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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GABRIEL GONZALEZ,
Petitioner,
vs.
JIM BENEDETTI, et al.,
Respondents.

Case No. 3:10-cv-00695-HDM-VPC
ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#7), respondents' answer (#21), and petitioner's reply (#22). The court finds that relief is not warranted, and the court denies the petition.

Procedural History

In state district court, petitioner was charged with one count of trafficking in a controlled substance and one count of conspiracy to trafficking in a controlled substance. Ex. 29 (#10). After a trial, the jury found him guilty of trafficking in a controlled substance. Ex 37 (#11). The trial court entered its amended judgment of conviction on January 10, 2007. Ex. 42 (#11). Petitioner appealed. The Nevada Supreme Court affirmed on March 6, 2008. Ex. 51 (#11).

1 also testified that when petitioner took out the cocaine to give to
2 Andreozzi, petitioner dropped the bag. Williams picked the bag up
3 and handed it back to petitioner, who gave it to Andreozzi.

4 After Andreozzi walked away from the car, petitioner started
5 to drive away. The police intercepted petitioner in the parking
6 lot. They arrested petitioner, Williams, and Ordaz. They
7 recovered the pre-recorded purchase money from petitioner. They
8 also found several grams of cocaine in Ms. Ordaz's purse.

9 Williams had not been working with the police before the
10 arrest, but he agreed to provide testimony against petitioner.

11 Ordaz ultimately pleaded no contest to trafficking in a
12 controlled substance.

13 **Standard of Review**

14 Congress has limited the circumstances in which a federal
15 court can grant relief to a petitioner who is in custody pursuant
16 to a judgment of conviction of a state court.

17 An application for a writ of habeas corpus on behalf of a
18 person in custody pursuant to the judgment of a State court
19 shall not be granted with respect to any claim that was
20 adjudicated on the merits in State court proceedings unless
21 the adjudication of the claim—

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

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

29 28 U.S.C. § 2254(d). "By its terms § 2254(d) bars relitigation of
30 any claim 'adjudicated on the merits' in state court, subject only
31 to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v.
32 Richter, 131 S. Ct. 770, 784 (2011).

1 Federal habeas relief may not be granted for claims subject to
2 § 2254(d) unless it is shown that the earlier state court's
3 decision "was contrary to" federal law then clearly
4 established in the holdings of this Court, § 2254(d) (1);
5 Williams v. Taylor, 529 U.S. 362, 412 (2000); or that it
6 "involved an unreasonable application of" such law,
7 § 2254(d) (1); or that it "was based on an unreasonable
8 determination of the facts" in light of the record before the
9 state court, § 2254(d) (2).

10 Richter, 131 S. Ct. at 785. "For purposes of § 2254(d) (1), 'an
11 unreasonable application of federal law is different from an
12 incorrect application of federal law.'" Id. (citation omitted).
13 "A state court's determination that a claim lacks merit precludes
14 federal habeas relief so long as 'fairminded jurists could
15 disagree' on the correctness of the state court's decision." Id.
16 (citation omitted).

17 [E]valuating whether a rule application was unreasonable
18 requires considering the rule's specificity. The more
19 general the rule, the more leeway courts have in reaching
20 outcomes in case-by-case determinations.

21 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

22 Under § 2254(d), a habeas court must determine what arguments
23 or theories supported or, as here, could have supported, the
24 state court's decision; and then it must ask whether it is
25 possible fairminded jurists could disagree that those
26 arguments or theories are inconsistent with the holding in a
27 prior decision of this Court.

28 Richter, 131 S. Ct. at 786.

As a condition for obtaining habeas corpus from a federal
court, a state prisoner must show that the state court's
ruling on the claim being presented in federal court was so
lacking in justification that there was an error well
understood and comprehended in existing law beyond any
possibility for fairminded disagreement.

Id., at 786-87.

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1 **Discussion**

2 Grounds 1, 2 and 3 are claims of error in the trial court.
3 Petitioner did not present these claims on direct appeal. He did
4 present the claims in his state habeas corpus petition. The state
5 district court and the Nevada Supreme Court construed these claims
6 as claims of ineffective assistance of counsel. Nonetheless, the
7 court presumes that the state courts considered the merits of the
8 underlying claims. Johnson v. Williams, 133 S. Ct. 1088, 1094
9 (2013). Indeed, the state courts' analyses of whether petitioner
10 suffered any prejudice are analyses on the merits of the claims.

11 Ground 1 is a claim that petitioner is actually innocent. On
12 this issue, the Nevada Supreme Court held:

13 Fourth, appellant claimed that his appellate counsel was
14 ineffective for failing to argue that he was innocent and for
15 raising only frivolous arguments. Appellant failed to
16 demonstrate that he was prejudiced. A review of the record
17 reveals sufficient evidence to establish appellant's guilt
18 beyond a reasonable doubt, Leonard v. State, 114 Nev. 1196,
19 1209-10, 969 P.2d 288, 297 (1998), thus he failed to
20 demonstrate that a claim of innocence would have had a
21 reasonable likelihood of success on appeal. Further, he
22 failed to demonstrate that he was prejudiced by his appellate
23 counsel's failure to raise any additional claims. Therefore,
24 the district court did not err in denying this claim.

25 Ex. 71, at 4 (#12). The Supreme Court of the United States has not
26 determined whether a free-standing claim of actual innocence exists
27 in federal habeas corpus. District Attorney's Office for Third
28 Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009); Herrera v.
Collins, 506 U.S. 390, 398-417 (1993)). Without any clearly
established federal law on the issue, the Nevada Supreme Court's
determination cannot be contrary to, or an unreasonable application
of, clearly established federal law. Carey v. Musladin, 549 U.S.
70, 77 (2006). Ground 1 is without merit.

1 Ground 2 is a claim that the prosecution knowingly used
2 perjured testimony to convict petitioner. Napue v. Illinois, 360
3 U.S. 264, 269-70 (1959); Pyle v. Kansas, 317 U.S. 213, 216 (1942);
4 Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam). On this
5 issue, the Nevada Supreme Court held:

6 Third, appellant claimed that his appellate counsel was
7 ineffective for failing to argue that the State knowingly used
8 perjured testimony to convict him. Appellant failed to
9 demonstrate that his appellate counsel's performance was
10 deficient. Nothing in the record supports appellant's claim
11 that the State knew two witnesses committed perjury.
Appellant's bare and naked claims are insufficient to
demonstrate that he is entitled to relief for this claim.
12 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225
(1984). Therefore, the district court did not err in denying
this claim.

12 Ex. 71, at 4 (#12).

13 Petitioner argues that at sentencing the trial judge stated
14 that Williams and Andreozzi committed perjury. This is what the
15 judge actually said:

16 What I am telling you is that the evidence before this Court,
17 and I take judicial notice of everything that came out in the
18 trial, is that you were involved with a group of people in
19 Reno. One of those, who happened to live in Battle Mountain,
he got caught with drugs. Within the drug world, there are no
loyalties. It's a world of deception and lies and cheating
and no loyalty. The only loyalty that you have are the people
sitting in the courtroom, your family.

20 Where are your friends? Where are your friends that you were
21 involved with the drug dealing and all that? I don't see them
22 in the in courtroom. And they will never be here. They
23 abandon—they abandon those who get caught, because they know
24 that they are next and that they could be in that same
25 position. So the people that you came here with, um, you may
26 still consider your friends. But I'm telling you the way this
entire system, and it's a pretty ugly system, works. It's
like one person gets caught and it's like tag. They catch the
next person and clear on down the line. And you were it. And
that's what it is today.

27 Ex. 40, at 37-38 (#11). Petitioner takes the judge's statements
28 out of context. The judge did not state that Williams and

1 Andrezzi testified falsely. The judge expanded upon the old
2 aphorism that there is no honor among thieves.

3 Furthermore, petitioner has not proven that the testimony in
4 question was perjured. Petitioner has shown minor inconsistencies
5 between the testimony of Williams and the testimony of Andrezzi,
6 but minor inconsistencies occur often when two different people
7 testify about their own recollections of the same event. Other
8 than petitioner's own statement that Andrezzi and Williams
9 perjured themselves, nothing in the record supports that argument.
10 Even if petitioner testified at trial to a different version of
11 events, that testimony would not prove that Andrezzi and Williams
12 perjured themselves. Furthermore, the officers testified that they
13 knew before the transaction that Williams was not the drug dealer,
14 but that he was the facilitator between Andrezzi and petitioner.
15 The officers also testified that Williams was not working for them,
16 and that Williams agreed to testify against petitioner only after
17 Williams was arrested. For petitioner's claim to be true, there
18 would have to be evidence of a conspiracy between Williams and
19 Andrezzi to frame petitioner for a crime. There is no evidence of
20 such a conspiracy. Consequently, the Nevada Supreme Court
21 reasonably could have determined that the prosecution did not know
22 that it was using perjured testimony; it also reasonably could have
23 determined that petitioner had not proven that the testimony was
24 perjured. Ground 2 is without merit.

25 In ground 3, petitioner claims that the third amended
26 information did not give petitioner notice that the prosecution
27 would pursue the theory of aiding and abetting for the charge of
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1 trafficking in a controlled substance. On this issue, the Nevada
2 Supreme Court held:

3 First, appellant claimed that his trial counsel was
4 ineffective for failing to argue that the State did not
5 provide notice of criminal liability under an aider and
6 abettor theory. Appellant cannot demonstrate that his trial
7 counsel was deficient because, in the third amended
8 information, the State charged appellant with trafficking in a
9 controlled substance and listed NRS 195.020, which states that
10 one who aids or abets shall be punished as a principal.
11 Appellant failed to demonstrate prejudice because the evidence
12 showed that he personally sold the cocaine to the police
13 informant. Therefore, the district court did not err in
14 denying this claim. . . .

15 Second, appellant claimed that his appellate counsel was
16 ineffective for failing to argue that the State did not
17 provide notice of criminal liability under an aider and
18 abettor theory. As discussed previously, the State charged
19 appellant as an aider and abettor in the third amended
20 information. Accordingly, appellant failed to demonstrate
21 that the underlying issue had a reasonable likelihood of
22 success on appeal. Therefore, the district court did not err
23 in denying this claim.

24 Ex. 71, at 2, 4 (#12). Count 1 of the third amended information
25 does give petitioner notice of the theory of aiding and abetting.
26 Ex. 29, at 1 (#10). Ground 3 has no support in the record. The
27 Nevada Supreme Court's decision was not contrary to, or an
28 unreasonable application of, clearly established federal law.

Ground 4 contains three claims of ineffective assistance of
trial counsel. "[T]he right to counsel is the right to the
effective assistance of counsel." McMann v. Richardson, 397 U.S.
759, 771 & n.14 (1970). A petitioner claiming ineffective
assistance of counsel must demonstrate (1) that the defense
attorney's representation "fell below an objective standard of
reasonableness," Strickland v. Washington, 466 U.S. 668, 688
(1984), and (2) that the attorney's deficient performance
prejudiced the defendant such that "there is a reasonable

1 probability that, but for counsel's unprofessional errors, the
2 result of the proceeding would have been different," id. at 694.
3 "[T]here is no reason for a court deciding an ineffective
4 assistance claim to approach the inquiry in the same order or even
5 to address both components of the inquiry if the defendant makes an
6 insufficient showing on one." Id. at 697.

7 Strickland expressly declines to articulate specific
8 guidelines for attorney performance beyond generalized duties,
9 including the duty of loyalty, the duty to avoid conflicts of
10 interest, the duty to advocate the defendant's cause, and the duty
11 to communicate with the client over the course of the prosecution.
12 466 U.S. at 688. The Court avoided defining defense counsel's
13 duties so exhaustively as to give rise to a "checklist for judicial
14 evaluation of attorney performance. . . . Any such set of rules
15 would interfere with the constitutionally protected independence of
16 counsel and restrict the wide latitude counsel must have in making
17 tactical decisions." Id. at 688-89.

18 Review of an attorney's performance must be "highly
19 deferential," and must adopt counsel's perspective at the time of
20 the challenged conduct to avoid the "distorting effects of
21 hindsight." Strickland, 466 U.S. at 689. A reviewing court must
22 "indulge a strong presumption that counsel's conduct falls within
23 the wide range of reasonable professional assistance; that is, the
24 defendant must overcome the presumption that, under the
25 circumstances, the challenged action 'might be considered sound
26 trial strategy.'" Id. (citation omitted).

27 The Sixth Amendment does not guarantee effective counsel per
28 se, but rather a fair proceeding with a reliable outcome. See

1 Strickland, 466 U.S. at 691-92. See also Jennings v. Woodford, 290
2 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration
3 that counsel fell below an objective standard of reasonableness
4 alone is insufficient to warrant a finding of ineffective
5 assistance. The petitioner must also show that the attorney's
6 sub-par performance prejudiced the defense. Strickland, 466 U.S.
7 at 691-92. There must be a reasonable probability that, but for
8 the attorney's challenged conduct, the result of the proceeding in
9 question would have been different. Id. at 694. "A reasonable
10 probability is a probability sufficient to undermine confidence in
11 the outcome." Id.

12 Establishing that a state court's application of Strickland
13 was unreasonable under § 2254(d) is all the more difficult.
14 The standards created by Strickland and § 2254(d) are both
15 "highly deferential," . . . and when the two apply in tandem,
16 review is "doubly" so The Strickland standard is a
17 general one, so the range of reasonable applications is
18 substantial. Federal habeas courts must guard against the
19 danger of equating unreasonableness under Strickland with
20 unreasonableness under § 2254(d). When § 2254(d) applies, the
21 question is not whether counsel's actions were reasonable. The
22 question is whether there is any reasonable argument that
23 counsel satisfied Strickland's deferential standard.

19 Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citations
20 omitted).

21 The court uses respondents' designations for the claims of
22 ineffective assistance. In ground 4(1), petitioner argues that
23 counsel failed to question Williams or Andreozzi about their prior
24 criminal records. On this issue, the Nevada Supreme Court held:

25 Third, appellant claimed that his trial counsel was
26 ineffective for failing to impeach M. Williams' testimony with
27 his criminal history. Appellant cannot demonstrate that his
28 trial counsel's performance was deficient because counsel
attempted to question the witness in this area, but the
district court precluded questioning of this nature due to the

1 age of the conviction. See NRS 50.095(2). Therefore, the
2 district court did not err in denying this claim.

3 Ex. 71, at 2-3 (#12). The transcript shows that counsel did try to
4 cross-examine Williams about a prior felony conviction. The trial
5 court did not allow the questioning because the prior conviction
6 was too old to qualify under Nev. Rev. Stat. § 50.095. Ex. 34, at
7 37-40 (#11). Counsel could have done nothing else. Counsel also
8 cross-examined Andreozzi on the one item that would be the most
9 impeaching: Andreozzi's deal with police not to be charged in
10 exchange for setting up the transaction. Ex. 33, at 54 (#11). The
11 court agrees with respondents that petitioner has not presented any
12 evidence that Andreozzi had a criminal history that would have been
13 admissible pursuant to Nev. Rev. Stat. § 50.095. The Nevada
14 Supreme Court applied Strickland reasonably.

15 In ground 4(2), petitioner claims that counsel failed to call
16 Janet Ordaz to testify on petitioner's behalf. On this issue, the
17 Nevada Supreme Court ruled:

18 Second, appellant claimed that his trial counsel was
19 ineffective for failing to call J. Ordaz to testify because
20 she could have provided an alibi. Appellant failed to
21 demonstrate that he was prejudiced. As Ordaz was in the
22 vehicle with appellant during the drug transaction and
23 appellant was seen by numerous police officers participating
24 in the sale of cocaine, appellant failed to demonstrate that
25 she could have provided an alibi for appellant. Given the
26 evidence produced at trial, appellant failed to demonstrate a
27 reasonable probability that the outcome of the trial would
28 have been different had Ordaz testified at his trial.
Therefore, the district court did not err in denying this
claim.

25 Ex. 71, at 2 (#12). To the extent that petitioner claimed that
26 Ordaz could have provided an alibi, the Nevada Supreme Court was

1 correct.¹ Police officers found both petitioner and Ordaz in the
2 car. Ordaz could not have testified that petitioner was elsewhere.
3 However, petitioner alleged in ground 4 of his state habeas corpus
4 petition, and he alleges in ground 4 of his federal petition, that
5 Ordaz was "an eyewitness and/or alibi witness." The Nevada Supreme
6 Court's decision does not address counsel's decision not to call
7 Ordaz for her eyewitness testimony of events. The state district
8 court did address that contention. It held:

9 Here, Petitioner fails to overcome the presumption that trial
10 counsel's decision was not based upon prudent trial strategy.
11 The record demonstrates that Ms. Ordaz was with petitioner
12 when he provided cocaine to the cooperative source. Upon
13 arresting Ms. Ordaz and Petitioner, detectives found several
14 grams of cocaine in Ms. Ordaz's purse. This discovery
15 ultimately resulted in Ms. Ordaz being convicted of
16 Trafficking in a Controlled substance. These facts constitute
17 reasonable grounds for trial counsel not to call Ms. Ordaz to
18 testify. Rather than risk the jury imputing Ms. Ordaz's guilt
19 to Petitioner, trial counsel made the tactical decision not to
20 call her to the stand. Accordingly, Petitioner's trial
21 counsel did not provide ineffective assistance of counsel.

22 Ex. 64, at 5-6 (#12). The court presumes that the Nevada Supreme
23 Court rejected petitioner's claims for the same reason. See
24 Williams, 133 S. Ct. at 1094. Counsel's strategy was to argue that
25 Williams actually was the trafficker, and that the police charged
26 the wrong man with the more serious crime. That strategy would
27 have become more difficult if the jury learned that petitioner's
28 girlfriend, not Williams, was in possession of cocaine.
Consequently, the state-court determination was a reasonable
application of Strickland.

¹Perhaps petitioner was using the term "alibi" incorrectly, to mean that Ordaz would have testified that petitioner was not the person who sold cocaine to Andreoizzi.

1 In ground 4(3), petitioner claims counsel did not object to
2 the theory of aiding and abetting because the third amended
3 information did not put him on notice of that theory. The Nevada
4 Supreme Court determined that this claim lacked merit because the
5 third amended information did put petitioner on notice of the
6 theory of aiding and abetting. Ex. 71, at 2, 4 (#12).² The Nevada
7 Supreme Court's determination that counsel did not perform
8 deficiently was a reasonable application of Strickland.

9 **Conclusion**

10 To appeal the denial of a petition for a writ of habeas
11 corpus, Petitioner must obtain a certificate of appealability,
12 after making a "substantial showing of the denial of a
13 constitutional right." 28 U.S.C. §2253(c).

14 Where a district court has rejected the constitutional claims
15 on the merits, the showing required to satisfy §2253(c) is
16 straightforward: The petitioner must demonstrate that
reasonable jurists would find the district court's assessment
of the constitutional claims debatable or wrong.

17 Slack v. McDaniel, 529 U.S. 473, 484 (2000). After reviewing its
18 decision, the court concludes that reasonable jurists would not
19 find its conclusions to be debatable or wrong. The court will not
20 issue a certificate of appealability.

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28 ²The court has quoted that decision in its discussion of
ground 3, above.

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IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#7) is **DENIED**. The clerk of the court shall enter judgment accordingly.

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

DATED: March 6, 2014.



HOWARD D. MCKIBBEN
United States District Judge