-11. Petitioner has not shown this conclusion was unreasonable.

3 (h) Defense counsel unreasonably failed to call Dr. Birkby, an expert in forensic
4 anthropology to testify even though he told the jury during his opening
statement that he intended to present expert testimony in his defense case.

5 Petitioner argues that Dr. Birkby should have been called as promised during
6 counsel’s opening statement because he “could have eliminated all but two of the injuries as possible
7 sharp instrument trauma and all but one instance of possible blunt force trauma,” refuting many of
8 Dr. Brooks’s points of interest, which she testified “could have been” sharp instrument trauma.”
9 Amended Petition, p. 34. Petitioner further asserts that Dr. Birkby’s report opined that “none of the
10 observed sharp implement or knife marks *per se* would have led to an immediate death,....” *Id.*
11 Petitioner argues that counsel’s performance in abandoning Dr. Birkby and any lesser included
12 offenses as a possible outcome in favor of the all or nothing approach of full innocence was
13 constitutionally ineffective.

14 Respondents note that petitioner’s quote of Dr. Birkby’s report is incomplete. The
15 actual statement, as reported by the district court in its order denying post-conviction relief, was:
16 “While none of the observed sharp instrument or knife marks *per se* would have led to an immediate
17 death, it would be unreasonable to assume that the cause of death did not result from knife wounds
18 inflicted elsewhere on the body.” Exhibit 302, p. 10.

19 The Nevada Supreme Court considered the claim and decided as follows:

20 Seventh, Major claims the district court erred in rejecting the claim that Stermitz
21 was ineffective for failing to call expert witnesses. Specifically, Major argued
22 Stermitz should have called forensic anthropologist Dr. Walt Birkby, psychologist
23 Frank Hadley (Major’s brother), and a DNA expert. The district court found that
24 Stermitz was not ineffective, as Stermitz testified at the evidentiary hearing that
25 Dr. Birkby had told Stermitz that this testimony would not be helpful to the
26 defense. Stermitz further testified that he believed Frank Hadley thought Major
27 had killed Dell, and that expert DNA testimony would not be useful because the
28 blood found at the crime scene could not be matched to either Major or Dell.
Stermitz’s decision to call or not call particular witnesses was tactical, and did not
fall below an objective standard fo reasonableness under the circumstances. [fn
15, *See Doleman*, 112 Nev. At 848, 921 P.2d at 280-81 (quoting *Howard*, 106
Nev. at 722, 800 P2d at 180).] We note that, contrary to Major’s assertion,
Stermitz had the DNA testing report admitted into evidence, and the jury therefore
had the report to consider in its deliberations. We further note that the substance

1 of Dr. Birkby's report that was beneficial to Major came into the record, as
2 Stermitz cross-examined Dr. Brooks regarding Dr. Birkby's findings and her
3 discussions with him. Thus, the district court did not err in finding that Major
was not entitled to relief in this regard.

4 Exhibit 318, pp. 8-9.

5 Federal law requires the court's review to be "highly deferential," adopting counsel's
6 perspective at the time of the challenged conduct, avoiding the effects of hindsight, "indulg[ing] a
7 strong presumption that counsel's conduct falls within the wide range of reasonable professional
8 assistance ... [and] requiring the [petitioner] to overcome the presumption that ... the challenged
9 action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citation omitted).
10 Taking this view, the court finds that petitioner has failed to show that counsel was ineffective in
11 maintaining a consistent defensive strategy or that the Nevada Supreme Court's consideration and
12 decision as to his use of expert witnesses was wrong in light of 28 U.S.C. § 2254(d).

13 *Handling of Evidence*

- 14 (i) Defense counsel unreasonably failed to object to the chain of custody of the
15 evidence (skeletal remains) even though Dr. Brooks testified that she took the
16 skeletal remains to her home and laid them out on her back patio outside the
17 confines of a controlled environment.
- 18 (j) Dr. Birkby's report states that when he examined the bones, the labels (paper
19 numbers taped to the bones) had come loose and many had been mixed up.
20 Some bones had more than one label and other bones were not labeled at all.

21 Petitioner argues that the handling of the bones, as described above, was inconsistent
22 with established criminal forensic investigation and scientific procedure, rendering the evidence
23 suspect. Petitioner contends that counsel's failure to attack the foundation of the only evidence that
24 could prove criminal agency was ineffective representation.

25 The admissibility of evidence is a question of state law. *Lisenba v. California*, 314
26 U.S. at 228; *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir.1983). In Nevada the foundation
27 for the admissibility of evidence can be established either by a chain of custody or through proper
28 identification by an appropriate witness. *Franko v. State*, 94 Nev. 610, 613, 584 P.2d 678, 679
(1978); *see also, Eisentrager v. State*, 79 Nev. 38, 45, 378 P.2d 526, 531 (1963)("The burden is upon

1 the party relying upon expert testimony to prove the identity of the object upon which such testimony
2 is based.”) Because the bones were identified by an appropriate witness, the chain of custody need
3 not be closely adhered to. Any doubt as to possible tampering or alteration of the evidence properly
4 goes to the weight, not the admissibility of the evidence. *Id.*

5 Petitioner argues that the handling of the bones by Dr. Brooks, who took the bones to
6 her home to lay them out and examine them, could have resulted in a finding that the bones were
7 altered or tampered with. However, considering the fact that the bones lay exposed to all elements in
8 nature for some eighteen months, the issue of removing them from the laboratory and laying them
9 out on a sheet out-of-doors for examination rings hollow. The bones were identified by both
10 Dr. Brooks and Dr. Birkby and assembled by them based upon their individual characteristics and
11 normal placement in the skeleton. The party proving the identity of the object of the testimony need
12 not negative all possibility of substitution or tampering. *Eisentrager*, 79 Nev. At 45; 378 P.2d at
13 531. Petitioner makes no specific suggestion that the bones were altered or tampered with and the
14 mislabeling or dislodged labels observed by Dr. Birkby do not alter the true nature or identity of the
15 bones.

16 The Nevada Supreme Court considered and rejected this claim finding that the
17 custodian of the evidence, the investigator, accompanied the bones at all times. Additionally, the
18 court observed that testimony at the evidentiary hearing indicated that any damage done to the bones
19 during Dr. Brooks’ examination at her home would have been identifiable as post-mortem changes.
20 The court determined that petitioner had failed to show that an objection by counsel to the handling
21 of the evidence would have resulted in a different outcome at trial. Exhibit 318, pp. 11-12. This
22 court agrees.

23 *Collection of Evidence*

- 24 (k) Defense counsel unreasonably failed to object to the inferior procedures used
25 in the search for and recovery of the skeletal remains. The investigators
26 failed to do a line search and did not employ cadaver dogs trained to locate
27 human remains.
28 (l) Defense counsel unreasonably failed to track and find out what happened to
 the additional bones found after the skeletal remains that were examined were

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cremated and to find out if they were tested or examined for any exculpatory evidence. Counsel failed to investigate the “thread” found in one of the bones, did not have it tested to identify its origins.

Petitioner argues that had counsel objected to the methods used to locate the bones and to Dr. Brooks’ testimony related to a thread attached to one of the bones, the outcome of the trial would have been different. Pointing to the testimony of Dr. Fulginiti, the expert employed by petitioner to appear at the evidentiary hearing, he suggests that counsel was ineffective for failing to question the origins of the thread - which might have been a root, or for failing to investigate the possibility of exculpatory evidence on bones found after the original bones were examined and cremated. Petitioner argues that leaving the jury to believe the thread was deposited in the bone by means of a the sharp force implement, as testified by Dr. Brooks, without challenging a conclusion the expert was not qualified to reach, caused him significant prejudice.

The Nevada Supreme Court addressed the claim noting counsel’s testimony at the evidentiary hearing and agreeing that counsel had made a tactical decision based upon his belief that the fewer pieces of evidence admitted the better for his client. Exhibit 318, p. 15. The court denied relief on this claim and petitioner has not demonstrated how that decision was unreasonable either in application of federal law or in its factual determinations. The court will deny relief on this claim.

Trial Preparation

- (m) Defense counsel unreasonably failed to consult with an appropriate expert before trial to make certain he understood the evidence that would be presented regarding the injury to the bones.

Petitioner further argues that had counsel properly prepared for the expert testimony he could have raised effective objections, would have been able to cross-examine the witness more effectively and his closing arguments would have benefitted. To support the claim, petitioner points to counsel’s relative inexperience, particularly in the area of forensic anthropology. Moreover, counsel prepared for trial by reading a biography of a criminologist with case studies about medical and legal causes of death. Exhibit 282, pp. 233-234. Instead, petitioner argues counsel should have spent time with an expert (“like Dr. Fulginiti, for example”) who could have schooled him in the specifics of forensic anthropology.

1 Respondents argue the claim is conclusory.

2 The Nevada Supreme Court noted, in denying the claim, that counsel had conferred
3 with Dr. Birkby several times. Since Dr. Fulginiti acknowledged that Dr. Birkby was knowledgeable
4 in the field, as she stated he was her mentor (exhibit 282, pp. 113-114), it seems that consultations
5 with Dr. Birkby would have met petitioner’s criteria in this regard. Petitioner has not demonstrated
6 that the state court’s decision meets the criteria necessary for this court to grant relief.

7 (n) This subpart was dismissed as moot.

8 (p) Defense counsel unreasonably failed to object to the substantial and injurious
9 effect of the pattern of prosecutorial misconduct and overreaching which
10 distorted the fact finding process and rendered Major’s trial fundamentally
11 unfair. See Ground 12, *infra* at pp. 27-28.

12 Petitioner refers to the arguments offered in support of ground twelve, a ground that
13 was procedurally defaulted in state court. In that ground, petitioner argues that the prosecutor was
14 out to get him as evidenced by the attempts to prosecute the case in Eureka County on the murder
15 charge and the successful prosecution of him on a charge of perjury arising from an affidavit signed
16 by petitioner in his attempts to gain bail while awaiting trial.⁹ The actions complained of in this
17 ground for relief occurred outside the prosecution of this case and, while a motion to disqualify the
18 prosecutor might have been available, it would likely have been unsuccessful, as the prosecutor was
19 the elected district attorney and charged with prosecuting crimes in that county.

20 The Nevada Supreme Court opined that this claim did not merit relief stating:

21 Fourteenth, Major argues the district court erred in rejecting his claim that
22 Stermitz was ineffective for failing to object to “prosecutorial misconduct and
23 overreaching.” Major contended Stermitz should have objected that the
24 prosecution was engaging in “misconduct and overreaching” by prosecuting him
25 for the third time for the crime. Both prior prosecutions were dismissed without
26 prejudice, and the State was entitled to prosecute Major again. Major failed to
27 demonstrate how objecting on this ground would have changed the outcome of his
28 trial. The district court did not err in rejecting this claims.

26 ⁹ The perjury conviction was ultimately overturned by the Nevada Supreme Court. However,
27 that decision had not issued when petitioner stood trial and was convicted in 1996 in Elko County.
28 Petitioner asserts the perjury conviction prevented him from taking the stand in his own defense.

1 Exhibit 318, pp. 14-15.

2 No relief is warranted on this claim.

3 Ground Eighteen: Ground eighteen was discussed and rejected previously in this Order.

4 Ground Nineteen: Petitioner's Conviction and Sentence Are Invalid under the Constitutional
5 Guarantees of Due Process of Law, Equal Protection of the Laws, Effective
6 Assistance of Counsel and a Reliable Sentence Because Petitioner Was Not
7 Afforded Effective Assistance of Counsel in the First Prosecution for Murder.
8 U.S. Const. Amends. V, VI, & VIII.

9 Petitioner argues that counsel at the first prosecution was ineffective in failing to
10 obtain a dismissal of the charges with prejudice, allowing petitioner to be brought up on murder
11 charges some six years after the initial dismissal, and also allowing the destruction of the skeletal
12 remains of the victim.

13 Petitioner offers no additional argument in support of the claim, citing no case law to
14 support his proposition. The Nevada Supreme Court denied the claim finding that petitioner had
15 failed to show how Lockie's performance prejudiced him and presented no facts that would
16 demonstrate he was entitled to have the charges dismissed with prejudice. This claim was properly
17 considered by the Nevada court and no federal relief is warranted.

18 **III. Conclusion**

19 The court previously dismissed grounds 16 and 17(n) as moot. Petitioner abandoned
20 ground 8 as moot. As to the remaining grounds of the amended petition, petitioner has failed to
21 overcome the procedural bar to grounds 5 and 10-14. Additionally, he has not demonstrated that the
22 Nevada Supreme Court's consideration and rejection of his remaining grounds for relief was contrary
23 to or based upon an unreasonable application of clearly established federal law as determined by the
24 United States Supreme Court. Neither has petitioner demonstrated that the state court's decision was
25 an unreasonable determination of the facts in light of the evidence presented.

26 Certificate of Appealability

27 In order to proceed with his appeal, petitioner must receive a certificate of
28 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.

1 2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional
2 right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
3 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the
4 district court's assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529
5 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
6 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
7 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

8 Pursuant to the December 1, 2009, amendment to Rule 11 of the Rules Governing
9 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
10 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
11 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
12 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
13 issuance of a certificate of appealability, and determines that grounds 17(g) and 17(m) meet that
14 standard. The Court will therefore grant the certificate of appealability as to grounds 17(g) and
15 17(m) and deny petitioner a certificate of appealability as to the remaining grounds for relief.

16 **IT IS THEREFORE ORDERED** that grounds 5, 10, 11, 12, 13, 14 of the Amended
17 Petition are **DISMISSED WITH PREJUDICE** and grounds 1-4, 6-9, 15, 17(a)-(m), 17(o)-(r), 18
18 and 19 are **DENIED**.

19 **IT IS FURTHER ORDERED** that petitioner is **GRANTED** a Certificate of
20 Appealability as to grounds 17(g) and (m).

21 DATED this 17th day of March, 2010.



22
23
24 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE