

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

LANCE REBERGER,

Case No. 3:13-cv-00071-MMD-CLB

Petitioner,

ORDER

v.

RENEE BAKER, et al.,

Respondents.

**I. SUMMARY**

Petitioner Lance Reberger filed a petition for writ of habeas corpus (“Petition”) under 28 U.S.C. § 2254. This matter is before the Court for adjudication of the Petition’s merits. For the reasons discussed below, the Court grants Reberger habeas relief on Ground One’s Napue claim, and grants a certificate of appealability for Ground One’s Brady claim, but denies Reberger relief on his remaining grounds.

**II. BACKGROUND**

Reberger’s convictions are the result of events that occurred in Clark County, Nevada on November 4, 1990. (ECF No. 31-7 at 2.) Reberger and Amber Harvey entered an adult video and bookstore on the morning of November 4, 1990, at approximately 3:30 a.m. (ECF No. 29-2 at 13-14.) After speaking with the store clerk and watching some videos, Harvey stole some money and merchandise. (Id. at 17-20.) Reberger then took the store clerk into the back of the store and shot him three times in the head. (Id. at 21-22; see also ECF No. 28-3 at 75.) Reberger grabbed more money and the store’s cameras, and Reberger and Harvey drove away. (ECF No. 29-2 at 22.) After disposing of the cameras, their clothing, and some of the merchandise in the

1 desert, Reberger and Harvey eventually drove to Coos Bay, Oregon where they were  
2 apprehended by local law enforcement. (Id. at 22-23, 25-29.)

3 Following a jury trial, Reberger was found guilty of burglary, robbery with the use  
4 of a deadly weapon, and murder with the use of a deadly weapon. (ECF No. 31-7 at 2.)  
5 Reberger was sentenced to six years for the burglary conviction; ten years for the  
6 robbery conviction with an additional ten years for the deadly weapon enhancement, to  
7 run consecutive to the burglary sentence; and life with the possibility of parole for the  
8 murder conviction with an additional life with the possibility of parole for the deadly  
9 weapon enhancement, to run consecutive to the robbery sentence. (Id. at 3.) Reberger  
10 appealed, and the Nevada Supreme Court dismissed the appeal on May 26, 1995. (ECF  
11 No. 32-1.) Remittitur issued on June 14, 1995. (ECF No. 32-2.)

12 Reberger filed a state habeas corpus petition on January 30, 1996. (ECF No. 32-  
13 5.) Following the appointment of “five different attorneys over the course of ten (10)  
14 years,” Reberger filed a counseled, supplemental petition on June 25, 2007; however,  
15 this supplemental petition was later stricken. (ECF No. 32-43 at 2, 14.) Following nine  
16 evidentiary hearings, the state district court denied Reberger’s petition on January 19,  
17 2012. (ECF No. 38.) Reberger appealed, and the Nevada Supreme Court affirmed on  
18 December 12, 2012. (ECF No. 38-9.) Remittitur issued on January 7, 2013. (ECF No.  
19 38-10.)

20 Reberger dispatched his federal habeas corpus petition on February 10, 2013.  
21 (ECF No. 1-2 at 36.) Reberger thereafter filed a counseled, first amended federal petition  
22 on January 6, 2014. (ECF No. 16.) On January 15, 2014, Reberger moved for a stay and  
23 abeyance to allow him to return to state court to exhaust Ground One of his federal  
24 petition. (ECF No. 41.) This Court granted the motion and stayed this action. (ECF No.  
25 48 at 9.)

26 On January 14, 2014, Reberger filed a counseled, second state habeas petition.  
27 (ECF No. 42-1.) Reberger later filed a counseled, amended petition and a counseled,  
28 supplemental petition on May 12, 2014, and June 25, 2014, respectively. (ECF Nos. 54,

1 54-7.) Following two evidentiary hearings, the state district court dismissed Reberger's  
2 petition. (ECF Nos. 55-5, 55-8, 56-3.) Reberger appealed, and the Nevada Supreme  
3 Court affirmed on January 12, 2017. (ECF No. 57-3.) Remittitur issued on February 6,  
4 2017. (ECF No. 57-4.)

5 On March 22, 2017, Reberger moved to reopen this federal action. (ECF No. 51.)  
6 This Court granted the motion and ordered that the stay be lifted. (ECF No. 64 at 2.)  
7 Reberger then filed his counseled, second amended federal petition on April 19, 2017.  
8 (ECF No. 65.) Respondents moved to dismiss claims within Reberger's second amended  
9 petition. (ECF No. 66.) The Court granted the motion in part and denied it in part. (ECF  
10 No. 94.) Specifically, Ground 9I, 10A, 10B, and 10C were dismissed as procedurally  
11 defaulted; and Grounds 2 and 3 were dismissed as noncognizable. (Id. at 13.)  
12 Respondents answered the remaining claims on May 29, 2018. (ECF No. 96.) Reberger  
13 replied on October 25, 2018. (ECF No. 101.)

14 In his remaining claims, Reberger asserts the following violations of his federal  
15 constitutional rights:

- 16 1. The State suppressed evidence that Harvey had a deal to  
17 receive a reduced sentence in exchange for her testimony  
18 against him.
- 19 4. The state district court erred in allowing a jailhouse informant  
20 to testify.
- 21 5. There were cumulative errors of prosecutorial misconduct.
- 22 6. The testimony of Harvey was improper.
- 23 7. The jury engaged in premature deliberations.
- 24 8. The state district court erred in refusing to give two proposed  
25 jury instructions.
- 26 9A. His trial counsel failed to call Corrine Kemp.
- 27 9B. His trial counsel failed to investigate and call alibi witnesses.
- 28 9C. His trial counsel improperly waived his speedy trial rights.
- 9D. His trial counsel introduced incriminating evidence against  
him.
- 9E. His trial counsel failed to sufficiently challenge letters he  
allegedly wrote to Harvey.
- 9F. His trial counsel failed to challenge Detective Perkins'  
testimony.
- 9G. His trial counsel failed to challenge the search warrant.

1                   9H.    His trial counsel failed to object to Jury Instruction Number 16.  
2 (ECF No. 65 at 21-93.)

3   **III.    LEGAL STANDARD**

4           28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in  
5 habeas corpus cases under the Antiterrorism and Effective Death Penalty Act  
6 (“AEDPA”):

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

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

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

15   A state court decision is contrary to clearly established Supreme Court precedent, within  
16 the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the  
17 governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a  
18 set of facts that are materially indistinguishable from a decision of [the Supreme] Court.”  
19 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,  
20 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision  
21 is an unreasonable application of clearly established Supreme Court precedent within  
22 the meaning of 28 U.S.C. § 2254(d) “if the state court identifies the correct governing  
23 legal principle from [the Supreme] Court’s decisions but unreasonably applies that  
24 principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*, 529 U.S. at 413).  
25 “The ‘unreasonable application’ clause requires the state court decision to be more than  
26 incorrect or erroneous. The state court’s application of clearly established law must be  
27 objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation  
28 omitted).

1           The Supreme Court has instructed that “[a] state court’s determination that a  
2 claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could  
3 disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562  
4 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The  
5 Supreme Court has stated “that even a strong case for relief does not mean the state  
6 court’s contrary conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer*, 538 U.S. at  
7 75); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as  
8 a “difficult to meet” and “highly deferential standard for evaluating state-court rulings,  
9 which demands that state-court decisions be given the benefit of the doubt”) (internal  
10 quotation marks and citations omitted).

#### 11       **IV.     DISCUSSION**

12           The Petition asserts seven remaining grounds for relief. (ECF No. 65 at 21-93.)  
13 The Court will address each ground in turn.

##### 14       **A.     Ground One**

15           In Ground One, Reberger alleges that his federal constitutional rights were  
16 violated when the state district court suppressed evidence that Harvey had a deal to  
17 receive a reduced sentence in exchange for her testimony. (ECF No. 65 at 21.)  
18 Reberger’s claim is based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and  
19 *Napue v. Illinois*, 360 U.S. 264, 269 (1959). (*Id.* at 48.) In Reberger’s appeal of the denial  
20 of his second state habeas petition, the Nevada Supreme Court held:

21           Reberger contends that the district court erred in denying his claim that the  
22 State improperly withheld *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] evidence  
23 that would have impeached the State’s primary witness and his  
24 codefendant, Amber Harvey. “To prove a *Brady* violation, the accused must  
25 make three showings: (1) the evidence is favorable to the accused, either  
26 because it is exculpatory or impeaching; (2) the State withheld the evidence,  
27 either intentionally or inadvertently; and (3) prejudice ensured, i.e., the  
28 evidence was material.” *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91,  
95 (2012) (internal quotation marks omitted). Demonstrating the second  
and third elements of a *Brady* claim satisfies the good cause and prejudice  
requirements to overcome the procedural bars. *Id.* The district court found  
that the State withheld favorable evidence but that the evidence was not  
material. We agree.

1 The district court's finding that the State withheld favorable evidence is  
2 supported by significant evidence in the record. The State agreed not to  
3 oppose Harvey's postconviction efforts to reduce her sentence in exchange  
4 for her withdrawing her appeal and testifying against Reberger. Harvey  
5 performed her part of the bargain despite knowing the initially contemplated  
6 vehicle for the agreement was not available. At Reberger's trial, Harvey  
7 denied having any deal with the State and said she was testifying only  
8 because she wanted Reberger to pay for his actions. After Reberger's  
9 conviction, the State not only failed to oppose the [sic] Harvey's facially  
10 deficient postconviction efforts to reduce her sentence but entered into a  
11 guilty plea agreement with her before the district court granted the  
12 postconviction relief. [Footnote 2: After Reberger was convicted, Harvey,  
13 who had been convicted of the same crimes, filed a motion for new trial  
14 based on newly discovered evidence. The new evidence was introduced at  
15 Reberger's trial and suggested that he and not Harvey was the shooter.  
16 However, because the State had conceded at Harvey's trial that she was  
17 not the shooter, the new evidence could not have "render[ed] a different  
18 result probable upon retrial." *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d  
19 1279, 1284-85 (1991) (setting forth the elements necessary to obtain a new  
20 trial based on newly discovered evidence).]

21 The district court also correctly concluded that the evidence was not  
22 material. Because Reberger had specifically requested evidence of a deal  
23 between the State and Harvey, the withheld evidence is material if there is  
24 "a reasonable possibility that the claimed evidence would have affected the  
25 judgment of the trier of fact, and thus the outcome of the trial." *Jimenez v.*  
26 *State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (emphasis, quotation  
27 marks omitted). Although the withheld evidence constituted new and  
28 different impeachment evidence of the State's key witness, it does not  
undermine confidence in the outcome of the trial because, unlike in *Wearry*  
*v. Cain*, 136 S. Ct. 1002, 1006 (2016), there was sufficient independent  
evidence of Reberger's guilt. Overwhelming evidence points to Harvey's  
involvement in the crimes, and independent witnesses and evidence  
indicated Reberger and Harvey were together shortly before and after the  
crimes, they fled the state together despite having only recently met, and  
Reberger's own letters to and a conversation with Harvey while in jail  
indicated his participation in the crimes. For the same reason, Reberger's  
claim that the State violated *Napue v. Illinois*, 360 U.S. 264, 269 (1959)  
(holding it is a constitutional violation for the State to obtain a conviction  
through knowing use of false evidence or failing to correct false evidence  
when it appears), also fails. See *Giglio v. United States*, 405 U.S. 150, 154  
(1972) (applying a Brady materiality test to a *Napue* claim).

(ECF No. 57-3 at 3-5.)<sup>1</sup>

---

<sup>1</sup>The Court previously determined that this ground was not procedurally barred  
from federal habeas review because the Nevada Supreme Court's decision on this  
ground did not rest on an independent and adequate state ground; rather, the Nevada

1                   **1. Factual background**

2           Following a jury trial, Harvey was found guilty of burglary, robbery with the use of  
3 a deadly weapon, and first-degree murder with the use of a deadly weapon on September  
4 13, 1991. (ECF No. 21-4.) Harvey was sentenced and appealed on November 21, 1991.  
5 (ECF Nos. 22, 22-2.) On July 14, 1992, Harvey's trial counsel, Robert Miller, sent Harvey  
6 a letter stating that he had enclosed "copies of the Motion for Voluntary Dismissal of  
7 Appeal and [his] accompanying affidavit." (ECF No. 53-1.) Miller indicated that "Lance's  
8 trial has been put off until November, but we need to proceed with this part of the  
9 negotiations immediately." (Id.)

10           Thereafter, on August 4, 1992, Miller moved for voluntary dismissal of Harvey's  
11 appeal. (ECF No. 23-3.) Miller stated "[t]hat the present Motion for Voluntary Dismissal of  
12 Appeal is brought pursuant to and in accordance with negotiations entered into with the  
13 Clark County District Attorney's office" and that "[t]he substance of those negotiations is  
14 that Appellant Harvey would agree to voluntary dismissal of the present appeal and would  
15 agree to testify truthfully at the trial" of Reberger. (Id. at 3.) In exchange for Harvey's  
16 testimony, "the State agree[d] not to oppose Appellant Harvey's petition for post-  
17 conviction relief, the granting of which would result in amendment of the judgment of  
18 conviction to reflect omission of the life imprisonment sentence" for the deadly weapon  
19 enhancement. (Id. at 3-4.) Reberger's trial counsel "d[id] not remember ever seeing this  
20 motion" prior to November 21, 2013, approximately twenty years after Reberger's trial  
21 took place. (ECF No. 38-14 at 2; see also ECF No. 38-13 at 2.) The Nevada Supreme  
22 Court granted Harvey's motion. (ECF No. 23-4.)

23           On November 5, 1992, Reberger, through one of his trial counsel, Philip Dunleavy,  
24 moved to limit Harvey's testimony at his trial, explaining, in part, that "[t]he State has  
25 requested that Ms. Harvey waive her right to an appeal and testify in exchange for which  
26 they have agreed to request the Judge to resentence her to only one life with and run

27 \_\_\_\_\_  
28 Supreme Court's federal Brady analysis controlled the outcome of its state procedural  
default analysis. (ECF No. 94 at 8-9.)

1 everything else concurrent or dismiss the remaining sentence.” (ECF No. 23-7 at 4.)  
2 Dunleavy later explained that “[a]t some point prior to Reberger’s trial, I heard through  
3 word of mouth, rumor, and gossip around the courthouse that . . . Harvey[ ] had negotiated  
4 a deal with the prosecution to testify against Reberger at his trial.” (ECF No. 38-14 at 2.)  
5 The State opposed Reberger’s motion’s explaining, in part, that “the State has no  
6 agreement with Amber Harvey and does not know if she will even testify.” (ECF No. 23-8  
7 at 11.) At a hearing on Reberger’s motion, Miller stated that “[t]he status of [Harvey’s]  
8 case is that we, at one point, thought that we had negotiations on the case, which would  
9 involve her amending her appeal, there being a reduction in the sentence that she was  
10 facing, and that she would be testifying truthfully concerning this incident.” (ECF No. 23-  
11 11 at 20.) However, it was determined by Miller and the State “that those negotiations  
12 would not be something that could legally be consummated. There is no authority to  
13 reduce the sentences that were imposed by the jury.” (Id.) It does not appear that there  
14 was any effort made to reinstate Harvey’s appeal. (ECF No. 55-5 at 189-190.)

15 On December 29, 1992, Reberger moved for an in-camera inspection of the  
16 State’s file in regards to any deal between Harvey and the State, explaining that  
17 “[c]ounsel for Defendant is concerned that there may be some agreement and/or  
18 understanding between counsel for the State and counsel for Ms. Harvey which would  
19 allow the [previous] negotiations to come to actually be entered into.” (ECF No. 24 at 4.)  
20 The state district court granted the motion. (ECF No. 24-1 at 3.)

21 Reberger’s first trial began on December 29, 1992, but it ended in a mistrial. (See  
22 ECF Nos. 24-1, 26-1 at 72.) During opening statements for Reberger’s second trial, the  
23 State commented that “[y]ou are going to hear why [Harvey] wants to testify,” and Harvey  
24 “is going to get up here and she is going to tell you if the State gave her any kind of deal  
25 to testify.” (ECF No. 28 at 9, 38.) Harvey later testified as a State witness. (ECF No. 29-  
26 2 at 9.) Harvey responded in the negative when asked if she was “testifying because of  
27 any kind of deal that the State ha[d] given [her].” (Id. at 10-11.) And Harvey responded  
28 in the affirmative when asked if she “originally ha[d] an offer of a deal made to [her]” and

1 when asked to elaborate replied, “for whatever reason, that deal is no longer open.” (Id.  
2 at 11.) Harvey explained that she was testifying “[b]ecause [she] want[ed] Lance to pay  
3 for what he did.” (Id.) During cross-examination, Harvey testified that the State had  
4 “dropped [a grant of immunity] too” and that she was “down here because [she] want[ed]  
5 to testify.” (Id. at 55.)<sup>2</sup>

6 Harvey testified that she and Reberger went to the Fantasy Video Adult  
7 Bookstore on November 4, 1990, with a “.22 nickel pistol gun that belonged to [Harvey’s]  
8 ex-husband.” (ECF No. 29-2 at 9, 13-14.) It was Reberger’s idea to go to that location  
9 to commit a robbery “because [he] kn[e]w the roots to it” since “[a] friend of [his] used to  
10 work there.” (Id. at 16.) When they entered the store, Reberger “had the gun and  
11 [Harvey] had [Reberger’s] knife.” (Id. at 17.) After Reberger and Harvey talked to the  
12 store clerk and watched some movies, Reberger brought the store clerk “out of the back”  
13 with a gun to the store clerk’s head and Harvey held a knife under his chin. (Id. at 17,  
14 19-20.) Harvey then took some money out of the cash register and some store  
15 merchandise. (Id. at 20.) Reberger walked the store clerk to the back of the store while  
16 pointing a gun at the back of his head, and Harvey told Reberger to “[d]o whatever you  
17 have to do.” (Id. at 21.) Harvey then heard three gunshots while Reberger and the store  
18 clerk were in the back of the store. (Id. at 22.) Harvey started their vehicle, and Reberger  
19 “came running out with the cameras and the gun and the rest of the money.” (Id.)

20 Harvey and Reberger disposed of the cameras, their clothing, and some  
21 merchandise in the desert and went to a hotel to take a shower. (Id. at 22-23.) After  
22 leaving the hotel, they went to Harvey’s ex-husband’s house to return the gun and “d[o]  
23 some drugs.” (Id. at 25.) They then left with Harvey’s son and drove to Los Angeles,  
24 then San Francisco, and finally Coos Bay, Oregon. (Id. at 25-26, 28.) Harvey and  
25 Reberger were arrested in Coos Bay. (Id. at 29.)

---

27 <sup>2</sup>During closing arguments, the State commented, “Amber testified because she is  
28 doing life in prison . . . . She does not feel it’s fair that he is not.” (ECF No. 30-3.)

1           Following Reberger's trial, on August 17, 1993, Harvey moved for a new trial  
2 based on newly discovered evidence. (ECF No. 31-9.) Harvey explained that "evidence  
3 was adduced [at Reberger's trial] that Reberger had forged a letter from Amber Harvey"  
4 and that "[t]his evidence was not available at the time of Defendant Harvey's trial and  
5 constitutes newly discovered evidence." (Id. at 4.) It does not appear that the State  
6 opposed Harvey's motion. (See ECF No. 54-5 at 2 (declaration from an investigator of  
7 the Federal Public Defender's office that "[t]here is no opposition to the 1993 motion for  
8 a new trial in Harvey's court file"); see also ECF No. 55-4 at 2 (stipulation by the parties  
9 that "[a] written opposition from the District Attorney's Office to the Motion for a New  
10 Trial based on Newly Discovered Evidence" does not appear in Harvey's Eighth Judicial  
11 District Court's file); ECF No. 55-8 at 175-76.)

12           A few weeks after filing the motion, on September 3, 1993, Miller sent Harvey a  
13 letter enclosing a guilty plea memorandum that "eliminate[d] the use of a deadly weapon  
14 enhancement on the murder charge and . . . eliminate[d] one of the two life sentences."  
15 (ECF No. 53-10 at 2.) The guilty plea agreement provided that in exchange for pleading  
16 guilty, Harvey's use of a deadly weapon enhancement would be dropped from the  
17 murder count, the recommended sentence on the murder count would be life  
18 imprisonment with the possibility of parole, and it would be recommended that  
19 sentences on all counts run concurrently. (ECF No. 53-6 at 2.)

20           A hearing was held on Harvey's motion. (ECF No. 31-14.) The motion was  
21 granted without argument, although the state district court indicated that it "ha[d] a copy  
22 of [the State's] opposition." (Id. at 3.) When the state district court asked what the parties  
23 "we[re] going to do," Miller responded that the parties had entered into negotiations  
24 whereby the State had agreed to drop the deadly weapon enhancement on the murder  
25 count. (Id. at 3-4.) Thereafter, during the same hearing, Harvey pleaded guilty pursuant  
26 to the plea agreement, and the state district court sentenced her. (Id. at 5.) Harvey's  
27 guilty plea memorandum does not appear in her court file. (See ECF No. 54-5 at 2; ECF  
28 No. 55-4 at 2.)

1           Years later, on June 11, 2010, during Reberger’s first state habeas evidentiary  
2 hearing proceedings, William Kephart, the prosecutor in Reberger’s case, explained that  
3 Harvey’s trial counsel moved for a new trial, and the state district court “represented on  
4 the record that he was going to grant a new trial,” so “they renegotiated.” (ECF No. 35-  
5 5 at 31.) Kephart also explained that “[t]here [were] no deals given to her, nothing” and  
6 it would not make sense to negotiate for her testimony that had already been given. (Id.  
7 at 31, 33.) Kephart then took the stand and testified that the State did not have  
8 “negotiations with Amber Harvey for her testimony in [Reberger’s] 1993 trial.” (Id. at 44,  
9 54, 57.)

10           In October 2011, Harvey had a hearing before the parole board. (ECF No. 38-  
11 19.) Harvey told the parole board that she “testified against [Reberger] and got some of  
12 [her] time dropped.” (Id. at 4.) Years later, on January 8, 2015, during Reberger’s second  
13 state habeas evidentiary hearing proceedings, Harvey, in response to the question “[d]id  
14 you get some of your time dropped as a result of your testimony” against Reberger,  
15 responded, “Yeah. But that still wasn’t the deal. The first degree murder was supposed  
16 to be dropped.” (ECF No. 55-5 at 99, 115.) Harvey also testified that she “was promised  
17 that if [she] testified and showed those letters that [Reberger] wrote [her], that they would  
18 drop that.” (Id. at 123.) Harvey explained that she lied at Reberger’s trial when she  
19 testified that there was no deal for her testimony “because [she] said what they told [her]  
20 to say.” (Id. at 127.)

## 21                   **2. Brady**

22           “[T]he suppression by the prosecutor of evidence favorable to an accused upon  
23 request violates due process where the evidence is material either to guilt or to  
24 punishment irrespective of the good faith or bad faith of the prosecution.” Brady, 373  
25 U.S. at 87. Because a witness’s “‘reliability . . . may well be determinative of guilt or  
26 innocence,’ nondisclosure of evidence affecting credibility falls within [the Brady] rule.”  
27 Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue, 360 U.S. at 269).  
28 “There are three components of a true Brady violation: The evidence at issue must be

1 favorable to the accused, either because it is exculpatory, or because it is impeaching;  
2 that evidence must have been suppressed by the State, either willfully or inadvertently;  
3 and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).  
4 The materiality of the evidence that has been suppressed is assessed to determine  
5 whether prejudice exists. See *Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir. 2006).  
6 Evidence is material “if there is a reasonable probability that, had the evidence been  
7 disclosed to the defense, the result of the proceeding would have been different.” *United*  
8 *States v. Bagley*, 473 U.S. 667, 682 (1985). “The question is not whether the defendant  
9 would more likely than not have received a different verdict with the evidence, but  
10 whether in its absence he received a fair trial, understood as a trial resulting in a verdict  
11 worthy of confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Accordingly, “[a]  
12 ‘reasonable probability’ of a different result is . . . shown when the government’s  
13 evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Id.* (quoting  
14 *Bagley*, 473 U.S. at 678).

15 Addressing the first Brady prong, the Nevada Supreme Court reasonably  
16 concluded that a deal between the State and Harvey was favorable evidence. Indeed,  
17 because Harvey was a crucial witness for the State, as she was the only eyewitness, a  
18 deal whereby she received a reduced sentence for her testimony undermines her  
19 credibility and reliability. See *Giglio*, 405 U.S. at 154. This evidence would certainly have  
20 been helpful to Reberger’s defense. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 316-17  
21 (1974) (“[T]he exposure of a witness’ motivation in testifying is a proper and important  
22 function of the constitutionally protected right of cross-examination.”).

23 Turning to the second Brady prong, the Nevada Supreme Court reasonably  
24 concluded that a deal between the State and Harvey was suppressed. In fact,  
25 Respondents do not appear to dispute this conclusion. (See ECF No. 96 at 20.)

26 First, evidence reasonably supports the conclusion that the State made a deal  
27 with Harvey before she testified against Reberger in his second trial. Harvey voluntarily  
28 dismissed her appeal of her judgment of conviction because she had entered into

1 negotiations with the State whereby she would testify against Reberger in return for the  
2 dismissal of the deadly weapon enhancement and a reduction in her sentence. (ECF  
3 No. 23-3 at 3-4.) Miller later explained that the agreement between the State and Harvey  
4 did not come to fruition because “[t]here is no authority to reduce the sentences that  
5 were imposed by the jury,” however, Miller did not attempt to reinstate Harvey’s appeal  
6 after the agreement allegedly fell through. (ECF No. 23-11 at 20; ECF No. 55-5 at 189-  
7 190.) After Harvey testified against Reberger and confirmed that there was no deal made  
8 for her testimony (see ECF No. 29-2 at 10-11), Harvey moved for a mistrial (ECF No.  
9 31-9). The State did not oppose Harvey’s motion (see ECF No. 54-5 at 2; ECF No. 55-  
10 4 at 2; ECF No. 55-8 at 175-76), and, prior to a hearing taking place on the motion,  
11 Harvey signed a guilty plea agreement which, in line with the original negotiations with  
12 the State, dismissed the deadly weapon enhancement (ECF No. 53-6 at 2). The state  
13 district court granted the motion for a new trial without argument or discussion, accepted  
14 Harvey’s guilty plea, and resentenced Harvey in the course of one undisputed hearing.  
15 (ECF No. 31-14.) Later, Harvey testified at her parole hearing and at Reberger’s second  
16 state postconviction evidentiary hearing that the State had promised to reduce her  
17 charges if she testified against Reberger. (ECF No. 38-19 at 4; ECF No. 55-5 at 99, 115,  
18 123.) This evidence demonstrates that the Nevada Supreme Court reasonably  
19 determined that a deal existed between the State and Harvey. Indeed, this evidence  
20 demonstrates that a deal was initially made between the State and Harvey prior to  
21 Reberger’s trial, and even though it was allegedly abandoned, the same terms of the  
22 deal were later revived following Reberger’s trial. See, e.g., *United States v. Shaffer*,  
23 789 F.2d 682, 690 (9th Cir. 1986) (“While it is clear that an explicit agreement would  
24 have to be disclosed because of its effect on [the witness]’s credibility, it is equally clear  
25 that facts which imply an agreement would also bear on [the witness]’s credibility and  
26 would have to be disclosed.”).

27       Regarding suppression, the State never provided Reberger with Harvey’s motion  
28 for voluntary dismissal of her appeal even after the state district court granted

1 Reberger's request for an in-camera inspection of the State's file (ECF No. 38-14 at 2;  
2 ECF No. 38-13 at 2); the State made comments during its opening statement at  
3 Reberger's trial that Harvey was not offered a deal for her testimony (ECF No. 28 at 9,  
4 38); the State continued to deny that any deal was made to Harvey for her testimony  
5 (see ECF No. 35-5 at 54, 57); and Harvey testified at Reberger's second state  
6 postconviction evidentiary hearing that she was instructed to lie at Reberger's trial  
7 regarding the lack of a deal (ECF No. 55-5 at 127). This evidence demonstrates that the  
8 Nevada Supreme Court reasonably determined that the State suppressed the deal.

9 Turning to the final Brady prong, materiality, Reberger asserts that this Court's  
10 review should be de novo because the Nevada Supreme Court used a sufficiency of the  
11 evidence standard to assess materiality instead of using the test outlined in Kyles. (ECF  
12 No. 101 at 50-52.) To be sure, the Supreme Court explained that a Brady materiality  
13 assessment "is not a sufficiency of evidence test." Kyles, 514 U.S. at 434. However,  
14 even though the Nevada Supreme Court reasoned that "there was sufficient  
15 independent evidence of Reberger's guilt," its holding that the suppressed evidence  
16 "does not undermine confidence in the outcome of the trial" was in line with Kyles. (ECF  
17 No. 57-3 at 4.) Indeed, it appears that the Nevada Supreme Court was merely assessing  
18 the remainder of the evidence presented against Reberger in order to determine  
19 whether "the favorable evidence could reasonably be taken to put the whole case in  
20 such a different light." Kyles, 514 U.S. at 435. Accordingly, this Court is unpersuaded  
21 that its review of the materiality prong is de novo.

22 Reberger points out that the Nevada Supreme Court noted in his first state  
23 habeas appeal that "[t]he State's case against [Harvey] was based primarily on the  
24 testimony of [Harvey]" (ECF No. 38-9 at 4-5), and as such, evidence impeaching her  
25 credibility is material. See Giglio, 405 U.S. at 154-55 (determining that a witness'  
26 credibility was "an important issue in the case, and evidence of any understanding or  
27 agreement as to a future prosecution would be relevant to his credibility and the jury  
28 was entitled to know of it"); see also Silva v. Brown, 416 F.3d 980, 987 (2005)

1 (“Impeachment evidence is especially likely to be material when it impugns the  
2 testimony of a witness who is critical to the prosecution’s case.”). However, importantly,  
3 the Nevada Supreme Court also reasonably noted in the same sentence that Harvey’s  
4 testimony “was corroborated by [Reberger’s] own incriminating writings.” (ECF No. 38-  
5 9 at 4-5.) In fact, as is discussed further in Ground Nine, Subpart E, Reberger wrote  
6 letters to Harvey stating, among other things, that “[w]e fucked up, I am is [sic] good as  
7 dead[,] you will be out in 10 or 20 years if your [sic] lucky but not me[.] . . . we should  
8 have never done it in the first place now we are going to pay for it big time.” (ECF No.  
9 18-9 at 3.) In another letter, Reberger wrote, “[y]ou don’t know how he died only I know  
10 how.” (ECF No. 19 at 4.) Further, the State introduced evidence from Andrew Jackson,  
11 a corrections officer for the Coos County Sheriff’s Department, who testified, among  
12 other things, that he heard Reberger tell Harvey “that she doesn’t have anything to worry  
13 about because she wasn’t in the back room when it happened.” (ECF No. 29 at 4, 10.)

14 Thus, although Harvey provided the only eyewitness testimony to the crimes, her  
15 testimony that Reberger shot the victim was corroborated by other evidence. See *Smith*  
16 *v. Cain*, 565 U.S. 73, 76 (2012) (“[O]bserv[ing] that evidence impeaching an eyewitness  
17 may not be material if the State’s other evidence is strong enough to sustain confidence  
18 in the verdict.”); cf. *Banks v. Dretke*, 540 U.S. 668, 700-01 (2004) (holding that  
19 impeachment evidence was material where it pertained to a witness whose testimony,  
20 which was “uncorroborated by any other witness,” was “crucial to the prosecution”);  
21 *Wearry v. Cain*, 136 S. Ct. 1002, 1006-1007 (2016) (determining that there was a lack  
22 of confidence in the jury’s verdict due to the suppression of evidence related to two  
23 witnesses’ motivations for testifying because “the only evidence directly tying [the  
24 defendant] to th[e] crime was [one witness’s] dubious testimony, corroborated by the  
25 similarly suspect testimony of [the other witness]”); *Hayes v. Brown*, 399 F.3d 972, 985  
26 (9th Cir. 2005) (finding suppressed evidence material where tainted witness’s testimony  
27 “was the centerpiece of the prosecution’s case” and “[n]early all of the other evidence  
28 against Hayes was circumstantial”). Because Harvey’s testimony was corroborated by

1 Reberger's own statements, the Nevada Supreme Court reasonably concluded that the  
2 confidence in the outcome of Reberger's trial was not undermined by the State's  
3 suppression of its deal with Harvey. See *Kyles*, 514 U.S. at 434. Accordingly, it cannot  
4 be concluded that "there [was] a reasonable probability that, had the evidence [that there  
5 was a deal between Harvey and Reberger] been disclosed to the defense, the result of  
6 the proceeding would have been different." *Bagley*, 473 U.S. at 682.

### 7 **3. Napue**

8 "[A] conviction obtained through use of false evidence, known to be such by  
9 representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360  
10 U.S. at 269. This rule applies "when the State, although not soliciting false evidence,  
11 allows it to go uncorrected when it appears" and when "the false testimony goes only to  
12 the credibility of the witness." *Id.* A *Napue* violation claim will succeed when "(1) the  
13 testimony (or evidence) was actually false, (2) the prosecution knew or should have  
14 known that the testimony was actually false, and (3) the false testimony was material."  
15 *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (internal quotation marks and  
16 alternation omitted). "[A] conviction obtained by the knowing use of perjured testimony is  
17 fundamentally unfair, and must be set aside if there is any reasonable likelihood that the  
18 false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427  
19 U.S. 97, 103 (1976).

20 Reberger asserts that this Court's review of his *Napue* claim should be *de novo*  
21 because the Nevada Supreme Court improperly applied the *Brady* materiality analysis  
22 to the *Napue* materiality analysis. (ECF No. 101 at 65.) To be sure, the Ninth Circuit has  
23 explained that "[t]he *Napue* materiality standard is less demanding than *Brady*." *Reis-*  
24 *Campos v. Biter*, 832 F.3d 968, 976 (9th Cir. 2016). However, the Court is unconvinced  
25 that the Nevada Supreme Court used the wrong materiality analysis. The Nevada  
26 Supreme Court cited *Giglio*, which cites to the proper *Napue* materiality standard. See  
27 *Giglio*, 405 U.S. at 154 ("A new trial is required if 'the false testimony could . . . in any  
28 reasonable likelihood have affected the judgment of the jury.'").

1           Turning next to the Nevada Supreme Court's rejection of Reberger's Napue  
2 claim, the Nevada Supreme Court, through its Brady discussion, appears to have  
3 implicitly and reasonably concluded that Reberger satisfied the first two factors under  
4 Napue. Indeed, because the underlying facts of the Brady and Napue claims are so  
5 intertwined, the analysis for the first two Napue factors are the same as Brady. During  
6 Harvey's testimony, she explained, in response to the State's questions, that she was  
7 not "testifying because of any kind of deal that the State ha[d] given [her]" but "[b]ecause  
8 [she] want[ed] Lance to pay for what he did." (ECF No. 29-2 at 10-11.) Harvey also  
9 explained that she "originally ha[d] an offer of a deal made to [her]," but, "for whatever  
10 reason, that deal is no longer open." (Id. at 11.) As was discussed previously, the  
11 Nevada Supreme Court reasonably determined in its Brady analysis that there was a  
12 deal—fluid or not—between the State and Harvey for her testimony against Reberger.  
13 Therefore, Harvey's foregoing testimony was false, and the State, a party to that deal,  
14 knew or should have known that the testimony was false.<sup>3</sup> See Hayes, 399 F.3d at 984.

15           However, the Nevada Supreme Court's conclusion as to materiality under  
16 Napue's less demanding materiality standard was objectively unreasonable. As  
17 discussed supra, the State elicited and failed to correct Harvey's crucial false evidence.  
18 And Harvey's false testimony failed to alert the jury to the fact that she was testifying in  
19 return for a reduced sentence. This information would have cast great doubt on her  
20 credibility, and because Harvey was the only eyewitness to the crimes, her credibility  
21 was central to the State's case and to Reberger's convictions. This false testimony about  
22 the lack of a deal between the State and Harvey for her testimony played a significant  
23

---

24           <sup>3</sup>In fact, the evidence supports the reasonable inference that the State intentionally  
25 solicited false testimony knowing it was false, or at a minimum, knew that the testimony  
26 was false after Harvey testified and did nothing to correct it. As discussed supra, at  
27 Reberger's second trial, the State represented in its opening statement that Harvey was  
28 expected to testify that she was not given any kind of deal to testify which was contrary  
to the negotiations and deal reached by then (ECF No. 28 at 9, 38), and Harvey testified  
as the State represented—that she did not have a deal when asked (ECF No. 29-2 at 10-  
11). As Harvey later testified, she was directed to lie about the lack of a deal. (ECF No.  
55-5 at 127.)

1 role in the jury's credibility evaluation of Harvey; in fact, the jury was under the mistaken  
2 impression that Harvey was testifying for altruistic reasons only. Contrarily, Harvey  
3 testified against Reberger for her own self-interest: her second life sentence for the  
4 murder deadly weapon enhancement, which originally ran consecutive to her first life  
5 sentence for murder, was dismissed. (Compare ECF No. 22 at 3 with ECF No.  
6 31-14.) Reberger's resulting conviction "obtained by the knowing use of [Harvey's]  
7 perjured testimony is fundamentally unfair[.]" Agurs, 427 U.S. at 103. Moreover, due to  
8 the important role Harvey played in Reberger's trial and her false testimony that  
9 suppressed the fact that she was receiving an extraordinary reduction in her sentence  
10 in return for her testimony, "there is a[ ] reasonabl[e] likelihood that [her] false testimony  
11 could have affected the judgment of the jury." Id. Therefore, although the Nevada  
12 Supreme Court appears to have "identifie[d] the correct governing legal principle" to  
13 assess materiality under a Napue violation, "it unreasonably applie[d] that principle to  
14 the facts of [Reberger's] case." Lockyer, 538 U.S. at 75.

15 In sum, the Court finds that the Nevada Supreme Court's determination that  
16 Reberger failed to demonstrate materiality under a Napue violation was an objectively  
17 unreasonable application of clearly established federal law as determined by the  
18 Supreme Court of the United States. The Court therefore grants Reberger habeas  
19 corpus relief with respect to Ground One's Napue claim under 28 U.S.C. § 2254(d)(1).<sup>4</sup>

20 ///

21 ///

---

22  
23 <sup>4</sup>Reberger argues that he is entitled to dismissal of the charges, an immediate  
24 release from custody, and an order barring the State from retrying him due to the State's  
25 egregious misconduct. (ECF No. 101 at 69-70.) Alternatively, Reberger argues that this  
26 Court should issue a conditional writ, ordering that he be released from custody unless  
27 the State retries him within a certain period of time, and deny a stay if Respondents  
28 appeal. (Id. at 75.) While this Court agrees that the State's misconduct was outlandish, it  
does not agree that a dismissal of the charges or the denial of a stay if Respondents  
appeal are warranted. This Court will, however, order that Reberger be released from  
custody within 60 days unless the Respondents file a written notice of election to retry  
Reberger, and the State thereafter, within 180 days after the filing of that notice,  
commences proceedings toward the retrial.

1           **B.       Ground Four**

2           In Ground Four, Reberger alleges that his federal constitutional rights were  
3 violated when the state district court allowed an unreliable jailhouse informant to testify.  
4 (ECF No. 65 at 71.) In Reberger's appeal of his judgment of conviction, the Nevada  
5 Supreme Court held: "We remain unpersuaded by Reberger's argument[ that the district  
6 court erred] because . . . evidence independent of testimony rendered by . . . a jailhouse  
7 informant connected Reberger to the crimes, *see D'Agostino v. State*, 107 Nev. 1001,  
8 823 P.2d 283 (1991)." (ECF No. 32-1 at 2.) Reberger also raised this claim in his appeal  
9 of the denial of his first state habeas petition, but the Nevada Supreme Court stated that  
10 the claim was barred by the doctrine of the law of the case because it had already held  
11 on direct appeal that the claim lacked merit. (ECF No. 38-9 at 8-9 & n.4.) In response to  
12 Respondents' contention in the motion to dismiss that Reberger raised this claim as a  
13 state-law claim only on direct appeal, this Court held that the Nevada Supreme Court  
14 implicitly considered the federal claims in the appeal of the denial of the state  
15 postconviction petition. (ECF No. 94 at 4.) As the Nevada Supreme Court only implicitly  
16 considered the federal claims, the question here is whether Reberger has shown that  
17 there was no reasonable basis for the Nevada Supreme Court to deny relief. See  
18 *Harrington*, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an  
19 explanation, the habeas petitioner's burden still must be met by showing there was no  
20 reasonable basis for the state court to deny relief.").

21           Dean Salvador Zuniga, Reberger's former cellmate, testified at Reberger's trial  
22 that he was contacted by Detective White of the Henderson Police Department in  
23 December 1992,<sup>5</sup> and told Detective White that Reberger had told him that "he capped"  
24 someone. (ECF No. 29-1 at 43-45, 50.) Zuniga explained that he understood this to  
25 mean that Reberger shot someone. (*Id.* at 46.) Reberger "didn't give the specifics" about  
26 the shooting. (*Id.* at 49.) In return for his testimony, Zuniga testified that Detective White

---

27  
28           <sup>5</sup>Reberger's first jury trial commenced on December 29, 1992. (See ECF No. 24-1.)

1 said he would “speak on [Zuniga’s] behalf” by writing a letter to the parole board. (Id. at  
2 46-48; see also id. at 51, 81-82 (testimony of Detective White that he told Zuniga he  
3 would “write a letter stating his cooperation in this matter for them to consider when he  
4 came up for parole”).)

5 “A habeas petitioner bears a heavy burden in showing a due process violation  
6 based on an evidentiary decision.” *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005),  
7 *as amended on reh’g*, 421 F.3d 1154 (9th Cir. 2005). “[C]laims deal[ing] with admission  
8 of evidence” are “issue[s] of state law,” *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th  
9 Cir. 2009), and “federal habeas corpus relief does not lie for errors of state law.” *Lewis*  
10 *v. Jeffers*, 497 U.S. 764 (1990). Therefore, the issue before this Court is “whether the  
11 state proceedings satisfied due process.” *Jammal v. Van de Kamp*, 926 F.2d 918, 919-  
12 20 (9th Cir. 1991). In order for the admission of evidence to provide a basis for habeas  
13 relief, the evidence must have “rendered the trial fundamentally unfair in violation of due  
14 process.” *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (citing *Estelle v. McGuire*,  
15 502 U.S. 62, 67 (1991)). Further, “[u]nder AEDPA, even clearly erroneous admissions  
16 of evidence that render a trial fundamentally unfair may not permit the grant of federal  
17 habeas corpus relief if not forbidden by ‘clearly established Federal law,’ as laid out by  
18 the Supreme Court.” *Yarborough*, 568 F.3d at 1101 (citing 28 U.S.C. § 2254(d)); see  
19 also *Dowling v. United States*, 493 U.S. 342, 352 (1990) (explaining that the Supreme  
20 Court has “defined the category of infractions that violate ‘fundamental fairness’ very  
21 narrowly”). Importantly, the Supreme Court “has not yet made a ruling that admission of  
22 irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to  
23 warrant issuance of the writ.” Id.

24 Although there was a question about Zuniga’s reliability, that is insufficient to  
25 demonstrate a due process violation. See *United States v. Berry*, 624 F.3d 1031, 1040  
26 (9th Cir. 2010) (“In order . . . to succeed on [a] due process claim, it is not enough that  
27 the evidence introduced against [a petitioner] was of . . . questionable reliability.”).  
28 Instead, Reberger “must establish that the evidence was so arbitrary that ‘the factfinder

1 and the adversary system [were] not . . . competent to uncover, recognize, and take due  
2 account of its shortcomings.” *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)  
3 superseded on other grounds by 28 U.S.C. § 2253(c)(2)); see also *United States v.*  
4 *Scheffer*, 523 U.S. 303, 313 (1998) (“Determining the weight and credibility of witness  
5 testimony . . . has long been held to be the ‘part of every case [that] belongs to the jury.’”) (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)).

7 Here, the jury was aware that Zuniga was a cellmate of Reberger’s; that Zuniga  
8 had been convicted of stealing a car, stealing credit cards, and attempted coercion; and  
9 that Detective White promised to write a letter on Zuniga’s behalf to the parole board if  
10 he testified. (ECF No. 29-1 at 44, 46-48.) Further, the jury was instructed that “[t]he  
11 credibility or believability of a witness should be determined by his manner upon the  
12 stand, his relationship to the parties, his fears, motives, interests or feelings, [and] his  
13 opportunity to have observed the matter to which he testified.” (ECF No. 30-1 at 11.)  
14 The jury was also instructed that “[y]ou have heard testimony that the Defendant made  
15 an oral admission to a person in custody. Evidence of an oral admission by a Defendant  
16 ought to be viewed with caution.” (*Id.* at 13.) Because the jury was aware of the potential  
17 shortcomings of Zuniga’s testimony through cross-examination and the jury instructions  
18 and was able to weigh Zuniga’s credibility in light of these shortcomings, it cannot be  
19 concluded that Reberger’s trial was rendered fundamentally unfair. See *McGuire*, 502  
20 U.S. at 67. Accordingly, because Reberger has not demonstrated unfairness and  
21 because the Supreme Court has not held that “overtly prejudicial evidence constitutes a  
22 due process violation,” *Yarborough*, 568 F.3d at 1101, Reberger has failed to show that  
23 there was no reasonable basis for the Nevada Supreme Court to deny relief. See  
24 *Harrington*, 562 U.S. at 98.

25 Reberger is denied federal habeas relief for Ground Four.

### 26 **C. Ground Five**

27 In Ground Five, Reberger alleges that his federal constitutional rights were  
28 violated due to the cumulative effect of prosecutorial misconduct. (ECF No. 65 at 72.)

1 Reberger alleges four instances of prosecutorial misconduct. (See *id.* at 72-76.) In  
2 Reberger’s appeal of his judgment of conviction, the Nevada Supreme Court held: “We  
3 remain unpersuaded by Reberger’s arguments [that the district court erred]  
4 because . . . alleged misconduct by the State did not materially affect the verdict when  
5 viewed in the context of the entire trial, see *Leonard v. State*, 108 Nev. 79, 824 P.2d 287  
6 (1992).” (ECF No. 32-1 at 2-3.)

7 “[T]he touchstone of due process analysis in cases of alleged prosecutorial  
8 misconduct is the fairness of the trial, not the culpability of the prosecutor.” *Smith v.*  
9 *Phillips*, 455 U.S. 209, 219 (1982). “The relevant question is whether the prosecutors’  
10 comments ‘so infected the trial with unfairness as to make the resulting conviction a  
11 denial of due process.’” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting  
12 *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). A court must judge the remarks  
13 “in the context in which they are made.” *Boyde v. California*, 494 U.S. 370, 385 (1990).  
14 The fairness of a trial is measured “by considering, *inter alia*, (1) whether the  
15 prosecutor’s comments manipulated or misstated the evidence; (2) whether the trial  
16 court gave a curative instruction; and (3) the weight of the evidence against the  
17 accused.” *Tan v. Runnels*, 413 F.3d 1101, 1115 (9th Cir. 2005). “[P]rosecutorial  
18 misconduct[ ] warrant[s] relief only if [it] ‘had substantial and injurious effect or influence  
19 in determining the jury’s verdict.’” *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012)  
20 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

### 21 **1. Subpart A**

22 In Ground Five, Subpart A, Reberger alleges that his federal constitutional rights  
23 were violated when the state failed to disclose that Harvey had been described by the  
24 State as being “patently unreliable” in a different case. (ECF No. 65 at 72.)

25 During Reberger’s trial, outside the presence of the jury, Reberger’s trial counsel  
26 indicated to the state district court that “[i]t came to our attention accidentally last week  
27 that the State in fact has a document wherein Mel Harmon of the district attorney’s office  
28 in another case filed a motion in which he referred to Amber Lynn Harvey as patently

1 unreliable.” (ECF No. 29-1 at 4.) Reberger’s trial counsel elaborated that “there is  
2 apparently extensive evidence that [Harvey] gave very inconsistent statements in  
3 another murder case, specifically Hagelmeyer” and that “we never found out about it  
4 until one of our investigators happened to be in another attorney’s office and by accident  
5 noticed a file on his desk captioned Amber Lynn Harvey and asked about it.” (Id.)  
6 Reberger’s trial counsel explained that “if we’d had this weeks or months ago, we could  
7 have done an investigation to find out all the details.” (Id. at 5.) The state district court  
8 stated that it did not “know if an opinion by a prosecutor in an adversary proceeding  
9 rises to the level of exculpatory evidence” because it is “argument of counsel[,] . . . not  
10 evidence.” (Id. at 7.) The state district court then denied Reberger’s motion, stating that  
11 the motion was in a different case filed by a different prosecutor. (Id. at 9.)

12 Harvey’s testimony was presented later that day, and Reberger’s trial counsel  
13 cross-examined Harvey regarding a statement she gave in the Hagelmeyer case and  
14 its similarity to a statement she made in Reberger’s case. (ECF No. 29-2 at 2, 9, 62-63.)  
15 Harvey denied giving more than one statement in that case. (Id. at 63.) And as is  
16 explained further in Ground Six, Harvey was questioned about the prior inconsistent  
17 statements that she made in Reberger’s case. (See ECF No. 29-2 at 30, 57-58, 61-62,  
18 66, 88.)

19 Although information that the State opined that Harvey was unreliable in a  
20 different case may have been favorable to Reberger and may have been suppressed  
21 pursuant to Brady, the Nevada Supreme Court reasonably concluded that the verdict  
22 was not materially affected. Reberger’s trial counsel questioned Harvey about the  
23 inconsistent statements she made in Reberger’s case and about the similarities between  
24 Harvey’s statement in the Hagelmeyer case and her statement to Detective Perkins in  
25 Reberger’s case. Because Harvey was impeached with her prior statements, which cast  
26 doubt on her reliability, Reberger fails to demonstrate that the potential prosecutorial  
27 misconduct in suppressing additional impeachment evidence against Harvey dealing  
28 with reliability “had substantial and injurious effect or influence in determining the jury’s

1 verdict.” Brecht, 507 U.S. at 637-38. Accordingly, because the Nevada Supreme Court  
2 reasonably denied that there was prosecutorial misconduct warranting the granting of  
3 relief to Reberger, Reberger is denied federal habeas relief for Ground Five, Subpart A.

## 4 **2. Subpart B**

5 In Ground Five, Subpart B, Reberger alleges that his federal constitutional rights  
6 were violated when the State deliberately placed prejudicial information before the jury.  
7 (ECF No. 65 at 73.) Specifically, Reberger alleges that the State laid the autopsy  
8 photographs face up so that they were visible to the jury before they had been admitted  
9 and elicited evidence that Reberger was involved in an unrelated traffic stop. (Id.)

10 Regarding Reberger’s first contention, Reberger’s trial counsel explained to the  
11 state district court that during Reberger’s first trial, which ended in a mistrial, “the  
12 prosecution had taken out the autopsy photos and laid them out on the table so the jury  
13 could see them. We would ask the Court to request them to keep them turned down until  
14 and unless they are admitted into evidence, then only publish them to the jury.” (ECF  
15 No. 28 at 4.) The state district court indicated that it believed “that is appropriate.” (Id.)  
16 Later, through the testimony of Giles Green, the coroner who performed the victim’s  
17 autopsy, the autopsy photographs were admitted and published to the jury. (ECF No.  
18 28-3 at 69-70, 85.) Outside the presence of the jury, Reberger’s trial counsel indicated  
19 that the State again laid the photographs “face up on the desk facing the jury.” (ECF No.  
20 28-3 at 104.) The State admitted that the photographs “were face up, but there was only  
21 one of them that was actually viewable.” (Id. at 105.) The state district court then stated  
22 that there was no prejudice because it did not “think it was intentional and [there was]  
23 only one photograph” that was later admitted. (Id.)

24 Turning to Reberger’s second contention, Troy Hatch, an undercover narcotics  
25 detective with the Henderson Police Department, testified that he “ma[de] a traffic stop  
26 on October 25<sup>th</sup> of 1990 in reference to a black Chevrolet Camaro with Florida license  
27 plates.” (ECF No. 28-4 at 28-29.) Detective Hatch explained Reberger was one of two  
28 occupants in the vehicle. (Id. at 29.) The State asked Detective Hatch if he “recall[ed] if

1 [Reberger] was driving or was the passenger.” (Id. at 30.) Detective Hatch indicated that  
2 Reberger was driving. (Id.) Detective Hatch then testified, “without going into the  
3 particulars of the traffic stop itself,” as the State requested, that he arrested the  
4 passenger on an outstanding warrant. (Id.) Later, outside the presence of the jury,  
5 Reberger’s trial counsel explained that the State “didn’t have to elicit testimony that  
6 [Reberger] was the driver and it was a traffic stop.” (Id. at 69.) The state district court  
7 ruled that it was “not convinced that what happened even arose to the level to whereby  
8 it was a previous criminal act” because “most of the discussion and the testimony was  
9 surrounding the passenger who was wanted on some kind of felony warrant” and there  
10 was no “indication that Mr. Reberger was wanted or anything or had to be charged or  
11 was even ticketed for anything.” (Id. at 70.)

12 Even if these two circumstances warranted a finding that the State committed  
13 misconduct, the Nevada Supreme Court reasonably concluded that the jury’s verdict  
14 was not affected or influenced by the conduct. See Brecht, 507 U.S. at 637-38. First, the  
15 jury was able to view the photographs shortly after they were allegedly improperly  
16 displayed when they were subsequently published. And second, Detective Hatch did not  
17 give any description of or reason for the traffic stop of Reberger’s vehicle. Accordingly,  
18 because the Nevada Supreme Court reasonably denied that there was prosecutorial  
19 misconduct warranting the granting of relief to Reberger, Reberger is denied federal  
20 habeas relief for Ground Five, Subpart B.

### 21 **3. Subpart C**

22 In Ground Five, Subpart C, Reberger alleges that his federal constitutional rights  
23 were violated when the State improperly commented on the reasonable doubt standard.  
24 (ECF No. 65 at 74.) During the State’s closing argument, the following colloquy occurred:

25 [THE STATE]: . . . 27 times the defense made the statement not  
26 beyond a reasonable doubt. Is that a defense, simply  
27 not beyond a reasonable doubt? Stand up here and  
28 say - -

1 MR. DUNLEAVY: Your Honor, I am going to object. This is a defense.  
2 That's the law.

3 [THE STATE]: Is the statement not beyond a reasonable doubt a  
4 defense? Is he putting it forward now?

5 Ladies and gentlemen, you read - - we will take some  
6 time. I will go through this right now with you. You are  
7 going to have the opportunity to read it. It's instruction  
8 number four. In that instruction, pay attention to the  
9 second paragraph. The second paragraph says: "A  
10 reasonable doubt is one based on reason. It is not  
11 mere possible doubt but is such a doubt as would  
12 govern or control a person in their more weighty affairs  
13 of life. If in the minds of the jurors, after the entire  
14 comparison and consideration of all of the evidence are  
15 in such a condition that they can say they fill [sic] an  
16 abiding conviction of the truth of the charge, there is  
17 not a reasonable doubt." Doubt must be reasonable.  
18 Doubt to be reasonable must be actual, not mere  
19 possibility or speculation. . . .

20 (ECF No. 30-3 at 42-43.)

21 The Nevada Supreme Court's conclusion that the State's comment did not  
22 materially affect the verdict was reasonable. Even if the State's argument can be  
23 described as being misleading, see *Deck v. Jenkins*, 814 F.3d 954, 977-78 (9th Cir.  
24 2016), the State immediately and accurately thereafter gave the definition of reasonable  
25 doubt. (See ECF No. 30-1 at 5 (reasonable doubt jury instruction).) Thus, it cannot be  
26 determined that the State's previous, isolated comment "had [a] substantial and injurious  
27 effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637-38; see  
28 generally *United States v. Williams*, 690 F.3d 70 (2d Cir. 2012) (determining that the  
prosecutor's comment that "'this is not a search for reasonable doubt. This is a search  
for truth" was improper but not plain error). Therefore, because the Nevada Supreme  
Court reasonably denied that there was prosecutorial misconduct warranting the  
granting of relief to Reberger, Reberger is denied federal habeas relief for Ground Five,  
Subpart C.

///

///

1                   **4. Subpart D**

2                   In Ground Five, Subpart D, Reberger alleges that his federal constitutional rights  
3                   were violated when the State deliberately withheld important discovery material related  
4                   to letters Reberger allegedly wrote from the Coos Bay Correctional Center. (ECF No. 6  
5                   at 74.) Specifically, Reberger alleges that the State misled him into believing that the  
6                   original letters were destroyed and ambushed him at trial with the letter logs obtained  
7                   from the Coos Bay Correctional Center. (Id. at 75.)

8                   As was discussed briefly in Ground One and is discussed further in Ground Nine,  
9                   Subpart E, Reberger wrote Harvey three letters from the Coos County Corrections  
10                  facility. (ECF Nos. 18-9, 18-10, 19.) At a pre-trial hearing, Reberger's trial counsel  
11                  indicated that the original letters "are no longer in existence." (ECF No. 23-17 at 4.)  
12                  Reberger's trial counsel explained that he was "advised . . . that someone in the law  
13                  enforcement chain . . . took the letters and gave them to Amber Lynn Harvey, who sent  
14                  them to her mother, who threw them away." (Id. at 5.) The State confirmed that Coos  
15                  Bay Correction Facility officers "made photocopies of letters, and they passed on the  
16                  originals to Amber Harvey. And they made photocopies of the copies to send them down  
17                  to Henderson. And of course these are the letters that everybody has here in Court." (Id.  
18                  at 12.) The State also confirmed that he "spoke with Amber Harvey's mother a week  
19                  ago, and [he] asked her where the originals were," and because "Amber basically  
20                  wanted to have nothing else to do with Lance Reberger," the original letters were  
21                  disposed of. (Id. at 12-13.)

22                  Later, during the first trial, Reberger's trial counsel explained that, "all of a sudden,  
23                  the originals [of the letters] are sitting here[.] . . . I don't now [sic] how they came from  
24                  the dead, but we weren't advised that somehow they miraculously appeared." (ECF No.  
25                  26-1 at 46.) Reberger's trial counsel explained that they had "a Xerox copy of a Xerox  
26                  copy" and that Reberger was prejudiced by the late introduction of the original  
27  
28

1 documents because Reberger did not have “a chance to challenge the validity of the  
2 chain of custody or the authorship of the letters.”<sup>6</sup> (Id. at 48-49.)

3 Turning to Reberger’s second contention, during the second trial, the State called  
4 Officer Jackson, who testified, among other things, about the mail procedures in the  
5 Coos County Corrections facility. (ECF No. 29 at 4, 10.) The State asked Officer Jackson  
6 about a log of the letters that Reberger sent while he was housed at the Coos County  
7 Corrections facility. (Id. at 11, 15.) Officer Jackson testified that the log, which was four  
8 pages in length, showed how many letters Reberger mailed and to whom the letters  
9 were sent. (Id. at 15.) When the State moved to admit the log, Reberger’s trial counsel  
10 explained that he had “never seen [the log] until a couple minutes ago” and requested  
11 that he be able to ask Officer Jackson some questions about it. (Id. at 16.) During  
12 Reberger’s trial counsel’s questions, Officer Jackson testified that the log indicated  
13 whether mail is “inter-jail correspondence,” does not state who in the jail the mail was  
14 sent to, and does not state when people receive mail. (Id. at 16-17.) Reberger’s trial  
15 counsel then objected to the admission of the log on the basis that Officer Jackson was  
16 “not the custodian of records, he’s not the person that can verify whether or not the  
17 information contained in those logs is proper or what procedures [were] used.” (Id. at  
18 26.) The state district court admitted the log over Reberger’s trial counsel’s objection.  
19 (Id. at 27.) Later, outside the presence of the jury, Reberger’s trial counsel explained  
20 that “Andrew Jackson [came] in with logs that [he] didn’t know existed and never had an  
21 opportunity to review.” (Id. at 49.) The State indicated that it just saw the log that day  
22 and that it told Officer Jackson to bring them. (Id.) The state district court then stated  
23 that it did not “think those documents were so prejudicial,” but warned the State that if it  
24 “told [Officer Jackson] to bring them and [it] was going to introduce them, it’s encumbent  
25 [sic] upon [the State] to let [the defense] know.” (Id. at 50.)

---

26  
27  
28 <sup>6</sup>The Court notes that the State had the original letters tested for fingerprints. (ECF  
No. 26-1 at 42-43.)

1           The Nevada Supreme Court reasonably concluded that the late notice of the  
2 original letters and the log of letters did not materially affect the verdict in Reberger's  
3 case. See *Brecht*, 507 U.S. at 637-38. First, although it is unclear when the State  
4 obtained the original letters, it explained that it did not originally have access to them.  
5 However, because notice of the original letters was given during the first trial, which  
6 ended in a mistrial, Reberger had knowledge of them prior to the commencement of the  
7 second trial. Regarding the log, it does not appear that the log contained any pertinent  
8 information that Reberger's trial counsel did not already know from the copies of the  
9 underlying letters contained in the log. Accordingly, because the Nevada Supreme Court  
10 reasonably rejected Reberger's prosecutorial misconduct claim, Reberger is denied  
11 federal habeas relief for Ground Five, Subpart D.

12           Because Reberger has failed to demonstrate that the foregoing instances of  
13 alleged prosecutorial misconduct warrant the granting of federal habeas relief, the  
14 cumulative effect of the alleged prosecutorial misconduct does not warrant the granting  
15 of federal habeas relief.

16           **D.     Ground Six**

17           In Ground Six, Reberger alleges that his federal constitutional rights were violated  
18 when Harvey was allowed to testify even though she was incompetent. (ECF No. 65 at  
19 76.) Secondly, Reberger asserts that there was a lack of independent corroboration  
20 regarding Harvey's testimony. (Id. at 78.)

21           Regarding the first part of Ground Six, incompetence, in Reberger's appeal of his  
22 judgment of conviction, the Nevada Supreme Court held: "Reberger appeals, arguing  
23 that the district court erred in numerous respects. We remain unpersuaded by  
24 Reberger's arguments because . . . Reberger produced no credible evidence . . .  
25 demonstrat[ing] why jurors could not properly determine the veracity of his co-  
26 defendant's testimony." (ECF No. 32-1 at 2.) This Court previously dismissed  
27 Respondents' argument that Reberger failed to rely on federal constitutional provisions  
28

1 in his direct appeal, so this Court found this portion of Ground Six to be exhausted. (ECF  
2 No. 94 at 6.)

3 Regarding the second part of Ground Six, corroboration, in Reberger's appeal of  
4 his judgment of conviction, the Nevada Supreme Court held: "We remain unpersuaded  
5 by Reberger's argument[ that the district court erred] because . . . evidence independent  
6 of testimony rendered by Reberger's co-defendant . . . connected Reberger to the  
7 crimes, see *D'Agostino v. State*, 107 Nev. 1001, 823 P.2d 283 (1991)." (ECF No. 32-1  
8 at 2.) Reberger also raised this claim in his appeal of the denial of his first state habeas  
9 petition, but the Nevada Supreme Court stated that the claim was barred by the doctrine  
10 of the law of the case because it had already held on direct appeal that the claim lacked  
11 merit. (ECF No. 38-9 at 8-9 & n.4.) In response to Respondents' contention in the motion  
12 to dismiss that Reberger raised this claim as a state-law claim only on direct appeal, this  
13 Court held that the Nevada Supreme Court implicitly considered the federal claims in  
14 the appeal of the denial of the state postconviction petition. (ECF No. 94 at 4.) As the  
15 Nevada Supreme Court only implicitly considered the federal claims, the question here  
16 is whether Reberger has shown that there was no reasonable basis for the Nevada  
17 Supreme Court to deny relief. See *Harrington*, 562 U.S. at 98 ("Where a state court's  
18 decision is unaccompanied by an explanation, the habeas petitioner's burden still must  
19 be met by showing there was no reasonable basis for the state court to deny relief.").

20 Prior to his trial, Reberger moved to limit Harvey's testimony. (ECF No. 23-7.) A  
21 hearing on the motion was held on November 20, 1992, wherein the state district court  
22 indicated that it "think[s] there is a lot of circumstantial evidence that [Reberger is]  
23 involved, but [it] need[s] something to connect him to the crime." (ECF No. 23-11 at 16.)  
24 The state district court then indicated that it would reserve ruling on the issue. (*Id.* at 23.)  
25 A second hearing on the motion was held on December 3, 1992, and again, the state  
26 district court "h[e]ld a ruling on this issue in abeyance" because it wanted "to see how  
27 the case goes." (ECF No. 23-14 at 17.) A third hearing on the motion was held on  
28 December 9, 1992, and at this time the state district court denied "[t]he motion to limit

1 the testimony of Amber Lynn Harvey.” (ECF No. 23-17 at 17.) The state district court  
2 explained that “[t]here is a whole composite of facts and circumstances established by  
3 a number of witnesses that the accused was linked to the accomplice by association,  
4 motive, opportunity, knowledge. The whole gambit of their relationship is enough.” (Id.)  
5 The state district court also explained, “it doesn’t have to be enough to prove guilt; the  
6 slightest evidence that tends to connect. And I believe, based upon what the State says,  
7 they can prove that’s sufficient.” (Id.)

8 Reberger first takes issue with Harvey’s testimony because she was on drugs,  
9 including heroin, crank, marijuana, and alcohol, when the crimes were committed. (ECF  
10 No. 29-2 at 67, 70.) Further, Harvey was taking Thorazine when she testified at  
11 Reberger’s trial. (Id. at 67) Jack Jurasky, a physician and psychiatrist, testified that  
12 “Thorazine is a very powerful antipsychotic” drug. (ECF No. 30-2 at 11-13.)

13 Next, Reberger takes issue with Harvey’s testimony because of her cognitive  
14 abilities. Harvey testified that she “ha[s] a little retardness [sic] in [her].” (ECF No. 29-2  
15 at 69.) And Lewis Marvin Etcoff, a licensed psychologist and a clinical  
16 neuropsychologist, testified that he met with Harvey and determined that “[h]er  
17 intelligence test score, her verbal intelligence, came out to an I.Q. of 68, which falls in  
18 the mildly mentally retarded range.” (ECF No. 30-2 at 16-18.) Dr. Etcoff explained that  
19 he “wasn’t convinced that [Harvey] was relating the facts to [him] as they actually  
20 occurred. [He] wasn’t sure that [Harvey] was able to or even remembered exactly what  
21 occurred, because she seemed to have changed her story several times from the  
22 information that [he] had been provided.” (Id. at 18.) Dr. Etcoff explained that he thought  
23 Harvey was “confused and mixed up, which would probably account for her telling  
24 different stories at different times to different people.” (Id. at 26.)

25 Third, Reberger takes issue with Harvey’s testimony because she told  
26 inconsistent stories. Harvey testified that she believed she told Coos Bay law  
27 enforcement that she had never seen the gun before and that “the only reason [she]  
28 went along was because Lance put a gun up against [her] son’s head.” (ECF No. 29-2

1 at 57-58.) Harvey admitted that this was not true and that she lied because she was  
2 scared, had not slept for days, was sick, was pregnant and was on drugs. (Id. at 30, 57.)  
3 Later, in a statement to the Henderson Police Department, Harvey said that she heard  
4 two muffled shots when she was in the vehicle, saw somebody dressed all in black, and  
5 had possession of the gun. (Id. at 61-62, 66.) Harvey later told an inmate that she did  
6 not have anything to do with the crimes in question. (Id. at 57.) Finally, in her interview  
7 with the Department of Parole and Probation, Harvey said she “only provided an  
8 interview to the police because they threatened [her] with rape” and that “she had no  
9 memory of the instant offense, the actual crime.” (Id. at 88; see also ECF No. 29-4 at  
10 12.) However, in her written statement given to Joy Mundy-Neal, the Department of  
11 Parole and Probation officer who wrote Harvey’s presentence investigation report,  
12 Harvey wrote the following: “I know I was wrong doing a burglary, but I swear on my life,  
13 I did not know about the robbery and murder.” (Id. at 23.)

14         Similar to Ground Four, there was a question about Harvey’s competence and  
15 whether, under Nevada law, there was corroborating evidence supporting Harvey’s  
16 testimony. See *LaPena v. Sheriff*, 91 Nev. 692, 694, 541 P.2d 907, 909 (1975)  
17 (explaining that Nevada law “prohibits a conviction on testimony of an accomplice unless  
18 he is corroborated”). However, in order to prevail on a federal habeas claim, Reberger  
19 must demonstrate that Harvey’s “testimony is almost entirely unreliable and that the  
20 factfinder and the adversary system will not be competent to uncover, recognize, and  
21 take due account of its shortcomings.” *Barefoot*, 463 U.S. at 899, superseded on other  
22 grounds by 28 U.S.C. § 2253(c)(2). Here, the jury was aware that Harvey was on drugs  
23 when the crimes occurred, was on medication while testifying at Reberger’s trial, had  
24 limited cognitive abilities, and told previous inconsistent stories. Further, as was also  
25 pointed out in Ground Four, the jury was instructed about credibility and believability of  
26 a witness. (ECF No. 30-1 at 11.) Because the jury was aware of the potential  
27 shortcomings of Harvey’s testimony and was able to weigh Harvey’s credibility in light  
28 of these shortcomings, the Nevada Supreme Court reasonably concluded that Reberger

1 failed to demonstrate why the jury could not determine Harvey's veracity. Accordingly,  
2 it cannot be concluded that Reberger's trial was rendered fundamentally unfair due to  
3 Harvey's alleged incompetence. McGuire, 502 U.S. at 67.

4 Further, regarding the corroboration issue, it is Reberger's burden to demonstrate  
5 a lack of congruence with United States Supreme Court precedent. Reberger only cites  
6 case law regarding sufficiency of the evidence; however, he fails to cite any apposite  
7 constitutional decisions by the Supreme Court regarding corroborating evidence.  
8 Reberger has failed to show that there was no reasonable basis for the Nevada  
9 Supreme Court to deny relief. See Harrington, 562 U.S. at 98.

10 Reberger is denied federal habeas relief for Ground Six.

#### 11 **E. Ground Seven**

12 In Ground Seven, Reberger alleges that his federal constitutional rights were  
13 violated when the jury engaged in premature deliberations. (ECF No. 65 at 81.)  
14 Reberger elaborates that the state district court should have engaged in further inquiry  
15 after being informed that some jurors were discussing the case prematurely. (Id.) In  
16 Reberger's appeal of his judgment of conviction, the Nevada Supreme Court held:  
17 "Reberger appeals, arguing that the district court erred in numerous respects. We  
18 remain unpersuaded by Reberger's arguments because . . . Reberger produced no  
19 credible evidence of prejudicial juror misconduct." (ECF No. 32-1 at 2.)

20 On January 20, 1993, Deanna Domingo was called as a witness for the defense  
21 at Reberger's trial. (ECF No. 29-3 at 3, 27.) The following day, January 21, 1993, outside  
22 the presence of the jury, Reberger's trial counsel informed the state district court that  
23 "Miss Domingo, who testified yesterday, apparently contacted [Reberger] yesterday and  
24 advised him that when she was downstairs, she overheard the jury talking about how  
25 they felt sorry for Amber and were upset at what Lance might have put Amber through."  
26 (ECF No. 29-5 at 5.) The state district court replied that it "d[id]n't know if that's true or  
27 what," and indicated, in response to Reberger's trial counsel suggesting that an inquiry  
28

1 could be made of Domingo, it was “not going to do anything. You can if you think there  
2 is a problem, but [it] didn’t see any.” (Id.)

3 Reberger’s trial counsel later insisted on making a record of Domingo’s  
4 observations regarding the jury. (Id. at 36.) Domingo testified outside the presence of  
5 the jury that as she was walking alongside a couple of people in the courthouse, she  
6 heard them say, “‘Lance is taking it pretty good.’ And another girl said, ‘I kind of felt sorry  
7 for the girl.’” (Id. at 37.) A little while later, after the lunchbreak, Domingo recognized the  
8 people she heard speaking sitting as jurors in Reberger’s trial. (Id.) During cross-  
9 examination, Domingo testified that she told Reberger this information when he called  
10 her the night before. (Id. at 38.) Domingo also explained that she had visited Reberger  
11 in jail approximately twenty-five times. (Id. at 39.) The state district court then ruled on  
12 the issue:

13 I don’t know if she’s talking about our jury or what they were talking about.  
14 There are two juries, two or three juries, out there. Two of them are outside  
15 our courtroom. There’s one outside our courtroom that’s not even our jury  
who’s been sitting around here.

16 She didn’t identify who the people were. I have no idea what she’s talking  
17 about. And if they’re even jurors, or if they were our jurors, or if they were  
18 witnesses or - - I don’t even know. She wasn’t very clear about when and  
where and what, who or anything.

19 The Court will admonish the jury not to discuss this case again. But I think  
20 I’ve done that, and I don’t have any credible evidence that they’ve been  
doing otherwise.

21 (Id. at 40.)

22 The Supreme Court has explained that “due process does not require a new trial  
23 every time a juror has been placed in a potentially compromising situation,” rather, due  
24 process guarantees “a jury capable and willing to decide the case solely on the evidence  
25 before it, and a trial judge ever watchful to prevent prejudicial occurrences and to  
26 determine the effect of such occurrences when they happen.” *Smith v. Phillips*, 455 U.S.  
27 209, 217 (1982). If juror misconduct is alleged, “the remedy . . . is a hearing in which the  
28 defendant has the opportunity to prove actual bias.” *Id.* at 215. Following that hearing,

1 the court must assess “whether or not the misconduct has prejudiced the defendant to  
2 the extent that he has not received a fair trial.” *United States v. Klee*, 494 F.2d 394, 396  
3 (9th Cir. 1974).

4 Reberger was given an “opportunity to prove actual bias,” *Smith*, 455 U.S. at 215,  
5 by having Domingo testify about her observations. Thereafter, the state district court  
6 concluded that Domingo was not credible and, as such, no action was warranted beyond  
7 further admonishment of the jury. (ECF No. 29-5 at 40.) The relationship between  
8 Reberger and Domingo supports the state district court’s credibility determination. See  
9 generally *Rice v. Collins*, 546 U.S. 333, 341-42 (2006) (“Reasonable minds reviewing  
10 the record might disagree about the prosecutor’s credibility, but on habeas review that  
11 does not suffice to supersede the trial court’s credibility determination.”). Indeed,  
12 Domingo testified that she had visited Reberger in jail approximately twenty-five times  
13 and had spoken to him on the telephone the evening that she allegedly observed the  
14 jury members conversing. (ECF No. 29-5 at 38-39.) Accordingly, the Nevada Supreme  
15 Court’s conclusion that Reberger failed to produce sufficient support that a prejudicial  
16 occurrence took place was reasonable. See *Smith*, 455 U.S. at 217. Because Reberger  
17 fails to show a violation of his federal constitutional rights, he is denied federal habeas  
18 relief for Ground Seven.

#### 19 **F. Ground Eight**

20 In Ground Eight, Reberger argues that his federal constitutional rights were  
21 violated when the state district court refused to give two proposed jury instructions which  
22 were based on his theory of defense. (ECF No. 65 at 82.) In Reberger’s appeal of his  
23 judgment of conviction, the Nevada Supreme Court held that “the district court  
24 adequately instructed the jury regarding Reberger’s theory of the case.” (ECF No. 32-1  
25 at 2.) As with Ground Four and Six, Reberger also raised this claim in his appeal of the  
26 denial of his first state habeas petition, but the Nevada Supreme Court stated that the  
27 claim was barred by the doctrine of the law of the case because it had already held on  
28 direct appeal that the claim lacked merit. (ECF No. 38-9 at 9 & n.4.) In response to

1 Respondents' contention in the motion to dismiss that Reberger raised this claim as a  
2 state-law claim only on direct appeal, this Court held that the Nevada Supreme Court  
3 implicitly considered the federal claims in the appeal of the denial of the state  
4 postconviction petition. (ECF No. 94 at 4.) As the Nevada Supreme Court only implicitly  
5 considered the federal claims, the question here is whether Reberger has shown that  
6 there was no reasonable basis for the Nevada Supreme Court to deny relief. See  
7 *Harrington*, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an  
8 explanation, the habeas petitioner's burden still must be met by showing there was no  
9 reasonable basis for the state court to deny relief.").

10 Issues relating to jury instructions are not cognizable in federal habeas corpus  
11 unless they violate due process. See *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); see also  
12 *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("[W]e have never said that the possibility of  
13 a jury misapplying state law gives rise to federal constitutional error."). The question is  
14 "whether the ailing instruction by itself so infected the entire trial that the resulting  
15 conviction violates due process', . . . not merely whether 'the instruction is undesirable,  
16 erroneous, or even universally condemned.'" *Henderson v. Kibbe*, 431 U.S. 145, 154  
17 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)). A challenged  
18 instruction "may not be judged in artificial isolation,' but must be considered in the context  
19 of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp*,  
20 414 U.S. at 147); see also *United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999)  
21 (explaining that a court inquires as to "whether the instructions as a whole are misleading  
22 or inadequate to guide the jury's deliberation" (internal citations omitted)). Furthermore,  
23 jurors are presumed to follow the instructions that they are given. See *United States v.*  
24 *Olano*, 507 U.S. 725, 740 (1993). Even if an instruction contains a constitutional errors,  
25 the court must then "apply the harmless-error analysis mandated by *Brecht*[ v.  
26 *Abrahamson*, 507 U.S. 619 (1993)]." *Calderon v. Coleman*, 525 U.S. 141, 146 (1998).  
27 The question is whether the error had a "substantial and injurious effect or influence in  
28 determining the jury's verdict." *Id.* at 145.

1 The heart of Reberger's argument is that the district court prevented him from  
2 establishing his defense theory by denying his proposed instructions. See Mathews v.  
3 United States, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled  
4 to an instruction as to any recognized defense for which there exists evidence sufficient  
5 for a reasonable jury to find in his favor."). Reberger's trial counsel proposed two jury  
6 instructions. (ECF No. 30-2 at 38.) The first proposed instruction provided that "the State  
7 has introduced evidence which was discovered approximately two years after the crime  
8 was committed. In deciding what weight to give this evidence, you must consider the time  
9 which has passed between the date the crime was committed and the date the evidence  
10 was discovered." (Id. at 38-39.) The second proposed instruction provided that "the jury  
11 has little knowledge as to the type of pressures and inducement that the jail inmates are  
12 under to cooperate with the State and to say anything that is helpful to the State's case.  
13 Therefore, such testimony should be carefully evaluated." (Id. at 39.)

14 Reberger's trial counsel explained that "[t]he Court refused [his second proposed]  
15 instruction. However, we compromised on an instruction which is now Number 12." (Id.)  
16 Following comment from the State, the state district court explained:

17 The Court - - in regards to Defense Instruction Number B, the Court declined  
18 to give that instruction because the Court did not feel that it was - - the Court  
19 did not approve of the way it was written. The Court thought it was confusing  
and that it was not the law, per se.

20 However, the Court did find an instruction - - we fashioned one which would  
21 take care of the problems that the defense wanted to cure, and that is having  
22 a jailhouse person come into court and testify to the admission that was  
made by the defendant and that his testimony should be looked at with  
caution and with great scrutiny.

23 The Court felt that Instruction Number 12 would alleviate concerns that our  
24 Supreme Court expressed in the D'Agostino case. And also the Court would  
25 note that the instruction that the defense proposed came out of D'Agostino,  
26 which specifically went to the penalty phase of the hearing and not to the  
guilt phase. And the Court thinks Instruction Number 12 states what the  
defense wanted to state about the witness who was in custody.

27 In reference to defense Instruction Number 8, basically the Court found this  
28 instruction to be consuming also. I mean, I don't know what the - - it's just a

1 statement that the case - - some evidence was found two years after the  
2 crime was committed; and that they must consider the time between the  
3 time that the crime happened and when the evidence was submitted. I don't  
4 know. That's not stating any law, and it just made one blanket statement.  
5 Of course, in a murder case sometimes it's 20 years before evidence is  
6 discovered, in order to convict a person for murder. There is no statute of  
7 limitations on murder and on the evidence that can be used.

8  
9 Therefore, that's why the Court gave this instruction, although you can  
10 always argue weight and inferences to be drawn from any evidence. And  
11 that's your prerogative during closing argument. The Court is not going to  
12 foreclose that to you. However, the Court doesn't think it's proper in a jury  
13 instruction.

14 (Id. at 40-41.)

15 Turning first to Reberger's proposed jury instruction about later-discovered  
16 evidence, this proposed instruction regarded Harvey taking law enforcement to the desert  
17 "[t]o show them the stuff that [Harvey and Reberger had] ditched," which occurred "a  
18 couple months" before Reberger's trial. (See ECF No. 29-2 at 30; see also ECF No. 23-  
19 25.) Reberger's proposed instruction was based on Bishop v. State, which explained that  
20 the passage of time between the crime and the discovery of evidence "goes to the weight  
21 rather than the admissibility" of that evidence. 554 P.2d 266, 273 (Nev. 1976). Although  
22 the jurors were not instructed about consideration of later-discovered evidence  
23 specifically, they were instructed about the consideration of evidence generally. (See ECF  
24 No. 30-1 at 6 ("Although you are to consider only the evidence in the case in reaching a  
25 verdict, you must bring to the consideration of the evidence [their] everyday common  
26 sense and judgment as reasonable men and women.").) Because the jury was instructed  
27 to use their common sense and judgment in considering the evidence against Reberger,  
28 the jury was adequately instructed about Reberger's defense theory that the evidence  
was unreliable. See Mathews, 485 U.S. at 63. Therefore, because Reberger fails to  
demonstrate a due process violation, Estelle, 502 U.S. at 72, Reberger has failed to show  
that there was no reasonable basis for the Nevada Supreme Court to deny relief.  
Harrington, 562 U.S. at 98.

1 Turning to Reberger's proposed instruction about evaluating inmate testimony,  
2 Reberger cites to *D'Agostino v. State*, which provided that "[a] legally unsophisticated jury  
3 has little knowledge as to the types of pressures and inducements that jail inmates are  
4 under to 'cooperate' with the state and to say anything that is 'helpful' to the state's case."  
5 823 P.2d 283, 284 (Nev. 1991). Reberger's proposed jury instruction copies this language  
6 from *D'Agostino* and then adds that "such testimony should be carefully evaluated." (ECF  
7 No. 30-2 at 39.) Instead of Reberger's proposed instruction, the state district court  
8 instructed the jury as follows: "You have heard testimony that the Defendant made an  
9 oral admission to a person in custody. Evidence of an oral admission by a Defendant  
10 ought to be viewed with caution." (ECF No. 30-1 at 13.) Although the jury was not  
11 instructed about the pressures an inmate is under to cooperate, which is more akin to  
12 argument, the jury was instructed about the careful evaluation that ought to be given to  
13 inmate testimony, which was the basis of Reberger's proposed instruction and defense  
14 regarding inmate testimony. Accordingly, the jury was adequately instructed about  
15 Reberger's defense theory, see Mathews, 485 U.S. at 63, such that Reberger fails to  
16 demonstrate a due process violation, see Estelle, 502 U.S. at 72, and fails to show that  
17 there was no reasonable basis for the Nevada Supreme Court to deny relief, see  
18 Harrington, 562 U.S. at 98.

19 Reberger is denied federal habeas relief for Ground Eight.

#### 20 **G. Ground Nine**

21 In Ground Nine, Reberger alleges that his federal constitutional rights were  
22 violated due to eight instances of ineffective assistance of his trial counsel. (ECF No. 65  
23 at 83-93.) In *Strickland*, the Supreme Court propounded a two-prong test for analysis of  
24 claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1)  
25 that the attorney's "representation fell below an objective standard of reasonableness,"  
26 and (2) that the attorney's deficient performance prejudiced the defendant such that  
27 "there is a reasonable probability that, but for counsel's unprofessional errors, the result  
28 of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668,

1 688, 694 (1984). A court considering a claim of ineffective assistance of counsel must  
2 apply a “strong presumption that counsel’s conduct falls within the wide range of  
3 reasonable professional assistance.” *Id.* at 689. The petitioner’s burden is to show “that  
4 counsel made errors so serious that counsel was not functioning as the ‘counsel’  
5 guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Additionally, to establish  
6 prejudice under Strickland, it is not enough for the habeas petitioner “to show that the  
7 errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693.  
8 Rather, the errors must be “so serious as to deprive the defendant of a fair trial, a trial  
9 whose result is reliable.” *Id.* at 687.

10 Where a state district court previously adjudicated the claim of ineffective  
11 assistance of counsel under Strickland, establishing that the decision was unreasonable  
12 is especially difficult. See *Harrington*, 562 U.S. at 104-05. In *Harrington*, the United  
13 States Supreme Court instructed:

14 The standards created by Strickland and § 2254(d) are both “highly  
15 deferential,” [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320,  
16 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply  
17 in tandem, review is “doubly” so, *Knowles [v. Mirzayance]*, 556 U.S. 111,  
18 123 (2009)]. The Strickland standard is a general one, so the range of  
19 reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420.  
20 Federal habeas courts must guard against the danger of equating  
unreasonableness under Strickland with unreasonableness under §  
2254(d). When § 2254(d) applies, the question is not whether counsel’s  
actions were reasonable. The question is whether there is any reasonably  
argument that counsel satisfied Strickland’s deferential standard.

21 *Harrington*, 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 995 (9th  
22 Cir. 2010) (internal quotation marks omitted) (“When a federal court reviews a state  
23 court’s Strickland determination under AEDPA, both AEDPA and Strickland’s deferential  
24 standards apply; hence, the Supreme Court’s description of the standard as doubly  
25 deferential.”).

### 26 **1. Subpart A**

27 In Ground Nine, Subpart A, Reberger argues that his trial counsel erred in failing  
28 to call Corrine Kemp to testify. (ECF No. 65 at 84.) Reberger explains that Kemp, the

1 girlfriend of jailhouse informant Dean Salvador Zuniga, would have undermined Zuniga's  
2 testimony. (Id. at 84-85.) In Reberger's appeal of the denial of his first state habeas  
3 petition, the Nevada Supreme Court held:

4 [A]ppellant claimed counsel were ineffective for failing to call C. Kemp as a  
5 witness to impeach the credibility of the jailhouse informant. Appellant failed  
6 to demonstrate deficiency or prejudice. Kemp testified at the evidentiary  
7 hearing that she arrived at the courthouse too late to testify, was high on  
8 heroin when she arrived, and would not have gone into the courtroom so  
"loaded." We therefore conclude that the district court did not err in denying  
this claim.

9 (ECF No. 38-9 at 3.)

10 As was explained in Ground Four, Zuniga, Reberger's former cellmate, testified  
11 at Reberger's trial that Reberger had told him that "he capped" someone. (ECF No. 29-  
12 1 at 43-45.) Kemp, who had previously been in a relationship with Zuniga and had a son  
13 with him, testified at the post-conviction evidentiary hearing that Zuniga told her  
14 approximately two months prior to Reberger's trial that Zuniga "did not . . . know that  
15 Lance killed that kid" and that "he didn't know that that's what [he] did or that's what [he  
16 was] in there for." (ECF No. 34 at 51, 61-62, 72.) Kemp was "never called to [Reberger's]  
17 trial in 1993" because she "was doing illegal activity, . . . was on drugs and . . . didn't  
18 show up for court." (Id. at 53-55.) In fact, Kemp testified that she went to the courthouse  
19 during Reberger's trial "because [she] was told that they brang [sic] Dean down for court.  
20 So, [she] was going to go to court and tell them that Dean was lying." (Id. at 57.)  
21 However, Kemp testified that she was using heroin and PCP during that time and missed  
22 Zuniga's testimony. (Id. at 58, 67.) Later, after Reberger's trial, Kemp wrote Reberger a  
23 letter telling Reberger "that [Zuniga] was lying." (Id. at 58, 61; see also ECF No. 39-1  
24 (Kemp's letter to Reberger in which she states "if I can get sapenad [sic] [and] test a fi  
25 [sic] in your appeal that Dino lied[,] I will do it").) Kemp believed that Zuniga "was  
26 testifying against [Reberger] to get out of prison." (ECF No. 34 at 63.)

27 Kemp explained that she was contacted by Reberger's trial counsel prior to his  
28 trial. (Id. at 53.) "[A] detective that was helping Lance" came to her house, and Kemp

1 spoke to him more than once. (Id. at 66, 68.) On one occasion, Reberger’s “investigator  
2 put a tape recorder in [her] baby’s crib so [they] could catch the conversation between  
3 the DA’s office and [Kemp].” (Id.; see also ECF No. 23-23 (transcript of Officer White’s  
4 conversation with Kemp at Kemp’s home).) Kemp testified that she “probably” told  
5 Reberger’s investigator what Zuniga had told her regarding being unaware of  
6 Reberger’s crime, but she did not recall whether she told the investigator whether she  
7 had prior felony convictions. (ECF No. 34 at 67, 73.)

8 Trial “counsel has a duty to make reasonable investigations.” Strickland, 466 U.S.  
9 at 691. Reberger’s trial counsel satisfied this requirement, as they sent an investigator  
10 to speak with Kemp on several occasions prior to the trial. (ECF No. 34 at 66, 68.) Even  
11 if Kemp could have discredited Zuniga’s statement that Reberger told him that he  
12 “capped” someone (ECF No. 29-1 at 45), that does not lead to a conclusion that  
13 Reberger’s trial counsel were deficient in not calling Kemp as a witness. See Strickland,  
14 466 U.S. at 688. Kemp was using several illegal drugs around the time of Reberger’s  
15 trial and had prior felony convictions. (ECF No. 34 at 53-55, 67.) Accordingly, refraining  
16 from calling Kemp as witness may have been strategic, such that the Nevada Supreme  
17 Court reasonably concluded that Reberger failed to demonstrate deficiency. See  
18 Strickland, 466 U.S. at 688. And even if Reberger’s trial counsel was deficient, the  
19 Nevada Supreme Court also reasonably concluded that Reberger could not  
20 demonstrate prejudice. See id. at 694. Kemp’s drug use and prior convictions cast doubt  
21 on her credibility, and Zuniga’s testimony was already questionable without further  
22 impeachment evidence from Kemp. In fact, Zuniga testified at the trial that Detective  
23 White told him that he would “speak on [Zuniga’s] behalf” via a letter to the parole board  
24 if Zuniga testified against Reberger. (ECF No. 29-1 at 46.)

25 Reberger is denied federal habeas relief for Ground Nine, Subpart A.

26 ///

27 ///

28 ///

1                   **2. Subpart B**

2           In Ground Nine, Subpart B, Reberger argues that his trial counsel failed to  
3 investigate and call two alibi witnesses. (ECF No. 65 at 85.) In Reberger's appeal of the  
4 denial of his first state habeas petition, the Nevada Supreme Court held:

5           [A]ppellant claimed counsel were ineffective for failing to locate and call at  
6 trial two alibi witnesses. Appellant failed to demonstrate deficiency or  
7 prejudice. At the evidentiary hearing on the instant petition, counsel testified  
8 and appellant presented a report demonstrating that defense investigators  
9 attempted to locate the alibi witnesses. Counsel further testified that they  
10 did not call any alibi witness because appellant had confessed to the crimes  
11 and counsel would not suborn perjury. We therefore conclude that the  
12 district court did not err in denying this claim.

13 (ECF No. 38-9 at 3.)

14           On December 9, 1991, a report was issued by Louis Smit, the Director of  
15 Investigations at Selgae Associates. (ECF No. 39-10.) On the request of Dunleavy, Smit  
16 interviewed Reberger, who provided two individuals who he believed "may provide an  
17 alibi for his whereabouts on or about November 4, 1990" because "he believed he was  
18 in the Skyline Casino" at the time the crime was committed. (Id. at 2.) After contacting  
19 the Skyline Casino, Smit learned the name of one of the potential witnesses, Heidi  
20 Hubbard, and her contact information. (Id. at 3.) Smit concluded his report by indicating  
21 that "[f]urther follow-up and contact of these individuals will be suspended until there is  
22 a further conference between myself and Attorney Philip Dunleavy." (Id. at 5.)

23           After the case was submitted to the jury for deliberation, the state district court  
24 allowed Reberger the opportunity to lodge "any objections he may have to the defense  
25 counsel as to the manner in which defense counsel . . . conducted his defense." (ECF  
26 No. 30-3 at 58-59.) Reberger explained that he had "two alibis in this case. But  
27 unfortunately when it was investigated, went to the Skyline Casino where I was at the  
28 time, the two change girls that were there were nowhere to be found." (Id. at 62.) In  
response, Dunleavy called Steven Jensen, an investigator with Selgae Associates, to  
testify. (Id. at 63-64.) Jensen testified that he "went to the Skyline Casino and talked to

1 the change manager,” however, “[n]o one there knew anybody with [the given]  
2 description or [given first] name that worked about approximately that time.” (Id. at 64.)

3 Dunleavy’s co-counsel, Patrick McDonald, Esq. testified years later at the post-  
4 conviction evidentiary hearing that he did not remember seeing Smit’s report. (ECF No.  
5 36-2 at 60, 73; ECF No. 34-1 at 217.) And Dunleavy testified that his investigator “found  
6 a potential alibi witness,” but Dunleavy did not call her to testify because she was not  
7 credible and would have lied. (ECF No. 34 at 85, 124.) Dunleavy elaborated that  
8 Reberger told him “on multiple occasions” that he “was at the scene of the crime” and  
9 told Dunleavy he committed the crime. (Id. at 125.) Therefore, Dunleavy refused to call  
10 Hubbard to testify because she would have committed perjury “if she said [Reberger  
11 was] at the casino at the time of the crime.” (Id.) Reberger refuted Dunleavy’s testimony  
12 when he testified at the post-conviction evidentiary hearing that “Dunleavy lied when  
13 claiming [he] allegedly confessed to this crime.” (ECF No. 37-1 at 122, 125.) Reberger  
14 explained that “Dunleavy failed to interview one of my alibi witnesses, Heidi  
15 Hubbard . . . , when her address was provided to Mr. Dunleavy” and his “two alibi  
16 witnesses would have put [him] at Skyline Casino at the time of this crime.” (Id. at 132.)

17 Although it appears that Jensen’s testimony during Reberger’s trial was  
18 erroneous because Smit’s report clearly stated that he had obtained Hubbard’s name  
19 and contact information, the Nevada Supreme Court reasonably concluded that  
20 Reberger’s trial counsel was not deficient for failing to investigate and call Hubbard or  
21 another Skyline Casino employee to testify. See Strickland, 466 U.S. at 688. Dunleavy  
22 refrained from calling an alibi witness because Reberger had previously confessed to  
23 committing the crimes to him, so Dunleavy was prevented from presenting false  
24 information. See Nix v. Whiteside, 475 U.S. 157, 173 (1986) (“[T]he right to counsel  
25 includes no right to have a lawyer who will cooperate with planned perjury.”). Further,  
26 the Nevada Supreme Court reasonably concluded that Reberger failed to establish  
27 prejudice because it is unclear what either of Reberger’s two alleged alibi witnesses’  
28 testimony would have been. See Strickland, 466 U.S. at 694. It is mere speculation that

1 they would have testified that Reberger was at the Skyline Casino on November 4, 1990.  
2 See *Djerf v. Ryan*, 931 F.3d 870, 881 (9th Cir. 2019) (“Strickland prejudice is not  
3 established by mere speculation.”). Because the Nevada Supreme Court reasonably  
4 concluded that Reberger’s ineffective assistance of counsel claim was meritless,  
5 Reberger is denied federal habeas relief for Ground Nine, Subpart B.

### 6 **3. Subpart C**

7 In Ground Nine, Subpart C, Reberger argues that his trial counsel improperly  
8 waived his speedy trial rights because the State was able to build a stronger case  
9 against him after the sixty-day time period had expired. (ECF No. 65 at 86.) In  
10 Reberger’s appeal of the denial of his first state habeas petition, the Nevada Supreme  
11 Court held:

12 [A]ppellant claimed counsel were ineffective for waiving his right to a speedy  
13 trial without discussing it with him. Appellant failed to demonstrate  
14 deficiency. Counsel testified at the evidentiary hearing that they did discuss  
15 appellant’s right, how counsel could not be ready in 60 days, and that  
appellant agreed to waive the right. We therefore conclude that the district  
court did not err in denying this claim.

16 (ECF No. 38-9 at 4.)

17 At Reberger’s arraignment on March 3, 1992, his trial counsel “waive[d] the 60-  
18 day [r]ule.” (ECF No. 22-10 at 4.) Reberger’s first trial commenced later that year on  
19 December 29, 1992. (ECF No. 24-1 at 2.) Years later at the post-conviction evidentiary  
20 hearing held in 2010, Reberger testified that he “specifically told Mr. Dunleavy [he]  
21 wanted to invoke [his] 60-day right to a speedy trial rule.” (ECF No. 37-1 at 122.)  
22 Reberger elaborated that he “specifically told Mr. Dunleavy . . . that [he] wanted to go to  
23 trial as soon as possible” since he “knew the prosecution had no case on [him], and [he]  
24 knew [he] did not commit this crime. And [he] didn’t want to stay in jail for a crime [he]  
25 did not commit.” (Id.) Reberger explained that “Mr. Dunleavy . . . waived [his] right to a  
26 speedy trial to allow the prosecution to gather as much evidence as possible before he  
27 took [Reberger] to trial to make sure [Reberger] would be convicted,” and “Mr. McDonald  
28 agreed with Mr. Dunleavy’s decision on waiving [Reberger’s] 60 day rule right to a

1 speedy trial because he also wanted [Reberger] to go to trial and help the prosecution  
2 convict [him].” (Id. at 123.)

3 Dunleavy’s testimony at the post-conviction evidentiary hearing contradicted  
4 Reberger’s testimony. Dunleavy explained that he and McDonald “talked to [Reberger]  
5 repeatedly about the need to actually prepare to do an investigation and that if  
6 [Reberger] insisted on the 60-day speedy trial rule, [trial counsel] may not be able to get  
7 it all done.” (ECF No. 34 at 86, 117.) After speaking with Reberger “at least twice” about  
8 waiving the 60-day rule, “[Reberger] specifically told [Dunleavy and McDonald that he]  
9 wanted to waive [his] speedy trial and have [trial counsel] prepare.” (Id. at 117-118.) In  
10 those discussions, Dunleavy and Reberger “talked about the need in a capital case to  
11 do a thorough preparation and that it’s impossible to properly prepare a capital case in  
12 60 days. It usually takes over a year.” (Id. at 121.) Dunleavy also explained that “almost  
13 all defense cases get better with age” and that Reberger’s case “is the only case  
14 [Dunleavy] ever had where [the State] went out and found evidence like a year and a-  
15 half afterwards.” (Id.) Similarly, McDonald testified at the post-conviction evidentiary  
16 hearing that he agreed with Dunleavy’s decision to waive the 60-day rule because  
17 Reberger’s case was complex. (ECF No. 36-2 at 60, 76-77.) However, McDonald  
18 explained that Reberger’s case is “the only case [he had] seen . . . in 23 years” where  
19 evidence come out after the waiver of the 60-day rule. (Id. at 77.) McDonald testified  
20 that, in hindsight, it would have been better to have taken “the case to trial four months  
21 before Amber Harvey.” (Id. at 78.)

22 Although the State obtained further evidence against Reberger after he waived  
23 his right to a trial within 60 days, that does not lead to a conclusion that Reberger’s trial  
24 counsel acted deficiently in waiving that right. Indeed, Dunleavy and McDonald both  
25 explained that Reberger’s case was the only case they had ever had where the State  
26 was able to obtain further evidence after the waiver. (See ECF No. 34 at 121; ECF No.  
27 36-2 at 77.) Reberger’s trial counsel were not deficient for failing to anticipate these rare,  
28 unfortunate, future circumstances. Further, contrary to Reberger’s contentions and

1 testimony, Dunleavy testified that he spoke with Reberger about the waiver and that  
2 Reberger specifically authorized the waiver in order to give his trial counsel adequate  
3 time to prepare for his complex, capital case. (ECF No. 34 at 117-118.) Accordingly, the  
4 Nevada Supreme Court reasonably determined that Reberger failed to show deficiency  
5 on the part of his trial counsel. See Strickland, 466 U.S. at 688.

6 Reberger is denied federal habeas relief for Ground Nine, Subpart C.

#### 7 **4. Subpart D**

8 In Ground Nine, Subpart D, Reberger argues that his trial counsel introduced  
9 incriminating evidence against him at the trial. (ECF No. 65 at 87.) Specifically, Reberger  
10 alleges that his trial counsel called the State's handwriting expert as a witness to testify  
11 about letters allegedly written to Reberger from Harvey; however, that testimony  
12 included the fact that the expert believed Reberger had altered the letters. (Id. at 87-88.)  
13 This error was allegedly compounded by Reberger's trial counsel later moving for the  
14 admission of the altered letters. (Id. at 87.) In Reberger's appeal of the denial of his first  
15 state habeas petition, the Nevada Supreme Court held:

16 [A]ppellant claimed counsel were ineffective for failing to interview the  
17 State's handwriting expert prior to calling him as a defense witness.  
18 Appellant failed to demonstrate prejudice. The expert testified at trial that  
19 appellant likely changed one word in each of two letters written by the  
20 codefendant to appellant. Appellant failed to demonstrate that, but for this  
21 testimony, there was a reasonable probability of a different outcome at trial.  
22 The State's case against appellant was based primarily on the testimony of  
the codefendant, who had already been convicted and sentenced for the  
crime and had not been promised anything to induce her testimony, and  
was corroborated by appellant's own incriminating writings. We therefore  
conclude that the district court did not err in denying this claim.

23 (ECF No. 38-9 at 4-5.)

24 During Reberger's cross-examination of Harvey, Harvey answered in the  
25 affirmative when asked if she wrote letters to Reberger "wherein [she] said that [she]  
26 shot the man." (ECF No. 29-2 at 80.) In fact, Harvey explained that she wrote that  
27 information in a couple of letters to Reberger. (Id.) Following a discussion outside of the  
28 jury, Harvey's cross-examination continued wherein Harvey was asked whether she

1 wrote a specific letter which stated, “[t]hey know I shot that guy.” (Id. at 80, 83-84.)  
2 Harvey responded that she “didn’t put that in that letter then.” (Id. at 84.) Harvey then  
3 clarified that she “didn’t write none [sic] of those [letters] that said [she] shot anybody.”  
4 (Id.) After admitting that the letter was in her handwriting, Harvey explained that she  
5 “didn’t put those records in there.” (Id. at 85.)

6 Later, during Reberger’s case-in-chief, William Leaver, a document examiner  
7 with the Las Vegas Metropolitan Police Department, was called and asked if he was  
8 “provided with some letters last night and asked to look them over.” (ECF No. 29-5 at  
9 14; ECF No. 29-2 at 103.) Leaver responded in the affirmative and explained that he  
10 looked at several handwritten letters and envelopes from Harvey to Reberger. (ECF No.  
11 29-5 at 14-15.) Although he could not confirm whether Harvey wrote the letters due to  
12 the lack of a comparison sample, Leaver found that “[t]here was common authorship,  
13 for the most part, with the exception of a few words in which a determination could not  
14 be made.” (Id. at 16, 28.)

15 Leaver explained that in two of the handwritten letters, the “particular word, K-N-  
16 O-W, [was] dissimilar to the other writing[s]” on the pages. (Id. at 17, 20.) Leaver  
17 clarified, regarding the first letter, “there’s been erasure, overwriting, retouching,  
18 resimulation of that word, K-N-O-W, and I believe it to be sufficiently dissimilar; that it  
19 was not written by the same person who wrote the remaining body of this letter.” (Id. at  
20 18.) Similarly, regarding the word “know” in the second letter, Leaver stated that “there  
21 is overwriting and retouching on that particular word. And it is dissimilar to the point that  
22 my opinion is it was not written by the same person that wrote the body of this particular  
23 document.” (Id. at 20.) The full sentence from the first letter that contained the altered  
24 word “know,” read, “[t]hey know I shot that guy, because Bob had the weapon back, if  
25 you know what I mean.” (Id. at 17-18.) And the full sentence from the second letter that  
26 contained the altered word “know,” read, “[y]ou will pay for this. You just got me life in  
27 prison, because they know I shot that guy. So you better start talking a little more than  
28 you are.” (Id. at 21.) Leaver also testified that he believed that the “know” replaced the

1 word “think” in the first letter. (Id. at 33.) Because he had previously analyzed Reberger’s  
2 writing in the examination of his letters, Leaver stated that “[t]here were similarities with  
3 [Reberger’s writings], but [he could not] identify absolutely any other person as having”  
4 written the altered “know” in Harvey’s two letters. (Id. at 18-19.) Reberger’s trial counsel  
5 then moved for the admission of Harvey’s letters into evidence. (Id. at 24.)

6 Dunleavy later testified at the post-conviction evidentiary hearing that Harvey’s  
7 handwritten letters were used to impeach her direct examination testimony. (ECF No.  
8 34-1 at 35, 175.) Dunleavy explained that Harvey admitted authoring the letter “wherein  
9 she admitted she shot the person,” however, Harvey also indicated “that some of [the  
10 letter] had been changed.” (Id. at 175.) Dunleavy testified that he and McDonald “did not  
11 know [the letters] had been doctored at the time” and that Reberger’s alterations to the  
12 letters “[c]hanged the content” of the letters. (Id. at 177.)

13 Although Reberger’s trial counsel may have been deficient in calling Leaver to  
14 testify about the letters without sufficiently questioning him beforehand about the  
15 possibility that the letters had been altered, especially in light of Harvey’s previous  
16 testimony that they were altered, the Nevada Supreme Court reasonably determined  
17 that Reberger failed to demonstrate prejudice. See *Strickland*, 466 U.S. at 694; see  
18 generally *Crisp v. Duckworth*, 743 F.2d 580, 587 (7th Cir. 1984) (concluding that  
19 “[a]lthough [the defendant]’s contention [that his trial counsel elicited damaging testimony  
20 from a prosecution witness] has some merit, the snippet of testimony was not sufficiently  
21 damaging . . . to shake our confidence in the reliability of the jury’s verdict”); *United*  
22 *States v. Gooch*, 842 F.3d 1274, 1279 (D.C. Cir. 2016) (concluding that no prejudice  
23 resulted from the defendant’s trial counsel’s open-ended question when cross-  
24 examining a police detective about why the defendant had ceased going to a particular  
25 area, which led the detective to respond “[b]ecause he shot the people” because this  
26 was a “fleeting remark” made during a month-long trial and the evidence of guilt was  
27 substantial). Indeed, as was discussed in Ground One and will be discussed in Ground  
28 Nine, Subpart E, Reberger wrote letters to Harvey stating, among other things, that

1 “[y]ou don’t know how he died only I know how,” and “[w]e fucked up, I am is [sic] good  
2 as dead[,] you will be out in 10 or 20 years if your [sic] lucky but not me[.] . . . we should  
3 have never done it in the first place now we are going to pay for it big time.” (ECF No.  
4 19 at 4; ECF No. 18-9 at 3.) This incriminating evidence demonstrates the  
5 reasonableness of the Nevada Supreme Court’s holding that Reberger “failed to  
6 demonstrate that, but for [Leaver’s] testimony, there was a reasonable probability of a  
7 different outcome at trial.” (ECF No. 38-9 at 4-5.) Further, the jury was instructed that  
8 “[e]vidence that a defendant . . . tried to manufacture evidence . . . is not sufficient in  
9 itself to prove guilt and its weight and significance, if any, are matters for your  
10 determination.” (ECF No. 30-1 at 12.) Accordingly, because the Nevada Supreme  
11 Court’s rejection of Reberger’s Strickland claim was reasonable, Reberger is denied  
12 federal habeas relief for Ground Nine, Subpart D.

### 13 **5. Subpart E**

14 In Ground Nine, Subpart E, Reberger argues that his trial counsel failed to  
15 sufficiently challenge the letters he wrote to Harvey. (ECF No. 65 at 88.) Specifically,  
16 Reberger argues that his trial counsel failed to contact an expert to refute that Reberger  
17 wrote the letters; failed to call those familiar with Reberger’s handwriting to testify that,  
18 unlike the admitted letters, Reberger always wrote in cursive and used correct grammar;  
19 failed to challenge the chain of custody of the letters; and failed to seek suppression of  
20 the letters as derivative of the right to counsel violation. (Id. at 88-89.) In Reberger’s  
21 appeal of the denial of his first state habeas petition, the Nevada Supreme Court held:

22 [A]ppellant claimed counsel were ineffective for failing to call appellant’s  
23 handwriting expert at trial to prove appellant did not write certain  
24 incriminating letters. Appellant failed to demonstrate deficiency or prejudice.  
25 Appellant failed to demonstrate that he had requested counsel to retain a  
26 specific handwriting expert or that the expert would have concluded that  
27 appellant did not author the letters. The expert that counsel did retain opined  
28 that appellant had authored the letters and was thus not called at trial. We  
therefore conclude that the district court did not err in denying this claim.

(ECF No. 38-9 at 3.)

1 Reberger wrote Harvey three letters from the Coos County Corrections facility.  
2 (ECF Nos. 18-9, 18-10, 19.) In one of the letters, Reberger wrote:

3 We fucked up, I am is [sic] good as dead[,] you will be out in 10 or 20 years  
4 if your [sic] lucky but not me[.] After we go to court together you will never  
5 see me again[,] we should have never done it in the first place now we are  
6 going to pay for it big time. . . . Tell me the trueth [sic] on what you said[,]  
they don't know how he died[,] no camera saw that[. A]ll they can go by is  
what we tell them.

7 (ECF No. 18-9 at 3.) In a second letter, Reberger wrote, "[p]lease listen to me I want to  
8 get out of this alive[.] If you fuck up[,] I'm dead and if you don't[,] we will make it together."

9 (ECF No. 18-10 at 4.) Reberger later wrote:

10 You and me both know I did not kill him[,] he killed himself but only I really  
11 know that. We can get out of this with less time if you listen to me, and I  
12 mean it! Don't talk to anyone but your PD all they have on us is armed  
robbery because of the money.

13 (Id. at 5.) In a third letter, Reberger wrote, "I hope that you didn't tell the cops from Las  
14 Vegas much when you spoke to them. If we get time it will be your fault and if we get  
15 over 2 year for this[,] you will never see me again." (ECF No. 19 at 3.) Later, Reberger  
16 wrote:

17 You don't know how he died only I know how and that's the trueth [sic]. . . .  
18 Amber I just hope you didn't blow it for us, but we will see if you did. We  
19 may have done a burglary[,] but we did not do anything els [sic] [and] I did  
not kill anyone we both know he killed himself.

20 (Id. at 4.) Reberger maintained that he did not write the letters; rather, he believed that  
21 "Detective Richard Perkins wrote all three of them [sic] Oregon incriminating letters  
22 thinking I was illiterate because Amber Harvey was illiterate." (ECF No. 37-1 at 126-27.)

23 Prior to the trial, Reberger's trial counsel moved to suppress the "written  
24 statements allegedly made and/or written by [Reberger] while in a custodial setting in  
25 the Coos County, Oregon Jail, Coos Bay, Oregon." (ECF No. 19-11.) The state district  
26 court denied the motion, and, at the trial, the State called Officer Jackson to explain how  
27 the letters were obtained. (ECF No. 29 at 4.) Officer Jackson testified that because  
28 Reberger was on suicide watch, "it is part of the policy to check his mail." (Id. at 11, 13,

1 28.) Reberger's letters were then given to Dale Willis, a lieutenant with the Coos County  
2 Sheriff's office, who sent them to the Henderson Police Department. (Id. at 32, 35-37,  
3 43.) The State then called Harvey to testify that the letters were "the letters Lance wrote  
4 to [her]." (ECF No. 29-2 at 34.) Harvey testified that she knew Reberger wrote the letters  
5 due to his handwriting and the content of the letters. (Id. at 34-37) During cross-  
6 examination, Reberger's trial counsel questioned Harvey about whether she had  
7 previously told a doctor that she could not read or write and whether she had observed  
8 Reberger's handwriting on any occasion before receiving these letters. (Id. at 38-39.)  
9 Finally, regarding the letters, the State called William Leaver, the Las Vegas  
10 Metropolitan Police Department document examiner, who testified that he compared  
11 Reberger's letters to "a handwriting exemplar" from Reberger. (ECF No. 29-2 at 103,  
12 107.) Leaver determined that Reberger had written the letters. (Id. at 108-109, 111.)  
13 Leaver also identified latent fingerprints on two of the letters that matched Reberger's.  
14 (Id. at 110-111.)

15 Later, at the post-conviction evidentiary hearing, Reberger explained that his trial  
16 counsel "failed and refused to contact [his] handwriting expert to thoroughly examine  
17 those three Oregon letters" even though he "tried to give [his trial counsel] all the  
18 information on [his] handwriting expert." (ECF No. 37-1 at 124-25.) Reberger received a  
19 letter from R. David Crisp, a forensic document examiner, stating that he "examined the  
20 documents [Reberger] sent [him] again, and [his] opinion [was] inconclusive." (ECF No.  
21 40-5 at 2.) Mr. Crisp explained that "[a]ny examiner would have to have definite known  
22 letters or other writing from the same period, (1990), in order to make a proper  
23 examination in order to arrive at a definite opinion." (Id.) Reberger was also in contact  
24 with Trisha Berry of Nationwide Document Examiners, Inc. regarding the review of his  
25 handwriting and the letters. (See ECF No. 39-3.) Berry indicated that her colleague, Mr.  
26 Phillips, attempted to call Reberger's trial counsel, but that telephone call was not  
27 answered and not returned as of a week and a half later. (Id. at 4.) In one of Berry's  
28 letters, she indicated that "[i]t's important that you have comparison writing from the time

1 that the letters you claim convicted you were (allegedly) written.” (ECF No. 39-2 at 4.)  
2 Reberger also presented testimony of his sister-in-law, Sandra Reberger, during the  
3 post-conviction evidentiary hearing. (ECF No. 37-1 at 50-51.) Sandra Reberger testified  
4 that the letters Reberger sent to her during his incarceration—unlike the letters Reberger  
5 allegedly wrote to Harvey—were in cursive handwriting, contained correct grammar, and  
6 had no spelling mistakes.

7 McDonald testified at the post-conviction evidentiary hearing that a handwriting  
8 expert was retained, and Reberger’s letters were sent to him for his review. (ECF No.  
9 36-2 at 95-96.) That expert, Huntzinger, concluded that “Reberger had written the  
10 letters.” (Id. at 96.) This was the reason he was not called to testify. (Id.)

11 Because Reberger’s trial counsel moved to suppress the letters, cross-examined  
12 Harvey on her ability to identify the letters, and retained an expert to analyze the letters,  
13 the Nevada Supreme Court reasonably concluded that Reberger’s trial counsel were  
14 not deficient in attempting to challenge the letters. See *Strickland*, 466 U.S. at 688.  
15 Reberger asserts that his trial counsel should have retained the experts he contacted.  
16 However, Reberger’s experts were not able to analyze the letters without a writing  
17 exemplar from the same time period. Reberger also asserts that his trial counsel should  
18 have challenged the letters in other ways. This argument fails because trial counsel is  
19 not required to use certain approaches to challenge evidence; rather, they are given  
20 latitude to decide how best to approach a problem. See *Harrington*, 562 U.S. at 106  
21 (“Rare are the situations in which the wide latitude counsel must have in making tactical  
22 decisions will be limited to any one technique or approach.”); see also *Strickland*, 466  
23 U.S. at 688-89 (“No particular set of detailed rules for counsel’s conduct can  
24 satisfactorily take account of the variety of circumstances faced by defense counsel or  
25 the range of legitimate decisions regarding how best to represent a criminal  
26 defendant.”). Accordingly, because the Nevada Supreme Court reasonably rejected  
27 Reberger’s *Strickland* claim, Reberger is denied federal habeas relief for Ground Nine,  
28 Subpart E.

1                   **6. Subpart F**

2           In Ground Nine, Subpart F, Reberger argues that his trial counsel failed to  
3 challenge Detective Richard Perkins' demonstrably false claims at the suppression  
4 hearing. (ECF No. 65 at 90.) Reberger asserts that these failures by his trial counsel  
5 prejudiced him because Detective Perkins' testimony provided probable cause for  
6 Reberger's arrest. (ECF No. 101 at 111.) In Reberger's appeal of the denial of his first  
7 state habeas petition, the Nevada Supreme Court held:

8           Appellant claimed counsel did not impeach a police officer at a hearing on  
9 a motion to suppress, but he failed to state what counsel should have done  
10 to impeach the officer. . . . Further, appellant failed to state . . . how the  
11 outcome at trial would have changed had counsel acted differently. We  
therefore conclude that the district court did not err in denying these claims.

12 (ECF No. 38-9 at 6.)

13           Reberger takes issue with three lines of Detective Perkins' pretrial suppression  
14 hearing testimony from June 17, 1992. (See ECF No. 23 at 61.) First, Detective Perkins  
15 testified that he had "determined that Amber and Lance . . . stayed at a Shady Rest  
16 Motel in Henderson the week prior to this incident." (Id. at 83.) Reberger asserts that his  
17 trial counsel should have challenged Detective Perkins on this testimony because  
18 Harvey's ex-husband, Robert Harvey, told Detective Perkins in an interview on  
19 November 8, 1990, that Harvey had been staying with him at his "place for the last two  
20 or three weeks." (ECF No. 39-20 at 9.) Although Harvey also stated on November 9,  
21 1990, that she had "been living with [her] ex-husband" prior to the incident, she also  
22 provided that she stayed in a motel with Reberger for one night around the time of the  
23 murder. (ECF No. 39-22 at 2.) Even though Detective Perkins' testimony may have been  
24 challengeable based on the timing of Harvey and Reberger's stay at the motel, the  
25 Nevada Supreme Court reasonably concluded that Reberger failed to establish  
26 prejudice. See Strickland, 466 U.S. at 694. Indeed, Reberger fails to demonstrate how  
27 "the result of the proceeding would have been different" had his trial counsel challenged  
28

1 the fact that the motel stay was close in time to the murder as opposed to a week prior.  
2 Id.

3 Next, Reberger takes issue with Detective Perkins' testimony regarding a  
4 witness, Mary Ellen Quant. Detective Perkins testified that he had "interviewed a Mary  
5 Ellen Quant who had conversations with Miss Harvey over the telephone." (ECF No. 23  
6 at 84.) Quant told Detective Perkins that Harvey had told her that "[she] didn't pull the  
7 trigger; he did." (Id.) Detective Perkins explained that Quant and Harvey were good  
8 friends and that "a couple weeks prior to the incident, . . . Amber Harvey asked Mary  
9 Ellen Quant if she wanted to go with her and Lance to California; and that they were  
10 going to do something very illegal prior to going." (Id.)

11 Reberger argues that Quant and Harvey were not actually friends because during  
12 Quant's November 8, 1990, statement to Detective Perkins, she stated that Harvey  
13 "went out with my old man and stuff, and I didn't like her much and then I, look, started  
14 talkin [sic] to her and stuff like that." (ECF No. 39-20 at 5.) Contrarily, Robert Harvey  
15 stated that he would say that Harvey and Quant were friends. (ECF No. 39-21 at 3.)  
16 Further, Reberger argues that Harvey did not tell Quant that she was going to do  
17 something illegal prior to traveling to California. Quant's statement to Detective Perkins  
18 provided that Harvey had asked her "if [she] wanted to go to California. She asked, she  
19 said she was gonna [sic] do something [sic] illegal." (ECF No. 39-20 at 7.) The Nevada  
20 Supreme Court reasonably concluded that Reberger failed to demonstrate prejudice  
21 regarding either of these two allegedly challengeable statements. See Strickland, 466  
22 U.S. at 694. The statement about Harvey and Quant being friends was supported by  
23 Robert Harvey's police statement. And Detective Perkins' testimony about Harvey  
24 stating that she was going to do something illegal was similar to her actual statement to  
25 Quant such that it cannot be concluded that "the result of the proceeding would have  
26 been different" had Reberger's trial counsel corrected Detective Perkins. Id.

27 Finally, Reberger takes issue with Detective Perkins' statements regarding  
28 Reberger's warrant. Detective Perkins testified that he instructed someone to enter a

1 message into the NCIC database at the end of his shift on November 8, 1990, that  
2 Reberger was on “a temporary want.” (ECF No. 23 at 61, 75-76, 87-88.) Detective  
3 Perkins testified that he entered a “temporary want,” which is “merely a request for  
4 apprehension if they find the suspect that you’re looking for,” because he believed there  
5 was probable cause to arrest Reberger. (Id. at 81-82, 89.) Detective Perkins applied for  
6 the actual warrant the following morning, November 9, 1990, but that application was  
7 denied. (Id. at 70, 87-88.) The warrant for Reberger’s arrest was not secured until “[a]fter  
8 [law enforcement] traveled to Coos Bay and . . . talked to Mr. Reberger.” (Id. at 96.)

9 Reberger argues that this testimony should have been impeached because, in  
10 response to the Coos Bay Police Department’s message on November 9, 1990 that they  
11 had Reberger in custody (ECF No. 39-6 at 2), the operator at the Henderson Police  
12 Department provided that Reberger’s “temporary warrant has been confirmed” (ECF No.  
13 39-7 at 2). The operator at the Henderson Police Department also reported later that  
14 day, November 9, 1990, that “we have 2 detectives that are our [sic] district atty’s office  
15 right now picking up the warrants.” (ECF No. 40-8 at 2.) These messages that a warrant  
16 was being secured and picked up appear to be untrue based on the fact that the  
17 application for Reberger’s warrant was originally denied. However, importantly,  
18 Reberger’s trial counsel did impeach Detective Perkins with this information. In response  
19 to Reberger’s trial counsel’s question, Detective Perkins admitted that a warrant had not  
20 been granted even though he had previously sent a “telex out indicating [he was] walking  
21 a warrant.” (ECF No. 23 at 70.) Also, in response to a question posed by Reberger’s  
22 trial counsel, Detective Perkins admitted that there was no “warrant in existence at 1:45  
23 a.m. on November 9, 1990, as to Mr. Reberger” even though he had “put a temporary  
24 want” into NCIC for Reberger at that time. (Id. at 75-76.) Accordingly, because  
25 Reberger’s trial counsel adequately impeached Detective Perkins, the Nevada Supreme  
26 Court reasonably concluded that Reberger’s ineffective assistance of counsel claim  
27 should fail. See *Strickland*, 466 U.S. at 688, 694.

28 Reberger is denied federal habeas relief for Ground Nine, Subpart F.

1                   **7. Subpart G**

2           In Ground Nine, Subpart G, Reberger argues that his trial counsel failed to  
3 challenge the search warrant of his vehicle. (ECF No. 65 at 92.) In Reberger’s appeal  
4 of the denial of his first state habeas petition, the Nevada Supreme Court held:

5           Appellant claimed that counsel failed to investigate . . . the search warrant  
6 for his vehicle, . . . but he failed to state what the results of such  
7 investigations would have been. Further, appellant failed to state . . . how  
the outcome at trial would have changed had counsel acted differently.

8 (ECF No. 38-9 at 6.)

9           The search warrant application explained that Harvey and Reberger were  
10 arrested “on outstanding fugitive complaints” and that Harvey had given a taped  
11 statement. (ECF No. 18-6 at 3.) Harvey told law enforcement that Reberger “robbed the  
12 Fantasy Video and shot the clerk three times in the head. That she and Lance drove to  
13 Fantasy Video in the vehicle owned by Lance Reberger. That Amber described that  
14 vehicle as a Camero, black in color.” (Id.) Following Harvey and Reberger’s arrests, the  
15 “1977 Chevrolet Camero, black in color bearing Florida license # HLG 89L was taken  
16 into custody, sealed, and transported to the Coos Bay City shops, pending a search  
17 warrant.” (Id.) The application sought a search of the vehicle for the murder weapon,  
18 ammunition, cameras, currency, pipes, business cards, sexual novelties, shell casings,  
19 cassette tapes, and other property connected to the store. (Id. at 3-4.) Detective Perkins  
20 testified that “a folding-type knife” and five .22 caliber bullets were found as a result of  
21 the search warrant of Reberger’s vehicle. (ECF No. 28-2 at 9, 15-16, 26.)

22           The Nevada Supreme Court reasonably determined that Reberger failed to  
23 demonstrate prejudice because he failed to demonstrate how the result of the trial would  
24 have changed had his trial counsel challenged the search warrant. See Strickland, 466  
25 U.S. at 694. Although a successful challenge of the search warrant could have  
26 suppressed the introduction of the knife and bullets found in Reberger’s vehicle, there  
27 still would have been evidence presented that Reberger wrote incriminating letters to  
28 Harvey (ECF Nos. 18-9, 18-10, 19), Reberger admitted to his former cellmate that he

1 shot someone (ECF No. 29-1 at 43-45, 50), and Reberger told Harvey at the jail that  
2 she did not have anything to worry about because she was not in the room when it  
3 happened (ECF No. 29 at 4, 10). Accordingly, because the Nevada Supreme Court  
4 reasonably denied Reberger's Strickland claim, Reberger is denied federal habeas relief  
5 for Ground Nine, Subpart G.

#### 6 **8. Subpart H**

7 In Ground Nine, Subpart H, Reberger argues that his trial counsel failed to object  
8 to Jury Instruction Number 16, which provided that intent may be proven by  
9 circumstantial evidence, because it allowed the jury to draw an adverse inference from  
10 his silence at trial. (ECF No. 65 at 92-93.) Reberger also asserts that his trial counsel  
11 should have requested a no-adverse-inference instruction. (Id. at 93.)

12 Reberger presented this argument in his appeal of the denial of his first state  
13 habeas petition. (See ECF No. 38-6 at 83-84). However, the Nevada Supreme Court did  
14 not address this argument in its order. (See ECF No. 38-9.)

15 28 U.S.C. § 2254(d) generally applies to unexplained as well as reasoned state-  
16 court decisions: "[w]hen a federal claim has been presented to a state court and the  
17 state court has denied relief, it may be presumed that the state court adjudicated the  
18 claim on the merits in the absence of any indication or state-law procedural principles to  
19 the contrary." Harrington, 562 U.S. at 99. When the state court has denied a federal  
20 constitutional claim on the merits without explanation, the federal habeas court  
21 "determine[s] what arguments or theories supported or . . . could have supported, the  
22 state court's decision; and then it must ask whether it is possible fairminded jurists could  
23 disagree that those arguments or theories are inconsistent with the holding in a prior  
24 decision of [the United States Supreme] Court." Id. at 102; see also Johnson v. Williams,  
25 568 U.S. 289, 301 (2013) ("When a state court rejects a federal claim without expressly  
26 addressing that claim, a federal habeas court must presume that the federal claim was  
27 adjudicated on the merits.").

28 Jury Instruction Number 16 provided:

1 Intent may be proved by circumstantial evidence. It rarely can be  
2 established by any other means. While witnesses may see and hear and  
3 thus be able to give direct evidence of what a defendant does or fails to do,  
4 there can be no eyewitness account of a state of mind with which the acts  
were done or omitted, but what a defendant does or fails to do may indicate  
intent or lack of intent to commit the offense charged.

5 In determining the issue as to intent, the jury is entitled to consider any  
6 statements made and acts done or omitted by the accused, and all facts  
7 and circumstances in evidence which may aid determination of state of  
mind.

8 (ECF No. 30-1 at 17.) Contrary to Reberger's contention, Jury Instruction Number 16  
9 did not allow the jury to draw an adverse inference from his silence at trial. In fact, Jury  
10 Instruction 16 does not discuss trial testimony; rather, it simply discusses a defendant's  
11 actions and omission related to the commission of the crime. Because Jury Instruction  
12 16 does not permit the jury to make impermissible inferences as Reberger claims, his  
13 trial counsel was not deficient in not objecting to it. See Strickland, 466 U.S. at 688.

14 Regarding Reberger's assertion that his trial counsel failed to request a no-  
15 adverse-inference instruction regarding his decision to remain silent, Reberger's trial  
16 counsel specifically indicated that he did not want the state district court "to give the  
17 instruction on remaining silent."<sup>7</sup> (ECF No. 30-2 at 43.) Reberger's trial counsel did not  
18 explain the reasoning behind this decision. However, Reberger fails to demonstrate that  
19 this decision was deficient. See Strickland, 466 U.S. at 688. Although the jury was not  
20 specifically instructed that they could not make an adverse inference regarding  
21 Reberger's decision to remain silent, when reviewing the instructions as a whole, it can  
22 be concluded that such an instruction was implied. See Estelle, 502 U.S. at 72. Indeed,  
23 the jury was strictly instructed regarding what they were allowed to consider in their  
24 deliberations, and Reberger's silence was not included. (See ECF No. 30-1 at 10 (Jury  
25 Instruction Number 9 instructed the jury that "[t]he evidence which you are to consider  
26 in this case consists of the testimony of the witnesses, the exhibits, and any facts

---

27  
28 <sup>7</sup>It is noted that Reberger did not testify "because of the alleged, supposed, bogus  
confession they said I said." (ECF No. 30-2 at 37.)

1 admitted or agreed to by counsel”).) Because the Court determines that fairminded  
2 jurists would agree that this reasoning establishing that Reberger’s federal constitutional  
3 rights were not violated was not inconsistent with prior decisions of the United States  
4 Supreme Court, Harrington, 562 U.S. at 102, Reberger is not entitled to relief on Ground  
5 Nine, Subpart H.

## 6 **V. CERTIFICATE OF APPEALABILITY**

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

12 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner  
13 “has made a substantial showing of the denial of a constitutional right.” With respect to  
14 claims rejected on the merits, a petitioner “must demonstrate that reasonable jurists would  
15 find the district court’s assessment of the constitutional claims debatable or wrong.” Slack  
16 v. McDaniel, 529 U.S. 473, 484 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 & n.4  
17 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate  
18 (1) whether the petition states a valid claim of the denial of a constitutional right and (2)  
19 whether the court’s procedural ruling was correct. See id.

20 Applying these standards here, the Court finds that a certificate of appealability is  
21 warranted for Reberger’s Brady claim contained in Ground One. Reasonable jurists could  
22 debate whether prejudice ensued from the State’s suppression of the deal with Harvey  
23 for her testimony against Reberger. Although the State introduced evidence of  
24 incriminating letters Reberger wrote to Harvey, testimony from Reberger’s former  
25 cellmate that Reberger admitting to shooting someone, and testimony that a correctional  
26 officer overheard Reberger tell Harvey that she did not have anything to worry about  
27 because she was not in the room when it happened, Harvey’s testimony that Reberger  
28 shot the victim was otherwise uncorroborated and was relied upon heavily by the State.

1 Evidence that there was a deal between the State and Harvey would have severely  
2 impeached her testimony, such that reasonable jurists could debate whether the  
3 confidence in Reberger's verdict was undermined pursuant to Brady.

4 This court declines to issue a certificate of appealability for its resolution of any  
5 procedural issues or any of Reberger's habeas claims on the remaining grounds.

6 **VI. CONCLUSION**

7 It is therefore ordered that the Second Amended Petition for Writ of Habeas Corpus  
8 Pursuant to 28 U.S.C. § 2254 (ECF No. 65) is granted for Ground One's Napue claim.  
9 Lance Reberger will be released from custody within 60 days unless the Respondents file  
10 in this action, within that 60-day period, a written notice of election to retry Reberger, and  
11 the State thereafter, within 180 days after the filing of that notice, commences  
12 proceedings toward the retrial. Any party may request a reasonable modification of the  
13 time limits set forth in this paragraph.

14 The judgment in this action will be stayed pending the conclusion of any appellate  
15 or certiorari review in the Ninth Circuit Court of Appeals or the United States Supreme  
16 Court, or the expiration of the time for seeking such appellate or certiorari review,  
17 whichever occurs later.

18 It is further ordered that Reberger is granted a certificate of appealability for  
19 Ground One's Brady claim. It is further ordered that a certificate of appealability is denied  
20 as to Reberger's remaining grounds.

21 The Clerk of Court is directed to enter judgment accordingly.

22 DATED THIS 23<sup>rd</sup> day of March 2020.



24 MIRANDA M. DU  
25 CHIEF UNITED STATES DISTRICT JUDGE  
26  
27  
28