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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

SAMUEL GRIFFIN,

*Petitioner,*

vs.

JAMES BENEDETTI, *et al.*,

*Respondents.*

3:07-cv-00525-HDM-VPC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court for a final decision on the claims presented.

***Background***

Petitioner Samuel Griffin seeks to set aside his 2002 Nevada state conviction, pursuant to a guilty plea, of armed robbery. On federal habeas review, the Court’s scheduling order directed respondents to present any remaining procedural defenses to the amended petition together with their response to the merits. In their answer, in addition to responding to the merits, respondents contend: (a) that the equal protection claim in Ground 1-6 is not exhausted; and (b) that the claims in Grounds 1-1, 1-3, 1-5 and 1-6 lack the required specificity and should be summarily dismissed.

***Procedural Defenses***

The equal protection claim in Ground 1-6 is not exhausted.

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this

1 exhaustion requirement, the claim must have been fairly presented to the state courts  
2 completely through to the highest court available, in this case the state supreme court. *E.g.*,  
3 *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d  
4 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the specific federal  
5 constitutional guarantee and must also state the facts that entitle the petitioner to relief on the  
6 federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir. 2000). That  
7 is, fair presentation requires that the petitioner present the state courts with both the operative  
8 facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo v. McFadden*,  
9 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the state courts,  
10 as a matter of federal-state comity, will have the first opportunity to pass upon and correct  
11 alleged violations of federal constitutional guarantees. *See, e.g.*, *Coleman v. Thompson*, 501  
12 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

13 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed  
14 petition presenting both exhausted and unexhausted claims must be dismissed without  
15 prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate  
16 relief.

17 In Ground 1-6, petitioner alleges that defense counsel failed to advise and/or consult  
18 with him regarding his direct appeal rights. He alleges that he learned of his direct appeal  
19 rights from other inmates and filed a *pro se* notice of appeal. Petitioner alleges that he was  
20 denied rights to equal protection, due process and effective assistance of counsel in violation  
21 of the Sixth and Fourteenth Amendments.<sup>1</sup>

22 No equal protection claim in this regard was presented to the Supreme Court of  
23 Nevada on the state post-conviction appeal. Petitioner presented a claim arising on these  
24 facts based upon a denial of only a right to effective assistance of counsel.<sup>2</sup> In the federal  
25 reply, petitioner urges – without addressing the equal protection claim separately – that  
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27 <sup>1</sup>#32, at electronic docketing page 7.

28 <sup>2</sup>#22, Ex. 83, at 11 (fast track statement).

1 Ground 1-6 was fairly presented to the state courts because the claim was presented to the  
2 state district court and the state supreme court “on the same factual basis.”<sup>3</sup> However, it is  
3 established law that petitioner must present the state courts with both the operative facts and  
4 the federal legal theory upon which his claim is based. *Castillo, supra*. Petitioner did not do  
5 so as to the equal protection legal theory in Ground 1-6.

6 The equal protection claim in Ground 1-6 thus is not exhausted.

7 Further proceedings under *Rose v. Lundy* as to this claim are not warranted, however.  
8 The Court may dismiss an unexhausted claim on the merits pursuant to 28 U.S.C. §  
9 2254(b)(2). The equal protection legal theory plainly is meritless on its face. Not all allegedly  
10 unequal or dissimilar treatment of individuals gives rise to an equal protection violation,  
11 particularly in situations where other constitutional provisions instead are applicable.  
12 *See, e.g., Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). Alleged ineffective assistance  
13 of counsel in allegedly failing to consult with a defendant about appeal rights does not give  
14 rise to an equal protection violation.

15 The equal protection claim in Ground 1-6 therefore will be dismissed on the merits.

16 On their other procedural defense, respondents contend that Grounds 1-1, 1-3, 1-5  
17 and 1-6 lack the specificity required by habeas pleading rules. However, even assuming,  
18 *arguendo*, that respondents are correct, it appears that these claims were exhausted and  
19 rejected by the state courts on the merits on the arguments and record presented in those  
20 courts. The more efficient and determinative resolution<sup>4</sup> of the claims therefore would be to  
21 address the issue of whether the state courts’ rejection of the same claims was contrary to  
22 or an unreasonable application of clearly established federal law.

23 The Court accordingly turns to the merits of the exhausted claims.

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25 <sup>3</sup>#38, at 5. Petitioner also states in note 3 on the preceding page of the reply that he abandons as  
26 redundant a statement regarding “a denial of his rights to equal protection and due process.” *Id.*, at 4 n.3. It  
27 is not entirely clear to what petitioner is referring, either as to the specific language in question or as to the  
28 specific action that he is purporting to take. The Court has proceeded on the basis that petitioner contests  
the exhaustion issue as to this claim, given that he provides opposition argument on the issue.

<sup>4</sup>The Court generally does not dismiss deficiently-pled claims without an opportunity to amend.

1 **Standard of Review on the Merits**

2 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly  
3 deferential standard for evaluating state-court rulings.” *Lindh v. Murphy*, 521 U.S. 320, 333  
4 n.7, 117 S.Ct. 2059, 2066 n.7, 138 L.Ed.2d 481(1997). Under this deferential standard of  
5 review, a federal court may not grant habeas relief merely on the basis that a state court  
6 decision was incorrect or erroneous. *E.g.*, *Clark v. Murphy*, 331 F.3d 1062, 1067 (9<sup>th</sup> Cir.  
7 2003). Instead, under 28 U.S.C. § 2254(d), the court may grant relief only if the decision: (1)  
8 was either contrary to or involved an unreasonable application of clearly established law as  
9 determined by the United States Supreme Court; or (2) was based on an unreasonable  
10 determination of the facts in light of the evidence presented at the state court proceeding.  
11 *E.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

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

24 A state district court decision constitutes an “unreasonable application” of clearly  
25 established federal law only if it is demonstrated that the state court’s application of Supreme  
26 Court precedent to the facts of the case was not only incorrect but “objectively unreasonable.”  
27 *E.g.*, *Mitchell*, 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 384 F.3d 628, 638 (9<sup>th</sup> Cir.  
28 2004).

1 To the extent that the state court’s factual findings are challenged intrinsically based  
2 upon evidence in the state court record, the “unreasonable determination of fact” clause of  
3 Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d  
4 943, 972 (9<sup>th</sup> Cir. 2004). This clause requires that the federal courts “must be particularly  
5 deferential” to state court factual determinations. *Id.* The governing standard is not satisfied  
6 by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973.  
7 Rather, the AEDPA requires substantially more deference:

8 . . . . [I]n concluding that a state-court finding is unsupported by  
9 substantial evidence in the state-court record, it is not enough that  
10 we would reverse in similar circumstances if this were an appeal  
11 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.

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

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

17 The petitioner bears the burden of proving by a preponderance of the evidence that he  
18 is entitled to habeas relief. *Davis*, 384 F.3d at 638.

### 19 **Governing Substantive Law**

20 The Supreme Court decisions in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36  
21 L.Ed.2d 235 (1973), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985),  
22 sharply curtail the possible grounds available for challenging a conviction entered following a  
23 guilty plea. As the Court stated in *Tollett*:

24 . . . . [A] guilty plea represents a break in the chain of  
25 events which has preceded it in the criminal process. When a  
26 criminal defendant has solemnly admitted in open court that he is  
27 in fact guilty of the offense with which he is charged, he may not  
28 thereafter raise independent claims relating to the deprivation of  
constitutional rights that occurred prior to the entry of the guilty  
plea. He may only attack the voluntary and intelligent character of  
the guilty plea by showing that the advice he received from

1                   counsel was not within the [constitutional] standards [established  
2                   for effective assistance of counsel.]  
3 411 U.S. at 267, 93 S.Ct. at 1608. Accordingly, “while claims of prior constitutional deprivation  
4 may play a part in evaluating the advice rendered by counsel, they are not themselves  
5 independent grounds for federal collateral relief.” *Id.*

6                   In *Hill*, the Court held that the two-pronged test of *Strickland v. Washington*, 466 U.S.  
7 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), applies to challenges to guilty pleas based on  
8 alleged ineffective assistance of counsel. 474 U.S. at 58, 106 S.Ct. at 370. Accordingly, a  
9 petitioner seeking to set aside a guilty plea due to ineffective assistance of counsel must  
10 demonstrate: (1) that his counsel’s performance fell below an objective standard of  
11 reasonableness; and (2) that the defective performance resulted in actual prejudice. 474 U.S.  
12 at 58-59, 106 S.Ct. at 370.

13                   On the performance prong, the question is not what counsel might have done differently  
14 but rather is whether counsel’s decisions were reasonable from counsel’s perspective at the  
15 time. In this regard, the reviewing court starts from a strong presumption that counsel’s  
16 conduct fell within the wide range of reasonable conduct. *E.g.*, *Beardslee v. Woodford*, 358  
17 F.3d 560, 569 (9<sup>th</sup> Cir. 2004).

18                   On the prejudice prong, as a general matter under *Strickland*, the petitioner must  
19 demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result  
20 of the proceeding would have been different. *E.g.*, *Beardslee*, 358 F.3d at 569. Application  
21 of this general principle to the specific context of a guilty plea leads to the requirement that the  
22 petitioner “must show that there is a reasonable probability that, but for counsel’s errors, he  
23 would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59,  
24 106 S.Ct. at 370.

25                   Under *Hill*, a challenge to the voluntariness of a guilty plea potentially may be based  
26 upon a claim of ineffective of assistance of counsel in proceedings prior to the plea. As the  
27 Court observed:

28                   . . . . For example, where the alleged error of counsel is a  
                          failure to investigate or discover potentially exculpatory evidence,

1 the determination whether the error "prejudiced" the defendant by  
2 causing him to plead guilty rather than go to trial will depend on  
3 the likelihood that discovery of the evidence would have led  
4 counsel to change his recommendation as to the plea. This  
5 assessment, in turn, will depend in large part on a prediction  
6 whether the evidence likely would have changed the outcome of  
7 a trial. Similarly, where the alleged error of counsel is a failure to  
8 advise the defendant of a potential affirmative defense to the  
9 crime charged, the resolution of the "prejudice" inquiry will depend  
10 largely on whether the affirmative defense likely would have  
11 succeeded at trial. . . . As we explained in *Strickland v.*  
12 *Washington, supra*, these predictions of the outcome at a possible  
13 trial, where necessary, should be made objectively, without regard  
14 for the "idiosyncrasies of the particular decisionmaker." *Id.*, 466  
15 U.S., at 695, 104 S.Ct., at 2068.

16 474 U.S. at 59-60, 106 S.Ct. at 370-71. Thus, an attorney's unprofessional error in failing to  
17 develop a meritorious defense may serve as a basis for overturning a guilty plea and  
18 conviction only if, viewed objectively, there is a reasonable probability that, but for the error,  
19 the petitioner would not have pled guilty and would have insisted on going to trial.

### 20 ***Discussion***

#### 21 ***Ground 1-1***

22 In Ground 1-1, petitioner alleges that he was denied effective assistance of counsel  
23 because counsel did not file a motion, allegedly as directed by the state district court, to hold  
24 the State to a prior unconsummated plea agreement. Petitioner maintains that the State was  
25 attempting to pressure him into pleading guilty in another case, No. CR02-1201, to a crime that  
26 he allegedly did not commit. He alleges that, when he refused to do so, the State withdrew  
27 from the first agreement and instead presented a proposed plea agreement that had three  
28 times as much sentencing exposure. Griffin maintains that counsel should have zealously  
fought against the State's "transparent attempt to coerce Griffin (successfully) into entering the  
second plea agreement."<sup>5</sup>

In April 2002, Griffin was on parole on a prior armed robbery conviction. He had two  
prior convictions from the early 1990's, a conviction for robbery and another for armed robbery.  
It appears from the record and Griffin's own acknowledgments at the sentencing on

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<sup>5</sup>#32, at electronic docketing pages 3-4.

1 the present conviction that he was out on parole on the armed robbery conviction in April  
2 2002.<sup>6</sup>

3 The declaration in support of the arrest report reflects that petitioner would have faced,  
4 *inter alia*, evidence corresponding to the following had he gone to trial.<sup>7</sup>

5 On April 6, 2002, a black male entered a convenience store at 501 W. 4th Street in  
6 Reno, Nevada. The male ultimately pulled a handgun and demanded that the store clerk give  
7 him the money from the register. A struggle ensued, during which the male grabbed and  
8 pulled off a necklace that the clerk was wearing. The male also pulled the trigger five times,  
9 but the gun did not discharge. The robber left the store with the necklace.

10 On April 11, 2002, Helen Jones was in the 4<sup>th</sup> Street store. The clerk recognized the  
11 necklace that she was wearing as the one that had been taken from him in the robbery. Jones  
12 told the police that the necklace had been a present from a man who they identified as Eric  
13 Norman. The police lost track of Norman before they could question him.

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15 <sup>6</sup>#21, Ex. 24, at 19, 26, 27-29 & 36-38; see also #22, Ex. 66, at 17-19.

16 <sup>7</sup>#21, Ex. 2. When a defendant enters a plea prior to trial, there of course is no trial record reflecting  
17 the evidence that the State would have presented at trial and any evidence that the defense might have  
18 presented. The only indicia of the evidence that the State potentially would have presented at trial absent a  
19 plea generally are arrest reports and any preliminary examination testimony.

19 In summarizing factual assertions made in the state court record, the Court makes no credibility  
20 determination as to the veracity of any declarant or witness or any factual finding as to the truth or falsity of  
21 any factual assertions. In this instance, the Court summarizes the factual assertions solely as an indication of  
22 the evidence that would have been available to the State had the matter gone to trial. The evidence that the  
23 State likely would have presented at trial is relevant to the determination of whether, but for the alleged error  
24 of counsel, there is a reasonable probability that a defendant in the petitioner's situation would not have pled  
25 guilty and instead would have insisted on going to trial. See *Hill*, 474 U.S. at 59, 106 S.Ct. at 370.

23 To be sure, petitioners on habeas review often maintain that they did not commit a crime. In this  
24 case, Griffin admits that he committed the second armed robbery on April 14, 2002, but he adamantly  
25 maintains that he did not commit the April 6, 2002, armed robbery. Be that as it may, absent a plea deal, he  
26 was going to trial on, *inter alia*, the April 6, 2002, armed robbery. Griffin's disagreement with the State's  
27 evidence on the April 6, 2002, armed robbery would not have prevented the case from going to trial and  
28 would not have prevented the State from presenting its evidence. At trial, it would have been in the province  
of the jury to either disbelieve – or believe – the State's evidence. That is the situation that Griffin faced prior  
to the plea.

The Court makes no factual findings regarding the truth or falsity of any evidence in summarizing any  
factual assertions in the state court record.



1 On April 14, 2002, Griffin entered a convenience store at 1445 E. 6<sup>th</sup> Street in Reno. He  
2 pulled a knife and demanded that the store clerk give him the money from the register. The  
3 clerk complied, and Griffin left the store. Griffin was followed to a nearby motel, arrested by  
4 the police, and positively identified as the robber by the store clerk. Griffin does not deny that  
5 he committed this April 14, 2002, armed robbery -- in which he was tracked fleeing from the  
6 store directly to the motel where he was arrested and immediately positively identified.

7 On April 16, 2002, Griffin was charged with the April 14, 2002, 6<sup>th</sup> Street store armed  
8 robbery. On May 1, 2002, he signed a waiver of the preliminary examination. Handwriting on  
9 the bottom of the waiver noted: "Def to plead to Armed Robbery[,] State will recommend 24-  
10 60 months on charge then 24-60 months on enhancement – (4-10) years."<sup>8</sup>

11 According to the investigating officer, after the April 14, 2002, 6<sup>th</sup> Street robbery, he  
12 began comparing the surveillance tapes from the two robberies due to similarities between  
13 them. The clothing appeared to be the same in each crime. According to the officer, he then  
14 presented a photo lineup to the 4<sup>th</sup> Street store clerk from the April 6, 2002, armed robbery.  
15 According to the officer's report, the clerk selected Griffin's picture "but he could only initially  
16 say it was a strong possibility as he had focused a great deal of his attention on the gun."  
17 According to the report, the clerk began feeling more certain that Griffin was the robber after  
18 viewing the images from the April 6, 2002, surveillance video. When the officer showed the  
19 clerk images from the April 14, 2002, robbery at the 6<sup>th</sup> Street store, the 4<sup>th</sup> Street store clerk  
20 immediately identified the clothing as the same that had been worn by the robber of his store.  
21 The 4<sup>th</sup> Street store clerk then "was even more certain" that Griffin was the robber at his store.<sup>9</sup>

22 On May 2, 2002, the police were able to locate and question Eric Norman. According  
23 to the arrest report, Norman identified Griffin from a photo lineup as the man who sold him the  
24 necklace that he had given to Jones. #21, Ex. 2.

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27 <sup>8</sup>#21, Exhs. 1 & 4.

28 <sup>9</sup>#21, Ex. 2.

1 On May 6, 2002, Griffin was charged by criminal complaint with the April 6, 2002, 4<sup>th</sup>  
2 Street store armed robbery.<sup>10</sup>

3 On July 24, 2002, the case based upon the April 6, 2002, 4<sup>th</sup> Street store robbery came  
4 on for a preliminary examination. The store clerk, Ramiro Palacios, testified as follows.  
5 Palacios positively identified Griffin in his testimony as the robber at the 4<sup>th</sup> Street store.  
6 Palacios testified that Griffin came into the store, ultimately pulled a handgun, and told  
7 Palacios to give him the money in the cash register. When Palacios did not comply quickly  
8 enough, Griffin grabbed Palacios near the neck. As they separated, Griffin pulled Palacios'  
9 chain from around his neck and hit Palacios in the head with the butt of the handgun.  
10 According to Palacios, Griffin then said "I going to kill you now," and he pulled the trigger but  
11 the gun did not discharge. Palacios grabbed a bat and chased Griffin out of the store, with  
12 Griffin pulling the trigger several times more in an attempt to shoot Palacios.<sup>11</sup>

13 Palacios testified further regarding the woman coming into the store the next day  
14 wearing his chain. According to Palacios' testimony, he subsequently picked Griffin out of a  
15 photo lineup.<sup>12</sup>

16 The two cases were carried over to the state district court. The charges on the April 6,  
17 2002, 4<sup>th</sup> Street store armed robbery were carried over in No. CR02-1201. The charges on  
18 the April 14, 2002, 6<sup>th</sup> Street store armed robbery were carried over in No. CR02-1040.

19 On August 7, 2002, the two cases came on for a previously scheduled proceeding.  
20 Defense counsel advised that, following negotiations, Griffin had anticipated pleading guilty  
21 in No. CR02-1040, but "the State wishe[d] to withdraw from the negotiations and the  
22 negotiated agreement." He stated: "We would be opposed to that." #21, Ex. 21, at 3-4.

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24 <sup>10</sup>#21, Ex. 1.

25 <sup>11</sup>#21, Ex. 15, at 4-24. Petitioner made it known during the preliminary examination that he disagreed  
26 with Palacios' testimony. *Id.*, at 17-18 & 34. Griffin's disagreement, however, would not have prevented the  
27 State from going forward with the case and would not have necessarily prevented a jury from believing the  
28 witness. The Court, again, makes no factual finding as to the truth or falsity of this, or any other, evidence.

<sup>12</sup>*Id.*, at 25-31.

1 The prosecutor responded:

2 What would happen, Your Honor, is that the defendant  
3 committed two robberies; two armed robberies, as a matter of fact.  
4 And there were negotiations on the first case. And when the  
5 defendant was arrested on the second case, we tried to package  
6 these cases. We were unable to do so, and so negotiations have  
7 fallen through. There was no meeting of the minds.

8 #21, Ex. 21, at 4.

9 Defense counsel advised the state district court that Griffin wanted to address the court  
10 directly. He stated that “my client wishes to address the fact that he does not feel the State  
11 can withdraw from the negotiations.” The court responded: “That’s fine. Go ahead. File the  
12 motion. I think they can.” The court then proceeded forward to set No. CR02-1201-- the April  
13 6, 2002, 4<sup>th</sup> Street store armed robbery -- for trial and to remand No. CR02-1040 -- the April  
14 14, 2002, 6<sup>th</sup> Street store armed robbery -- back to the justice court.<sup>13</sup>

15 The transcript then reflects a recess in the proceeding. Thereafter, *as a continuation*  
16 *of the same proceeding the same day*, Griffin entered the plea in No. CR02-1040 as to the 6<sup>th</sup>  
17 Street store robbery upon which the conviction under attack is based, pursuant to an overall  
18 plea deal in which the State agreed to dismiss No. CR02-1201 at sentencing.<sup>14</sup>

19 Griffin, who had been present throughout, made no request that the state district court  
20 first entertain and rule on a motion regarding the State’s withdrawal from the prior negotiations  
21 before he entered the plea. He instead responded that he did not have any questions about  
22 the negotiations, that he had had enough time to discuss the entire matter with counsel, that  
23 he was satisfied with the legal services provided by counsel, that he understood that he did  
24 not have to change his plea, that no promises outside of the plea agreement had been made  
25 to him to induce him to change his plea, that no threats had been made against him to get him  
26 to change his plea, that he was changing his plea freely and voluntarily, that he was pleading  
27 guilty because he was guilty and for no other reason, that the State was free to argue for the

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28 <sup>13</sup>#21, Ex. 21, at 4-6.

<sup>14</sup>*Id.*, at 6-7.

1 maximum penalty, that the court did not have to follow any negotiations, and that his  
2 sentencing exposure was consecutive sentences of two to fifteen years on the robbery and  
3 weapon enhancement, consecutive to the sentence that he then was serving.<sup>15</sup>

4 The state district court accepted the plea, under which the charges as to the 4<sup>th</sup> Street  
5 store robbery in No. CR02-1201 would be dismissed at sentencing.<sup>16</sup>

6 On October 22, 2002, the matter came on for sentencing.

7 With Griffin present, defense counsel noted that the negotiations included, *inter alia*,  
8 the dismissal of No. CR02-1201. Referring back to the day of the plea, he noted that the case  
9 had been before the court on a motion to confirm the trial date, but a plea deal had been  
10 reached after further negotiations in the hall after the proceeding was recessed. Counsel  
11 stated that the guilty plea memorandum and colloquy both were done correctly and “[t]hat’s  
12 what my client understands the negotiations to be.”<sup>17</sup>

13 Counsel continued, however, that one of the draft guilty-plea memoranda in the *prior*  
14 negotiations erroneously had stated that probation was an option. He stated that he had  
15 discussed the matter with Griffin and that he had “explained to him that if he made this deal  
16 with the thought that probation was an option, that he would have grounds to withdraw his  
17 guilty plea in my opinion.” Counsel informed the court:

18  
19 He informs me that he does not wish to withdraw his guilty  
20 plea to this case; that he made this negotiation knowing that –  
21 Whether he knew or not that probation was an option I am not  
22 sure; however, he knew that prison was likely based upon his  
23 record. And that at this point he does not wish to withdraw his  
24 guilty plea. He does not want to create waves for the Court.

25  
26 He knows that probation is not an option pursuant to the  
27 guilty-plea memoranda actually filed with the Court,  
28 notwithstanding what he had reviewed in a prior guilty-plea  
memoranda [sic] where it stated that it was an option.

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26 <sup>15</sup>#21, Ex. 21, at 7-12. See also *id.*, Ex. 22 (acknowledgments in written guilty plea agreement).

27 <sup>16</sup>*Id.*, at 12.

28 <sup>17</sup>#21, Ex. 24, at 3-4.

1                   So I've discussed that with my client. He understands that  
2                   these are the negotiations; that probation is not an option; and that  
3                   the State is free to argue.

3 #21, Ex. 24, at 5-6.

4                   The court asked Griffin whether he understood that, and he responded: "Yes, sir."<sup>18</sup>

5                   Petitioner did not seek to withdraw the plea – on any ground – prior to sentencing, even  
6 after the prospect of withdrawing the plea was clearly and expressly raised on the record.

7                   Defense counsel, in his argument as to sentencing, observed that prior negotiations had  
8 contemplated two consecutive 24 to 60 month sentences on the April 14, 2002, robbery and  
9 weapon enhancement in No. CR02-1040 along with two consecutive 24 to 60 month  
10 sentences on the April 6, 2002, robbery and weapon enhancement in No. CR02-1201.

11 Counsel stated:

12                   That was for both cases. In this case – and I remember  
13 discussing this with my client for an extended period of time – that  
14 free to argue leaves the State free to argue. My client pled guilty  
15 to this case because he did the case. He did not wish to take any  
16 deals or negotiate any cases with any other case because he did  
17 not do those other cases. He did not do the CR02-1201. He did  
18 not want to take any deals on that, did not want to discuss that.  
19 He had pled guilty to this case, CR02-1040, because in his mind  
20 he was guilty of this.

17 #21, Ex. 24, at 7-8.

18                   Griffin and Griffin's wife similarly admitted on the record that he committed the April 14,  
19 2002, robbery. The defense sought to attribute the robbery – and his prior robberies over the  
20 years – to his being unable to stay clear of drugs.<sup>19</sup>

21                   Griffin maintained that he did not do the April 6, 2002, robbery. Defense counsel  
22 pointed out that the prosecutor correctly stated that Palacios had identified Griffin at the  
23 preliminary examination and that Griffin was referring to a police report where "one of the  
24 witnesses pointed out somebody else" as the robber. #21, Ex. 24, at 30-35 & 38-39.

25                   ////

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27                   <sup>18</sup>#21, Ex. 24, at 6; see also *id.*, at 27-29.

28                   <sup>19</sup>#21, Ex. 24, at 11 & 30.

1 The state district court sentenced Griffin to two consecutive sentences of 24 to 180  
2 months each, consecutive to his remaining time following upon his parole revocation.<sup>20</sup>

3 The same state district judge that took Griffin's plea considered his state post-conviction  
4 petition. The judge rejected the corresponding ineffective assistance claim presented in the  
5 state courts on the following grounds:

6 Petitioner claims ineffective assistance of counsel, alleging  
7 his attorney failed to file a motion to enforce a previous plea  
8 agreement between the State and Petitioner. The State argues  
9 that this . . . claim should . . . be dismissed because under [sic] the  
10 State is free to withdraw from a plea agreement until it is  
11 performed or until the defendant detrimentally relies on it. *State*  
12 *v. Crockett*, 110 Nev. 838, 877 P.2d 1077 (1994). The State also  
13 contends that Petitioner brings forth no specific factual allegations  
14 that he detrimentally relied on the plea agreement prior to its  
execution. This Court finds that the State was able to withdraw its  
first plea agreement and that it invited Petitioner to file a motion on  
the issue stating otherwise. The Court never ordered Petitioner or  
his attorney to respond with a written motion. This Court finds that  
Petitioner has failed to present any facts that if true would entitle  
him to relief. Therefore, Petitioner's claim as to counsel's failure  
to file a motion to force the State to specifically perform on its first  
plea agreement is dismissed.

15 #22, Ex. 61, at 3.

16 The Supreme Court of Nevada affirmed the state district court's decision as to this claim  
17 on the grounds that petitioner had not demonstrated that the district court's findings were not  
18 supported by substantial evidence or were clearly wrong and that he had not demonstrated  
19 that the lower court erred as a matter of law.<sup>21</sup>

20 Petitioner has not carried his burden of demonstrating that the state courts' rejection  
21 of Ground 1-1 was contrary to or an unreasonable application of clearly established federal  
22 law. Petitioner did not even respond in the reply on this claim, responding only as to Ground  
23 1-6.

24 Petitioner has presented no federal constitutional or Nevada state authority tending to  
25 establish a reasonable probability that a motion to enforce the unconsummated plea

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27 <sup>20</sup>#21, Ex. 24, at 39.

28 <sup>21</sup>#22, Ex. 94, at 2-3.

1 agreement would have been successful.<sup>22</sup> In the prior negotiations, the State offered a  
2 recommendation of 24 to 60 month consecutive sentences. The State did so first for a  
3 proposed plea deal that would have closed No. CR02-1040 alone, in negotiations conducted  
4 *before* Griffin was charged with the April 6, 2002, armed robbery in No. CR02-1201. The State  
5 then did so for a proposed plea deal that would have closed both No. CR02-1040 and No.  
6 CR02-1201, pursuant to a package deal including a recommendation of 24 to 60 month  
7 consecutive sentences also in No. CR02-1201. After Griffin declined to enter a plea in No.  
8 CR02-1201, the State was under no obligation, under either state or federal law, to  
9 nonetheless enter into a plea bargain that concluded both cases – with an agreement to  
10 dismiss No. CR02-1201 as part of the overall deal – based upon the exposure previously  
11 offered as to only one case. While Griffin maintains that he did not commit the armed robbery  
12 in No. CR02-1201, the State had evidence tending to establish to the contrary, including a  
13 positive in-court identification by the victim. The State was not required to close both cases  
14 at the same sentencing exposure that it previously had offered as to only one case.

15 Griffin cites no authority holding that the State was required to abandon consideration  
16 of No. CR02-1201 in plea negotiations simply because he denied that he did the offense. It  
17 is an inherent aspect of plea bargaining that securing the dismissal of additional charges can  
18 come at the cost of an agreement to additional sentencing exposure on the charges to which  
19 the defendant enters a plea. The State clearly could bargain for more potential exposure in  
20 a plea deal that closed both cases. Petitioner has presented no authority holding that what  
21 in truth is inherent to the plea bargaining process is unconstitutionally “coercive.” If petitioner  
22

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23 <sup>22</sup> *Cf. United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir.1992)(“[N]either the defendant nor the  
24 government is bound by a plea agreement until it is approved by the court.”); *United States v. Fagan*, 996  
25 F.2d 1009, 1013 (9th Cir.1993) (“A plea agreement that has not been entered and accepted by the trial court  
does not bind the parties.”).

26 The state court record further fully supports the state district court’s factual finding that it invited, but  
27 did not direct, defense counsel to file such a motion if the defense wanted. The point in any event is not a  
28 material one. If the state court had directed the filing of such a motion but there was not a reasonable  
probability of success on the motion if it were filed, petitioner would not be able to establish prejudice based  
upon the failure to file the motion.

1 did not believe that the plea deal was in his best interests considering the evidence and  
2 potential exposure in the two cases, he was free to go to trial, in either one or both cases.

3         Petitioner further has not established a reasonable probability that a defendant in his  
4 situation would not have entered the plea and instead would have elected to go to trial but for  
5 counsel's failure to file the meritless motion. The Court notes in this regard that petitioner  
6 himself entered the plea at the very same proceeding where the prospect of filing such a  
7 motion was discussed. If the filing of the motion were a determinative factor for him, all that  
8 he had to do was decline to enter into the plea and instruct his counsel to file the motion.  
9 Petitioner did not do that. He instead affirmed to the state district court, *inter alia*, that he had  
10 enough time to discuss the entire matter with counsel, that he was satisfied with the legal  
11 services provided by counsel, that he understood that he did not have to change his plea, that  
12 no promises outside of the plea agreement had been made to him to induce him to change  
13 his plea, that no threats had been made against him to get him to change his plea, that he was  
14 changing his plea freely and voluntarily, and that he was pleading guilty because he was guilty  
15 and for no other reason. These declarations to the state district court during the plea colloquy  
16 present a formidable barrier to any claim by Griffin that defense counsel's failure to file the  
17 motion in the short interval before Griffin accepted the plea deal affected the outcome as to  
18 entry of a plea. *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d  
19 136 (1977).<sup>23</sup>

20         The state courts' rejection of this claim accordingly was neither contrary to nor an  
21 unreasonable application of clearly established federal law, as reflected by *Strickland*, *Tollett*  
22 and *Hill*.

23         Ground 1-1 therefore does not provide a basis for federal habeas relief.  
24

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25  
26         <sup>23</sup>The Court additionally notes that petitioner, by the plea deal, secured the dismissal of a criminal  
27 case in which additional charges potentially could have been filed based upon the robber striking the store  
28 clerk with the weapon and, more importantly, pulling the trigger while stating that he was going to kill the  
clerk. There perhaps was a strong incentive for a defendant in petitioner's situation to accept culpability in  
No. CR02-1040 (where he was followed from the scene, arrested, and immediately identified) in an effort to  
avoid possible exposure in No. CR02-1201 that potentially might not be limited to only armed robbery.



1           **Ground 1-2**

2           In Ground 1-2, petitioner alleges that he was denied effective assistance of counsel  
3 because counsel did not object to the State’s reference to the facts in case No. CR02-1201  
4 in the sentencing on No. CR02-1040. Griffin urges that it was improper for the State to refer  
5 to the facts in No. CR02-1201 because the case was dismissed only minutes later at the  
6 sentencing. Petitioner maintains that “the State knew Case 1201 would be dismissed because  
7 Griffin did not do the acts charged in 1201, yet the State blatantly used the facts of the soon  
8 to be dismissed case against Griffin.”<sup>24</sup>

9           The basic background facts regarding this claim, including those concerning the  
10 relationship between the two cases, are summarized in the discussion above of Ground 1-1.

11           In the plea agreement, Griffin expressly acknowledged the following:

12                           I understand and agree that pursuant to the terms of the  
13 plea agreement stated herein, any counts that are to be dismissed  
14 and any other cases charged or uncharged which are either to be  
dismissed or not pursued by the State, may be considered by the  
court at the time of my sentencing.

15 #21, Ex. 22, at 4, ¶ 11.

16           At the sentencing, the State maintained that “contrary to Mr. Griffin’s protestations that  
17 he’s not the person who committed that armed robbery,” the State had evidence tending to  
18 establish that he did. The State pointed to the store clerk’s positive identification of Griffin as  
19 the robber and Eric Norman’s positive identification of Griffin as the person who provided him  
20 the necklace.<sup>25</sup>

21           On state post-conviction review, the state district court rejected a related independent  
22 substantive claim on the following grounds:

23                           Petitioner . . . claims the State, during Petitioner’s  
24 sentencing hearing, wrongfully referred to charges that were later  
25 dismissed. The State argues that this claim should [be] dismissed  
because, under Nevada law, a prosecutor may cite to dismissed  
charges at sentencing. See *Jezierski v. State*, 107 Nev. 395, 812

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27           <sup>24</sup>#32, at electronic docketing page 4.

28           <sup>25</sup>#21, Ex. 24, at 18-19.

1 P.2d 355 (1991). The Court finds that the State's reference to  
2 dismissed charges against the Petitioner was not wrongful, and,  
therefore, Petitioner's claim is dismissed.

3 #22, Ex. 61, at 3.

4 The state district court rejected the related claim of ineffective assistance of counsel on  
5 the following grounds:

6 Petitioner also claims his counsel was ineffective because  
7 he did not object to the State's reference to dismissed charges at  
8 sentencing. The Court addressed this point in Petitioner's first  
9 claim for relief, holding that Nevada law allows prosecutors to refer  
to dismissed charges at sentencing. Therefore, the Court finds  
that Petitioner . . . has failed to present any fact, if true, that would  
entitle him to relief. Thus this claim is dismissed.

10 #22, Ex. 61, at 4.

11 The Supreme Court of Nevada affirmed the state district court's decision as to this claim  
12 on the grounds that petitioner had not demonstrated that the district court's findings were not  
13 supported by substantial evidence or were clearly wrong and that he had not demonstrated  
14 that the lower court erred as a matter of law.<sup>26</sup>

15 Petitioner has not carried his burden of demonstrating that the state courts' rejection  
16 of Ground 1-2 was contrary to or an unreasonable application of clearly established federal  
17 law.

18 Petitioner did not even respond in the reply on this claim as well, responding only as  
19 to Ground 1-6. He has presented no state or federal authority tending to establish a  
20 reasonable probability that an objection by defense counsel to the State's reference to the  
21 charges in No. CR02-1201 would have been sustained, much less that such an objection  
22 would have changed the outcome of the sentencing proceeding.

23 At bottom, petitioner's underlying premise for the claim is fundamentally flawed.  
24 Petitioner urges that the State acted improperly in referring to the facts in No. CR02-1201  
25 because the State allegedly knew that the case was being dismissed because Griffin did not  
26 do the acts charged. No. CR02-1201 was *not* being dismissed on the premise that Griffin did

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28 <sup>26</sup>#22, Ex. 94, at 2-3.

1 not commit the armed robbery. Rather, No. CR02-1201 was being dismissed as part of a plea  
2 deal in which the State agreed to dismiss No. CR02-1201 in connection with petitioner's entry  
3 of a plea to the charge in No. CR02-1040. The State never abandoned its position that Griffin  
4 committed the armed robbery in No. CR02-1201, and it never made any concession that  
5 Griffin did not commit the armed robbery. The armed robbery charge in No. CR02-1201  
6 instead was supported by testimony by the store clerk that the justice court found established  
7 probable cause for the charge to proceed forward in the district court. As discussed as to  
8 Ground 1-1, Griffin's own self-serving statements that he did not commit the armed robbery  
9 in No. CR02-1201 do not establish that he did not commit the armed robbery. His own self-  
10 serving statements clearly did not provide a basis for barring the State from referring to the  
11 facts in No. CR02-1201 at sentencing, especially given Griffin's express acknowledgment in  
12 the written plea agreement that the sentencing court could consider dismissed charges.

13       Moreover, as the Ninth Circuit has noted, "the Supreme Court has not delineated a  
14 standard which should apply to ineffective assistance of counsel claims in noncapital  
15 sentencing cases [such that] ... there is no clearly established federal law as determined by  
16 the Supreme Court in this context." *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th  
17 Cir.2006)(internal citation omitted). Because there is no clearly established Supreme Court  
18 precedent that applies in this noncapital sentencing context, petitioner cannot establish that  
19 the state courts' rejection of his claim was either contrary to or an unreasonable application  
20 of clearly established federal law as determined by the United States Supreme Court. *Id.*

21       The state courts' rejection of this claim accordingly was neither contrary to nor an  
22 unreasonable application of clearly established federal law.

23       Ground 1-2 therefore does not provide a basis for federal habeas relief.

24       **Ground 1-3**

25       In Ground 1-3, petitioner alleges that he was denied effective assistance of counsel  
26 because counsel failed to object to and correct "false information" and "errors" in the  
27 presentence investigation report. Griffin asserts that he brought "these errors" to counsel's  
28 attention yet he did nothing to correct them. #32, at electronic docketing pages 4-5.

1 As respondents correctly note, the amended petition does not specify, *inter alia*, what  
2 “false information” or “errors” allegedly were contained in the presentence investigation report.  
3 Nor does petitioner allege how he was prejudiced as a result.

4 At the sentencing, defense counsel advised the court, *inter alia*, that the presentence  
5 investigation report did not correctly state the plea bargain, which was acknowledged by the  
6 parole and probation representative. Counsel also advised the court that the report referred  
7 to a number of arrests and charges that were dismissed, not pursued, or as to which no  
8 information was available; and he asked the court to disregard them. Parole and probation  
9 recommended consecutive sentences of 72 to 180 months, with the consecutive sentencing  
10 on the weapon enhancement being mandatory. The State sought to have the court follow this  
11 recommendation, noting, *inter alia*, that petitioner had two prior convictions, one for robbery  
12 and the other for armed robbery. The defense sought lesser consecutive sentences of 24 to  
13 60 months. The court imposed consecutive sentences of 24 to 180 months.<sup>27</sup>

14 On state post-conviction review, the state district court held an evidentiary hearing on  
15 petitioner’s claims that the presentence investigation report contained errors and that his  
16 counsel was ineffective for failing to object to and correct the errors.

17 At the evidentiary hearing, Griffin testified, *inter alia*, that he pointed out to defense  
18 counsel that the report showed 26 arrests with no dispositions. He testified that he instead  
19 had been arrested prior to the present case “no more than” 14 times. When pressed on cross-  
20 examination, however, he could not identify any errors in the description of his arrest record.  
21 All that he could point to, as purportedly erroneous, was the fact that a single arrest on multiple  
22 charges would generate multiple entries on the report. His argument thus apparently turned  
23 on the distinction that the 26 entries reflected that he was arrested on 26 different charges  
24 rather than that he was arrested on 26 different occasions. Griffin further acknowledged that  
25 defense counsel had advised the court that the arrests had not led to convictions and  
26 requested that the court disregard the arrests. #22, Ex. 66, at 6-8 & 23-28.

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27  
28 <sup>27</sup>#21, Ex. 24, at 3-5, 7, 9-10, 19-20, 25-27 & 39.

1 Griffin further acknowledged that the prior criminal history section of the report  
2 accurately reported his two prior felony convictions, one for robbery and the other for armed  
3 robbery. He relied, however, on an erroneous reference on the last page of the report that  
4 referred to an aggravating factor of: “Extensive criminal history, including three felony  
5 convictions of violence.”<sup>28</sup>

6 Griffin explained that his belief that the above arrest and conviction references in the  
7 presentence report resulted in him getting 180 months for the top end of his sentence was  
8 based on the following:

9 . . . I remember the judge and Miss Pappas [the parole and  
10 probation representative] – well, the judge mentioned to Miss  
11 Pappas, “This paperwork looks – the P and P looks like it’s right  
on the money.” So he said, “I’m going to give you the low end of  
the DA and the high end of the P and P.”

12 #22, Ex. 66, at 9.

13 What the transcript of the sentencing instead shows, however, is that it was the  
14 *prosecutor* who said: “After making the changes, I think the Division’s recommendation is right  
15 on the money, Judge.”<sup>29</sup> The sentencing transcript does not contain anything remotely  
16 resembling the exchange described by Griffin between the judge and the division  
17 representative. His testimony seeking to establish prejudicial impact thus was directly belied  
18 by the contemporaneous record.

19 The state district judge, who presided at both the sentencing and the state post-  
20 conviction evidentiary hearing, found as follows. He found in both oral and written findings that  
21 he did not rely on the arrest record and that he relied on the correct number of two convictions  
22 – which is how the State had argued the matter – rather than three. The judge stated that he  
23 imposed the 180-month high end on the sentence because of the two prior robbery  
24 convictions, one of which was for armed robbery. The court accordingly rejected the post-  
25 conviction claims presented. #22, Ex. 66, at 45-47; *id.*, Ex. 71, at 1-2.

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27 <sup>28</sup>#21, Ex. 24, at 6-7 & 16-20.

28 <sup>29</sup>*Id.*, at 19, lines 9-11.

1 The Supreme Court of Nevada, citing the *Strickland* standard, affirmed the state district  
2 court's decision as to the ineffective assistance claim on the grounds that petitioner had not  
3 demonstrated that the district court's findings were not supported by substantial evidence or  
4 were clearly wrong and that he had not demonstrated that the lower court erred as a matter  
5 of law.<sup>30</sup>

6 Petitioner has not carried his burden of demonstrating that the state courts' rejection  
7 of Ground 1-3 was based upon an unreasonable determination of fact or was contrary to or  
8 an unreasonable application of clearly established federal law.

9 Here, too, petitioner did not respond in the reply as to this claim. The conclusory claim  
10 and lack of argument presented by petitioner on federal habeas review clearly fails to establish  
11 that the state courts' rejection of the corresponding claim was based upon an unreasonable  
12 determination of fact or was either contrary to or an unreasonable application of clearly  
13 established federal law. The state district court expressly found that the arrests did not factor  
14 into the sentence and that the sentence was based upon petitioner having two, not three, prior  
15 convictions. Petitioner has not begun to carry his burden of demonstrating that the state  
16 district court's factual determination was an unreasonable determination of fact. The state  
17 court's factual findings thus are clothed with a presumption of correctness. *Lambert*, 393 F.3d  
18 at 972. In light of the state district court's findings, petitioner cannot establish prejudice under  
19 *Strickland* even if he, *arguendo*, could establish deficient performance by counsel. *See also*  
20 *Davis, supra* (there is no clearly established Supreme Court precedent delineating the  
21 standards applicable to ineffective assistance of counsel claims in noncapital sentencing  
22 cases).

23 Ground 1-3 therefore does not provide a basis for federal habeas relief.

24 **Ground 1-4**

25 In Ground 1-4, petitioner alleges that he was denied effective assistance of counsel  
26 because counsel allegedly misled him into accepting the plea by erroneously informing him

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28 <sup>30</sup>#22, Ex. 94, at 2-3.

1 – off the record – that the State would not pursue the 180-month top end of the sentencing  
2 range but instead would make a recommendation of 24 to 60 month consecutive sentences  
3 that was discussed in the prior plea negotiations that were not consummated.<sup>31</sup>

4 The basic background facts regarding this claim, including those concerning the prior  
5 negotiations, are summarized in the discussion above of Ground 1-1.

6 In the written plea agreement, petitioner expressly acknowledged, *inter alia*, the  
7 following:

8 I understand that the consequences of my plea of guilty are  
9 that I may be imprisoned for a period of two to fifteen years in the  
10 Nevada State Prison plus an additional consecutive sentence of  
two to fifteen years in the Nevada State Prison for the weapon  
enhancement and that I am not eligible for probation.

11 In exchange for my plea of guilty, the State, my counsel  
12 and I have agreed to recommend the following: The State will be  
free to argue for an appropriate sentence. . . . .

13 I understand that, even though the State and I have  
14 reached this plea agreement, the State is reserving the right to  
present arguments, facts, and/or witnesses at sentencing in  
15 support of the plea agreement.

16 . . . . .

17 I understand that the Court is not bound by the agreement  
18 of the parties and that the matter of sentencing is to be  
determined solely by the Court. . . . .

19 . . . . .

20 My plea of guilty is voluntary, is not the result of any threats,  
coercion or promises of leniency.

21 I am signing this Plea Memorandum voluntarily with advice  
22 of counsel, under no duress, coercion, or promises of leniency.

23 #21, Ex. 22, at 3-5, ¶¶ 6-8, 12 & 15-16.

24 In the plea colloquy, Griffin again acknowledged on the record that no promises outside  
25 of the plea agreement had been made to him to induce him to change his plea, that the State  
26 was free to argue for the maximum penalty, that the court did not have to follow any

27 \_\_\_\_\_

28 <sup>31</sup>#32, at electronic docketing pages 4-5.

1 negotiations, and that his sentencing exposure was consecutive sentences of two to fifteen  
2 years on the robbery and weapon enhancement, consecutive to the sentence that he then was  
3 serving.<sup>32</sup>

4 On state post-conviction review, the state district court rejected a related independent  
5 substantive claim on the following grounds:

6  
7 Petitioner argues that the State enticed him into entering  
8 the plea agreement by promising to argue for a lighter sentence.  
9 The State contends that this argument should be dismissed  
10 because the record belies Petitioner's allegation. This Court finds  
11 that Petitioner signed the plea agreement, which states a prison  
term of 2 to 15 years for both the burglary [sic] charge and the  
weapon enhancement. Petitioner raises no specific factual  
allegations that Petitioner entered into that plea agreement  
involuntarily. Thus, the Court dismisses this portion of Petitioner's  
claim.

12 #22, Ex. 61, at 2.

13 The state district court rejected the related claim of ineffective assistance of counsel on  
14 the following grounds:

15  
16 Petitioner also claims counsel misinformed him as to the  
17 State's recommendation at sentencing. The State contends this  
18 claim should be dismissed because Nevada law treats plea  
19 agreements as contracts and, therefore, the terms of the plea  
20 agreement control regardless of Petitioner's subjective  
21 expectations. This Court addressed this issue in Petitioner's first  
claim, finding that the plea agreement clearly stated the maximum  
term that Petitioner could receive under the agreement.  
Therefore, this Court finds that the Petitioner's statement is  
conclusory, failing to show specific facts that would entitle him to  
relief on this issue. This Court dismisses this portion of  
Petitioner's . . . claim for relief.

22 #22, Ex. 61, at 4.

23 The Supreme Court of Nevada affirmed the state district court's decision as to this claim  
24 on the grounds that petitioner had not demonstrated that the district court's findings were not  
25 supported by substantial evidence or were clearly wrong and that he had not demonstrated  
26 that the lower court erred as a matter of law. #22, Ex. 94, at 2-3.

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28 <sup>32</sup>#21, Ex. 21, at 8-11.





1           **Ground 1-5**

2           In Ground 1-5, petitioner alleges that he was denied effective assistance of counsel  
3 because counsel allegedly failed to perform “investigation and defenses necessary to dismiss”  
4 case No. CR02-1201 before his sentencing. Griffin maintains that “[t]here were discussions”  
5 between his counsel and the State “well before” his sentencing. He alleges that with “a little  
6 effort,” only “a modicum of effective assistance,” counsel “could have easily performed  
7 sufficient investigation . . . to insure” the case was dismissed prior to his sentencing. Griffin  
8 alleges that counsel’s failure adversely impacted his sentencing.<sup>33</sup>

9           The basic background facts regarding this claim, including those concerning the  
10 relationship between the two cases, are summarized in the discussion above of Ground 1-1.

11           As respondents note, the amended petition does not specify, *inter alia*, what further  
12 investigation and defenses should have been pursued. Nor does the amended petition specify  
13 what information would have been developed through such unspecified investigation that  
14 allegedly would have insured the dismissal of No. CR02-1201.

15           The state district court rejected the corresponding claim presented in the state courts  
16 on the following grounds:

17  
18                                 . . . . Petitioner’s claim that counsel failed to timely  
19 investigate the separate charge raises no factual allegation that  
20 entitles him to relief. Nevada law allows the State to reference  
21 dismissed charges; thus, this Court finds that the State would  
22 have been able to call the Court’s attention to the charges even if  
23 counsel was successful in getting the charges dismissed after an  
24 investigation. Therefore, this Court dismisses this portion of  
25 Petitioner’s claim.

26 #22, Ex. 61, at 3.

27           The Supreme Court of Nevada affirmed the state district court’s decision as to this claim  
28 on the grounds that petitioner had not demonstrated that the district court’s findings were not  
supported by substantial evidence or were clearly wrong and that he had not demonstrated  
that the lower court erred as a matter of law. #22, Ex. 94, at 2-3.

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<sup>33</sup>#32, at electronic docketing pages 6-7.

1           Petitioner has not carried his burden of demonstrating that the state courts' rejection  
2 of Ground 1-5 was based upon an unreasonable determination of fact or was contrary to or  
3 an unreasonable application of clearly established federal law. Here as well, petitioner did not  
4 even respond in the reply on this claim.

5           The conclusory claim and lack of argument presented on federal habeas review clearly  
6 fails to carry petitioner's burden.

7           The Court notes, first, that the "discussions as to the dismissal" of No. CR02-1201  
8 between counsel and the State *concerned the dismissal of the case pursuant to a plea*  
9 *bargain*. Petitioner repeatedly has stated or implied in this proceeding that the State  
10 dismissed No. CR02-1201 because the State allegedly knew that Griffin did not commit the  
11 crime. As discussed extensively above as to Grounds 1-1 and 1-2, the record flatly refutes  
12 Griffin's representations. The crime victim made a positive in-court identification of Griffin as  
13 the robber, and there is no indication in the record that the State intended to abandon the  
14 prosecution in No. CR02-1201 in the absence of a plea deal. No. CR02-1201 ultimately was  
15 dismissed pursuant to a plea bargain under which No. CR02-1201 would be dismissed *at*  
16 *Griffin's sentencing*, not before, and under which the sentencing court was not precluded from  
17 considering dismissed charges. While Griffin maintained and maintains that he did not commit  
18 the robbery in No. CR02-1201, his self-serving denials – clearly – do not establish that there  
19 was not sufficient evidence for the State to bring the case to trial. Petitioner's implication that  
20 No. CR02-1201 was hovering on the brink of dismissal prior to his sentencing, per discussions  
21 between counsel, is directly belied by the record. The state court record instead reflects that,  
22 absent the plea deal, the case was going to trial.<sup>34</sup>

23           The Court notes, second, that petitioner, in his conclusory claim and his nonresponsive  
24 reply as to this claim, has completely failed to present any specific information or defense that  
25 would have provided a basis for dismissing No. CR02-1201. Again, the store clerk positively  
26 identified Griffin as the robber. Petitioner's claim is speculative as well as conclusory, as it is

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28           <sup>34</sup>See text, *supra*, at 10, 15 & 18-19.

1 entirely speculative as to what further – as yet unspecified – investigation would have revealed  
2 that was not known at the time and that would have resulted in the dismissal of the case. In  
3 order to establish ineffective assistance of counsel, petitioner must establish not only what  
4 counsel allegedly failed to do, but also that he sustained prejudice as a result. It is entirely  
5 speculative that further investigation would have yielded results that would have provided a  
6 basis for dismissal of No. CR02-1201 prior to petitioner’s sentencing.

7 The state courts’ rejection of this conclusory and speculative claim was neither contrary  
8 to nor an unreasonable application of clearly established federal law.

9 Ground 1-5 therefore does not provide a basis for federal habeas relief.

10 **Ground 1-6**

11 In Ground 1-6, petitioner alleges that defense counsel “failed to advise and/or consult  
12 with” him regarding his direct appeal rights. He maintains that he discovered his direct appeal  
13 rights from other inmates. According to Griffin, he filed a *pro se* notice of appeal only after  
14 learning of his appeal rights from fellow inmates. Petitioner alleges that “this failure by counsel  
15 to advise and/or consult with [him] regarding [his] direct appeal rights amounts to ineffective  
16 assistance.”<sup>35</sup>

17 Petitioner did not include any claim in Ground 1-6 in the amended petition alleging that  
18 counsel provided ineffective assistance by failing to argue any particular issue or issues on  
19 appeal. The claim in Ground 6 instead was based upon counsel allegedly failing “to advise  
20 and/or consult with” petitioner as to his direct appeal rights, such that petitioner did not learn  
21 of his appeal rights until he learned of them from other inmates.

22 At the outset, petitioner’s allegation that he was not advised or informed of his direct  
23 appeal rights, such that he had to first learn of them from other inmates, is directly belied by  
24 the state court record. During the plea colloquy, the state district court specifically informed  
25 Griffin that “you have a right of appeal even on a guilty plea.” The court told Griffin to “[m]ake  
26 sure that you talk to [defense counsel] about that, because any appeal must be filed within 30

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27  
28 <sup>35</sup>#32, at electronic docketing page 7.

1 days from the date of sentencing.” The court asked Griffin whether he understood that, and  
2 he replied: “Yes, sir.” The court asked him whether he had any questions, and he responded:  
3 “No, sir.”<sup>36</sup>

4 Petitioner’s allegation that he was not informed of his direct appeal rights until he was  
5 told by other inmates thus is completely false.

6 Indeed, the state court record reflects that the public defender filed a timely notice of  
7 appeal at 8:57 a.m. on November 21, 2002, before petitioner’s *pro se* notice of appeal was  
8 filed by the Clerk later that day at 2:16 p.m. on November 21, 2002.<sup>37</sup> The public defender  
9 thereafter pursued the appeal, filing a fast track statement in support of the appeal. Counsel  
10 sought review of the sentence for abuse of discretion and requested a remand for a  
11 resentencing by a different judge.<sup>38</sup> The fast track statement reflects that the public defender  
12 had filed the notice of appeal “at Mr. Griffin’s request.”<sup>39</sup>

13 Subsequently on state post-conviction review, the state district court rejected the  
14 corresponding claim of ineffective assistance of counsel presented to that court on the  
15 following grounds:

16 . . . Petitioner states that counsel was ineffective because  
17 he failed to inform Petitioner of his right to appeal. This Court  
18 finds that Petitioner appealed his sentence to the Nevada  
19 Supreme Court. The Nevada Supreme Court, upon review,  
upheld Petitioner’s sentence. Therefore, the Court dismisses  
Petitioner’s claim on [sic] ineffective assistance that he was  
uninformed as to an appeal.

20 #22, Ex. 66, at 4-5.

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21  
22 <sup>36</sup>#21, Ex. 21, at 9. Petitioner’s reliance in the reply upon holdings that a federal district court must  
23 inform a federal criminal defendant of his appeal rights is misplaced for a number of reasons. First, Ground  
24 1-6, as pled in the amended petition, presented a claim of ineffective assistance of counsel, not a claim of  
25 error by the state court. Second, rules applicable in federal criminal cases are not always based upon federal  
constitutional principles applicable to the state courts, and there is no federal constitutional requirement that a  
state court advise a defendant of his appeal rights. Third, in all events, the state district court in fact informed  
Griffin that he would have a right to file an appeal after the sentencing.

26 <sup>37</sup>#21, Exhs. 31 & 32.

27 <sup>38</sup>#21, Ex. 38.

28 <sup>39</sup>*Id.*, at 2.

1 The Supreme Court of Nevada affirmed the state district court's decision as to this claim  
2 on the grounds that petitioner had not demonstrated that the district court's findings were not  
3 supported by substantial evidence or were clearly wrong and that he had not demonstrated  
4 that the lower court erred as a matter of law.<sup>40</sup>

5 The state courts' rejection of the ineffective assistance claim presented in Ground 1-6  
6 was neither contrary to nor an unreasonable application of clearly established federal law.  
7 Petitioner clearly was informed of his right to appeal by the state district court, and he filed a  
8 timely appeal, both through counsel and *pro se*. He accordingly cannot conceivably establish  
9 prejudice from an alleged failure to advise and/or consult with him regarding his direct appeal  
10 rights. He was not deprived of a direct appeal through any such alleged failure to inform and  
11 consult with him as to his appeal rights.

12 The fundamental flaw in the claim presented in the amended petition in Ground 1-6 is  
13 reflected by petitioner's reliance upon *Martin v. Texas*, 737 F.2d 460 (5<sup>th</sup> Cir. 1984). Griffin  
14 relies upon *Martin* for the proposition that a failure to inform a defendant of his right to appeal  
15 results in prejudice *per se*. However, *Martin* was a case, unlike the present one, where a  
16 timely direct appeal was not filed. Moreover, unlike the present case, the defendant "was not  
17 informed of this right by the trial judge." 737 F.2d at 462. In a case, such as the present one,  
18 where (a) the defendant was informed of his right to appeal by the trial court and (b) a timely  
19 appeal in fact was filed, there not only is no *per se* prejudice from counsel's alleged failure to  
20 inform and consult with the defendant as to his appeal rights, there is no prejudice at all.

21 The state court's rejection of this claim accordingly was neither contrary to nor an  
22 unreasonable application of clearly established federal law.

23 In the federal reply, petitioner sought to present a claim for the first time in this federal  
24 action that counsel was ineffective for failing to raise a claim on direct appeal based upon  
25 alleged errors in the presentence investigation report. This is a distinct and different claim  
26 from the claim raised in the amended petition in Ground 1-6. The amended petition presented

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28 <sup>40</sup>#22, Ex. 94, at 2-3.

1 only a claim based upon a failure to inform and consult with petitioner regarding his direct  
2 appeal rights. The amended petition presented no claim that counsel was ineffective based  
3 upon a failure to raise a particular claim or claims in the direct appeal that was filed. Ground  
4 1-6 made no mention of a failure to raise a claim on direct appeal based upon alleged errors  
5 in the presentence investigation report.

6 A habeas petitioner may not raise a claim for the first time in the reply. *See, e.g.,*  
7 *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir.1994). The only way to present an  
8 additional claim is in a properly-filed amended petition. Under Rule 15(a)(2) of the Federal  
9 Rules of Civil Procedure, a petitioner can amend the petition after the respondents have filed  
10 an answer only with the respondents' written consent or by obtaining leave of court to amend.  
11 Petitioner has not presented the claim argued in the reply in a properly-filed amended petition,  
12 and the claim therefore is disregarded herein.

13 Ground 1-6 does not provide a basis for federal habeas relief.

#### 14 ***Consideration of a Certificate of Appealability***

15 Under Rule 11 of the Rules Governing Section 2254 Cases, the district court must issue  
16 or deny a certificate of appealability (COA) when it enters a final order adverse to the  
17 applicant. A district court order granting or denying a certificate of appealability does not  
18 eliminate the requirement that the petitioner must file a timely notice of appeal in order to  
19 appeal the court's judgment. A motion to reconsider the order regarding a certificate of  
20 appealability does not extend the time to appeal.

21 As to the claims rejected by the district court on the merits, under 28 U.S.C. § 2253(c),  
22 a petitioner must make a "substantial showing of the denial of a constitutional right" in order  
23 to obtain a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct.  
24 1595, 1603-04, 146 L.Ed.2d 542 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999).  
25 To satisfy this standard, the petitioner "must demonstrate that reasonable jurists would find  
26 the district court's assessment of the constitutional claim debatable or wrong." *Slack*, 529 U.S.  
27 at 484, 120 S.Ct. at 1604.

28 The Court denies a COA as to all claims, for the reasons outlined below.

1           **Ground 1-1**

2           Jurists of reason would not find the dismissal of Ground 1-1 on the merits to be  
3 debatable or wrong.

4           In Ground 1-1, petitioner alleges that he was denied effective assistance of counsel  
5 because counsel did not file a motion to hold the State to a prior unconsummated plea  
6 agreement. Petitioner maintains that the State was attempting to pressure him into pleading  
7 guilty in another case to an armed robbery that he allegedly did not commit. He alleges that,  
8 when he refused to do so, the State withdrew from the prior agreement and instead presented  
9 a proposed plea agreement that had three times as much sentencing exposure. Griffin  
10 maintains that counsel should have fought against the State’s “transparent attempt to coerce  
11 Griffin (successfully) into entering the second plea agreement.”

12           Petitioner has presented no state or federal authority tending to establish a reasonable  
13 probability that a motion to enforce the unconsummated plea agreement would have been  
14 successful. While petitioner maintains that he did not commit the armed robbery in the other  
15 case, the State had evidence tending to establish to the contrary, including a positive in-court  
16 identification by the victim. Petitioner cites no authority tending to establish that the State was  
17 required to abandon consideration of the other case in plea negotiations simply because of  
18 his self-serving denial of the other armed robbery. Nor does he cite authority tending to  
19 establish that the State was required to enter into a plea deal closing both cases at the same  
20 sentencing exposure that it previously had offered as to only one case. At bottom, he presents  
21 no authority holding that what in truth was inherent to the plea bargaining process was  
22 unconstitutionally “coercive.”

23           Petitioner further has not established a reasonable probability that a defendant in his  
24 situation would not have entered the plea and instead would have elected to go to trial but for  
25 counsel’s failure to file the motion. Petitioner himself entered the plea at the very same  
26 proceeding where the prospect of filing such a motion was discussed. If the filing of the  
27 motion were a determinative factor for him, all that he had to do was decline to enter into the  
28 plea and instruct his counsel to file the motion. Petitioner did not do that. He instead made



1 multiple affirmations during the plea colloquy confirming that his plea was entered freely and  
2 voluntarily. These declarations present a formidable barrier under *Blackledge, supra*, to a  
3 claim that counsel's failure to further pursue the issue in the short interval before Griffin  
4 accepted the plea deal affected the outcome as to petitioner's entry of a plea.

5 Reasonable jurists therefore would not find debatable or wrong this Court's conclusion  
6 that the state supreme court's rejection of this claim was neither contrary to nor an  
7 unreasonable application of clearly established federal law. See text, *supra*, at 7-16.

### 8 **Ground 1-2**

9 Jurists of reason would not find the dismissal of Ground 1-2 on the merits to be  
10 debatable or wrong.

11 In Ground 1-2, petitioner alleges that he was denied effective assistance of counsel  
12 because counsel did not object to the State's reference to the facts of his other armed robbery  
13 case at sentencing, a case that was dismissed moments later. Petitioner urges that the other  
14 armed robbery case was being dismissed because the State allegedly knew that he did not  
15 commit the offense.

16 At bottom, petitioner's underlying premise for the claim is fundamentally flawed. The  
17 other case was *not* being dismissed on the premise that Griffin did not do the acts charged.  
18 Rather, the other case was being dismissed as part of an overall plea deal in which the State  
19 agreed to dismiss the other case in exchange for petitioner's plea. Petitioner's own self-  
20 serving denials clearly did not provide a basis for barring the State from referring to the facts  
21 of the other case at sentencing, especially given Griffin's express acknowledgment in the  
22 written plea agreement that the sentencing court could consider other charges.

23 Petitioner presents no federal constitutional or state law authority tending to establish  
24 a reasonable probability that an objection by defense counsel to the State's reference to the  
25 charges in the other case would have been sustained, much less that such an objection would  
26 have changed the outcome of the sentencing proceeding.

27 Moreover, the Ninth Circuit has noted that the United States Supreme Court has not  
28 delineated a standard applicable to ineffective assistance of counsel claims in noncapital

1 sentencing cases. There accordingly is no clearly established federal law as determined by  
2 the Supreme Court in this context. *Davis, supra*.

3 Reasonable jurists therefore would not find debatable or wrong this Court's conclusion  
4 that the state supreme court's rejection of this claim was neither contrary to nor an  
5 unreasonable application of clearly established federal law. See text, *supra*, at 17-19.

6 **Ground 1-3**

7 Jurists of reason would not find the dismissal of Ground 1-3 on the merits to be  
8 debatable or wrong.

9 In Ground 1-3, petitioner alleges conclusorily that he was denied effective assistance  
10 of counsel because counsel failed to object to and correct "false information" and "errors" in  
11 the presentence investigation report (PSR).

12 The only clear error identified in the PSR at the state court evidentiary hearing was that  
13 the report detailed in the criminal history section two prior convictions but referred in the  
14 recommendation section to there being three prior convictions. The state district court made  
15 a factual finding – which was consistent with the State's argument at sentencing – that it relied  
16 upon there being only two prior convictions at the sentencing.

17 The only other, purported, error identified in the PSR was the fact that arrests on  
18 multiple charges from the same incident resulted in multiple entries in the report. Petitioner  
19 complained that his "only" 13 or 14 arrests therefore resulted in 26 entries in the report due  
20 to the multiple charges. Defense counsel did in fact ask the state district court to disregard  
21 the arrests section of the report at sentencing. The state district court made a factual finding  
22 that it did not rely upon arrests at sentencing.

23 The conclusory claim and lack of argument presented by petitioner on federal habeas  
24 review clearly fails to establish that the state courts' rejection of the corresponding claim was  
25 based upon an unreasonable determination of fact or was contrary to or an unreasonable  
26 application of clearly established federal law. The state district court expressly found that the  
27 arrests did not factor into the sentence and that the sentence was based upon petitioner  
28 having two, not three, previous convictions. Petitioner has not carried his burden of

1 demonstrating that the state district court's factual determination was an unreasonable  
2 determination of fact. The state court's factual findings thus are clothed with a presumption  
3 of correctness. In light of the state court's findings, petitioner cannot establish prejudice even  
4 if he, *arguendo*, could establish deficient performance by counsel. See also *Davis, supra* (no  
5 clearly established Supreme Court precedent delineating the standards applicable to  
6 ineffective assistance of counsel claims in noncapital sentencing cases).

7 Reasonable jurists therefore would not find debatable or wrong this Court's conclusion  
8 that the state supreme court's rejection of this claim was not based upon an unreasonable  
9 determination of fact and was neither contrary to nor an unreasonable application of clearly  
10 established federal law. See text, *supra*, at 19-22.

11 **Ground 1-4**

12 In Ground 1-4, petitioner alleges that he was denied effective assistance of counsel  
13 because counsel allegedly misled him into accepting the plea by erroneously informing him  
14 – off the record – that the State would not pursue the 180-month top end of the sentencing  
15 range but instead would make a recommendation of 24 to 60 month consecutive sentences  
16 that was discussed in prior negotiations that did not lead to a consummated plea agreement.

17 Petitioner's allegations directly contradict multiple acknowledgments by petitioner in  
18 both the written plea agreement and the plea colloquy as to, *inter alia*, his sentencing exposure  
19 under the plea deal that was consummated. Under *Blackledge, supra*, he may not accomplish  
20 what he is seeking to do here. He may not overturn an otherwise clearly valid guilty plea,  
21 accepted following a thorough plea colloquy, based upon uncorroborated allegations as to  
22 what allegedly occurred "off the record" that directly contradict his declarations to the court at  
23 the time of the plea. Petitioner's uncorroborated *post hoc* account, which flies directly in the  
24 face of his declarations to the court, does not present "the most extraordinary circumstances"  
25 that would warrant an evidentiary hearing under *Blackledge*.

26 Reasonable jurists therefore would not find debatable or wrong this Court's conclusion  
27 that the state supreme court's rejection of this claim was neither contrary to nor an  
28 unreasonable application of clearly established federal law. See text, *supra*, at 22-25.

1           **Ground 1-5**

2           In Ground 1-5, petitioner alleges that he was denied effective assistance of counsel  
3 because counsel allegedly failed to perform “investigation and defenses necessary to dismiss”  
4 his other armed robbery case before his sentencing.

5           While petitioner maintains that the dismissal of the other case was being discussed  
6 between counsel, that discussion *concerned the dismissal of the case pursuant to a plea*  
7 *bargain*. Nothing in the state court record reflects that the other armed robbery case was  
8 vulnerable to dismissal on a defense motion. The store clerk in the other armed robbery had  
9 positively identified Griffin in court as the robber, and there is no indication in the state court  
10 record that the State was considering dismissal of the case absent a plea deal.

11           Petitioner’s conclusory claim completely failed to present any specific information or  
12 defense that would have provided a basis for dismissing the other armed robbery case. The  
13 claim is speculative as well as conclusory, as it is entirely speculative as to what further – as  
14 yet unspecified – investigation would have revealed that was not known at the time and that  
15 would have resulted in the dismissal of the case.

16           Moreover, as the state district court noted, the plea agreement expressly permitted the  
17 court to consider dismissed charges, such that a dismissal would not have necessarily  
18 precluded the state district court from considering the facts of the other case at sentencing.

19           Reasonable jurists therefore would not find debatable or wrong this Court’s conclusion  
20 that the state supreme court’s rejection of this claim was neither contrary to nor an  
21 unreasonable application of clearly established federal law. See text, *supra*, at 26-28.

22           **Ground 1-6**

23           In Ground 1-6, petitioner alleges that defense counsel “failed to advise and/or consult  
24 with” him regarding his direct appeal rights such that he had to learn of his appeal rights from  
25 other inmates.

26           The allegation that petitioner was not informed of his direct appeal rights and learned  
27 of them only through other inmates is directly refuted by the record. The state district court  
28 clearly informed petitioner of his appeal rights during the plea colloquy. Timely notices of

1 appeal in any event were filed by both the public defender and petitioner, and the public  
2 defender represented petitioner on the appeal. Petitioner accordingly cannot conceivably  
3 establish prejudice from an alleged failure by counsel to advise and/or consult with him  
4 regarding his direct appeal rights. He was not deprived of a direct appeal through any such  
5 alleged failure to inform and consult with him as to his appeal rights.

6 Reasonable jurists therefore would not find debatable or wrong this Court's conclusion  
7 that the state supreme court's rejection of this claim was neither contrary to nor an  
8 unreasonable application of clearly established federal law. See text, *supra*, at 28-31.

9 Petitioner further seeks to raise a different and distinct claim for the first time herein in  
10 the federal reply alleging that counsel was ineffective for failing to raise a claim on direct  
11 appeal based upon alleged errors in the presentence investigation report. A petitioner may  
12 not raise a claim for the first time in the reply. See, e.g., *Cacoperdo, supra*.

13 A certificate of appealability therefore will be denied as to all claims.

14 IT THEREFORE IS ORDERED that the petition for a writ of habeas corpus shall be  
15 DENIED and that this action shall be DISMISSED with prejudice on the merits.

16 IT FURTHER IS ORDERED that a certificate of appealability is DENIED.

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

19 DATED: March 30, 2011.

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HOWARD D. MCKIBBEN  
United States District Judge