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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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ROBERT M. REIGER,

Case No. 3:12-cv-00218-MMD-VPC

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Petitioner,

ORDER

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v.

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DWIGHT NEVEN, *et al.*,

13

Respondents.

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Before the Court for decision is a habeas corpus petition under 28 U.S.C. § 2254 brought by Robert M. Reiger. (ECF No. 15-1.)

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I. PROCEDURAL BACKGROUND¹

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Reiger seeks habeas relief from a judgment of conviction entered in the Eighth Judicial District Court in Clark County, Nevada. In February 2007, after a two-day trial, a jury found Reiger guilty of trafficking in a controlled substance and possession of a controlled substance with the intent to sell. At sentencing, the state district court adjudicated Reiger a habitual offender and, with respect to the trafficking count, imposed a sentence of life in prison with parole eligibility after serving ten years. With respect to the possession count, the court imposed a maximum term of 180 months, with parole eligibility beginning after a minimum term of 60 months, to be served concurrently with the other sentence.

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¹This procedural background is derived from the exhibits provided by respondents at ECF Nos. 31-34 and this Court's own docket.

1 Reiger appealed. In October 2008, the Nevada Supreme Court issued an order
2 affirming the convictions.

3 In October 2009, with the assistance of retained counsel, Reiger filed a post-
4 conviction petition for a writ of habeas corpus in the state district court. After substituting
5 himself in place of his attorney, he filed a pro per document entitled “Memorandum of
6 Points and Authorities in Support of Petitioner’s Amended Petition for Writ of Habeas
7 Corpus and an Evidentiary Hearing.” In the memorandum, petitioner raised additional
8 claims. In August 2010, the state district judge entered an order denying the petition.

9 Reiger appealed. In March 2012, the Nevada Supreme Court issued an order
10 affirming the denial of petitioner’s post-conviction habeas petition.

11 Reiger sent his original federal habeas petition to this Court in April 2012. In
12 November 2012, this Court granted Reiger leave to file an amended petition. In February
13 2014, this Court granted, in part, respondents’ motion to dismiss and dismissed Grounds
14 Ten, Eleven, and Twelve as untimely, and portions of Ground Six as procedurally
15 defaulted. In May 2014, respondents filed their answer, addressing the merits of Reiger’s
16 remaining habeas claims. Reiger filed his reply in July 2014.

17 **II. STANDARDS OF REVIEW**

18 This action is governed by the Antiterrorism and Effective Death Penalty Act
19 (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

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

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

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

27 28 U.S.C. § 2254(d).

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1 A decision of a state court is “contrary to” clearly established federal law if the state
2 court arrives at a conclusion opposite that reached by the Supreme Court on a question
3 of law or if the state court decides a case differently than the Supreme Court has on a set
4 of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An
5 “unreasonable application” occurs when “a state-court decision unreasonably applies the
6 law of [the Supreme Court] to the facts of a prisoner’s case.” *Id.* at 409. “[A] federal habeas
7 court may not “issue the writ simply because that court concludes in its independent
8 judgment that the relevant state-court decision applied clearly established federal law
9 erroneously or incorrectly.” *Id.* at 411.

10 The Supreme Court has explained that “[a] federal court’s collateral review of a
11 state-court decision must be consistent with the respect due state courts in our federal
12 system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a
13 ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-
14 court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773
15 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*,
16 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination that a claim lacks
17 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
18 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011)
19 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has
20 emphasized “that even a strong case for relief does not mean the state court’s contrary
21 conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003));
22 *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard
23 as “a difficult to meet and highly deferential standard for evaluating state-court rulings,
24 which demands that state-court decisions be given the benefit of the doubt”) (internal
25 quotation marks and citations omitted).

26 “[A] federal court may not second-guess a state court’s fact-finding process unless,
27 after review of the state-court record, it determines that the state court was not merely
28 wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004);

1 *see also Miller-El*, 537 U.S. at 340 (“[A] decision adjudicated on the merits in a state court
2 and based on a factual determination will not be overturned on factual grounds unless
3 objectively unreasonable in light of the evidence presented in the state-court proceeding,
4 § 2254(d)(2).”). Because *de novo* review is more favorable to the petitioner, federal courts
5 can deny writs of habeas corpus under § 2254 by engaging in *de novo* review rather than
6 applying the deferential AEDPA standard. *Berghuis v. Thompkins*, 560 U.S. 370, 390
7 (2010).

8 **III. DISCUSSION**

9 **A. Ground One**

10 In Ground One, Reiger alleges that his constitutional right to due process was
11 violated because there was insufficient evidence presented at trial to find him guilty of
12 trafficking in a controlled substance. Specifically, he alleges that the State failed to
13 present evidence to prove beyond a reasonable doubt that the quantity of
14 methamphetamine in his possession was 28 grams or more.²

15 At trial, a forensic scientist for the Las Vegas Metropolitan Police Department
16 (“LVMPD”) testified about testing and weighing the substances in question. (ECF No. 32-
17 7 at 14-27.)³ According to her testimony, one package (Exhibit 1-B-3) contained a mixture
18 of methamphetamine and dimethyl sulfone, a cutting agent, and weighed 15.23 grams.⁴
19 (*Id.* at 22-24.) Eleven other packages (Exhibit 1-B) weighed a total of 61.19 grams. *Id.* at
20 24-25. With respect to those 11 packages, the forensic scientist testified that 9 of them
21 tested positive for methamphetamine and that she only tested 9 of them because,

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24 ²While possession of 4 grams is sufficient to support a felony trafficking conviction
25 under Nevada law, 28 grams or more is the quantity necessary for a category A felony
conviction and the amount alleged by the State in Reiger’s case. See NRS § 453.3385.

26 ³Citations to page numbers for documents on this Court’s electronic docket are
based on CM/ECF pagination.

27 ⁴The phrase “28 grams or more” in NRS § 453.3385 “refers to the aggregate weight
28 of the entire mixture rather than the weight of the controlled substance that is contained
in the mixture.” *Sheriff, Humboldt Cty. v. Lang*, 763 P.2d 56, 59 (Nev. 1988).

1 according to the LVMPD's statistical approach to analysis, that number was sufficient to
2 establish that all 11 contained methamphetamine. *Id.*

3 Reiger argues that, without evidence that the two untested packages contained
4 methamphetamine or that the weight of the nine tested packages exceeded 12 grams,
5 the State failed to prove that the total amount of methamphetamine in his possession
6 exceeded 28 grams.

7 The Nevada Supreme Court did not explain its reasons for rejecting Reiger's
8 sufficiency of evidence claim. (ECF No. 33-7 at 2 n.1.) Even so, this Court must presume
9 that the state supreme court adjudicated his federal law claim on the merits for the
10 purposes of 28 U.S.C. § 2254(d). *See Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013)
11 ("When a state court rejects a federal claim without expressly addressing that claim, a
12 federal habeas court must presume that the federal claim was adjudicated on the
13 merits.").

14 The standard used by the federal habeas court to test whether sufficient evidence
15 supports a state conviction is the "rational factfinder" standard established in *Jackson v.*
16 *Virginia*, 443 U.S. 307 (1979). *Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991). Under
17 that standard, the court inquires as to "whether, after viewing the evidence in the light
18 most favorable to the prosecution, any rational trier of fact could have found the essential
19 elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (citation
20 omitted). And because this Court must review the Nevada Supreme Court's sufficiency
21 of evidence determination under AEDPA, "there is a double dose of deference that can
22 rarely be surmounted." *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011). That means
23 that even if this Court "think[s] the state court made a mistake," the petitioner is not entitled
24 to habeas relief unless the state court's application of the *Jackson* standard was
25 "objectively unreasonable." *Id.*

26 Here, Reiger's argument would, contrary to the *Jackson* standard, require this
27 Court to view the evidence in the light most favorable to the defense, not the prosecution.
28 Beyond that, the argument is premised on the extremely unlikely scenario that (1) the

1 LVMPD scientist happened to omit from testing the only two (out of 11) packages that did
2 not contain methamphetamine and (2) those two packages outweighed the nine tested
3 packages by a factor of nearly four to one. Certainly, a rational factfinder could find
4 beyond a reasonable doubt that the nine tested packages totaled at least 12.78 grams
5 (i.e. enough to total more than 28 grams when combined with Exhibit 1-B-3), when all
6 eleven packages totaled 61.19 grams.

7 Because Reiger falls well short of satisfying the *Jackson* standard, Ground One is
8 denied.⁵

9 **B. Ground Two**

10 In Ground Two, Reiger claims that he received ineffective assistance of counsel,
11 in violation of his constitutional rights, due to counsel's failure to challenge the trial
12 testimony of the LVMPD forensic scientist. In particular, Reiger argues that effective
13 counsel would have objected to her testimony based on the State's failure to comply with
14 NRS § 174.234(2), which imposed notice requirements when a party intended to call an
15 expert witness in a criminal case,⁶ and would have impeached her testimony with
16 inconsistent testimony from a different State's expert at Reiger's preliminary hearing. With
17 respect to the latter, the State's expert testified at the preliminary hearing that his test of
18 the package later admitted as Exhibit 1-B-3 at trial did not indicate the presence of
19 methamphetamine. (ECF No. 31-13 at 10-11.)

20 Ineffective assistance of counsel claims are governed by *Strickland v. Washington*,
21 466 U.S. 668 (1984). Under *Strickland*, a petitioner must satisfy two prongs to obtain
22 habeas relief — deficient performance by counsel and prejudice. 466 U.S. at 687. To

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24 ⁵Reiger also claims that the performance of his trial and appellate counsel fell
25 below constitutional standards due to their failure to raise the sufficiency of evidence
26 argument he raises in Ground One. Given the implausibility of the argument, counsel's
27 failure to raise it was not objectively unreasonable under the *Strickland* standard
28 discussed below.

⁶The Nevada Supreme Court has determined that NRS § 174.234 is
unconstitutional to the extent it requires a defendant to disclose expert witnesses but does
not require the State to reciprocate by disclosing expert rebuttal witnesses. *Grey v. State*,
178 P.3d 154, 160 (Nev. 2008),

1 meet the performance prong, a petitioner must demonstrate that his counsel's
2 performance was so deficient that it fell below an "objective standard of reasonableness."
3 *Id.* at 688. As to the prejudice prong, the court "must ask if the defendant has met the
4 burden of showing that the decision reached would reasonably likely have been different
5 absent [counsel's] errors." *Strickland*, 466 U.S. at 696. Put another way, a habeas
6 petitioner "must show that there is a reasonable probability that, but for counsel's
7 unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

8 In addressing Reiger's ineffective assistance of counsel ("IAC") claims in his state
9 post-conviction proceeding, the Nevada Supreme Court correctly identified *Strickland* as
10 the governing standard. (ECF No. 34-4 at 2-3.) The Nevada Supreme Court addressed
11 the claim contained in Ground Two as follows:

12 [A]ppellant claimed that trial counsel was ineffective for failing to
13 object to the State's failure to properly provide notice of the forensic scientist
14 pursuant to NRS 174.234(2). Appellant failed to demonstrate that trial
15 counsel's performance was deficient or that he was prejudiced as he failed
16 to demonstrate any bad faith on the part of the State. See NRS
17 174.234(3)(b) (providing that the court should prohibit an expert from
18 testifying if the court determines that the party acted in bad faith by not
19 disclosing the information required pursuant to NRS 174.234(2)). The
20 record indicates that the first forensic chemist to analyze the drugs was
21 unavailable to testify. The State informed the court and opposing counsel
22 that a different forensic chemist would be analyzing the drugs and testifying
23 at trial. Therefore, we conclude that the district court did not err in denying
24 this claim.

19 *Id.* at 6.

20 This Court is bound by Nevada Supreme Court's interpretation of NRS §
21 174.234(2). See *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). The Nevada Supreme
22 Court did not specifically address counsel's failure to exploit the alleged discrepancy
23 between the preliminary hearing testimony and the trial testimony. Again, this Court must
24 nonetheless presume that the state court adjudicated, and rejected, that aspect of the
25 claim on the merits for the purposes of § 2254(d). See *Johnson*, 133 S. Ct. at 1096. Even
26 reviewed *de novo*, however, the claim falls short of warranting habeas relief.

27 The State's expert at the preliminary hearing also testified that he tested all eleven
28 of the packages later admitted at trial as Exhibit 1-B. ECF No. 31-13 at 10, 21. According

1 to his testimony, all the packages tested positive for methamphetamine and weighed a
2 total of 61.78 grams. *Id.* Because this testimony and the report on which it was based
3 established the presence of more than 28 grams of methamphetamine, even without
4 including the package in dispute, counsel was not ineffective by not using those materials
5 to impeach the trial testimony of the LVMPD forensic scientist. For the same reason,
6 Reiger cannot establish that, but for counsel's omission, there is a reasonable probability
7 that his trial would have resulted in a more favorable outcome.

8 Ground Two is denied.

9 **C. Ground Three**

10 In Ground Three, Reiger alleges his constitutional right to due process was violated
11 by virtue of the trial court's failure to include his proposed language in several jury
12 instructions. At trial, his counsel asked to add the following language to four instructions
13 (Instructions 4, 5, 7, and 9):

14 That if the State has failed to prove beyond a reasonable doubt that
15 the defendant did knowingly and intentionally sell or was knowingly and
16 intentionally in actual or constructive possession of a Schedule 1 controlled
substance or any mixture which contains methamphetamine you must find
the defendant not guilty of trafficking in a controlled substance.

17 (ECF No. 32-7 at 3.)

18 The language was not included in the instructions issued to the jury. (ECF No.
19 32-1 at 5-6, 8, 10.)

20 The Nevada Supreme Court rejected, without discussion, the claim contained in
21 Ground Three. (ECF No. 33-7 at 2 n.1.) Because no U.S. Supreme Court case directly
22 addresses whether a constitutional violation may arise from a trial court's refusal to issue
23 a jury instruction proposed by the defense, it cannot be said that the Nevada Supreme
24 Court's decision is not entitled to deference under 28 U.S.C. § 2254(d). *See Carey v.*
25 *Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court regarding
26 the [issue presented] here, it cannot be said that the state court unreasonabl[y] appli[ed]
27 clearly established Federal law."").

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1 Moreover, “[a] defendant is not entitled to any particular form of instruction, nor is
2 he entitled to an instruction that merely duplicates what the jury has already been told.”
3 *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992). The jury at Reiger’s
4 trial was specifically instructed throughout the instructions that the State must prove his
5 guilt “beyond a reasonable doubt.” (ECF No. 32-1 at 7, 9, 11, 13.) The jury was also
6 instructed that it had to acquit: “If you have a reasonable doubt as to the guilt of the
7 Defendant, he is entitled to a verdict of not guilty.” (*Id.* at 13.) Moreover, the instructions
8 that contain the elements of the two offenses at issue—possession of a controlled
9 substance with intent to sell and possession of a controlled substance—instruct the jury
10 that a defendant is guilty “if each of the [] elements are proved.” (ECF No. 32-1 at 6, 10
11 (Instructions 5 and 9).) It was thus clear that all elements would have to be established
12 for the jury to find guilt. Because the proposed instructions were redundant and potentially
13 confusing, the state trial court did err by not including them in the set of instructions issued
14 to the jury.

15 Ground Three is denied.

16 **D. Ground Four**

17 In Ground Four, Reiger claims that his *constitutional* rights were violated as a result
18 of the state trial court’s refusal to dismiss a juror who had an out-of-court contact with
19 someone associated with him (Reiger). On the second day of Reiger’s two-day trial, the
20 court was notified that someone had communicated with a juror about the case while the
21 juror was using the restroom. (ECF No. 32-4 at 15-22.) The court questioned the juror
22 about the incident and allowed both counsel to also ask questions. (*Id.*)

23 The juror related that a very brief exchange occurred, during which the person
24 disparaged the testimony of an important eye-witness for the State (Kelly Souther). (*Id.*)
25 The juror informed the court that he did not believe the incident would influence his ability
26 to be fair and impartial. (*Id.*) The juror also noted that he recognized the person as
27 someone who had been sitting in the back of the courtroom and speculated that he was
28 related to Reiger. (*Id.*) The court subsequently ascertained, outside the presence of the

1 juror, that the person was Reiger's brother and ordered him removed from the courthouse.
2 (*Id.* at 23-25.)

3 The Nevada Supreme Court rejected, without discussion, the claim contained in
4 Ground Four. (ECF No. 33-7 at 2 n.1.) In *Mattox v. United States*, 146 U.S. 140 (1892),
5 the Supreme Court held that “[p]rivate communications, possibly prejudicial, between
6 jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden,
7 and invalidate the verdict, at least unless their harmlessness is made to appear.” *Mattox*,
8 146 U.S. at 150. In *Remmer v. United States*, 347 U.S. 227 (1954), the Supreme Court
9 reversed a conviction under *Mattox* when it was shown that during the trial someone had
10 told the jury foreman that he could profit by acquitting the defendant. *Remmer*, 347 U.S.
11 at 228. The Court in *Remmer* held that *Mattox*'s “presumption is not conclusive, but the
12 burden rests heavily upon the Government to establish, after notice to and hearing of the
13 defendant, that such contact with the juror was harmless to the defendant.” *Id.* at 229.

14 The Supreme Court has also recognized, however, that “it is virtually impossible
15 to shield jurors from every contact or influence that might theoretically affect their vote.”
16 *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Thus, the Ninth Circuit has held that, when
17 an unauthorized communication with a juror was “*de minimis*,” “the defendant must show
18 that the communication could have influenced the verdict before the burden of proof shifts
19 to the prosecution.” *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir.
20 2004). A communication is possibly prejudicial — i.e., not *de minimis*, if it “raises a risk of
21 influencing the verdict.” *Id.* at 697.

22 The court in *Caliendo* identified the factors to be considered in making that
23 determination:

24 Whether an unauthorized communication between a juror and a third
25 party concerned the case is but one factor in determining whether the
26 communication raised a risk of influencing the verdict. Other factors may
27 include the length and nature of the contact, the identity and role at trial of
28 the parties involved, evidence of actual impact on the juror, and the
possibility of eliminating prejudice through a limiting instruction. In weighing
these factors we generally accord some deference to the findings of the trial
judge, who is in the best position to determine whether possibly prejudicial

1 misconduct took place and, if so, whether the government clearly
2 established harmlessness.

3 *Caliendo*, 365 F.3d at 697–98 (citation omitted).

4 Here, the communication concerned the case. However, it was very brief and,
5 because Reiger’s brother was already in the bathroom when the juror walked in (ECF No.
6 32-4 at 17), appears to have been coincidental. In addition, the juror terminated the
7 conversation when Reiger’s brother mentioned the witness (*Id.* at 18) and reported the
8 contact to the bailiff, as previously instructed to do by the court. (*Id.* at 19.) Jurors were
9 instructed to disregard anything they saw or heard outside the courtroom and base their
10 verdict only on evidence admitted at trial. (ECF No. 32-1 at 15.) The trial judge was
11 satisfied, based on the juror’s description of the incident and his assurances of
12 impartiality, that the juror should not be discharged. That finding is entitled to deference.

13 Based on the foregoing, this Court concludes that the unauthorized contact was
14 *de minimis* and Reiger has not shown that communication could have influenced the
15 verdict. Accordingly, the Nevada Supreme Court’s decision to reject the claim was not an
16 unreasonable application of Supreme Court precedent, nor was it based on an
17 unreasonable determination of the facts.

18 Ground Four is denied.

19 **E. Ground Five**

20 In Ground Five, Reiger alleges that his constitutional rights were violated due to
21 several instances of judicial misconduct by the trial judge. He cites to remarks by the trial
22 judge that he claims to have ridiculed the defense. (ECF No. 32-2 at 30-31, 46; ECF No.
23 32-3 at 10, 19; ECF No.32-8 at 8.) He also cites to the trial judge’s repeated
24 admonishments for defense counsel to “have a seat” after ruling upon his objections.
25 (ECF No. 32-2 at 30-31, 46; ECF No. 32-7 at 40; ECF No. 32-8 at 15, 22.)

26 The Due Process Clause guarantees a criminal defendant the right to a fair and
27 impartial judge. *See In re Murchison*, 349 U.S. 133, 136 (1955). A claim of judicial
28 misconduct by a state judge in the context of federal habeas review does not simply

1 require that the federal court determine whether the state judge committed judicial
2 misconduct; rather, the question is whether the state judge's behavior "rendered the trial
3 so fundamentally unfair as to violate federal due process under the United States
4 Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995) (citations omitted). To
5 succeed on a judicial bias claim, a petitioner must "overcome a presumption of honesty
6 and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).
7 "In the absence of any evidence of some extrajudicial source of bias or partiality, neither
8 adverse rulings nor impatient remarks are generally sufficient to overcome the
9 presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or
10 even hostile to, counsel, the parties, or their cases.'" *Larson v. Palmateer*, 515 F.3d 1057,
11 1067 (9th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Indeed,
12 bias can "almost never" be demonstrated solely on the basis of a judicial ruling. *Liteky*,
13 510 U.S. at 555.

14 The Nevada Supreme Court addressed the allegations in Ground Five in deciding
15 Reiger's direct appeal. (ECF No. 33-7.) The state supreme court recounted the conduct
16 at issue and agreed that it "raise[d] concerns under the Nevada Code of Judicial Conduct
17 Canon 3B, which requires judges to be 'patient, dignified and courteous' when interacting
18 with counsel and litigants." (*Id.* at 4-6.) Analogizing Reiger's case to *Oade v. State*, 960
19 P.2d 336 (Nev. 1998), a case in which it reversed a conviction due to similar judicial
20 conduct, the Nevada Supreme Court stated as follows:

21 First, despite similarities in attitude and tone, unlike the district court
22 in *Oade*, the district court in this case did not resort to fines to punish
23 defense counsel's perceived infractions. Neither did it repeatedly call for
24 decorum in the courtroom, which would imply that such was not being kept,
25 or undermine the fairness of Reiger's trial by commenting on the merits of
26 Reiger's defense in front of the jury. Second, the record reveals that the
27 district court's exasperated tone was animated out of a concern for
28 expeditiously concluding Reiger's trial rather than any true animus for the
defense. Third, since the evidence against Reiger — including Souther's
eyewitness testimony as well as the testimony of the four responding
officers and the State's forensic chemist — was strong, we conclude that
the conduct of the district court did not adversely impact the jury's verdict.
Thus, although inappropriate at times, we conclude that the district court's
conduct did not constitute plain error.

1 (*Id.* at 6-7 (footnote omitted).)

2 While the Nevada Supreme Court premised its decision entirely on state law, the
3 standards it employed in denying relief were no less protective of Reiger's rights (and
4 perhaps more so) than the federal standards discussed above. In addition, the court's
5 findings of fact were reasonable in light of evidence presented in the state court
6 proceeding. Thus, even in the absence of citation to federal law, this Court must
7 nonetheless defer to the Nevada Supreme Court's decision under § 2254(d) because
8 neither the reasoning nor the result of the decision contradicts U.S. Supreme Court
9 precedent. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (holding that state court is not
10 required to cite U.S. Supreme Court cases, or even be aware of them, to avoid its decision
11 being "contrary to" U.S. Supreme Court precedent).

12 Ground Five is denied.

13 **F. Ground Six**

14 In Ground Six, Reiger alleges that he received ineffective assistance of counsel,
15 in violation of his constitutional rights, because his counsel failed to impeach the
16 testimony of a police officer (Officer Barrera) regarding the location of Viagra bottles found
17 in Reiger's possession. At trial, Officer Barrera testified that sample bottles of Viagra were
18 among the contents of a purple Crown Royal bag that, according to other testimony, was
19 discarded by Reiger as he drove through a car wash. (ECF No. 32-5 at 32.) He further
20 testified that, according to police records, the police impounded 24 bottles of Viagra. (*Id.*
21 at 33.) Reiger contends that effective counsel would have impeached this testimony with
22 Officer Barrera's written report, which stated that the bottles of Viagra were recovered
23 from inside Reiger's van, not the Crown Royal bag.

24 The Nevada Supreme Court addressed this IAC claim as follows:

25 [A]ppellant claimed that trial counsel [A] was ineffective for failing to
26 impeach Officer Barrera with his arrest report, which contradicted his
27 testimony about where the Viagra was found. Appellant failed to
28 demonstrate that he was prejudiced as any impeachment on the alleged
discrepancy regarding the location of the 24 bottles of Viagra did not have
a reasonable probability of altering the outcome of trial — guilty verdicts for

1 trafficking in a controlled substance (methamphetamine) and possession of
2 a controlled substance with intent to sell (heroin). Therefore, we conclude
that the district court did not err in denying this claim.

3 (ECF No. 34-4 at 5-6.)

4 This was a reasonable application of the *Strickland* standard. In addition, as
5 respondents point out, Officer Barrera's brief references were the only instances of a
6 witness mentioning Reiger's possession of Viagra. Any impeachment value to be had
7 from cross-examining Officer Barrera regarding the location of the bottles would have
8 likely been outweighed by the detrimental impact of focusing the jury's attention on the
9 fact that Reiger was in possession of several sample bottles of Viagra. Thus, counsel did
10 not perform below an objective standard of reasonableness by not impeaching Officer
11 Barrera with his arrest report.

12 Ground Six is denied.

13 **G. Ground Seven**

14 In Ground Seven, Reiger alleges that he received ineffective assistance of
15 counsel, in violation of his constitutional rights, because his counsel failed to adequately
16 cross-examine eye-witness Souther. Reiger contends that Souther's testimony contained
17 inconsistencies with regard to what he observed when the police stopped Reiger prior to
18 Reiger's arrest. He also contends that Souther's testimony about the stop conflicted with
19 the testimony of one of the police officers (Officer Tlockowski). Reiger argues that
20 effective counsel would have cross-examined Souther on these points.

21 The Nevada Supreme Court addressed this IAC claim as follows:

22 [A]ppellant claimed that trial counsel failed to adequately cross-
23 examine K. Souther about inconsistencies in his testimony about the "stop."
Appellant failed to demonstrate that he was prejudiced because he failed to
24 demonstrate that any further questions regarding the "stop" would have had
25 a reasonable probability of altering the outcome at trial. Trial counsel
exhaustively questioned Souther about his story and his ability to observe
26 the bag being thrown from the van. Therefore, we conclude that the district
court did not err in denying this claim.

27 (ECF No. 34-4 at 4.)

28 ///

1 Here again, the Nevada Supreme Court was reasonable in its application of the
2 *Strickland* standard. This Court agrees that counsel’s cross-examination of Souther was
3 thorough and notes that it was roughly twice as long as the State’s direct examination.
4 (ECF Nos. 32-2, 32-3.) Counsel was not ineffective for not trying to exploit what appear
5 to be, at best, minor inconsistencies about what Souther observed. Thus, not only is the
6 Nevada Supreme Court’s prejudice conclusion at least arguable among fair-minded
7 jurists, this Court concludes that counsel’s performance did not fall below an objective
8 standard of reasonableness.

9 Ground Seven is denied.

10 **H. Ground Eight**

11 In Ground Eight, Reiger alleges the state trial court violated his constitutional rights
12 by allowing two police officers to testify as to their opinion that the packaging of the drugs
13 indicated an intent to sell. At trial, Officer Tlockowski and Officer Barrera each testified
14 that placing drugs into small baggies or balloons showed that they were meant for resale.
15 (ECF No. 32-4 at 43-45; ECF No. 32-5 at 35.) Reiger contends that the testimony
16 amounted to an expert opinion that was admitted without qualifying either officer as an
17 expert.

18 The Nevada Supreme Court rejected, without discussion, the claim contained in
19 Ground Eight. (ECF No. 33-7 at 2 n.1.) Habeas relief is generally unavailable with respect
20 to violations of state evidence law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a
21 federal writ is not available for alleged error in the interpretation or application of state
22 law); *Rhoades v. Henry*, 638 F.3d 1027, 1034, n. 5 (9th Cir. 2011) (“[E]videntiary rulings
23 based on state law cannot form an independent basis for habeas relief.”); *Jammal v. Van*
24 *de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991) (petitioner may not challenge evidentiary
25 ruling on ground that it violated state’s evidence code; failure to comply with state rules
26 of evidence does not warrant federal habeas relief). The erroneous admission of evidence
27 will rise to a constitutional violation only when “there are no permissible inferences the
28 jury may draw from the evidence” and that evidence is “of such quality as necessarily

1 prevents a fair trial.” *Jammal*, 926 F.2d at 920 (quoting *Kealohapauole v. Shimoda*, 800
2 F.2d 1463, 1465 (9th Cir. 1986)) (internal quotation marks omitted).

3 Here it is far from clear that the testimony at issue constituted expert opinion. Under
4 Nevada law, expert opinions are based on “scientific, technical or other specialized
5 knowledge” (NRS § 50.275), while lay witness opinion testimony is “[o]pinions or
6 inferences . . . [r]ationally based on perception of the witness; and . . . helpful to a clear
7 understanding of the testimony of the witness or the determination of a fact in issue” (NRS
8 § 50.265). Arguably, it did not require specialized knowledge for the officers to opine that
9 drugs placed in multiple, small baggies indicated that the drugs were packaged for resale.
10 In any case, this is the type of evidentiary ruling that is the province of the state court, not
11 a cognizable ground for federal habeas relief.

12 Ground Eight is denied.

13 **I. Ground Nine**

14 In Ground Nine, Reiger alleges that the state trial court violated his constitutional
15 rights in adjudicating him a habitual criminal because the court did not hold a proper
16 hearing and the adjudication was made by a judge rather than a jury. He also alleges that
17 the court failed to specify which convictions it relied upon to find him a habitual criminal
18 and that two of his convictions arose out of the same transaction.

19 The Nevada Supreme Court rejected, without discussion, the claim contained in
20 Ground Nine. (ECF No. 33-7 at 2 n.1.) As a general matter, a challenge to a trial court's
21 application of its own state's sentencing laws does not raise a federal question cognizable
22 on habeas review. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Christian v. Rhode*,
23 41 F.3d 461, 469 (9th Cir. 1994) (“Absent a showing of fundamental unfairness, a state
24 court's misapplication of its own sentencing laws does not justify federal habeas relief.”
25 (citations omitted)); *Sturm v. California Adult Authority*, 395 F.2d 446, 448 (9th Cir. 1967)
26 (“A state court's interpretation of its [sentencing] statute does not raise a federal
27 question.”).

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1 To state a cognizable federal habeas claim based on a claimed state sentencing
2 error, petitioner must show that the alleged error was “so arbitrary or capricious as to
3 constitute an independent due process violation.” *Richmond v. Lewis*, 606 U.S. 40, 50
4 (1992). Reiger has made no such showing here. Indeed, the record shows that the State
5 provided the court with certified copies of seven prior felony convictions (ECF No. 32-11
6 at 3-4), while Nevada law only requires a finding of three to impose the sentence Reiger
7 received. See NRS § 207.010.

8 Reiger’s claim that he had a right to have a jury determine his sentence is also
9 without merit. The Nevada Supreme Court has rejected “any interpretation of [its] prior
10 case law as suggesting that facts other than prior convictions must be found in order to
11 adjudicate a defendant a habitual criminal.” *O’Neill v. State*, 153 P.3d 38, 43 (Nev. 2007).
12 And, the U.S. Supreme Court has specifically excluded the fact of a prior conviction as a
13 fact that must be submitted to a jury for the purposes of sentence enhancement. *Apprendi*
14 *v. New Jersey*, 530 U.S. 466, 490 (2000).

15 Ground Nine is denied.

16 **IV. CONCLUSION**

17 For the reasons set forth above, Reiger’s petition for habeas relief is denied.

18 *Certificate of Appealability*

19 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
20 Governing Section 2254 Cases requires this Court to issue or deny a certificate of
21 appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within
22 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
23 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

24 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
25 “has made a substantial showing of the denial of a constitutional right.” With respect to
26 claims rejected on the merits, a petitioner “must demonstrate that reasonable jurists would
27 find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*
28 *v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4


1 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate
2 (1) whether the petition states a valid claim of the denial of a constitutional right and (2)
3 whether the court's procedural ruling was correct. *Id.*

4 Having reviewed its determinations and rulings in adjudicating Reiger's petition,
5 the Court declines to issue a certificate of appealability for its resolution of any procedural
6 issues or any of Reiger's habeas claims.

7 It is therefore ordered that Reiger's petition for writ of habeas corpus (ECF No. 15-
8 1) is denied. The Clerk will enter judgment accordingly.

9 It is further ordered that a certificate of appealability is denied.

10 DATED THIS 22nd day of May 2017.

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14 MIRANDA M. DU
15 UNITED STATES DISTRICT JUDGE
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