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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GUS MILLER,

Petitioner,

vs.

LENARD VARÉ, *et al.*,

Respondents.

3:05-cv-00703-ECR-RAM

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on the remaining claims. In the claims that remain before the Court, petitioner Gus Miller seeks to set aside his 1997 Nevada state conviction, pursuant to a jury verdict, of conspiracy to commit murder and first degree kidnaping with use of a deadly weapon.

Preliminary Matters

Jurisdiction over Remaining Portions of Ground 4

Ground 4 presents various legal claims concerning the stop and search of the vehicle in which Miller was a passenger. The Court previously dismissed all claims challenging the petitioner’s conviction on Count IV for possession of a controlled substance with intent to sell for lack of jurisdiction over the subject matter. The Court dismissed the claims because the concurrent sentence on that conviction had fully expired seven years prior to the filing of the federal petition. See #34, at 1-6 & 11. In a subsequent order, the Court raised the question as to whether it had jurisdiction over the portions of Ground 4 that remained before the Court, querying whether the search-and-seizure related claims pertained only to the Count IV

1 conviction for possession of a controlled substance with intent to sell. See #51, at 3 n.2 & 6.
2 Following review of the parties' responses, it appears that the search-and-seizure related
3 claims also pertain to evidence used in convicting Miller of the charges of conspiracy to
4 commit murder and first degree kidnaping with the use of a dangerous weapon. The Court
5 accordingly concludes that it has jurisdiction over the remaining claims in Ground 4, but only
6 to the extent that the claims are directed to the convictions for conspiracy to commit murder
7 and first degree kidnaping with the use of a dangerous weapon.

8 ***Procedural Default***

9 Respondents contend that Grounds 2(a), 2(c), 2(d), 3(a)(1) & (2), 3(c)(1) & (2), 5(c),
10 6(a), 7(a), and 9 are barred by procedural default. These grounds, with two exceptions, are
11 claims of trial error that Miller presented for the first time on state post-conviction review.
12 Applying N.R.S. 34.810(1)(b), the state high court rejected all such substantive claims that
13 Miller presented on post-conviction review independently of his ineffective assistance claims,
14 because the claims had not been presented on direct appeal. #19, Ex. 25, at 2 n.2.

15 Under the procedural default doctrine, federal review of a claim may be barred if the
16 state courts rejected the claim on an independent and adequate state law ground due to a
17 procedural default. Review of a defaulted claim will be barred even if the state court also
18 rejected the claim on the merits in the same decision. Federal habeas review will be barred
19 on claims that were rejected on an independent and adequate state law ground unless the
20 petitioner can demonstrate either: (a) cause for the procedural default and actual prejudice
21 from the alleged violation of federal law; or (b) that a fundamental miscarriage of justice will
22 result in the absence of review. See, e.g., *Bennet v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003).

23 In the reply, petitioner responds only as follows:

24
25 The State of Nevada previously raised these issues in both
26 of its Motions to Dismiss. #19 and 43. This Honorable Court
27 considered the motions and in fact dismissed certain claims. #42
28 and 51. This Court has previously found that the remaining
claims have been properly exhausted and therefore the Court
should consider Petitioner Miller's arguments.

#56, at 12.

1 habeas relief merely on the basis that a state court decision was incorrect or erroneous. *E.g.*,
2 *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Instead, under 28 U.S.C. § 2254(d),
3 the federal court may grant habeas relief only if the decision: (1) was either contrary to or
4 involved an unreasonable application of clearly established law as determined by the United
5 States Supreme Court; or (2) was based on an unreasonable determination of the facts in
6 light of the evidence presented at the state court proceeding. *E.g.*, *Mitchell v. Esparza*, 540
7 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

8 A state court decision is “contrary to” law clearly established by the Supreme Court only
9 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or
10 if the decision confronts a set of facts that are materially indistinguishable from a Supreme
11 Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell*, 540 U.S. at 15-16,
12 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely
13 because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has
14 held that a state court need not even be aware of its precedents, so long as neither the
15 reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may
16 not overrule a state court for simply holding a view different from its own, when the precedent
17 from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 16, 124 S.Ct. at 11.
18 For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme
19 Court precedent is not contrary to clearly established federal law.

20 A state court decision constitutes an “unreasonable application” of clearly established
21 federal law only if it is demonstrated that the court’s application of Supreme Court precedent
22 to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.*, *Mitchell*,
23 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003).

24 To the extent that the state court’s factual findings are challenged intrinsically based
25 upon evidence in the state court record, the “unreasonable determination of fact” clause of
26 Section 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d
27 943, 972 (9th Cir. 2004). This clause requires that the federal courts “must be particularly
28 deferential” to state court factual determinations. *Id.* The governing standard is not satisfied

1 by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973.

2 Rather, the AEDPA requires substantially more deference:

3 [I]n concluding that a state-court finding is unsupported by
4 substantial evidence in the state-court record, it is not enough that
5 we would reverse in similar circumstances if this were an appeal
6 from a district court decision. Rather, we must be convinced that
an appellate panel, applying the normal standards of appellate
review, could not reasonably conclude that the finding is
supported by the record.

7 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also *Lambert*, 393 F.3d at 972.

8 If the state court factual findings withstand intrinsic review under this deferential
9 standard, they then are clothed in a presumption of correctness under 28 U.S.C. § 2254(e)(1);
10 and they may be overturned based on new evidence offered for the first time in federal court,
11 if other procedural prerequisites are met, only on clear and convincing proof. 393 F.3d at 972.

12 On a claim of ineffective assistance of counsel, the petitioner must satisfy the two-
13 pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
14 (1984). He must demonstrate that: (1) counsel’s performance fell below an objective standard
15 of reasonableness; and (2) counsel’s defective performance caused actual prejudice. On the
16 performance prong, the issue is not what counsel might have done differently but rather is
17 whether counsel’s decisions were reasonable from his perspective at the time. The reviewing
18 court starts from a strong presumption that counsel’s conduct fell within the wide range of
19 reasonable conduct. On the prejudice prong, the petitioner must demonstrate a reasonable
20 probability that, but for counsel’s unprofessional errors, the result of the proceeding would
21 have been different. *E.g.*, *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9th Cir. 2003).

22 When evaluating claims of ineffective assistance of appellate counsel, the performance
23 and prejudice prongs of the *Strickland* standard partially overlap. *E.g.*, *Bailey v. Newland*, 263
24 F.3d 1022, 1028-29 (9th Cir. 2001); *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).
25 Effective appellate advocacy requires weeding out weaker issues with less likelihood of
26 success. The failure to present a weak issue on appeal neither falls below an objective
27 standard of competence nor causes prejudice to the client for the same reason – because the
28 omitted issue has little or no likelihood of success on appeal. *Id.*

1 The petitioner bears the burden of proving by a preponderance of the evidence that
2 he is entitled to habeas relief. *Davis*, 333 F.3d at 991.

3 **Ground 2(e): Failure to Request Limiting Instruction**

4 In Ground 2(e), petitioner alleges that he was denied effective assistance of counsel
5 when his trial counsel failed to request a limiting instruction regarding the appropriate use of
6 the prior bad act evidence admitted at his trial.

7 The respondents have not directed the Court to a holding by the Supreme Court of
8 Nevada on this ineffective assistance claim. The Court reviewed the state supreme court's
9 August 24, 2005, order of affirmance on state post-conviction review, and the Court could not
10 find a holding addressing the claim. See #19, Ex. 25. The Court accordingly reviews the
11 claim *de novo* rather than under the deferential AEDPA standard of review.

12 On direct appeal, the Supreme Court of Nevada summarized the trial evidence as
13 follows:

14 Herbert Little ("Little") was a confidential informant for the
15 Magnet Task Force of the La Paz County Sheriff's Department in
16 Arizona. On two occasions, Little participated in "controlled buys"
17 of narcotics from appellant Gus William Miller ("Miller"). Soon
18 thereafter, Miller and several other suspects were arrested and
19 indicted on drug charges in Arizona.

20 Following the arrests and indictments, La Paz County
21 authorities relocated Little to Laughlin, Nevada, to ensure his
22 safety. In Laughlin, Little was given a trailer in which to live and
23 await the trials of those individuals who were arrested as a result
24 of his participation with the task force.

25 On March 10, 1996, while Little was asleep in his trailer, a
26 truck pulled into his driveway, which awakened him. In the truck
27 were Miller and Wanda Sergi ("Sergi"). While Little was in bed,
28 Miller broke the window next to Little's head, pointed a gun at
29 Little, and ordered Little out of the trailer. Miller threatened to kill
30 Little and informed him that he was taking him back to Arizona.

31 As they were driving away, a police officer stopped them
32 because the rear tire mount on the truck was loose. Before the
33 officer could approach them, Little emerged from the truck and
34 told the officer that Miller and Sergi had guns and were trying to
35 kill him.

36 Miller and Sergi were arrested. A search of the truck
37 uncovered a loaded pistol on the floorboard where Miller was
38 seated and six packages of marijuana in a purse in the glove

1 compartment. Officers also found an “owe sheet” and
2 methamphetamines on Sergi, and a .38 caliber bullet in Miller’s
pocket that matched the bullets in the loaded pistol.

3 #19, Ex. 14, at 1-2.

4 The state high court further described the bad act evidence and the circumstances
5 surrounding the admission of the evidence as follows:

6
7 At trial, the state filed a motion in limine in an effort to
introduce evidence of Miller’s pending Arizona drug charges. The
8 state argued that such evidence was a necessary part of the
‘complete story’ regarding Miller’s motive to conspire to murder
9 Little. The district court granted the motion and admitted
testimonial evidence of the pending drug charges.

10 *Id.*, at 2.

11 Miller raised a claim on direct appeal that the trial court failed to provide a limiting
12 instruction regarding the proper use of the drug charges as prior bad act evidence. The
13 Supreme Court of Nevada concluded that the claim lacked merit. The state high court noted
14 that the district court had a duty in some situations to provide such a limiting instruction *sua*
15 *sponte*, but it held that Miller’s case did not present such a situation, citing prior Nevada case
16 law. *Id.*, at 3 & 3-4.

17 This Court is not persuaded that the petitioner has established the requisite prejudice
18 under *Strickland* on the corresponding claim of ineffective assistance of counsel.

19 Petitioner perhaps may have been able to obtain a limiting instruction as to the prior
20 bad act evidence if counsel had requested one. And he perhaps may have been able to
21 obtain a reversal on appeal if his counsel had requested a limiting instruction and the trial
22 court further had failed to honor the request.

23 The pertinent inquiry under the *Strickland* prejudice analysis, however, is not whether
24 counsel would have obtained the instruction if he had requested it or whether a viable
25 appellate issue would have arisen if the request had been denied. The pertinent inquiry under
26 *Strickland* instead is whether there is a reasonable probability that the outcome of the trial
27 would have been different if counsel had requested the limiting instruction. Given the strong
28 evidence of the petitioner’s guilt – in which he essentially was caught “red-handed” abducting

1 the informant against him on the drug charges while he was armed with a gun – this Court is
2 not persuaded that there is a reasonable probability that the petitioner would have been
3 acquitted if a limiting instruction had been requested and given.²

4 On *de novo* review, Ground 2(e) therefore does not provide a basis for habeas relief.³

5 **Ground 3(b)(1): Failure to Request a Fingerprint Examination of the Gun**

6 In Ground 3(b)(1), petitioner alleges that he was denied effective assistance of counsel
7 when his trial counsel failed to request an inspection of the handgun for fingerprints.

8 The Supreme Court of Nevada rejected this claim on the following grounds:

9
10 . . . [A]ppellant claimed that his trial counsel was ineffective
11 for failing . . . to demand that the gun be processed for
12 fingerprints. Appellant failed to demonstrate that his trial

13 ²As discussed further on the next claim, the defense theory presented in opening statements was
14 that Miller brought the gun but that he did not intend to kidnap or kill Little but instead only to bribe or
15 intimidate Little into not testifying in the Arizona case. The Court is not persuaded that there is a reasonable
16 probability that, but for trial counsel’s failure to request a limiting instruction, the jury would have acquitted
17 Miller based upon this explanation for why he had the primary witness against him in the drug prosecution in
18 his truck in the predawn hours while armed with a gun that he brought with him.

19 ³Petitioner relies on a statement in *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001), that it is
20 likely that cases involving the absence of a limiting instruction will not constitute harmless error. 30 P.3d at
21 1133. *Tavares*, however, was decided after both the trial and direct appeal in Miller’s case. The Supreme
22 Court of Nevada announced a new rule in *Tavares* under which the defendant no longer had the burden of
23 requesting a limiting instruction and under which the prosecutor “henceforth” had a duty to request the limiting
24 instruction. If the prosecutor failed to do so, the district court was obliged to raise the issue *sua sponte*. The
25 court further announced a non-constitutional harmless error standard applicable to the failure to provide the
26 limiting instruction. See 30 P.3d at 1132-33. In the context of these new rules, the state supreme court made
27 the above-referenced statement that it was likely that the absence of a limiting instruction would not constitute
28 harmless error under the state law harmless error standard applied.

29 *Tavares* was decided after Miller’s trial. The non-constitutional harmless error standard discussed
30 therein applied to the district court’s failure to give the instruction *sua sponte* rather than to a failure to request
31 the instruction in the first instance. *Tavares* did not apply the constitutional *Strickland* prejudice standard
32 applied in this case on federal habeas review to the failure to request the instruction in the first instance. It
33 further is noteworthy in this regard that the Supreme Court of Nevada -- applying the precedents in force at
34 the time of Miller’s trial and direct appeal – held that the failure to give the limiting instruction *sua sponte* in his
35 case was not error.

36 Additionally, in *Tavares*, the conviction “rested primarily on circumstantial evidence as there was no
37 clear direct evidence showing Tavares’s actions.” 30 P.3d at 1133. In this case, there was abundant direct
38 evidence of Miller’s guilt. *Tavares* does not necessitate a conclusion on federal habeas review that there is a
reasonable probability – on the evidence presented at Miller’s trial – that the outcome of the trial would have
been different if Miller’s trial counsel had requested and obtained a limiting instruction.

1 counsel's performance was deficient or that he was prejudiced.
2 The theory of defense as presented in opening statements was
3 that appellant brought the gun, but that he did not intend to
4 kidnap or kill the victim, but rather, he intended to bribe or
5 intimidate the victim into not testifying in the Arizona case.
6 Appellant was observed by the police reaching down to the floor
7 where the gun was ultimately found. A bullet found in appellant's
8 pocket matched the type of bullets found in the gun itself.
9 Appellant failed to demonstrate that further testing of the gun
10 would have revealed exculpatory evidence that would have had
11 a reasonable probability of altering the outcome of the trial.
12 Therefore, we conclude that the district court did not err in
13 determining that this claim lacked merit.

14 #19, Ex. 25, at 7-8 (eleventh ground of error).

15 The state high court's rejection of this claim was neither contrary to nor an
16 unreasonable application of *Strickland*.

17 Petitioner makes bald assertions in the reply that "[h]ad Petitioner Miller's attorney
18 requested the fingerprint examination, there would have been ample evidence that the firearm
19 was possessed by one of the two other passengers in the vehicle," and that "[f]urther testing
20 of the firearm would have resulted in exculpatory evidence." #56, at 7. These assertions
21 contradict the factual assertions of the defense made at trial, lack any foundation in the record
22 presented to the state courts, and are based upon nothing more than speculation. Under
23 Nevada state post-conviction practice, a petitioner must attach affidavits, records or other
24 evidence supporting the factual allegations of the petition, and he may not present merely an
25 unsubstantiated claim. See N.R.S. 34.370(4). Moreover, in this case, the state district court
26 held an evidentiary hearing on the state petition and appointed counsel for the petitioner. See
27 #19, Ex. 22. On federal habeas review, petitioner does not point to any evidence in the state
28 post-conviction record in any way establishing that a fingerprint examination of the gun in fact
would have produced exculpatory evidence. See also #54, Ex. H, Part 2, at 680-83
(discussing the limitations of fingerprint examination). A claim of ineffective assistance of
counsel that is based upon pure speculation as to resulting prejudice fails to present a viable
claim under *Strickland*. The state supreme court's rejection of the claim therefore was neither
contrary to nor an unreasonable application of clearly established federal law.

Ground 3(b)(1) therefore does not provide a basis for federal habeas relief.

1 **Ground 3(b)(2): Failure to Conduct a Reasonable Inspection of the Case**

2 In Ground 3(b)(2), petitioner alleges that he was denied effective assistance of counsel
3 when his trial counsel failed to conduct a reasonable inspection of the case against him,
4 including, in particular an investigation of the victim.

5 The Supreme Court of Nevada rejected this claim on the following grounds:

6
7 ... [A]ppellant claimed that his trial counsel was ineffective
8 for failing to adequately investigate the victim. Appellant failed to
9 demonstrate that his trial counsel's performance was deficient or
10 that he was prejudiced. Appellant failed to indicate what further
investigation should have been performed such that there is a
reasonable probability of a different outcome. Therefore, we
conclude that the district court did not err in determining that this
claim lacked merit.

11 #19, Ex. 25, at 7 (tenth ground of error).

12 The state high court's rejection of this claim was neither contrary to nor an
13 unreasonable application of *Strickland*.

14 In the reply, petitioner acknowledges that trial counsel filed a motion in the trial court
15 seeking information regarding the confidential informant. He urges, however, that "trial
16 counsel should have conducted an investigation independent of the motions he filed." As
17 noted above under Ground 3(b)(1), a petitioner may not present merely an unsubstantiated
18 claim on Nevada state post-conviction review, and the state district court held an evidentiary
19 hearing and appointed counsel for petitioner. On federal habeas review, petitioner does not
20 point to any evidence in the state post-conviction record in any way establishing either what
21 further investigation would have revealed or how the unspecified investigation results would
22 have affected the outcome at trial. A claim of ineffective assistance of counsel that is based
23 upon pure speculation as to resulting prejudice fails to present a viable claim under *Strickland*.
24 The state supreme court's rejection of the claim therefore was neither contrary to nor an
25 unreasonable application of clearly established federal law.

26 Ground 3(b)(2) therefore does not provide a basis for federal habeas relief.

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1 **Ground 3(b)(3): Failure to File Motions Seeking Confidential Informant File**

2 In Ground 3(b)(3), petitioner alleges that he was denied effective assistance of counsel
3 when his trial counsel failed to file pretrial discovery motions seeking the confidential
4 informant's file.

5 The Supreme Court of Nevada rejected this claim on the following grounds:

6
7 ... [A]ppellant claimed that his trial counsel was ineffective
8 for failing to file crucial pretrial formal discovery motions seeking
9 the confidential informant file. Appellant's trial counsel did seek
10 discovery of the confidential informant file. Appellant failed to
11 indicate what further steps counsel should have taken that would
12 have had a reasonable probability of altering the outcome of the
13 proceedings. Therefore, we conclude that the district court did
14 not err in determining that this claim lacked merit.

15 #19, Ex. 25, at 7 (ninth ground of error).

16 The state high court's rejection of this claim was neither contrary to nor an
17 unreasonable application of *Strickland*.

18 In the reply, petitioner does not address the fact that – as noted by the Supreme Court
19 of Nevada – trial counsel did in fact seek discovery of the confidential informant's file but the
20 motion was denied by the state district court. #53, Ex. C. The petitioner's claim that counsel
21 failed to seek the file therefore is completely belied by the record.

22 The petitioner's bald assertion that petitioner "believes" that the file "would have made
23 a significant difference in the outcome of his trial" further is unsupported speculation. As
24 noted above under Ground 3(b)(1), a petitioner may not present merely an unsubstantiated
25 claim on Nevada state post-conviction review, and the state district court held an evidentiary
26 hearing and appointed counsel for petitioner. On federal habeas review, petitioner does not
27 point to any evidence in the state post-conviction record in any way establishing either what
28 the file in fact would have revealed or how the unspecified information would have affected
the outcome at trial. A claim of ineffective assistance of counsel that is based upon pure
speculation as to resulting prejudice fails to present a viable claim under *Strickland*.

 The state supreme court's rejection of the claim therefore was neither contrary to nor
an unreasonable application of clearly established federal law – both because the allegation

1 that trial counsel failed to seek the file is directly belied by the record and further because the
2 petitioner's claim of resulting prejudice is based upon nothing more than speculation.

3 Ground 3(b)(3) therefore does not provide a basis for federal habeas relief.

4 **Ground 3(b)(4): Failure to Request Confidential Informant Jury Instruction**

5 In Ground 3(b)(4), petitioner alleges that he was denied effective assistance of counsel
6 when his trial counsel failed to request a jury instruction regarding the victim's credibility as
7 a confidential informant.

8 The Supreme Court of Nevada rejected this claim on the following grounds:

9
10 . . . [A]ppellant claimed that his trial counsel was ineffective
11 for failing to demand a cautionary jury instruction addressing the
12 credibility of confidential informant testimony. Appellant failed to
13 demonstrate that his trial counsel's performance was deficient or
14 that he was prejudiced. An instruction addressing the credibility
15 of confidential informant testimony would have been inappropriate
as the victim was not testifying as a confidential informant but as
the victim of the charged offenses. Moreover, a cautionary jury
instruction would not have had a reasonable probability of altering
the outcome of the trial where there was testimony that the victim
was reliable. Therefore, we conclude that the district court did not
err in determining that this claim lacked merit.

16 #19, Ex. 25, at 6 (seventh ground of error)(citation footnote omitted).

17 Petitioner provides no argument regarding this claim in the reply. The state supreme
18 court's rejection of this claim was neither contrary to nor an unreasonable application of
19 *Strickland*.

20 Ground 3(b)(4) does not provide a basis for federal habeas relief.

21 **Grounds 4(c)(1) & (2): Failure to Challenge Search at Trial and On Appeal**

22 In Ground 4(c)(1), petitioner alleges that he was denied effective assistance of trial
23 counsel when counsel failed to file a motion to suppress the admission of the gun into
24 evidence based upon an allegedly illegal search of the vehicle. In Ground 4(c)(2), petitioner
25 alleges that he was denied effective assistance of appellate counsel when counsel failed to
26 challenge the search on appeal.

27 The Supreme Court of Nevada rejected the claim based upon trial counsel's failure to
28 file a pretrial motion to suppress without assigning detailed reasons. See #19, Ex. 25, at 7.

1 The Supreme Court of Nevada did, however, assign detailed reasons with regard to
2 the underlying substantive issue when it rejected the claim of ineffective assistance of
3 appellate counsel:

4 . . . [A]ppellant claimed that his appellate counsel failed to
5 argue that the trial court committed reversible error when it
6 permitted introduction of evidence obtained through an illegal
7 search and seizure. Appellant claimed that the stop of the
8 vehicle, in which he was a passenger, was pretextual and that
9 there was no consent or warrant for a search of the glove
10 compartment in which marijuana packaged for sale was found.
11 Appellant failed to demonstrate that his appellate counsel's
12 performance was deficient or that this issue had a reasonable
13 likelihood of success on appeal. First, appellant had no standing
to challenge the search of the vehicle as he was a passenger in
the vehicle and he was not an owner of the vehicle, nor had he
rented or borrowed the vehicle from the registered owner. Even
assuming that appellant had standing to challenge the search of
the car, appellant failed to demonstrate that the search was not
valid because appellant failed to establish that the stop was
pretextual and because the record reveals that the marijuana was
discovered in an inventory search of an impounded vehicle.
Therefore, we conclude that the district court did not err in
determining that this claim lacked merit.

14 #19, Ex. 25, at 10-11 (citation footnotes omitted).⁴

15 In the reply, petitioner does not challenge the proposition that “the officer may have
16 had probable cause to stop the vehicle for the traffic stop,” which was based upon, *inter alia*,
17 the loose rear tire mount. See #56, at 8, lines 8-12; *id.*, at 11, lines at 14-15. He argues,
18 however, that the circumstances did not create probable cause to search the vehicle because
19 it is not illegal to possess a firearm and the information given to the officer was only “that there
20 was a weapon in the vehicle.” *Id.*, at 8. Petitioner urges that the fact only that a weapon is
21 in a vehicle does not create probable cause to believe that a crime has been committed.

22 Petitioner misstates the record. According to the officer's testimony, Little told the
23 officer that Miller and Sergi had guns *and that they were trying to kill him*. #54, Ex. H, Part 1,
24

25
26 ⁴This Court has assumed, *arguendo*, that Grounds 4(c)(1) and (2) were exhausted vis-à-vis the
27 introduction of the weapon as well as the marijuana. As noted previously, the Court does not have jurisdiction
28 over a challenge to the conviction for possession of a controlled substance with intent to sell because the
concurrent sentence on that charge fully expired before petitioner sought federal habeas relief. See text,
supra, at 1-2. To the extent, if any, that the grounds were not exhausted vis-à-vis the introduction of the gun,
this Court rejects the claims on *de novo* review for substantially the reasons assigned in the text.

1 at 633, lines 16-18. This statement undeniably created probable cause for the officer to
2 believe that a crime had been committed, was being committed, or was about to be
3 committed. Petitioner's probable cause argument thus is based upon a statement that is
4 directly belied by the record.⁵

5 Moreover, petitioner notes, but does not challenge, the Nevada Supreme Court's
6 holding that he did not have standing to challenge the post-stop search because he was only
7 a passenger in the vehicle. If petitioner had no standing, then the remaining issues
8 concerning the validity of the post-stop search do not matter. Petitioner brings forward no
9 apposite authority or argument in any way suggesting that the state supreme court's holding
10 that he lacked standing was either contrary to or an unreasonable application of clearly
11 established federal law at the time of his trial and direct appeal.

12 On the showing and arguments made, petitioner therefore has failed to establish that
13 the Nevada Supreme Court's rejection of these claims of ineffective assistance of trial and
14 appellate counsel was either contrary to or an unreasonable application of clearly established
15 federal law.

16 Grounds 4(c)(1) and 4(c)(2) do not provide a basis for federal habeas relief.

17 **Ground 5(b)(1): Failure to Seek Severance**

18 In Ground 5(b)(1), petitioner alleges that he was denied effective assistance of trial
19 counsel when counsel failed to request a severance of his trial from that of his co-defendants.

20 The Supreme Court of Nevada rejected the claim presented to that court on the
21 following grounds:

22
23
24 ⁵The multiple suspicious circumstances leading up to and immediately following this statement by
25 Little further would tend to give an officer probable cause to search, including, *inter alia*, Miller's repeatedly
26 reaching to the floorboard where the gun ultimately was recovered, despite being repeatedly instructed not to
27 do so and to exit the vehicle. Miller stopped reaching down and exited the vehicle only after the officer told
28 him that if he reached down one more time the officer would shoot him. The weapon further was recovered
on the floorboard right underneath where Miller had been seated, in a place where the passengers or driver
could reach, not in a separate compartment such as a glove box. See #54, Ex. H, Part 1, at 625-38; *id.*, Part
2, at 672-75. Any claim that the officer did not have probable cause to conduct the minimal search that
resulted in the loaded gun being found on the floorboard is completely without merit.

1 . . . [A]ppellant claimed that his trial counsel was ineffective
2 for failing to file a motion to sever his trial from that of his co-
3 defendants. Appellant claimed that his trial counsel's
4 performance was hampered because the district court limited
5 defense counsel from asking questions previously asked by the
6 counsel for co-defendants. He further claimed that he was
7 unable to testify because the trials were joined, and thus, he was
8 unable to have evidence admitted relating to bribery or
9 intimidating of a witness. Appellant failed to demonstrate that his
10 trial counsel's performance was deficient or that he was
11 prejudiced. Appellant failed to demonstrate that a joint trial was
12 improper. Appellant failed to demonstrate that the ground rules
13 established by the district court were unreasonable or hampered
14 his trial counsel, and he failed to indicate what questions he was
15 prevented from asking as a result of the district court's
16 admonition. Appellant further failed to demonstrate that he was
17 prevented from testifying simply because his co-defendants had
18 testified. Therefore, we conclude that the district court did not err
19 in determining that this claim lacked merit.

20 #19, Ex. 25, at 9-10 (fourteenth ground of error)(citation footnote omitted).

21 In the reply, the represented petitioner argues, in total, only as follows:

22 Petitioner Miller's trial counsel failed to request a
23 separate trial for Petitioner Miller although the defenses of the co-
24 defendants were irreconcilable.

25 The Nevada Supreme Court's denial of Petitioner Miller's
26 claim was an objectively unreasonable application of *Strickland*.
27 Claim 5(b)(1) should be granted.

28 #56, at 8-9.

Petitioner has the burden on federal habeas review of demonstrating that he is entitled to relief. The petitioner's essentially one-line argument falls far short of demonstrating that the Nevada Supreme Court's rejection of the claim was an objectively unreasonable application of *Strickland*. On the showing and conclusory argument made, petitioner has failed to establish that the Nevada Supreme Court's decision was either contrary to or an unreasonable application of clearly established federal law.

Ground 5(b)(1) does not provide a basis for federal habeas relief.

Ground 5(b)(2): Failure to Present Defense and Advice to Not Testify

In Ground 5(b)(2), petitioner alleges that he was denied effective assistance of trial counsel when counsel failed to present an adequate theory of the defense. Petitioner did not provide any particular allegations seeking to support this claim other than the allegation that

1 trial counsel allegedly was ineffective because he advised petitioner to not testify in his own
2 defense, such that petitioner thus allegedly was not able to establish a reasonable doubt as
3 to who possessed the gun and drugs.

4 The Supreme Court of Nevada rejected the claim presented to that court on the
5 following grounds:

6 . . . [A]ppellant claimed that his trial counsel erroneously
7 advised him not to testify on his own behalf. Appellant claimed
8 that his testimony would have established reasonable doubt as to
9 who possessed the gun and drugs. Appellant further indicated
10 his testimony would have cast doubt that he kidnaped the
11 victim or conspired to commit the victim's murder. Appellant
12 failed to demonstrate that his trial counsel's performance was
13 deficient or that he was prejudiced. Appellant failed to
14 demonstrate that any testimony would have had a reasonable
15 probability of altering the outcome of the trial given the substantial
16 evidence of guilt presented at trial. Further, it was reasonable to
17 advise appellant not to testify in light of at least one prior felony
18 conviction that could have been used for impeachment purposes.
19 Therefore, we conclude that the district court did not err in
20 determining that this claim lacked merit.

21 #19, Ex. 25, at 8 (twelfth ground of error)(citation footnote omitted).

22 The state supreme court's rejection of this claim was neither contrary to nor an
23 unreasonable application of *Strickland*. In the reply, the petitioner contends that he would
24 have testified that he had no knowledge that a weapon or other contraband was in the vehicle
25 and that, based upon this testimony, the jury "could have" reasonably acquitted him. The
26 Nevada Supreme Court's conclusion that there was not a reasonable probability that any such
27 testimony would have altered the outcome of the trial was not an unreasonable application
28 of *Strickland*. This Court similarly is not persuaded that there was a reasonable probability
that the jury would have rendered a different verdict if only they had been presented with
testimony by Miller that he had no knowledge of the gun. The arresting officer testified that
Miller repeatedly reached down to where the gun was found on the floorboard despite being
told not to do so and to exit the vehicle. Miller stopped and complied only when the officer
told him that if he reached down one more time he would be shot. When the gun was
recovered from the floorboard right by where Miller had been sitting, the gun was loaded, with
a round chambered. A .380 caliber hollow point cartridge matching the cartridges found in

1 the pistol was found in Miller’s pocket. See #54, Ex. H, Part 1, at 629 & 634-41. There was
2 scant prospect that testimony by Miller that he did not know about the pistol – a weapon that
3 was located in precisely the area that he was repeatedly reaching for and for which he carried
4 matching ammunition – would have resulted in an acquittal. There would have been even
5 less of a prospect of such an outcome following impeachment with a prior felony conviction.
6 It “could have” happened, but there was not a reasonable probability that it would.

7 The Nevada Supreme Court’s rejection of the claim therefore was neither contrary to
8 nor an unreasonable application of clearly established federal law.

9 Ground 5(b)(2) does not provide a basis for federal habeas relief.⁶

10 **Ground 5(c)(part): Cumulative Error**

11 In the portion of Ground 5(c) that remains before the Court, Miller alleges cumulative
12 error based upon the multiple alleged instances of ineffective assistance of counsel.

13 The Supreme Court of Nevada rejected the cumulative error claim presented to that
14 court on the following grounds:

15 . . . [A]ppellant claimed that various constitutional rights
16 were violated due to ineffective assistance of counsel and
17 cumulative errors. Because appellant failed to demonstrate that
18 he received ineffective assistance of counsel, we conclude that
19 the district court did not err in determining that this claim lacked
20 merit.

21 #19, Ex. 25, at 14-15 (final ground of error).

22 The state high court’s rejection of this claim was neither contrary to nor an
23 unreasonable application of clearly established federal law. Following review of all of the
24 claims of ineffective assistance of counsel, including those discussed *infra*, this Court is not
25 persuaded that the meritless claims carry any more force in the aggregate than they do in
26 isolation. Petitioner provides no persuasive, non-conclusory argument to the contrary.

27 The portion of Ground 5(c) that remains thus does not provide a basis for relief.

28 ⁶The Court again reiterates, with regard to petitioner’s reference to lack of knowledge of other
contraband, that the Court lacks jurisdiction over the subject matter of any challenge to the conviction for
possession of a controlled substance with intent to sell, because the concurrent sentence on that charge fully
expired before petitioner sought federal habeas relief. See text, *supra*, at 1-2.

1 **Grounds 6(b) & (c): Failure to Challenge Alleged Prosecutorial Misconduct**

2 In Ground 6(b), petitioner alleges that he was denied effective assistance of trial
3 counsel when counsel failed to object to alleged prosecutorial misconduct. In Ground 6(c),
4 he alleges that he was denied effective assistance of appellate counsel when counsel failed
5 to raise the issue of the alleged prosecutorial misconduct on appeal.

6 In this Court, both counsel argue this claim as if petitioner were claiming that the
7 “prosecutorial misconduct” alleged in Ground 6 of the federal petition was the prosecution’s
8 introduction of allegedly impermissible other bad acts evidence.

9 That is not what petitioner alleged in Ground 6 of the petition in federal court.
10 Petitioner instead alleged:

11 Petitioner was denied his rights . . . to effective assistance
12 of counsel . . . when the State prosecutor engaged in numerous
13 egregious instances of misconduct during the trial, *particularly*
14 *during his closing argument*; when his attorney failed to request
15 and the court failed to give appropriate cautionary instructions to
the jury regarding each instance of prosecutorial misconduct; . .
. . and when his appellate counsel, who was also his trial counsel,
failed to raise issues pertaining to the egregious prosecutorial
misconduct in his direct appeal.

16 #5, at 13 (emphasis added).

17 Federal habeas claims must be alleged with specificity. See *Mayle v. Felix*, 545 U.S.
18 644, 649, 125 S.Ct. 2562, 2566, 162 L.Ed.2d 582 (2005). The only specific allegation in the
19 foregoing, such as it is, is an allegation that the prosecutor engaged in unspecified
20 misconduct during closing argument. A vague blanket incorporation of all remaining portions
21 of the federal petition and/or of large blocks of state court filings is not effective to state any
22 specific claim. Federal Ground 6 contains no allegation whatsoever that the prosecutor
23 engaged in “misconduct” by introducing other bad acts evidence. No such claim is properly
24 before this Court, and no such claim of a failure by trial and appellate counsel to challenge
25 “prosecutorial misconduct” – on this basis – was considered in the Nevada Supreme Court’s
26 decision on the state post-conviction appeal. See #19, Ex. 25, at 14.

27 In any event, this Court holds, on *de novo* review, that the claims of ineffective
28 assistance of counsel now being argued in federal court are without merit.

1 Petitioner contends in the reply on Ground 6(b) that the prosecution and the trial court
2 failed to comply with Nevada state law procedural requirements for the introduction of other
3 bad act evidence under the Nevada Supreme Court’s *Petrocelli*, *Tinch*, and related decisions.⁷
4 He maintains that he was prejudiced by trial counsel’s failure to object to the prosecutor’s
5 introduction of the bad act evidence because it was highly probable that, if an objection had
6 been raised, the trial court would have ruled that the evidence was improperly admitted. He
7 further asserts that if the bad act evidence had not been admitted, it is highly probable that
8 the outcome of the trial would have been different. #56, at 9-10.

9 Petitioner contends, in the reply on Ground 6(c), that appellate counsel should have
10 raised the issue on direct appeal and that, if counsel had done so, the outcome of the appeal
11 “could have” been different. #56, at 11.

12 These contentions notwithstanding, appellate counsel did in fact raise an issue on
13 direct appeal that the state trial court had failed to hold a *Petrocelli* hearing and comply with
14 Nevada state law requirements for the introduction of the other bad act evidence. The
15 Supreme Court of Nevada rejected that challenge on the following grounds:

16 At trial, the state filed a motion in limine in an effort
17 to introduce evidence of Miller’s pending Arizona drug charges.
18 The state argued that such evidence was a necessary part of the
19 “complete story” regarding Miller’s motive to conspire to murder
20 Little. The district court granted the motion and admitted
21 testimonial evidence of the pending drug charges.

22 Miller contends on appeal that several errors were
23 committed below in connection with the admission of the Arizona
24 drug charges. First, he contends that the Arizona drug charges
25 were not part of the *res gestae* of the alleged conspiracy to
26 commit murder. Second, he contends that his drug charges were
27 irrelevant to the conspiracy to commit murder charge. Third, he
28 contends that evidence of his drug charges was more prejudicial
than probative. *Fourth, he contends that the district court failed
to hold a Petrocelli hearing regarding the admissibility of the
evidence.*

 We concluded Miller’s contention lacks merit. While the
Arizona drug charges were not necessary to explain the

⁷See *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985); *Tinch v. State*, 113 Nev. 1170, 946 P.2d 1061 (1997).

1 kidnapping, the trial court did not abuse its discretion in admitting
2 them to establish the “complete story” of the conspiracy. Thus,
3 with respect to the conspiracy count, a weighing of prejudice
4 versus probative value was not necessary. See NRS 48.035(3);
5 State v. Shade, 111 Nev. 887, 894, 900 P.2d 327 . . . (1995).

6 Even if this evidence was not part of the res gestae as to
7 any of the substantive charges, this evidence was clearly
8 admissible to establish a motive for these offenses. In this
9 connection, the district court conducted a hearing on the record
10 regarding the state’s motion in limine and concluded that the
11 evidence was admissible. *Miller’s claim that the trial court failed
12 at this hearing to comply strictly with Tinch v. State, 113 Nev.
13 1170, 1176, 946 P.2d 1061 (1997), must be rejected as harmless
14 error. This is because the evidence would have been admissible
15 had the Tinch analysis been undertaken. See Qualls v. State,
16 114 Nev. 900, 903, 961 P.2d 765, 767 (1998).*

17 #19, Ex. 14, at 2-3 (emphasis added).

18 Accordingly, when petitioner raised a claim on state post-conviction review that
19 appellate counsel had been ineffective for failing to raise a challenge to the admission of the
20 bad act evidence on direct appeal, the Nevada Supreme Court rejected the claim *because*
21 *the challenge had in fact been raised – and rejected – on direct appeal:*

22 [A]ppellant claimed that his appellate counsel was
23 ineffective for failing to argue that the district court committed
24 reversible error when it failed to conduct a Petrocelli hearing prior
25 to granting the State leave to present prior bad act evidence.
26 Appellant claimed that the State failed to provide clear and
27 convincing evidence of the prior bad acts. Appellant further
28 claimed that because Arizona later dismissed the drug charges
that served as the prior bad acts that the prior bad acts were not
credible. Appellant failed to demonstrate that his appellate
counsel’s performance was deficient or that these issues had a
reasonable probability of success on appeal. *This court
considered appellant’s claim that the district court failed to
conduct the required Petrocelli hearing and concluded that it was
harmless error because the prior bad act evidence would have
been admissible had the proper hearing been conducted.*
Appellant failed to indicate what further argument should have
been made that would have had a reasonable probability of
altering the outcome of the direct appeal. Appellant further failed
to demonstrate that information relating to the subsequent
dismissal of the Arizona drug charges would have had a
reasonable probability of altering the outcome of the direct
appeal. Therefore, we conclude that the district court did not err
in determining that these claims lacked merit.

#19, Ex. 25, at 11-12 (emphasis added)(citation footnotes omitted).

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1 The Supreme Court of Nevada is the final arbiter of Nevada state law. The state high
2 court's holding that the prior bad act evidence would have been admissible even if the
3 *Petrocelli* and *Tinch* Nevada state law procedures had been followed is unassailable on
4 federal habeas review.

5 This state law holding completely undercuts any viable claim of prejudice on
6 petitioner's claims that he was denied effective assistance of counsel because trial and
7 appellate counsel failed to challenge "prosecutorial misconduct" occurring when the State
8 introduced allegedly impermissible other bad acts evidence. The Nevada Supreme Court's
9 holdings on direct appeal and state post-conviction review establish that the evidence in fact
10 was admissible under Nevada state law. Petitioner therefore cannot establish a reasonable
11 probability that the outcome of either the trial or the appeal would have been different if
12 counsel had challenged the alleged "prosecutorial misconduct." He therefore cannot
13 demonstrate prejudice under *Strickland*.

14 Petitioner further cannot establish deficient performance by appellate counsel, because
15 the challenge that he maintains should have been brought in fact was brought by appellate
16 counsel, albeit not as a challenge to "prosecutorial misconduct."

17 Grounds 6(b) and 6(c) therefore do not provide a basis for federal habeas relief.

18 **Grounds 7(b) and 8(a): Cumulative Error**

19 Grounds 7(b) and 8(a) present redundant claims of cumulative error based upon
20 ineffective assistance of counsel. The claims do not provide a basis for federal habeas relief
21 for the reasons assigned above as to the remaining portion of Ground 5(c).

22 **Ground 8(b): Failure of Appellate Counsel to Raise Constitutional Claims**

23 In Ground 8(b), petitioner alleges that he was denied effective assistance of counsel
24 because appellate counsel failed "to raise all constitutional grounds for relief, including each
25 and every sub-part of those grounds, . . . in his direct appeal." #5, at 17. The reply similarly
26 is conclusory, asserting only that "[t]he failure of Petition [sic] Miller's appellate counsel to
27 raise all constitutional issues on direct appeal negatively impacted his direct appeal to such
28 a degree as to deny Petitioner Miller effective assistance of counsel." #56, at 12.

1 It does not appear that the Supreme Court of Nevada considered any such claim on
2 the state post-conviction appeal. The Court holds, on *de novo* review, that the claim in any
3 event is completely without merit. As the Court observed on Grounds 6(b) and 6(c), federal
4 habeas claims must be alleged with specificity. *Mayle, supra*. A vague and nonspecific claim
5 only that counsel failed “to raise all constitutional grounds for relief” fails to present a
6 sufficiently specific and viable claim for federal habeas relief.

7 Ground 8(b) therefore does not provide a basis for federal habeas relief.

8 ***Ground 9 (part): Cumulative Error***

9 The remaining portion of Ground 9 presents another redundant claim of cumulative
10 error based upon ineffective assistance of counsel. The claim does not provide a basis for
11 federal habeas relief for the reasons assigned above as to the remaining portion of Ground
12 5(c).

13 IT THEREFORE IS ORDERED, for the reasons assigned: (a) that Grounds 2(a), 2(c),
14 2(d), 3(a)(1) & (2), 3(c)(1) & (2), 6(a), and 7(a) are DISMISSED with prejudice as procedurally
15 defaulted; (b) that Grounds 2(e), 3(b)(1-4), 4(c)(1-2), 5(b)(1-2), 6(b), 6(c), 7(b), 8(a), and 8(b)
16 are DISMISSED with prejudice on the merits; and (c) that Grounds 5(c) and 9 are
17 DISMISSED with prejudice, on the merits to the extent that the claims are based upon
18 allegations of ineffective assistance of counsel and on the basis of procedural default to the
19 extent that the claims are not.⁸

20 ////

21
22 ⁸The case was decided on the original *pro se* petition, and a motion for leave to file an amended
23 petition never was presented to the Court.

24 Petitioner’s retained counsel appeared in the case after the Court had granted the respondents’
25 motion to dismiss on the basis of lack of complete exhaustion and had given petitioner a period of time to
26 seek relief in alternative to a complete dismissal. Following counsel’s substitution into the case for the *pro se*
27 petitioner, the order regarding the need to make an election as to the unexhausted claims was disregarded.
28 The Court issued a compliance order and then an order denying a requested extension. ##37 & 40. In the
second order, the Court stated that -- after petitioner complied with the then-pending directives regarding the
unexhausted claims -- the Court would consider a request for a reasonable period of time to prepare an
amended petition, if affirmatively requested by petitioner by separate motion. #40, at 3, lines 15-24.

No such motion was filed. The case accordingly has been decided on the original *pro se* petition.

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The Clerk of Court shall enter final judgment accordingly, in favor of respondents and against petitioner, dismissing this action with prejudice.

DATED: February 2, 2009



EDWARD C. REED
United States District Judge