

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

* * *

MICHAEL L. SMITH,

Petitioner,

v.

RENEE BAKER,¹ et al.,

Respondents.

Case No. 3:13-cv-00246-RCJ-CSD

ORDER

Michael L. Smith’s 28 U.S.C. § 2254 second-amended habeas corpus petition is before the court for final adjudication on the merits (ECF No. 44). As discussed below, the petition is denied.

I. Background & Procedural History

As set forth in this court’s order granting in part respondents’ motion to dismiss, a grand jury indicted Smith, along with Adrian McKnight and Ronnie Antonio Gibson, on two counts conspiracy to commit robbery, one count robbery, one count battery with intent to commit a crime, two counts robbery with victim 60 years of age or older, one count murder, one count attempted murder, and one count possession of stolen vehicle (exhibits 5, 6).² The charges stemmed from two separate robberies committed on or

¹ According to the state corrections department’s inmate locator page, Smith is incarcerated at Ely State Prison. The department’s website reflects William Gittere is the warden for that facility. At the end of this order, the court directs the clerk to substitute William Gittere for prior respondent Renee Baker, under, *inter alia*, Rule 25(d) of the Federal Rules of Civil Procedure.

² Exhibits 1-208 are found at ECF Nos. 10-19. Exhibits 224-306 are found at ECF Nos. 53-68.

1 about May 29, 2007, that resulted in the death of one of the elderly victims. *Id.* In June
2 2009, a jury convicted Smith of all charges, with the exception of finding Smith guilty of
3 battery instead of attempted murder. Exh. 105. The state district court sentenced Smith
4 to two consecutive life sentences without the possibility of parole. Exh. 120. Judgment
5 of conviction was filed on August 6, 2009. Exh. 120.

6 The Nevada Supreme Court affirmed Smith's convictions. Exh. 149. After
7 conducting an evidentiary hearing on his state postconviction habeas corpus petition,
8 the state district court denied the petition. Exh. 172. The Nevada Supreme Court
9 affirmed the denial of the petition on December 12, 2012. Exh. 193.

10 Smith dispatched his federal habeas corpus petition for filing in April 2013 (ECF
11 No. 5). This court granted his motion for appointment of counsel (ECF No. 4). Smith
12 filed a counseled, first-amended petition and a motion for stay and abeyance, which this
13 court granted (ECF Nos. 9, 34, 39). The case was stayed while Smith litigated his
14 second state postconviction petition. Exhs. 282, 287, 290, 298. On April 11, 2018, the
15 Nevada Court of Appeals affirmed the denial of his second state postconviction petition.
16 Exh. 303. In July 2018, Smith filed a motion to reopen the case and a second-amended
17 petition (ECF Nos. 41, 44). Respondents have now answered the remaining claims, and
18 Smith replied (ECF Nos. 93, 98).

19 II. Legal Standard

20 AEDPA Standard of Review

21 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
22 Act (AEDPA), provides the legal standards for this court's consideration of the petition in
23 this case:

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

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

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

4 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
5 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court
6 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
7 685, 693-694 (2002). This court’s ability to grant a writ is limited to cases where “there is
8 no possibility fair-minded jurists could disagree that the state court’s decision conflicts
9 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
10 Supreme Court has emphasized “that even a strong case for relief does not mean the
11 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
12 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
13 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
14 state-court rulings, which demands that state-court decisions be given the benefit of the
15 doubt”) (internal quotation marks and citations omitted).

16 A state court decision is contrary to clearly established Supreme Court precedent,
17 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts
18 the governing law set forth in [the Supreme Court’s] cases” or “if the state court
19 confronts a set of facts that are materially indistinguishable from a decision of [the
20 Supreme Court] and nevertheless arrives at a result different from [the Supreme
21 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,
22 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

23 A state court decision is an unreasonable application of clearly established Supreme
24 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies
25 the correct governing legal principle from [the Supreme Court’s] decisions but
26 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
27 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
28 requires the state court decision to be more than incorrect or erroneous; the state

1 court's application of clearly established law must be objectively unreasonable. *Id.*
2 (quoting *Williams*, 529 U.S. at 409).

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

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

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

16 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
17 correct unless rebutted by clear and convincing evidence. The petitioner bears the
18 burden of proving by a preponderance of the evidence that he is entitled to habeas
19 relief. *Cullen*, 563 U.S. at 181.

20 **III. Trial Testimony**

21 Shane Burton testified that his 1996 Honda Accord was stolen out of his Las
22 Vegas, Nevada driveway sometime between 2:30 p.m. and 11:30 p.m. on May 28,
23 2007.³ Exh. 90, pt. 1, pp. 109, 112; exh. 94, p. 144. Katherine LaBelle testified that she
24

25
26 _____
27 ³ The court makes no credibility findings or other factual findings regarding the truth or
28 falsity of evidence or statements of fact in the state court record. The court summarizes the same
solely as background to the issues presented in this case, and it does not summarize all such
material. No assertion of fact made in describing statements, testimony, or other evidence in the
state court constitutes a finding by this court. Any absence of mention of a specific piece of

1 parked at her new apartment complex in Las Vegas around 11:30 p.m. that night. Exh.
2 90, pp. 69-107. She saw a man walk out from the dumpster area and sit on an
3 electrical box about 25 feet away. As she walked by him, he ran over, grabbed her
4 purse, tripped, and fell right in front of her. LaBelle started hitting him, and he curled up
5 around her purse. Someone grabbed her from behind and she began yelling. Neighbors
6 came out, the man grabbing her dropped her into the bushes, and both men fled. Her
7 phone and car keys had fallen out of the purse when the man was on the ground. A car
8 drove out of the complex, and LaBelle recognized the taillights as those of a Honda.
9 Both men were black, one was bigger and heavy-set, and the man who grabbed her
10 was on the thinner side. Police later recovered receipts from when LaBelle went
11 shopping earlier in the day as well as a Bacardi cigarette case that had been in her
12 purse from the stolen Honda. She had had approximately \$200-250 cash in her purse.

14 Lydia Nieva testified that she and her husband Angel were on vacation in Las
15 Vegas and staying at their timeshare. Exh. 91, pp. 63-119; exh. 92, pp. 16-27. They
16 returned to the timeshare about 2 a.m. on the night/morning in question. As Lydia was
17 using her door key card, she saw two men run up from her left. They grabbed her tote
18 bag. She stated that the men were black and perhaps in their twenties. She was
19 yelling, and the men hit her several times in the face and arms. Angel had been walking
20 behind Lydia, and she saw that he was on the ground, face up. After the men fled with
21 her bag, Lydia ran into the reception area to get help and returned to her husband with
22 a taxi driver. Angel was "snoring very hard," and she couldn't wake him. She identified
23 the contents of her tote bag that were recovered from the trunk of a car, including family
24
25
26

27 _____
28 evidence or category of evidence does not signify the court overlooked it in considering Smith's
claims.

1 photos, credit cards, and driver's license. Angel was declared brain dead about a day
2 later due to a severe head injury.

3 A forensic pathologist with the Clark County Coroner's office testified that he
4 reviewed Angel Nieva's autopsy report and agreed with the conclusion that Angel died
5 from blunt force head injury in the manner of homicide. Exh. 92, pp. 28-46. He stated
6 that Angel's head injury was consistent with being slammed down on the asphalt
7 parking lot.

8
9 Smith, Knight and Gibson were to be tried together, but Ronnie Gibson elected to
10 plead guilty to voluntary manslaughter, robbery and conspiracy to commit robbery and
11 testified for the State. Exh. 92, pt. 1, pp. 55-122, 127-161; exh. 92, pt. 2, pp. 2-92. He,
12 Smith, and McKnight were together on the night in question. Smith stole the Honda, and
13 they drove to an apartment complex parking lot. Smith got out and told Gibson to get in
14 the front seat and honk the horn if Gibson saw anyone coming. McKnight sat on an
15 electrical box, then he and Smith ran up to a woman, grabbed her purse, and ran back
16 to the car. Gibson drove off. Shortly thereafter, Smith switched to the driver's seat.
17 Smith spotted the Nievas driving, noted their California license plate and started
18 following them. They formed a plan in which Smith and Gibson would approach the
19 female and McKnight would approach the male. Ultimately, however, Gibson did not
20 participate. They followed the Nievas to their timeshare parking lot. He said he was
21 urinating near the pool when he heard the woman scream. He looked over and saw
22 McKnight "slamming the dude." *Id.* at 80. Gibson said McKnight grabbed Angel by his
23 belt buckle and slammed him to the ground; the back of his head struck the ground first.
24 Gibson saw Smith punching Lydia in the face and screaming for her to take off her ring.
25 She fell to her knees, and Smith kicked her in the face. The three men fled in the
26 Honda. Two or three days later Gibson was on the bus with his girlfriend, Kennisha
27
28

1 Lyons, and Smith and McKnight got on the bus. They told Gibson that television news
2 was reporting that Angel had died.

3 Lyons testified that she was on the bus with Gibson, and they encountered two
4 men. Exh. 92, pt. 2, pp. 93-117. She could only identify one in court – Smith. Smith told
5 Gibson that he saw on the news that Angel had died. Smith commented that the other
6 guy had slammed Angel onto the concrete and that Lydia had been bloody and
7 disoriented.

8
9 Detective Barry Jensen testified that police obtained warrants to trace the Nievas’
10 stolen cell phones. Exh. 94, pp. 93-158; exh. 100, pp. 5-54. Later, Smith told the
11 detective that he stole the Honda and let some other people use it but did not participate
12 in any robberies. He said he got the cellphone from the Honda when it was brought
13 back to him. Detective Jensen also said that McKnight admitted to him that he had
14 committed the Nieva robbery. McKnight said his role was to rob Lydia. McKnight said he
15 punched Lydia, and she let go of her purse. McKnight denied involvement in the
16 Katherine LaBelle robbery. Jensen also testified that LaBelle identified Smith from a
17 photo lineup.
18

19 **IV. Instant Petition**

20 **a. Claims Raised on Direct Appeal**

21
22 **Ground 1**

23 Smith asserts that the trial court violated his Fifth, Sixth, and Fourteenth
24 Amendment rights to present a defense, be proven guilty beyond a reasonable doubt,
25 confrontation, due process and a fair trial when it refused to sever Smith’s trial from his
26 co-defendant’s (ECF No. 44, pp. 18-25). Smith’s counsel filed a motion to sever based
27 on the conflicting statements that Smith, McKnight, and Gibson gave to the police. The
28 motion argued that defenses outlined in the statements were “antagonistic and mutually

1 exclusive.” Smith’s counsel stressed that Smith was the only one of the three who
2 denied any part in the Nieva robbery and murder.

3 Under Nevada state law, defendants are not entitled to separate trials without a
4 substantial showing of facts demonstrating that prejudice would result from a joint trial.
5 See *Amen v. State*, 801 P.2d 1354, 1358-59 (Nev. 1990). “Inconsistent defenses must
6 be antagonistic to the point that they are mutually exclusive.” *Id.* at 1359. The decision
7 to sever is left to the discretion of the trial court and such decision will not be reversed
8 absent an abuse of discretion. *Id.* at 1359; *McDowell v. State*, 746 P.2d 149 (Nev.
9 1987). The United States Court of Appeals for the Ninth Circuit Court has held that
10 where persons have been jointly indicted, they should be tried jointly, absent compelling
11 reasons to the contrary. *U.S. v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980), cert.
12 denied, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 71 (1980); *U.S. v. Silla*, 555 F.2d 703,
13 707 (9th Cir. 1977). This is also the rule in conspiracy cases. *Escalante*, 637 F.2d at
14 1201. The Ninth Circuit has described mutually exclusive defenses as when “the core of
15 the codefendant’s defense is so irreconcilable with the core of [the defendant’s] own
16 defense that acceptance of the codefendant’s theory by the jury precludes acquittal of
17 the defendant.” *U.S. v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996). Moreover, the
18 Ninth Circuit has observed that there is no clearly established federal law mandating
19 “the severance of criminal trials in state court even when the defendants assert mutually
20 antagonistic defenses. . .” *Runnigeagle v. Ryan*, 686 F.3d 758, 774 (9th Cir. 2012).

21 Smith argues that the denial of the motion to sever violated his rights under
22 *Bruton v. United States*, 391 U.S. 123 (1968). The three men’s version of events in their
23 statements to police differ, most significantly each claimed they had no contact with
24 Angel. During Smith’s interview with police, he initially said he had no specific
25 recollection of stealing Burton’s Honda but admitted that he had stolen vehicles in that
26 area of town before. See exh. 18. Smith said sometimes he stole vehicles and other
27 people would pay to use them, whether in cash or stolen items. Smith said he had not
28

1 been present at the robbery but got the Nieves' cell phone from another individual and
2 also went through Lydia's tote bag before discarding it.

3 McKnight admitted in his interview that he was involved in the Nieva robbery. He
4 said he grabbed Lydia's tote bag and punched her. See exh. 21. He denied involvement
5 in the LaBelle robbery. Gibson told police in his interview that he drove the vehicle
6 during the LaBelle robbery. He said that he and two others later spotted the Nieves.
7 Gibson said when they got out of the vehicle, he went to urinate. When he turned
8 around, he saw Angel get slammed to the ground. He described where they had
9 discarded the tote bag, which matched the statement of the woman who later found
10 some of the Nieves' belongings and turned them into police.

11 At the evidentiary hearing on the motion to sever counsel for McKnight argued
12 that there was no feasible way to redact the statements to eliminate references to
13 McKnight or Smith that would leave the jurors with statements that made any sense.
14 Exh. 52, pp. 6-38. McKnight's counsel pointed out that Gibson's statement was
15 particularly problematic because redacting references to both McKnight and Smith
16 would eviscerate the statement. He suggested one alternative was to suppress the
17 statements entirely. Counsel for Smith joined in arguing that severing the trials or
18 suppressing the statements was appropriate.

19 At a subsequent hearing the court inquired as to the status of the proposed
20 redactions:

21 THE COURT: . . . And we were going to pass this, and we did, in
22 fact, pass it so that counsel could go over the redacted version of the
23 statements. Have you done that counsel?

24 MS. DUSTIN [Counsel for McKnight]: Yes, Your Honor.

25 MR. BLOOMFIELD [Counsel for Smith]: We did. . . .

26 THE COURT: . . . Are we agreed then that the redacted version will
27 suffice? Or what's the status?

28 MS DUSTIN: Well, Your Honor, I've reviewed the redactions and
Mr. Bloomfield's reviewed the redactions I think Mr. Stanton has done an
excellent job in trying to definitely sanitize this. I mean, I've already noted

1 my position that even though we're using this generic discussion to refer
2 to the other people that are present, it's just really not going to take a
3 rocket scientist to figure out who they're talking about. So that's my
4 continued objection that I have here, is that I still think that underneath our
5 case law just generically switching it to "he" and "they" in the totality of
6 circumstances still inculcates my client. But I'm not going to relitigate that
7 standing before Your Honor, but that's always been my continuation
8 objection. Other than that, I think Mr. Stanton, the fact that we're not
9 actually admitting the statements, that it would just be testimony elicited
10 through the detective. And I don't know how he's going to just, basically,
11 say Ronnie Gibson told me that X-Y-Z. I'm sure we'll work out the logistics
12 on that, Your Honor.

8 THE COURT: Now, is that correct. Mr. Stanton, that you do not
9 intend to admit into evidence any part of these statements?

10 [Deputy District Attorney] MR. STANTON: Yes Judge . . . in my
11 case in chief I plan to introduce the highlighted portion of the respective
12 transcripts either in a direct Q and A with the detective of the highlighted
13 portions substituting the neutral pronouns, or merely stating to the
14 detective: What did Mr. Gibson say he did at Line 14 through 16, and then
15 not referring to anybody else.

14 Exh. 55, pp. 4-6.

15 The Nevada Supreme Court considered this claim at some length:

16 Severance

17 Smith next complains about the district court's denial of his motion
18 to sever his trial from that of his codefendant. "The decision to sever a
19 joint trial is vested in the sound discretion of the district court and will not
20 be reversed on appeal unless the appellant 'carries the heavy burden' of
21 showing that the trial judge abused his discretion." *Buff v. State*, 114 Nev.
22 1237, 1245, 970 P.2d 564, 569 (1998) (citing *Amen v. State*, 106 Nev.
23 749, 756, 801 P.2d 1354, 1359 (1990)). Although some prejudice may
24 inhere in a joint trial, "error in refusing to sever joint trials is subject to
25 harmless error review." *Chartier v. State*, 124 Nev. 760, 764- 65, 191 P.3d
26 1182, 1185 (2008). Reversal is only justified if refusal to sever a joint trial
27 had "a substantial and injurious effect on the verdict." *Id.* at 765, 191 P.3d
28 at 1185 (quoting *Marshall v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379
(2002)).

25 The district court's refusal to sever did not unfairly prejudice Smith.
26 To the contrary, he was the beneficiary of a pretrial ruling, later reversed
27 towards the end of the trial, that precluded his codefendant from
28 implicating Smith but that did not limit Smith or prohibit him from blame-
shifting in any way.

1 Smith argues that denial of a severance required the prosecution to
2 asked leading questions during direct examination in order to avoid a
3 problem under *Bruton v. United States*, 391 U.S. 123 (1968), resulting in
4 prejudice. However, Smith failed to object to any of the leading questions
5 below. Failure to object during trial generally precludes appellate review
6 unless it rises to the level of plain error that affects substantial rights. NRS
7 178.602; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003);
8 *Rippo v. State*, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). In
9 addition, this court has made plain that the district court has discretion to
10 permit leading questions on direct examination. NRS 50.115(3)(a);
11 *Leonard v. State*, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001).

12 Here, we conclude that any prejudice that may have resulted from
13 the leading questions did not rise to the level of affecting Smith's
14 substantial rights. In fact, the district court allowed leading questions to the
15 benefit of both Smith and his codefendant. Therefore, we reject Smith's
16 claim.

17 Exh. 149, pp. 4-6.

18 Smith's defense was that he was not present at either robbery.⁴ McKnight's
19 defense was that he was not present at the LaBelle robbery and that he punched Lydia
20 Nieva and grabbed her purse but that he had no contact with Angel Nieva. These are
21 not antagonistic defenses. The jury could believe both defenses or not believe either
22 defense. He has failed to demonstrate that the Nevada Supreme Court's decision on
23 federal ground 1 was contrary to, or involved an unreasonable application of, clearly
24 established U.S. Supreme Court law, or was based on an unreasonable determination
25 of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §
26 2254(d). Habeas relief on ground 1 is, therefore, denied.

27 **Ground 7**

28 Smith claims that the prosecutor and trial court made improper statements during
voir dire, in violation of his Fifth, Sixth, and Fourteenth Amendment rights to due
process, the presumption of innocence, and to be proven guilty beyond a reasonable
doubt (ECF No. 44, pp. 28-31).

To warrant federal habeas relief, a challenged instruction cannot be merely
"undesirable, erroneous, or even universally condemned," but must instead rise to the

⁴ See also discussion of ground 10(A)(1), *infra*.

1 level of a constitutional violation. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The
2 erroneous instruction must have “so infected the entire trial that the resulting conviction
3 violated due process.” *Id.* “Not every ambiguity, inconsistency, or deficiency in a jury
4 instruction rise to the level of a due process violation.” *Middleton v. McNeil*, 541 U.S.
5 433, 437 (2004). The challenged instruction must be evaluated in the context of the
6 overall charge to the jury as a component of the entire trial process. *Boyde v. California*,
7 494 U.S. 370, 378 (1990) (“A single instruction to a jury may not be judged in artificial
8 isolation but must be view in the context of the overall charge.”).

9 At the opening of voir dire, the state district court used a particular juror as a
10 “sounding board” as the judge put it:

11 THE COURT: You understand the process we’re going through at
12 this time is to try to get a jury that is fair and impartial to both sides.

13 Do you understand that?

14 PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

15 THE COURT: And as we sit here right now, do you understand that
16 the defendants in this case are presumed to be innocent until the State
17 proves the contrary, right?

18 PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

19 THE COURT: And the State has to prove the contrary; that is, that
20 they’re guilty beyond a reasonable doubt before you could vote guilty,
right?

21 PROSPECTIVE JUROR HETTERSCHIEDT: Yes, sir.

22 THE COURT: All right. If the State fails to carry that burden of
23 proof, would you vote not guilty?

24 PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

25 THE COURT: If they fail to carry the burden of proof beyond a
26 reasonable doubt, will you vote not guilty?

27 PROSPECTIVE JUROR HETTERSCHIEDT: Yes.
28

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

THE COURT: And if they do carry that burden of proof and prove the defendant is guilty beyond a reasonable doubt, will you vote guilty?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: Alright. Do you understand as the defendants sit here that the presumption is that they're innocent. Do you understand that?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: And so with that presumption of innocence, let's say that the defendants -- well, let's say right now the case was submitted to you, how would you vote?

PROSPECTIVE JUROR HETTERSCHIEDT: You have to vote innocent until presumed otherwise.

THE COURT: Because they're presumed innocent, right?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: The State has to show otherwise, right?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: They're the Plaintiff in this case and they brought the charge against you in the Superseding Indictment, right?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: And you're aware this Indictment is just like a Complaint for any other lawsuit or whatever, it's a vehicle to get a case into court, whether it's civil or criminal; do you understand that?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: And it's not any proof of their guilt; do you understand that?

PROSPECTIVE JUROR HETTERSCHIEDT: Yes.

THE COURT: If I ask everyone else those same questions, would any of you have answered differently than Mr. Steven Hetterschiedt? Would any of you have answered my questions differently?

Exh. 89, pp. 10-12.

1 Smith in particular complains that during the following exchange the judge
2 improperly and incorrectly described the required standard for proof beyond a
3 reasonable doubt to the jury pool:

4 THE COURT: Well, let me ask you this. If someone brought a
5 complaint against you for a traffic accident, do you feel you would have to
6 prove that you didn't do it and they did it? Or do you think that they might
7 have to prove that you were responsible?

8 PROSPECTIVE JUROR SPOHN: I don't know. I mean –

9 THE COURT: So if someone gets to the clerk's office first and files
10 a complaint, you figure that if they filed one against you they should
11 prevail?

12 PROSPECTIVE JUROR SPOHN: No. I think that they should
13 investigate, and what they find in their investigation. I don't know.

14 THE COURT: That's why we have juries to find the facts. That
15 piece of paper filed in court is not any evidence, it's how they get cases
16 going; civil, criminal, anyway; do you understand that?

17 Exh. 89, p. 35.

18 Smith argues that using the civil example confused the reasonable doubt
19 standard with the preponderance of the evidence standard. In its order affirming the
20 convictions, the Nevada Supreme Court discussed that exchange as well as a comment
21 by the prosecutor:

22 Voir dire

23 Smith claims that the prosecutor made improper statements
24 regarding reasonable doubt during voir dire. It is improper for attorneys to
25 "explain, elaborate on, or offer analogies or examples based on the
26 statutory definition of reasonable doubt." *Evans v. State*, 117 Nev. 609,
27 632, 28 P.3d 498, 514 (2001). Here, the prosecution did not do so--
28 instead, the prosecutor simply stated, in response to a prospective juror's
question about reasonable doubt:

"You talked about we would have to really, really, really prove the
case. That's not the burden of proof in a criminal case. That's not the law.
The law is proof beyond a reasonable doubt, and the definition of that
would be given to you by [the judge] in this case."

1 Moreover, even if that statement violated the rule against a lawyer
2 explaining reasonable doubt, any error is harmless because the district
3 court provided proper jury instructions on reasonable doubt. *Id.* at 631-32,
4 28 P.3d at 514.

5 Smith also complains that the judge misstated the burden of proof
6 during voir dire by giving a civil litigation example, and that this amounted
7 to judicial misconduct. Specifically, the district court asked a juror:

8 “THE COURT: Well, let me ask you this. If someone brought a
9 complaint against you for a traffic accident, do you feel you would have to
10 prove that you didn't do it and they did it? Or do you think that they might
11 have to prove that you were responsible?”

12 PROSPECTIVE JUROR []: I don't know. I mean

13 THE COURT: So if someone gets to the clerk's office first and files
14 a complaint, you figure that if they filed one against you they should
15 prevail?”

16 Smith failed to object or move for a mistrial below. To preserve a
17 judicial misconduct claim for appellate review, a party normally must
18 object or move for a mistrial. *Holderer v. Aetna Cas. and Sur. Co.*, 114
19 Nev. 845, 850, 963 P.2d 459, 463 (1998). However, failure to object does
20 not preclude judicial review “where judicial department is of an
21 inappropriate but non-egregious and repetitive nature that becomes
22 prejudicial when considered in its entirety.” *Parodi v. Washoe Medical Ctr.*,
23 111 Nev. 365, 370, 892 P.2d 588, 591 (1995).

24 Although the district court used civil case examples to explain the
25 law to prospective jurors in a criminal case, we conclude that these
26 actions did not rise to the level of prejudice required for reversal,
27 especially given the lack of contemporaneous objection by Smith. Here,
28 Smith failed to demonstrate that the jury erroneously applied the
preponderance-of-the-evidence standard just because a civil case
happened to be mentioned during voir dire. And even if the district courts
statements caused some confusion during voir dire, it was remedied when
the court provided the correct jury instructions on reasonable doubt and
the applicable burden of proof in this criminal case.

Exh. 149, pp. 3-4.⁵

 Respondents point out that the trial judge also asked jurors a series of questions
about whether they would be able to impose punishment, whether they had been a
victim of a crime or had been in law enforcement and about whether serving on the jury

⁵ The prosecutor's statements quoted here are found at ECF No. 89, pp. 48-49. The judge's
statements quoted by the Nevada Supreme Court are found at ECF No. 89, p. 35.

1 would cause extreme hardship. The judge then questioned individual jurors at length
2 depending on their responses. See e.g., exh. 89, pp. 15-43. The defense failed to
3 contemporaneously object to the alleged improper descriptions of the reasonable doubt
4 standard. The Nevada Supreme Court concluded that, even assuming any statements
5 were improper, Smith did not show that the jury applied a preponderance of the
6 evidence standard. The appellate court also held that accurate jury instructions on
7 reasonable doubt rectified any confusion. Smith has not demonstrated that this decision
8 was contrary to, or involved an unreasonable application of, clearly established U.S.
9 Supreme Court law, or was based on an unreasonable determination of the facts in light
10 of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal
11 habeas relief is denied as to ground 7.

12 **b. Ineffective Assistance of Counsel Claims**

13
14 Smith argues that his trial and appellate counsel rendered ineffective assistance.
15 Ineffective assistance of counsel (IAC) claims are governed by the two-part test
16 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
17 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
18 burden of demonstrating that (1) the attorney made errors so serious that he or she was
19 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the
20 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing
21 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
22 counsel’s representation fell below an objective standard of reasonableness. *Id.* To
23 establish prejudice, the defendant must show that there is a reasonable probability that,
24 but for counsel’s unprofessional errors, the result of the proceeding would have been
25 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in
26 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly
27
28

1 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,
2 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
3 petitioner’s burden to overcome the presumption that counsel’s actions might be
4 considered sound trial strategy. *Id.*

5 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
6 performance of counsel resulting in prejudice, “with performance being measured
7 against an objective standard of reasonableness, . . . under prevailing professional
8 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
9 omitted). When the ineffective assistance of counsel claim is based on a challenge to a
10 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that
11 there is a reasonable probability that, but for counsel’s errors, he would not have
12 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,
13 59 (1985).

14
15 If the state court has already rejected an ineffective assistance claim, a federal
16 habeas court may only grant relief if that decision was contrary to, or an unreasonable
17 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).
18 There is a strong presumption that counsel’s conduct falls within the wide range of
19 reasonable professional assistance. *Id.*

20
21 The United States Supreme Court has described federal review of a state supreme
22 court’s decision on a claim of ineffective assistance of counsel as “doubly deferential.”
23 *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).
24 The Supreme Court emphasized that: “We take a ‘highly deferential’ look at counsel’s
25 performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403 (internal
26 citations omitted). Moreover, federal habeas review of an ineffective assistance of
27 counsel claim is limited to the record before the state court that adjudicated the claim on
28

1 the merits. *Cullen*, 563 U.S. at 181-84. The Supreme Court has specifically reaffirmed
2 the extensive deference owed to a state court's decision regarding claims of ineffective
3 assistance of counsel:

4
5 Establishing that a state court's application of *Strickland* was
6 unreasonable under § 2254(d) is all the more difficult. The standards
7 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at
8 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
9 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
10 is "doubly" so, *Knowles*, 556 U.S. at 123. The *Strickland* standard is a
11 general one, so the range of reasonable applications is substantial. 556
12 U.S. at 124. Federal habeas courts must guard against the danger of
13 equating unreasonableness under *Strickland* with unreasonableness
14 under § 2254(d). When § 2254(d) applies, the question is whether there is
15 any reasonable argument that counsel satisfied *Strickland's* deferential
16 standard.

17 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance of
18 counsel must apply a 'strong presumption' that counsel's representation was within the
19 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466
20 U.S. at 689). "The question is whether an attorney's representation amounted to
21 incompetence under prevailing professional norms, not whether it deviated from best
22 practices or most common custom." *Id.* (internal quotations and citations omitted).

23 The claims that trial and appellate counsel rendered ineffective assistance largely
24 stem from the testimony of Detective Barry Jensen. Exh. 94, pp. 93-158; exh. 100, pp.
25 5-54. Prosecutor Stanton asked leading questions in order to try to confine Jensen's
26 testimony as agreed by the parties and the court prior to trial. Jensen testified that
27 police obtained warrants to trace the Nievas' stolen cell phones. Jensen said that police
28 traced one cell phone to a car that matched the description of a vehicle seen leaving the
area after the Nieva robbery. They checked the license plate and registration; it was the
car Shane Burton had reported stolen. One cell phone was recovered from the car.
Records of calls from that cell phone on the night in question led police to McKnight and
Smith. Police also found Target receipts that they traced back to Katherine LaBelle.
LaBelle later identified Smith from a photo lineup.

1 Jensen testified regarding the transcript of a September 24, 2007 interview with
2 Smith. Smith admitted that he stole the Honda and let some other people use it but
3 insisted that he did not participate in any robberies. He said he got the cellphone from
4 the Honda when it was brought back to him. After Jensen told him that they had DNA
5 and fingerprint evidence, Smith acknowledged that he had ridden in the car. During a
6 second interview on October 2, Smith told Jensen that he got into Shane Burton's car
7 after the Nieva robbery and searched through the tote bag (he had earlier described the
8 appearance of the tote bag). Smith adamantly maintained that he was not present at,
9 nor did he participate in either robbery. The Nieva robbery was reported to police at
10 2:28 a.m. Cell phone records reflect that a call was made from a Nieva cell phone at
11 2:54 a.m. to Nakita Burns, the mother of Smith's child and with whom Smith was living.

12 Detective Jensen also said that when he interviewed McKnight on September 27,
13 McKnight admitted to him that he had committed the Nieva robbery. McKnight said his
14 role was to rob Lydia. McKnight said he punched Lydia in the face, and she let go of her
15 purse. He said he found an envelope with \$1,000 in the purse that he never told Smith
16 and Gibson about. He said he did not know what happened to Angel; he was not paying
17 attention because he was going through the purse. He repeatedly denied having any
18 contact with Angel at all. McKnight also repeatedly denied involvement in the Katherine
19 LaBelle robbery.

20 **i. Grounds 10(A)(1)-(3) are Procedurally Barred**

21 Respondents have previously moved to dismiss grounds 10(A)(1)-(3) as
22 procedurally defaulted (ECF No. 52). Smith had argued that he can show cause and
23 prejudice to excuse the procedural default of these trial IAC claims pursuant to *Martinez*
24 *v. Ryan*, 566 U.S. 1 (2012), which held that the failure of a court to appoint counsel, or
25 the ineffective assistance of counsel in a state postconviction proceeding, may establish
26 cause to overcome a procedural default in specific, narrowly-defined circumstances. To
27 establish prejudice, Smith must show that his "underlying effective-assistance-of-trial-
28

1 counsel claim is a substantial one, which is the say that the prisoner must demonstrate
2 that the claim has some merit.” *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014)
3 (providing guidelines for applying *Martinez*). Smith did not have counsel in his first state
4 postconviction petition, thus he can establish cause under *Martinez*. This court deferred
5 a decision regarding prejudice to this merits decision, as the court now has the benefit
6 of full briefing on these claims (see ECF No. 83, pp. 7-9).

7
8 **Ground 10(A)(1)**

9 Smith asserts that his trial counsel was ineffective to the extent he failed to object
10 to leading questions asked of Detective Jensen as part of the State’s attempt to avoid
11 confrontation clause issues in the joint trial (ECF No. 44, pp. 31-32). Trial counsel has
12 the “immediate and ultimate responsibility of deciding if and when to object, which
13 witnesses, if any, to call, and what defenses to develop.” *Rhyne v. State*, 38 P.3d 163,
14 167 (Nev. 2002) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J.,
15 concurring)). Whether to object, even when a legal basis to do so exists, is a strategic
16 decision that is almost unchallengeable. See *Strickland*, 466 U.S. at 668.

17
18 As discussed above with respect to ground 1, Smith and co-defendant McKnight
19 filed motions to sever pursuant to *Bruton*. The trial court determined that the prosecution
20 would redact the relevant statements and ask Jensen leading questions in order to
21 prevent him from revealing restricted information, namely, to prevent him from naming
22 Smith or McKnight directly in certain instances.

23
24 The Nevada Supreme Court emphasized on direct appeal that the trial court has
25 discretion to permit the use of leading questions in some instances:

26 [T]his court has made plain that the district court has discretion to permit
27 leading questions on direct examination. NRS 50.115(3)(a); *Leonard v. State*,
28 117 Nev. 53, 70, 17 P.3d 397, 408 (2001).

1 Here, we conclude that any prejudice that may have resulted from the
2 leading questions did not rise to the level of affecting Smith's substantial rights. In
3 fact, the district court allowed leading questions to the benefit of both Smith and
4 his codefendant. Therefore, we reject Smith's claim.

5 Exh. 149, pp. 5-6.

6 At the evidentiary hearing on Smith's state postconviction petition, defense
7 counsel Jonathan McArthur testified that he and co-counsel Brian Bloomfield made
8 strategic decisions with respect to potential *Bruton* issues in order to preserve a
9 favorable pretrial ruling that prohibited McKnight from implicating Smith in the robberies.
10 Exh. 170, pp. 5-49.⁶ Smith cannot show prejudice. His statement to police did not
11 implicate any co-defendant, while McKnight's statement implicated Smith. Smith reaped
12 the benefit of the leading questions, which restricted the detective from revealing that
13 McKnight's statement implicated Smith. This claim is not substantial. Thus, Smith

14 ⁶ See also McArthur's affidavit in response to Smith's state postconviction petition for writ of
15 habeas corpus:

16 McKnight had been subjected to a remedial, but questionable, ruling by the trial
17 court, prohibiting McKnight from implicating Defendant Smith at trial as a
18 participant in the robberies resulting in the death of the Victim. The trial court
19 fashioned this remedy specifically to avoid having to sever the defendants and
20 requiring two trials. However, the order prevented McKnight from pursuing his best
21 defense, which would have been to shift the blame for the death to Smith.
22 McKnight's counsel vigorously, but unsuccessfully, objected to the ruling on
23 multiple occasions. When trial began, Judge Mosley, who had issued the ruling,
24 was out of the jurisdiction and unable to hear the trial. The trial was instead heard
25 by Senior Judge Brennan. Judge Brennan did not agree with the ruling that had
26 been issued by Judge Mosley, but initially recognized that it was the rule of the
27 case at the beginning of trial. Brennan specifically decried the unfairness of the
28 ruling to McKnight and appeared to Smith's counsel to be inclined to overturn the
ruling if encouraged by circumstances at trial to do so. As Smith was the direct
beneficiary of the ruling, both Bloomfield and I agreed that we should try to
preserve the ruling at any cost for the benefit of Smith. McKnight's counsel made
it clear that if we "tried to throw McKnight under the bus" at trial, that they would
insist on presenting McKnight as a witness in his own defense and revisit the issue
of the Order in Limine with Brennan to have it reversed. Accordingly, Bloomfield
and I strategically agreed to avoid casting unnecessary aspersions against
McKnight and advised Smith that this would be the approach moving forward.
Smith agreed to rely on our expertise in making strategic decisions at trial.

Exh. 167.

1 cannot establish prejudice to excuse the procedural default of this claim. Ground
2 10(A)(1) is dismissed as procedurally barred from federal habeas review.⁷

3 **Ground 10(A)(2)**

4 Smith claims that, to the extent that trial counsel was required to raise any such
5 objection in addition to objections he already made, he was ineffective for failing to seek
6 a specific instruction that the jury disregard the statement of McKnight for purposes of
7 determining the guilt of Smith (ECF No. 44, pp. 31-32).

8 The jury was instructed:

9 The conviction shall not be had on the testimony of an accomplice
10 unless he is corroborated by other evidence which in itself, and without the
11 aid of the testimony of the accomplice, tends to connect the defendant
12 with the commission of the offense; and the corroboration shall not be
13 sufficient if it merely shows the commission of the offense or the
14 circumstances thereof. An accomplice is hereby defined as one who is
liable for prosecution, for the identical offense charged against the
defendant(s) on trial in the cause in which the testimony of the accomplice
is given.

15 You are instructed that Ronnie Gibson is an accomplice in this
16 case.

17 Exh. 108, jury instruction no. 6.

18 Smith's counsel had already lodged a continuing objection to the use of
19 McKnight's statement. See exh. 55, p. 9. McKnight's statement was not admitted into
20 evidence. When Detective Jensen testified as to McKnight's statement, he used neutral
21 pronouns instead of naming Smith. Smith cannot show that the strategic decision not to
22 seek additional jury instructions is assailable, particularly given that such an instruction
23 would have further highlighted McKnight's statement. Ground 10(A)(2) is not a
24 substantial claim of ineffective assistance of counsel. Smith has not established
25 prejudice to excuse the procedural bar. Thus, ground 10(a)(2) is dismissed as
26 procedurally barred.

27 ⁷ As respondents point out, the State presented overwhelming evidence of
28 Smith's guilt apart from Jensen's testimony, including the testimony of Gibson and his girlfriend,
the physical evidence tying Smith to the car, his contact with victims' property and use of a victim's
cell phone after the robberies.

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

Ground 10(A)(3)

Smith contends that, to the extent that trial counsel was not barred from doing so, counsel was ineffective for failing to remedy the State’s misleading testimony and statements in closing argument by introducing the transcript of the statement that Smith gave to the police. Smith alleges that to the extent that the trial court barred defense counsel from doing so, counsel was ineffective for failing to challenge any such ruling (ECF No. 44, pp. 31-33).

Defense counsel Bloomfield stated in an affidavit in response to the state postconviction habeas corpus petition:

Defendant argues that counsel should have objected to the prosecutor’s opening and closing statements that defendant gave cars to people for them to commit robberies and Defendant received proceeds from the robberies. Counsel cannot be deemed ineffective for failing to make futile objections. During said trial, the above referenced facts came from Defendant’s own statements to police, which were introduced into evidence through the testimony of Detective Jensen.

Exh. 166.

Defense counsel McArthur testified during the state postconviction evidentiary hearing that the defense did suspect that Jensen misrepresented or extended Smith’s statements regarding stealing cars. Exh. 170, pp. 39-41. The prosecutor repeated those statements in arguments to the jury. But McArthur explained that the interview was not recorded, so they were limited to attacking Jensen’s credibility. The court questioned Stanton as well as McArthur:

THE COURT: So in their opening statements you indicate that he had made some false statement?

THE DEFENDANT: Yeah. They kept saying that I gave cars to people to commit robberies.

THE COURT: Is that your recollection, Mr. Stanton? Do you recall that?

MR. STANTON: Yes.

THE COURT: And what was that based on?

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

MR. STANTON: Detective Jensen’s testimony of both the September 24th and October 2nd statements.

THE COURT: Is that your understanding of what the nature of the testimony was, Mr. MacArthur?

THE WITNESS [MCARTHUR]: That was the nature of Detective Jensen’s testimony, yes.

THE COURT: Was there a basis for any objection?

THE WITNESS: With my recollection, Your Honor, the reason why we couldn’t object at opening argument is, of course, Mr. Stanton is entitled to his theory of the case. That was later substantiated by Detective Jensen, who testified that during the unrecorded interview, for which the defendant had been Mirandized, that he had ostensibly admitted to doing car robberies and supplying them to other people for the purposes of conducting robberies. However, the Defense felt as though that this was a conclusion that had been arrived to by Detective Jensen, rather than something that had been said by Mr. Smith. However, that did not provide us with a basis to render an objection. All we could do is attack his credibility on cross-examination. Therefore, there was no objection during the State’s case in chief. We did make an objection, I believe, in closing argument related to that issue. But, again, Mr. Stanton was entitled to summarize what he believed the State’s evidence had shown. So I understand the defendant’s dissatisfaction with the way that went, but it did not provide us with a legally recognizable basis for an objection.

Exh. 170, pp. 39-41.

The Nevada Supreme Court affirmed the denial of this claim:

Second, appellant claimed that his trial counsel failed to object to misstatements of facts not in evidence. In particular, appellant claimed that the prosecutor erroneously stated that he gave stolen cars to people for them to commit robberies and received proceeds from the robberies. Appellant claimed that this was a misstatement because it was not in his transcribed statement to the police. Appellant’s trial counsel acknowledged that there was an objection during closing arguments, but that there was no legal basis to challenge the statements. Appellant failed to demonstrate that his trial counsel’s performances were deficient or that he was prejudiced. On direct examination, the detective testified that, while denying participation in the robberies in this case, appellant admitted that he had stolen the car used in this case and gave the car, for a fee, to others for a robbery. On cross-examination, appellant’s trial counsel attempted to clarify the statement and provided a direct quotation from the statement for the jury’s consideration: appellant admitted that he “got cars from people in the alley ... that need to pay bills, just to run errands, a

1 bunch of little shit, I take a car charge.” Appellant denied that he knew
2 what people did with the cars. The detective testified that appellant told
3 him that his fee included being able to select property from the vehicle
4 when it was brought back. Trial counsel objected to the State’s
5 characterization of this testimony during closing arguments. Appellant
6 failed to indicate what further actions should have been taken by trial
7 counsel to clarify his statement to the police and how such action by
8 counsel would have had a reasonable probability of altering the outcome
9 at trial.

10 Exh. 149, pp. 4-5.

11 This claim lacks merit. Trial counsel explained their strategic determinations with
12 respect to the evidence that Smith routinely stole cars, which was eminently reasonable.
13 Ground 10(A)(3) is not a substantial claim of ineffective assistance of trial counsel, and
14 therefore, Smith cannot establish prejudice to excuse the procedural default. Ground
15 10(A)(3) is dismissed as procedurally barred.

16 **ii. Remaining Claims of Ineffective Assistance of Trial Counsel**

17 **Ground 10(A)(8)**

18 Smith asserts that his counsel failed to properly file a motion to suppress the
19 content of statements improperly obtained from Smith. Counsel also failed to object to
20 the extensive use of the statement in closing (ECF No. 44, pp. 33-34). Defense counsel
21 McArthur testified at the evidentiary hearing on Smith’s state postconviction petition that
22 the September 24, 2007 statement was transcribed and included a signed Miranda
23 waiver. Exh. 170, pp. 8-10. McArthur said that Detective Jensen testified that Smith
24 waived his Miranda rights and agreed to speak with Jensen on October 2, 2007.

25 The Nevada Supreme Court affirmed the denial of this claim in Smith’s first state
26 postconviction petition:

27 First, appellant claimed that trial counsel failed to file a motion to
28 suppress his statements to the police. Appellant claimed that his
September statement contained bad acts from other robbery cases.
Appellant claimed that the October statement was not recorded and
transcribed, there was not a signed Miranda waiver, [FN2] and appellant
made incriminating statements to knowing Ronnie Gibson, using the
victim’s stolen cell phone and receiving property in the instant case as
payment for the vehicle he had stolen. Appellant’s trial counsel testified
that there was no legal basis to challenge the statements and the

1 credibility of the detective was pursued at trial. Appellant failed to
2 demonstrate that his trial counsel's performances were deficient or that he
3 was prejudiced. Appellant failed to demonstrate that there was a legal
4 basis for suppressing the statements and that such a motion would have
5 been successful. The detective testified that appellant was Mirandized
6 before the interviews in September and October. No testimony was
7 presented at trial that appellant committed other robberies. [FN3] Nothing
8 requires the statement to the police to be recorded and transcribed in
9 order to be admissible at trial. Finally, the fact that appellant made
10 incriminating statements is not a basis to suppress an otherwise voluntary
11 and knowing statement, for which the defendant waived his rights.

12 [FN2: *Miranda v. Arizona*, 384 U.S. 436 (1966).]

13 [FN3: At a pretrial hearing on April 16, 2009, it was discussed that
14 redacted statements would not be presented as such to the juries, but the
15 contents, using neutral pronouns, would be elicited through the detective's
16 testimony. Appellant argued on direct appeal that a motion to sever should
17 have been granted as he was unfairly prejudiced by the prosecutor asking
18 leading questions to avoid problems under *Bruton v. United States*, 391
19 U.S. 123 (1968). *Smith v. State*, Docket No. 54397 (Order of Affirmance,
20 January 31, 2011). This court considered and rejected appellant's claim
21 that his substantial rights were prejudiced. To the extent that appellant
22 attempts to revisit this holding, the doctrine of the law of the case prevents
23 further litigation of this issue. *See Hall v. State*, 91 Nev. 314, 535 P.2d 797
(1975).]

24 Exh. 193, pp. 3-4.

25 Smith has failed to show that there was a legal basis to challenge the
26 admissibility of his statements. He presents nothing to demonstrate that the Nevada
27 Supreme Court's decision on federal ground 10(A)(8) was contrary to, or involved an
28 unreasonable application of, clearly established U.S. Supreme Court law, or was based
on an unreasonable determination of the facts in light of the evidence presented in the
state court proceeding. 28 U.S.C. § 2254(d). Accordingly, relief on ground 10(A)(8) is
denied.

29 **Ground 10(B)**

30 Smith urges that his trial counsel was ineffective for failing to present evidence of
31 the location of the stolen Nieva cellphone (ECF No. 44, pp. 34-35).

32 Defense counsel McArthur testified at the state postconviction evidentiary
33 hearing that the defense team made a tactical decision not to introduce evidence that

1 the cellphone was found in McKnight's apartment. Exh. 170, pp. 41-45. As touched on
2 with IAC claims discussed above, McArthur explained that when the original judge on
3 the case (who also presided over the evidentiary hearing) denied the motion he entered
4 a remedial order directing that McKnight would be precluded from inculcating Smith at
5 trial. A different judge tried the case. That judge disagreed with the order, but initially let
6 it stand. McKnight's counsel indicated to Smith's team that if they "threw McKnight
7 under the bus" that McKnight's team would revisit the issue and seek to have the order
8 reversed. Smith's team advised him that avoiding pointing the finger at McKnight was a
9 safer course. The presiding judge later *sua sponte* reversed the order. But McKnight
10 ultimately did not testify, thus Smith's defense was not impacted.⁸

11 The Nevada Supreme Court disagreed with Smith:

12 Third, appellant claimed that trial counsel failed to present the fact
13 that the stolen cell phone not recovered was traced to an apartment
14 occupied by his codefendant Adrian McKnight. Appellant's counsel
15 testified that this fact was strategically irrelevant, it could have opened the
16 door to admitting prior bad acts of a similar nature involving cell phones,
17 and it could have reopened the door regarding the pretrial ruling limiting
18 McKnight's ability to incriminate Smith during trial. Appellant failed to
19 demonstrate that his trial counsels' performances were deficient or that he
20 was prejudiced. Appellant admitted to using one of the victim's cell
21 phones. There was no evidence presented, at trial or at the evidentiary
22 hearing, regarding the location of the non-recovered cell phone. Because
23 appellant and the codefendant were convicted of conspiracy to commit
24 robbery and robbery, the location of any item taken during the robbery or
25 the identity of the individual who gained possession of items taken during
26 the robbery was irrelevant and would not have had a reasonable
27 probability of altering the outcome at trial.

28 Exh. 193, pp. 5-6.

Smith admitted to detectives that he used one of the cell phones. The fact that one
cell phone was recovered from McKnight's residence did not aid Smith's defense.
Defense counsel made a reasonable decision to try to preserve the favorable pre-trial
order prohibiting McKnight from inculcating Smith. Smith fails to demonstrate that the

⁸ See also McArthur's affidavit. Exh. 167.

1 Nevada Supreme Court's decision on federal ground 10(B) was contrary to, or involved
2 an unreasonable application of, clearly established U.S. Supreme Court law, or was
3 based on an unreasonable determination of the facts in light of the evidence presented
4 in the state court proceeding. 28 U.S.C. § 2254(d). Accordingly, relief on ground 10(B)
5 is denied.

6 **iii. Remaining Claims of Ineffective Assistance of Appellate Counsel**

7 With respect specifically to claims of ineffective assistance of appellate counsel,
8 appellate counsel must "examine the record with a view to selecting the most promising
9 issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Although "it is still
10 possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim,
11 . . . it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528
12 U.S. 259, 288 (2000). Appellate counsel cannot be found to be ineffective for failure to
13 raise an issue that lacks merit. *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). "In
14 most cases, an unpreserved trial error will not be a plainly stronger ground for appeal
15 than preserved errors. Thus, in most instances in which the trial court did not rule on the
16 alleged trial error (because it was not preserved), the prisoner could not make out a
17 substantial claim of ineffective assistance of appellate counsel . . ." *Davila v. Davis*, 137
18 S. Ct. 2058, 2067 (2017) (Internal citations omitted).

19 **Ground 11(A)**

20 Smith argues that appellate counsel was ineffective for failing to argue that the
21 admission of co-defendant McKnight's statements at the joint trial violated Smith's Sixth
22 and Fourteenth Amendment right to confrontation (ECF No. 44, pp. 36-38).
23 Respondents argue that while appellate counsel may not have used the specific phrase
24 "confrontation clause" that the Nevada Supreme Court evaluated the confrontation issue
25 and found that appellant counsel had properly challenged the denial of the motion to
26 sever on direct appeal:

27 The Nevada Supreme Court affirmed the denial of this claim in Smith's state
28 postconviction petition:

1 Second, appellant claimed that appellate counsel was ineffective
2 for failing to argue that the denial of a motion to sever prevented him from
3 confronting and cross-examining his codefendant, Adrian McKnight.
4 Appellant also complained that McKnight's redacted confession was
5 presented to the jury. Appellant failed to demonstrate that his appellate
6 counsel's performance was deficient. Appellate counsel did challenge the
7 denial of the motion to sever on appeal, and this court determined that he
8 was not unfairly prejudiced by the denial of the motion, he was the
9 beneficiary of a pretrial ruling made by Judge Mosley, and leading
10 questions about statements made to the police did not affect appellant's
11 substantial rights. *Smith v. State*, Docket No. 54397 (Order of Affirmance,
12 January 31, 2011). Appellant failed to demonstrate a violation under
13 *Bruton v. United States*, 391 U.S. 123 (1968) because the testimony about
14 McKnight's statements to the police regarding other participants was not
15 facially incriminating, was couched in neutral terms of "they" or "other
16 people," and only became incriminating to appellant when linked with
17 evidence introduced at trial.[FN 6] See *Richardson v. Marsh*, 481 U.S.
18 200, 208 (1987) (finding no Confrontation Clause violation because the
19 redacted statements did not directly refer to the defendant, but became
20 incriminating only when linked with evidence introduced later at trial); *Lisle*
21 *v. State*, 113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997) (rejecting
22 Bruton claim where "the other guy" was used in a redacted statement
23 because the statement was not incriminating to the defendant on its face,
24 but only when linked with other evidence introduced later at trial). *But see*
25 *Gray v. Maryland*, 523 U.S. 185, 192-196 (1998) (determining the right to
26 confrontation was violated where redacted confession of the nontestifying
27 codefendant included blanks, deletions, and symbols because the
28 redactions facially incriminated Gray: obviously referred directly to
someone, at times obviously Gray, and involved inferences that the jury
could make immediately);[FN 7] *Ducksworth v. State*, 114 Nev. 951, 953-
55, 966 P.2d 165, 166-67 (1998) (recognizing that where the nontestifying
codefendant's redacted statement suggested the participation of another
person and it was likely that the jury deduced this other person was the
defendant, admission of the statement violated *Bruton* where there was
only minimal, circumstantial evidence and the State implicitly conceded
that the most damaging evidence against the defendant was the redacted
statements). Further, part of appellant's defense hinged on only two
persons being specifically observed by the victims as being involved in the
crime and appellant used McKnight's statements to the police admitting
McKnight's involvement in the Nievas robbery to support this defense.[FN 8]
Given the substantial evidence presented against appellant at trial-the
testimony of the victims, the evidence linking appellant to the stolen
vehicle, the evidence linking appellant to the victim's cell phone, the
testimony of Ronnie Gibson (the third defendant who testified against
appellant and McKnight and was subject to confrontation and cross-
examination by two teams of defense attorneys), and the testimony of K.
Lyons who overheard appellant's inculpatory conversation with McKnight
and Gibson, appellant failed to demonstrate that further arguments made

1 by appellate counsel would have had a reasonable probability of altering
2 the outcome on appeal.

3 [FN 6: Indeed, McKnight's statements were presented after the
4 State presented evidence from the victims describing the offenses, after
5 Ronnie Gibson's testimony inculcating both appellant and McKnight in the
6 crimes, after the testimony of K. Lyons who overheard a conversation
7 between appellant, McKnight and Gibson, after the forensic testimony
8 regarding appellant's fingerprints found on the stolen vehicle used during
9 the crimes, and after the detective discussed appellant's statements to the
10 police which linked him to the crime. The references to "they" and "other
11 guys" in the testimony about McKnight's statement were minimal at best
12 and at the conclusion of the State's case-in-chief. The neutral pronouns
13 did not violate appellant's confrontation rights under the facts presented.]

14 [FN 7: Notably, the *Gray* Court did not overrule *Richardson*, but
15 distinguished the facts presented in each case and appeared to recognize
16 that a redaction referring to "a few other guys" may pass constitutional
17 muster. 523 U.S. at 196.]

18 [FN 8: Appellant's counsel argued strenuously during trial that only
19 two persons were observed by the victims to have participated in the
20 crimes and the suggestion made by counsel was that it was appellant's
21 co-defendant McKnight and Ronnie Gibson, who admitted to participating
22 in the charged offenses. Appellant's counsel emphasized that appellant
23 never wavered in his denial of participating in the robberies in question in
24 this case.]

25 Exh. 193, pp. 7-9.

26 As the state appellate court noted, and as discussed earlier in this order, the jury
27 heard substantial evidence of Smith's guilt before McKnight's statement was introduced.
28 Neutral references to "they" and "other guys" in McKnight's statement were minimal.
Defense counsel was able to cross-examine Gibson. Smith has not shown that the
Nevada Supreme Court's decision on federal ground 11(A) was contrary to, or involved
an unreasonable application of, clearly established U.S. Supreme Court law, or was
based on an unreasonable determination of the facts in light of the evidence presented
in the state court proceeding. 28 U.S.C. § 2254(d). Thus, federal habeas relief is
denied as to ground 11(A).

Ground 11(B)

1 Smith alleges that appellate counsel was ineffective for failing to argue that
2 Smith's Fifth, Sixth, and Fourteenth Amendment due process and fair trial rights were
3 violated when the State presented Detective Jensen's false and highly prejudicial
4 testimony (ECF No. 44, pp. 38-43). Smith argues that the detective inaccurately
5 paraphrased some of Smith's statements to police, and that the prosecutor then
6 repeated these paraphrased statements through questions and closing argument.

7 The Nevada Supreme Court disagreed that the statements were inaccurate or
8 misleading:

9 [A]ppellant claimed that his appellate counsel failed to argue that
10 the prosecutor misstated evidence about appellant's procuring stolen
11 vehicles and committed perjury. Appellant failed to demonstrate that his
12 counsel's performance was deficient or that this issue would have had a
13 reasonable likelihood of success on appeal. The prosecutor's statements
14 regarding the stolen vehicles were supported by the testimony of the
15 detective. To the extent that appellant claimed that the prosecutor
16 suborned perjury, appellant failed to demonstrate that the detective or
17 Ronnie [Gibson] committed perjury.

18 Exh. 193, p. 10.

19 This claim is meritless. Smith presents nothing in support of his assertions of perjury.
20 See *also* discussion of ground 10(A)(3), *supra*. Smith fails to show that the Nevada
21 Supreme Court's decision on federal ground 11(B) was contrary to, or involved an
22 unreasonable application of, clearly established U.S. Supreme Court law, or was based
23 on an unreasonable determination of the facts in light of the evidence presented in the
24 state court proceeding. 28 U.S.C. § 2254(d). The court denies federal habeas relief on
25 ground 11(B).

26 **Ground 11(C)**

27 Smith claims that appellate counsel failed to raise the claim that the trial court
28 erred in denying a mistrial after Kennisha Lyons' "highly prejudicial and irrelevant"
testimony, in violation of his Fifth, Sixth, and Fourteenth Amendment rights to have his
guilt proven beyond a reasonable doubt, due process and a fair trial (ECF No. 44, pp.
43-44).

1 On cross-examination, defense counsel asked Lyons why she did not contact
2 the police after Gibson told her about the robbery and after they learned of Angel's
3 death. Exh. 92, pt. 2, p. 117. She responded that Gibson told her he was scared that the
4 other guys would hurt his mom and his sister. Defense counsel for both Smith and
5 McKnight immediately objected, and the court struck the testimony.

6 The Nevada Supreme Court emphasized that the defense elicited the testimony:

7 Fifth, appellant claimed that his appellate counsel failed to argue
8 that the district court erred in denying a motion for mistrial based on K.
9 Lyons' testimony that she did not come forward earlier because she was
10 afraid appellant and McKnight would harm Ronnie Gibson's family.
11 Appellant failed to demonstrate that his counsel's performance was
12 deficient or that this issue would have had a reasonable likelihood of
13 success on appeal. Lyons' answer was in response to a question asked
14 by appellant's own counsel; thus, appellant was precluded from raising the
15 issue on appeal. *Jones v. State*, 95 Nev. 613, 618, 600 P.2d 247, 250
(1979) (holding that where a defendant participates in an alleged error, he
16 is estopped from raising any objection on appeal).

17 Exh. 193, pp. 10-11.

18 Defense counsel unintentionally elicited this brief statement. Again, especially in light
19 of the other, substantial evidence adduced at trial, Smith has not shown a reasonable
20 likelihood that this claim would have succeeded on appeal. He fails to demonstrate that
21 the Nevada Supreme Court's decision on federal ground 11(C) was contrary to, or
22 involved an unreasonable application of, clearly established U.S. Supreme Court law, or
23 was based on an unreasonable determination of the facts in light of the evidence
24 presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 11(C) is denied.

25 **Ground 11(D)**

26 Smith asserts that appellate counsel failed to argue that the State presented
27 insufficient evidence to convict him in violation of Fifth and Fourteenth Amendment due
28 process rights (ECF No. 44, pp. 44-45). "The Constitution prohibits the criminal
conviction of any person except upon proof of guilt beyond a reasonable doubt."
Jackson v. Virginia, 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358
(1970)). On federal habeas corpus review of a judgment of conviction pursuant to 28

1 U.S.C. § 2254, the petitioner “is entitled to habeas corpus relief if it is found that upon
2 the record evidence adduced at the trial no rational trier of fact could have found proof
3 of guilt beyond a reasonable doubt.” *Id.* at 324. “[T]he standard must be applied with
4 explicit reference to the substantive elements of the criminal offense as defined by state
5 law.” *Id.* at 324 n.16. On habeas review, this court must assume that the trier of fact
6 resolved any evidentiary conflicts in favor of the prosecution and must defer to such
7 resolution. *Id.* at 326. Generally, the credibility of witnesses is beyond the scope of a
8 review of the sufficiency of the evidence. *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

9 The Nevada Supreme Court rejected this claim:

10 [A]ppellant claimed that his appellate counsel should have argued
11 that there was insufficient evidence presented at trial. Appellant failed to
12 demonstrate that this issue would have had a reasonable likelihood of
13 success on appeal. Appellant offered no specific argument as to how the
evidence was insufficient for each of the nine counts for which he was
convicted.

14 Exh. 193, p. 10.

15 Smith cannot show a reasonable likelihood of success had this claim been raised on
16 appeal. Viewing the evidence in the light most favorable to the prosecution, the State
17 presented sufficient evidence to convict. Further, Smith did not specify how the
18 evidence was insufficient. He has not shown that the Nevada Supreme Court’s decision
19 on federal ground 11(D) was contrary to, or involved an unreasonable application of,
20 clearly established U.S. Supreme Court law, or was based on an unreasonable
21 determination of the facts in light of the evidence presented in the state court
22 proceeding. 28 U.S.C. § 2254(d). Ground 11(D) is denied.

23 **Ground 11(E)**

24 Smith alleges that appellate counsel failed to argue that his statements were
25 admitted in violation of his Fifth and Fourteenth Amendment rights to be free from self-
26 incrimination (ECF No. 44, pp. 46-47).

27 The Nevada Supreme Court affirmed the denial of this claim in Smith’s state
28 postconviction petition:

1 First, appellant claimed that trial counsel failed to file a motion to
2 suppress his statements to the police. Appellant claimed that his
3 September statement contained bad acts from other robbery cases.
4 Appellant claimed that the October statement was not recorded and
5 transcribed, there was not a signed Miranda waiver,[FN 2] and appellant
6 made incriminating statements to knowing Ronnie Gibson, using the
7 victim's stolen cell phone and receiving property in the instant case as
8 payment for the vehicle he had stolen. Appellant's trial counsel testified
9 that there was no legal basis to challenge the statements and the
10 credibility of the detective was pursued at trial. Appellant failed to
11 demonstrate that his trial counsel's performances were deficient or that he
12 was prejudiced. Appellant failed to demonstrate that there was a legal
13 basis for suppressing the statements and that such a motion would have
14 been successful. The detective testified that appellant was Mirandized
15 before the interviews in September and October. No testimony was
16 presented at trial that appellant committed other robberies. Nothing
17 requires the statement to the police to be recorded and transcribed in
18 order to be admissible at trial. Finally, the fact that appellant made
19 incriminating statements is not a basis to suppress an otherwise voluntary
20 and knowing statement, for which the defendant waived his rights.

21 [FN 2: *Miranda v. Arizona*, 384 U.S. 436 (1966).

22 Exh. 193, p. 6.

23 No legal basis existed for trial counsel to challenge the admission of Smith's
24 statements. See *also* discussion of ground 10(A)(3), *supra*. Thus, Smith could not have
25 prevailed on a claim that appellate counsel was ineffective for declining to raise that
26 claim. Smith has failed to demonstrate that the Nevada Supreme Court's decision on
27 federal ground 11(E) was contrary to, or involved an unreasonable application of, clearly
28 established U.S. Supreme Court law, or was based on an unreasonable determination
of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §
2254(d). The court, therefore, denies relief as to ground 11(E).

29 c. **Cumulative Error Claim**

30 **Ground 12**

31 Finally, Smith contends that the cumulative effect of multiple trial errors infected
32 his trial with such unfairness that his Fourteenth Amendment due process rights were
33 violated (ECF No. 44, p. 47).

1 The cumulative effect of multiple errors can violate due process and warrant habeas
2 relief where the errors have "so infected the trial with unfairness as to make the
3 resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637,
4 643 (1974); *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007).

5 The Nevada Supreme Court denied this claim on direct appeal:

6 Cumulative error can violate a defendant's constitutional right to a fair
7 trial. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008),.
8 This court considers the following factors for a cumulative error claim: (1) if
9 the issue of guilt is close, (2) the errors' size and character, and (3) the
10 severity of the charged crime. *Id.* Although first-degree murder is a serious
11 charge, we conclude that any error that may have occurred in this case
12 was harmless and the issue of guilt was not close. Therefore, we reject
13 Smith's cumulative error claim.

14 Exh. 149, p. 7.

15 Smith has not demonstrated error to cumulate. In light of the substantial evidence
16 presented Smith has not demonstrated that the Nevada Supreme Court's decision on
17 federal ground 12 was contrary to, or involved an unreasonable application of, clearly
18 established U.S. Supreme Court law, or was based on an unreasonable determination
19 of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §
20 2254(d). Accordingly, relief on ground 12 is denied.

21 The petition, therefore, is denied in its entirety.

22 **V. Certificate of Appealability**

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

28 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has
made a substantial showing of the denial of a constitutional right." With respect to
claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
would find the district court's assessment of the constitutional claims debatable or

1 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
2 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
3 jurists could debate (1) whether the petition states a valid claim of the denial of a
4 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

5 Having reviewed its determinations and rulings in adjudicating Smith's petition, the
6 court finds that none of those rulings meets the *Slack* standard. The court therefore
7 declines to issue a certificate of appealability for its resolution of Smith's petition.

8 **VI. Conclusion**

9 **IT IS THEREFORE ORDERED** that the second-amended petition (ECF No. 44) is
10 **DENIED.**

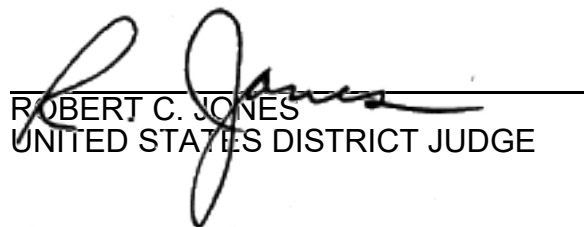
11 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED.**

12 **IT IS FURTHER ORDERED** the Clerk of the Court is directed to substitute
13 William Gittere for Respondent Renee Baker.

14 **IT IS FURTHER ORDERED** that the Clerk of Court enter judgment accordingly and
15 close this case.

16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: 12 May 2022.


ROBERT C. JONES
UNITED STATES DISTRICT JUDGE