

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LINKSTON LIONS,

Case No. 3:13-cv-00321-RCJ-WGC

Petitioner,

ORDER

v.

RENEE BAKER, et al.,

Respondents.

This *pro se* habeas matter under 28 U.S.C. § 2254 filed by Nevada state prisoner Linkston Lions comes before the court for final disposition on the merits (ECF No. 10).

I. Procedural History

Lions was tried on several charges arising out of a robbery where Lions ordered a pizza to be delivered to an abandoned residence in Las Vegas, choked the delivery driver with a cord until he lost consciousness, robbed the driver, and stole his vehicle (exhibits 4, 12 to motion to dismiss).¹ A jury found Lions guilty of robbery with the use of a deadly weapon, grand larceny auto, battery with the use of a deadly weapon, and battery by strangulation. Exh. 35. At sentencing, the State struck the conviction for battery by strangulation. Exh. 42 at 4. The state district court sentenced petitioner as follows: count 2 - robbery with the use of a deadly weapon - 48 to 120 months, with a consecutive 48 to 120 months for the deadly weapon enhancement; count 3 - grand larceny auto - 24 to 60 months to run concurrent to count 2; count 4 - battery with the

¹ The exhibits referenced in this motion are exhibits to respondents' motion to dismiss, ECF No. 19, and are found at ECF Nos. 20-23.

1 use of a deadly weapon - 12 to 120 months consecutive to count 2. *Id.* at 8. Judgment
2 of conviction was entered on February 23, 2011. Exh. 43.

3 The Nevada Supreme Court affirmed the convictions on November 18, 2011, and
4 remittitur issued on December 15, 2011. Exhs. 59, 61. The Nevada Supreme Court
5 affirmed the denial of Lions' state postconviction petition on April 10, 2013, and
6 remittitur issued on May 9, 2013. Exhs. 82, 84.

7 Petitioner dispatched his federal habeas petition on June 11, 2013 (ECF No.10).
8 Respondents moved to dismiss several grounds, and the court granted the motion to
9 dismiss in part, dismissing grounds 4, 5, 6, 7, and 9 as procedurally barred (ECF Nos.
10 19, 30). Respondents have now answered the remaining claims (ECF Nos. 36, 39),
11 and Lions has replied (ECF Nos. 38, 40).²

12 **II. Legal Standards**

13 **A. AEDPA**

14 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
15 Act (AEDPA), provides the legal standards for this court's consideration of the petition in
16 this case:

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

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

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

24 The AEDPA "modified a federal habeas court's role in reviewing state prisoner
25 applications in order to prevent federal habeas 'retrials' and to ensure that state-court
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27 ² Respondents filed an answer (ECF No. 36) and an amended answer (ECF No. 39), and they explain
28 that the original answer inadvertently failed to address one ground in the petition. Petitioner filed a
reply/traverse (ECF No. 37) and a reply/traverse to the amended answer (ECF No. 40), and the court has
considered all filings.

1 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
2 685, 693-694 (2002). This Court’s ability to grant a writ is limited to cases where “there
3 is no possibility fair-minded jurists could disagree that the state court’s decision conflicts
4 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
5 Supreme Court has emphasized “that even a strong case for relief does not mean the
6 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
7 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
8 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
9 state-court rulings, which demands that state-court decisions be given the benefit of the
10 doubt”) (internal quotation marks and citations omitted).

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

18 A state court decision is an unreasonable application of clearly established Supreme
19 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies
20 the correct governing legal principle from [the Supreme Court’s] decisions but
21 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
22 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
23 requires the state court decision to be more than incorrect or erroneous; the state
24 court’s application of clearly established law must be objectively unreasonable. *Id.*
25 (quoting *Williams*, 529 U.S. at 409).

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

6
7 [I]n concluding that a state-court finding is unsupported by
8 substantial evidence in the state-court record, it is not enough that we
9 would reverse in similar circumstances if this were an appeal from a
10 district court decision. Rather, we must be convinced that an appellate
11 panel, applying the normal standards of appellate review, could not
12 reasonably conclude that the finding is supported by the record.

13
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.

16 **B. Ineffective Assistance of Counsel**

17 Ineffective assistance of counsel claims are governed by the two-part test
18 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
19 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
20 burden of demonstrating that (1) the attorney made errors so serious that he or she was
21 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the
22 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing
23 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
24 counsel’s representation fell below an objective standard of reasonableness. *Id.* To
25 establish prejudice, the defendant must show that there is a reasonable probability that,
26 but for counsel’s unprofessional errors, the result of the proceeding would have been
27 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in
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1 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly
2 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,
3 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
4 petitioner’s burden to overcome the presumption that counsel’s actions might be
5 considered sound trial strategy. *Id.*

6 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
7 performance of counsel resulting in prejudice, “with performance being measured
8 against an objective standard of reasonableness, . . . under prevailing professional
9 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
10 omitted). When the ineffective assistance of counsel claim is based on a challenge to a
11 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that
12 there is a reasonable probability that, but for counsel’s errors, he would not have
13 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,
14 59 (1985).

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 The United States Supreme Court has described federal review of a state
21 supreme court’s decision on a claim of ineffective assistance of counsel as “doubly
22 deferential.” *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411,
23 1413 (2009)). The Supreme Court emphasized that: “We take a ‘highly deferential’ look
24 at counsel’s performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403
25 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance
26 of counsel claim is limited to the record before the state court that adjudicated the claim
27 on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has
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specifically reaffirmed the extensive deference owed to a state court's decision regarding claims of ineffective assistance of counsel:

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at —, 129 S.Ct. at 1420. 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 whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

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

III. Instant Petition

A. Claims other than Ineffective Assistance of Counsel

The court will first consider the claims of State and trial court error and then turn to the claims of ineffective assistance of counsel.

Ground 3

Lions contends that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose contact information for any neighbors police interviewed near the residence where the victim was attacked (ECF No. 10, pp. 23-29).

The State has a duty to turn over evidence that is favorable to the defense. See *Strickler v. Green*, 527 U.S. 263, 280 (1999). The State violates due process if it fails to turn over evidence that is "favorable to the accused, either because it is exculpatory, or

1 because it is impeaching; that evidence must have been suppressed by the State, either
2 willfully or inadvertently; and prejudice must have ensued, [that is, it must have been
3 reasonably probable that the outcome of trial would have been different if the
4 suppressed evidence had been disclosed to the defense].” *Id.* at 281-82; 289.

5 The Nevada Supreme Court denied this claim on direct appeal, determining that
6 (1) the State provided Lions with sufficient information such that the information Lions
7 claims he could have uncovered had he been provided with the contact information for
8 the neighbors “was discoverable with the exercise of reasonable diligence,” and (2) the
9 information was immaterial “because there was no possibility that its timely disclosure
10 would have affected the outcome of the trial....” Exh. 59, pp. 3-4.

11 At trial, police testified that neighbors had told at least one investigating officer
12 that the residence was vacant, the owners were in California, people sometimes went
13 into the patio area of the residence to do drugs, and squatters sometimes lived there.
14 Exh. 28, p. 62-64, 181, 191, 194. Lions argues that he specifically requested this
15 information in a motion to compel discovery and that the evidence would have allowed
16 him to establish that other squatters lived there and he did not have exclusive
17 possession of the residence (ECF No. 10, pp. 23-29).

18 Ground 3 lacks merit. The identities of the neighbors living near the residence
19 were certainly discoverable with the exercise of reasonable diligence. The neighbors
20 with whom police spoke did not witness the incident and stated only that no one lived at
21 the residence and squatters sometimes occupied it. Lions does not explain how there is
22 anything exculpatory or material about these statements. In light of the evidence
23 presented at trial, discussed below, Lions has failed to demonstrate that the Nevada
24 Supreme Court’s determination that the identity of the neighbors was reasonably
25 discoverable and was not material was a decision contrary to, or involving an
26 unreasonable application of, clearly established federal law, as determined by the U.S.
27 Supreme Court, or was based on an unreasonable determination of the facts in light of
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1 the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal
2 habeas relief is thus denied as to ground 3.

3 **Ground 8**

4 Lions argues that his Fourteenth Amendment due process rights were violated
5 when the district court erred in instructing the jury on flight because the State failed to
6 present any evidence of flight (ECF No. 10, pp. 60).

7 The jury received the following instruction:

8
9 The flight of a person immediately after the commission of a crime,
10 or after he is accused of a crime, is not sufficient in itself to establish his
11 guilt, but is a fact which, if proved, may be considered by you in light of all
12 other proved facts in deciding the question of his guilt or innocence.
Whether or not evidence of flight shows a consciousness of guilt and the
significance to be attached to such a circumstance are matters for your
deliberation.

13 Exh. 33, instruction no. 28.

14 The Nevada Supreme Court agreed that the district court erred by giving the flight
15 instruction “because there was no evidence that Lions ‘fled with consciousness of guilt
16 and to evade arrest,’ *Rosky v. State*, 111 P.3d 690, 699-700 (Nev. 2005), but the error
17 was harmless because it did not substantially affect the jury’s verdict.” Exh. 59, p. 2.

18 The evidence adduced at trial revealed that Lions’ DNA was identified on the cord
19 used to strangle the victim, that the victim identified Lions at trial as “somebody who
20 could fit what I saw,” that Lions was in possession of the victim’s car at the time he was
21 arrested and that Lions had used the victim’s credit card to try to wire himself money.
22 Exh. 28, pp. 25, 109-117, 163-164, 213-214.

23 Lions has not demonstrated that the Nevada Supreme Court’s determination that
24 the district court’s error was harmless was contrary to, or involved an unreasonable
25 application of, clearly established federal law, as determined by the U.S. Supreme
26 Court, or was based on an unreasonable determination of the facts in light of the
27 evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Accordingly,
28 federal habeas relief is denied as to ground 8.

1 **Ground 10**

2 Lions contends that the district erred in admitting evidence of Lions' uncharged
3 bad acts—switching the license plates on the vehicle at issue—without conducting a
4 *Petrocelli* hearing or providing the jury with a limiting instruction in violation of his
5 Fourteenth Amendment due process rights (ECF No. 10, p. 65-66).

6 The Nevada Supreme Court denied the claim on appeal, explaining:

7 Although the district court failed to conduct a proper hearing, we
8 conclude that its decision to admit this evidence was not manifestly wrong
9 and reversal is not warranted because the evidence was admissible under
10 the test announced in *Tinch v. State*, 946 P.2d 1061, 1064-1065 (Nev.
11 1997). . . . We further conclude that the district court's failure to instruct
the jury on the limited use of this uncharged bad act evidence was
harmless error under the facts of this case.

12 Exh. 59, p. 3.

13 At trial, a police officer testified that the stolen vehicle came to his attention in a
14 motel parking lot because it was backed into a space, had no front license plate, and
15 when he ran the rear plate it did not belong to the vehicle. Exh. 28, pp. 132-133. The
16 prosecutor had referred to the switched plates during opening arguments, and defense
17 counsel objected and moved for a mistrial, arguing that this was prejudicial uncharged
18 bad act testimony. *Id.* at 104-105. The prosecution indicated that the photos taken of
19 the vehicle when police arrested Lions at the motel—which depicted the switched
20 license plates—were in the case file shared with the defense. *Id.* at 105. The district
21 court denied the motion for a mistrial. *Id.* at 106.

22 While Lions was not charged with displaying a fictitious license plate, he was on
23 trial for stealing the car. Lions has failed to show how the Nevada Supreme Court's
24 determination that the district court's error was harmless was contrary to, or involved an
25 unreasonable application of, clearly established federal law, as determined by the U.S.
26 Supreme Court, or was based on an unreasonable determination of the facts in light of
27 the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Therefore,
28 federal habeas relief is denied as to ground 10.

1
2 **Ground 11**

3 Lions argues that the State failed to gather and preserve evidence based on
4 Lions' informing police that he was not responsible for the Western Union transaction at
5 issue, but that someone else had "opted to use his contact information" (ECF No. 10, p.
6 68; ECF No. 10-1, p. 1). He alleges that the State did not attempt to subpoena an
7 audio recording of the call to Western Union for nearly three months—at which point the
8 recordings no longer existed—which violated his Fourteenth Amendment fair trial rights.
9 Lions asserts that "he told police he didn't make the call and who was responsible, so . .
10 . assuming the voice on the tapes was not Mr. Lions'," there was a reasonable
11 probability of a different outcome on the robbery count had the police obtained the tape
12 (ECF No. 10-1, p. 1).

13 The State's loss or destruction of potentially exculpatory evidence violates due
14 process only when the evidence "possess[es] an exculpatory value that was apparent
15 before the evidence was [lost or] destroyed, and [is] of such a nature that the defendant
16 would be unable to obtain comparable evidence by other reasonably available means."
17 *California v. Trombetta*, 467 U.S. 479, 489 (1984); *see also United States v. Bingham*,
18 653 F.3d 983, 994 (9th Cir. 2011). Moreover, "unless a criminal defendant can show
19 bad faith on the part of the police, failure to preserve potentially useful evidence does
20 not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58
21 (1988); *see also Illinois v. Fisher*, 540 U.S. 544, 547–48 (2004) (*per curiam*). "The
22 presence or absence of bad faith by the police for purposes of the Due Process Clause
23 must necessarily turn on the police's knowledge of the exculpatory value of the
24 evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56 n. *; *United*
25 *States v. Sivilla*, 714 F.3d 1168, 1172 (9th Cir. 2013). Even negligence in failing to
26 preserve potentially useful evidence is not sufficient to constitute bad faith and does not
27 violate due process. *Youngblood*, 488 U.S. at 58; *see also United States v. Flyer*, 633
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1 F.3d 911, 916 (9th Cir. 2011) (“Bad faith requires more than mere negligence or
2 recklessness.”).

3 The Nevada Supreme Court rejected this claim:

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5 To succeed on a claim that an injustice occurred as a result of the
6 State’s failure to obtain evidence, the defense must demonstrate that the
7 evidence was material by showing “a reasonable probability that, had the
8 evidence been available to the defense, the result of the proceedings
9 would have been different.” *Daniels v. State*, 956 P.2d 111, 115 (Nev.
10 1998). Here, Lions asserts that “assuming that the voice on the tape did
11 not belong to [him],” the tape was material. We conclude that Lions’ bare
speculation does not show a reasonable probability that the trial result
would have been different if the police had obtained the recording, see
Steese v. State, 960 P.2d 321, 329 (Nev. 1998), and that the district court
did not abuse its discretion by refusing to give the proposed jury
instruction

12 Exh. 59, pp. 3-4.

13 At trial, a Western Union security manager of investigations testified that a person
14 attempted via telephone to wire money using the victim’s credit card to payee Linkston
15 Lions. Exh. 28 pp. 106-122. The security manager testified that he did not know if the
16 call had been recorded by the third-party vendor and that if it had the recording would
17 only have been retained for a short period of time. He also testified that he told law
18 enforcement that they would have to send a subpoena to the custodian of records to
19 contact the vendor. *Id.* A police officer also testified that he attempted to obtain the
20 recording, if any, but was unable to do so. *Id.* at 194.

21 Respondents first argue that, while *Youngblood* identifies a standard for
22 evaluating the State’s loss or destruction of potentially exculpatory evidence, they know
23 of no federal law clearly established by the U.S. Supreme Court that establishes a duty
24 to collect evidence. They also argue that even assuming the bad-faith standard of
25 *Youngblood* should apply, had the state courts concluded that the police did not act in
26 bad faith such a result would not be objectively unreasonable and would be “so lacking
27 in justification that there was an error well understood and comprehended in existing
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1 law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103;
2 ECF No. 39, p. 20.

3 No evidence presented at trial established that the call had been recorded, Lions
4 does not allege that the defense was prevented from serving a subpoena to ascertain
5 whether the call was recorded, and Lions claims only that “assuming that the voice is
6 not his” the recording would have been material. Lions has not demonstrated that the
7 Nevada Supreme Court’s determination that Lions’ bare speculation did not show a
8 reasonable probability that the trial result would have been different if the police had
9 obtained the recording was contrary to, or involved an unreasonable application of,
10 clearly established federal law, as determined by the U.S. Supreme Court, or was
11 based on an unreasonable determination of the facts in light of the evidence presented
12 in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as
13 to ground 11.

14 **B. Ineffective Assistance of Counsel Claims**

15 **Ground 1**

16 Lions asserts several instances of ineffective assistance of trial counsel in
17 violation of his Sixth and Fourteenth Amendment rights (ECF No. 10, pp. 4-17).

18 In ground 1(A) he argues that trial counsel failed to object to the trial court’s
19 characterization that the victim “identified” Lions in court, because the victim testified
20 only that Lions “resembled” his attacker. *Id.* at 4-6.

21 The Nevada Supreme Court affirmed the denial of this claim:

22
23 When asked to identify his attacker at trial, the victim testified that he
24 “couldn’t say for sure” but identified appellant as “somebody who could fit”
25 his description of the attacker. The district court acknowledged this
26 identification, and the State clarified that it was with the understanding that
the jurors heard what the identification was. Appellant failed to
demonstrate a reasonable probability of a different outcome had counsel
objected to the district court’s wording.

27 Exh. 82, p. 2.

1 Lions challenge lacks merit, and he has failed to meet his burden to demonstrate
2 that the Nevada Supreme Court's decision was contrary to, or involved an unreasonable
3 application of, *Strickland v. Washington*, or was based on an unreasonable
4 determination of the facts in light of the evidence presented in the state court
5 proceeding. 28 U.S.C. § 2254(d).

6 As ground 1(B) Lions contends that trial counsel should have lodged an objection
7 to the prosecutor's statement during closing argument that Lions was riding around in a
8 stolen car and had changed the license plates because Lions was not charged with
9 displaying fictitious license plates; thus the prosecutor improperly tried to show Lions'
10 bad character (ECF No. 10, p. 6).

11 The Nevada Supreme Court affirmed the denial of this ground, noting that the
12 State's closing argument was a reasonable inference from the facts presented. Exh.
13 82, p. 3.

14 As discussed above in ground 10, trial testimony reflected that when police
15 located the victim's vehicle, the license plates had been changed. Exh. 28, pp. 132-
16 133. Defense counsel had already objected that this was prejudicial bad act testimony,
17 and the district court had already denied the motion for a mistrial with respect to this
18 testimony. *Id.* at 104-106.

19 Lions has not demonstrated that the Nevada Supreme Court's decision is contrary
20 to, or involves an unreasonable application of, *Strickland v. Washington*, or was based
21 on an unreasonable determination of the facts in light of the evidence presented in the
22 state court proceeding. 28 U.S.C. § 2254(d).

23 In ground 1(C) Lions argues that trial counsel failed to use reasonable diligence to
24 locate defense witnesses that would have corroborated that Lions "squatted" at the
25 residence in question and would have contradicted the prosecutor's statement in closing
26 arguments that Lions never stayed at the residence (ECF No. 10, pp. 6-9).

1 The Nevada Supreme Court explained that Lions failed to demonstrate deficiency
2 or prejudice:

3 Appellant's claim was belied by the record as counsel stated during
4 an argument on a motion for mistrial that a defense investigator did
5 interview the neighbors. *See Hargrove v. State*, 100 Nev. 498, 503, 686
6 P.2d 222, 225 (1984). Further, the testimony of the investigating officers
7 corroborated appellant's claim that squatters used the residence, and
8 accordingly he failed to demonstrate a reasonable probability of a different
9 outcome had the neighbors testified as appellant hoped.

10 Exh. 82, p. 2.

11 As discussed with ground 8, trial testimony reflected that squatters sometimes
12 used the residence. Exh. 28, p. 62-64, 181, 191, 194. This court notes that even if
13 defense witnesses testified that Lions squatted at the residence, the evidence reflected
14 that Lions' DNA was identified on the cord used to strangle the victim and that the victim
15 could not be excluded as a minor contributor to the DNA mix identified, the victim stated
16 that he could not identify Lions for sure but that he resembled the attacker, the victim's
17 car was found in Lions' possession, and a wire transfer was attempted from the victim's
18 stolen credit card to Lions. Exh. 28, pp. 25, 109-110, 132-133, 213-214. Accordingly,
19 the Nevada Supreme Court did not unreasonably conclude that Lions could not show
20 prejudice.

21 Lions has not demonstrated that the Nevada Supreme Court's decision was
22 contrary to, or involved an unreasonable application of, *Strickland v. Washington*, 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).

25 In ground 1(D) Lions contends that trial counsel failed to object that the transcript
26 of Lions' interview with a police detective introduced at trial was incomplete, and the
27 omission of the detective's questioning Lions as to whether Lions thought he might have
28 been set up was prejudicial (ECF No. 10, pp. 9-10; ECF No. 40, pp. 8-9).

 The state supreme court affirmed the denial of this claim:

 Part of what appellant claimed was missing was in fact testified to at
trial by the interviewing officer, and appellant did not claim that he told

1 counsel of any discrepancy. Further, in light of the physical evidence
2 against him, appellant failed to demonstrate a reasonable probability of a
3 different outcome had the jury heard the allegedly missing portions of the
4 interview.

5 Exh. 82, p. 3.

6 The police detective who interviewed Lions testified that Lions told him that he
7 bought the car, though Lions said he was suspicious about the car and the seller never
8 gave him the title or other proof of ownership but did give him a receipt for the sale.
9 Exh. 28, p. 165. The detective also testified that Lions never admitted to the robbery or
10 state that he had ever been at the scene of the robbery, nor did he claim to have any
11 connection to the residence where the robbery took place. *Id.* at 174.

12 Again, in light of the physical evidence, the Nevada Supreme Court did not
13 unreasonably conclude that Lions could not show prejudice. Lions has not
14 demonstrated that the Nevada Supreme Court's decision is contrary to, or involves an
15 unreasonable application of, *Strickland v. Washington*, or was based on an
16 unreasonable determination of the facts in light of the evidence presented in the state
17 court proceeding. 28 U.S.C. § 2254(d).

18 In ground 1(E) Lions asserts that trial counsel failed to object to the prosecutor's
19 misconduct in stating during closing arguments that Lions claimed to have stayed at the
20 residence in question only after he heard a detective's testimony that squatters stayed
21 there (ECF No. 10, pp. 10-12). In ground 1(F) he claims that trial counsel failed to
22 object that the prosecutor attempted to shift the burden of proof by suggesting that
23 Lions never told the detective he used to stay at the residence (ECF No. 10, pp. 10-14).

24 The Nevada Supreme Court affirmed the denial of these claims and reasoned that

25 The State did not call appellant a "liar" nor did it shift the burden of
26 proof to appellant. Rather, the State made a permissible comment on its
27 view of what the evidence showed. *See id.* Moreover, the jury was made
28 aware by the officer's testimony on cross-examination that appellant had
not been told during the interview where the attack occurred.

Exh. 82, p. 4.

1 The Nevada Supreme Court did not unreasonably conclude that Lions could not
2 show prejudice. He has failed to carry his burden of demonstrating that the Nevada
3 Supreme Court's decision was contrary to, or involved an unreasonable application of,
4 *Strickland v. Washington*, or was based on an unreasonable determination of the facts
5 in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

6 In grounds 1(G) and 1(H) Lions argues that trial counsel failed to propose that the
7 jury be instructed on lesser included offenses with respect to the grand larceny auto and
8 robbery charges (ECF No. 10, pp. 14-16).

9 In affirming the denial of these claims, the Nevada Supreme Court pointed out
10 that the jury found Lions guilty beyond a reasonable doubt of the greater offenses and
11 Lions failed to demonstrate a reasonable probability of a different outcome if the jury
12 had received instructions on the lesser offenses. Exh. 82, pp. 4-5.

13 Lions merely states in conclusory fashion that the results of the trial would have
14 been different if they jury had been "given some middle ground for Lions' culpability"
15 (ECF No. 40, p. 13). He has failed to carry his burden of demonstrating that the Nevada
16 Supreme Court's decision is contrary to, or involves an unreasonable application of,
17 *Strickland v. Washington*, or was based on an unreasonable determination of the facts
18 in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

19 As to the last claim of trial counsel error, in ground 1(I) Lions contends that he and
20 trial counsel had a conflict; counsel disliked Lions based on her past representation of
21 Lions' girlfriend. Lions claims that counsel refused to call the girlfriend as a trial witness
22 even though the girlfriend was with Lions when he purchased the vehicle he was
23 convicted of stealing (ECF No. 10, pp. 16-17).

24 The Nevada Supreme Court affirmed the denial of this claim:

25 The State's expert recovered DNA from the area of the ligature that
26 the attacker would have to have held and concluded that appellant was
27 the major contributor with the victim being the minor contributor. In light of
28 this evidence as well as other, circumstantial evidence adduced at trial,
 appellant failed to demonstrate a reasonable probability of a different

1 outcome had Moore, appellant's girlfriend at the time, testified that she
2 saw appellant buy the stolen vehicle from a third party. To the extent
3 appellant claimed that counsel's inaction was due to a conflict of interest,
4 his claim was unsupported by specific facts that, if true, would have
5 demonstrated that an actual conflict existed or that counsel's performance
6 was adversely affected. *See Clark v. State*, 108 Nev. 324, 326, 831 P.2d
7 1374, 1376 (1992); *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. We
8 therefore conclude that the district court did not err in denying this claim.

9 Exh. 82, p. 3. Especially in light of the physical evidence, Lions has failed to carry
10 his burden of demonstrating that the Nevada Supreme Court's conclusion that he could
11 not show prejudice as to ground 1(l) was contrary to, or involved an unreasonable
12 application of, *Strickland v. Washington*, or was based on an unreasonable
13 determination of the facts in light of the evidence presented in the state court
14 proceeding. 28 U.S.C. § 2254(d).

15 Accordingly, ground 1 is denied in its entirety.

16 **Ground 2**

17 Lions asserts three claims that his appellate counsel rendered ineffective
18 assistance in violation of his Sixth and Fourteenth Amendment rights (ECF No. 10, pp.
19 19-21).

20 Lions contends in ground 2(A) that appellate counsel was ineffective for failing to
21 raise a claim that the trial court erred in overruling an objection pursuant to *Brady* based
22 on the fact that the State's DNA expert testified that about five DNA samples were
23 identified on the weapon, while her report stated that there were "at least two" DNA
24 contributors on the weapon (ECF No. 10, pp. 19-20; Exh. 28, pp. 213-215).

25 The Nevada Supreme Court affirmed the denial of this claim:

26 Appellant failed to demonstrate deficiency or prejudice because his
27 claim was belied by the record. Appellant acknowledged that the expert's
28 report said there were "at least," two contributors of DNA to the ligature,
which necessarily admits the possibility of more than two contributors.
Further, although appellant claimed that the expert testified that there
were in fact five contributors of DNA, the expert testified in accordance
with her report that "two numbers" at a DNA reference point would indicate
one DNA contributor and that at a couple of the reference points, there
were "five numbers," indicating "at least two" contributors. The expert

1 further testified that she could not identify who the contributors were
2 beyond appellant and the victim, but she did not state a reason.

3 Exh. 82, pp. 5-6. Ground 2(A) is belied by the record and is meritless.

4 Lions argues in ground 2(B) that appellate counsel failed to raise a claim that the
5 detective failed to gather and preserve evidence when he did not record a witness'
6 contact information to whom he spoke about unauthorized vehicles parked at the
7 residence (ECF No. 10, pp. 20-21). The Nevada Supreme Court affirmed the denial of
8 this claim, pointing out that on direct appeal it had previously held that that the State did
9 not violate *Brady* when it failed to disclose the neighbor's contact information because
10 "there was no possibility" of the information having affected the outcome of trial. Exh.
11 82, p. 6.

12 As discussed above with respect to ground 3, the Nevada Supreme Court did not
13 unreasonably conclude on direct appeal that no *Brady* error occurred with respect to the
14 identity of any neighbors. Accordingly, ground 2(B) lacks merit.

15 Lastly in ground 2, as 2(C) Lions argues that appellate counsel failed to raise the
16 claim that the trial court erred in overruling an objection that other bad act evidence—
17 Lions' use of the victim's credit card—was admitted at trial without a *Petrocelli* hearing
18 or a limiting instruction (ECF No. 10, p. 21).

19 The Nevada Supreme Court reasoned that, although the trial court erred in
20 admitting evidence of the attempted use of the victim's credit card to wire money to
21 Lions without first conducting an evidentiary hearing, the evidence was relevant as it
22 tended to establish the identity of the attacker. The state supreme court further noted
23 that Lions could not demonstrate prejudice because "in light of the physical evidence
24 against appellant, any failure to instruct the jury on the limited use of the evidence would
25 have been harmless." Exh. 82, pp. 6-7.

26 Lions has failed to demonstrate that the Nevada Supreme Court's decisions that
27 he challenges in ground 2 were contrary to, or involved an unreasonable application of,
28

1 *Strickland v. Washington*, or were based on an unreasonable determination of the facts
2 in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

3 Accordingly, ground 2 is denied in its entirety.

4 **C. Cumulative Error**

5 **Ground 12**

6 Finally, Lions claims that the cumulative effect of the trial errors violated his
7 Fourteenth Amendment rights to due process and a fair trial (ECF No. 10-1, p. 3).
8 Respondents argue first that cumulative error should not be cognizable in federal
9 habeas corpus, though they acknowledge that the Ninth Circuit has held that the
10 doctrine of cumulative error creates a cognizable federal habeas claim (ECF No. , p. 21;
11 *compare Parle v. Runnels*, 505 F.3d 922, 928-929 (9th Cir. 2007), with *Moore v. Parker*,
12 425 F.3d 250, 256 (6th Cir. 2005)). Respondents also point out that if a cumulative error
13 claim is cognizable, the alleged errors must have so infected the trial with unfairness as
14 to make the resulting conviction a denial of due process. *Parle*, 505 F.3d at 928.

15 The Nevada Supreme Court reasonably concluded that two errors occurred
16 during trial: the district court erred by giving the flight instruction (federal ground 8); and
17 the district court erred in not conducting a *Petrocelli* hearing or giving the jury a limiting
18 instruction with respect to the uncharged bad act evidence of the switched license plate
19 on the vehicle (federal ground 10). However, the state supreme court also reasonably
20 concluded, as discussed above, the both errors were harmless in light of the physical
21 evidence presented at trial. Lions has not demonstrated any errors that so infected the
22 trial with unfairness as to make his conviction a denial of his due process rights.
23 Ground 12 is, therefore, denied.

24 Accordingly, the petition is denied in its entirety.

25 **IV. Certificate of Appealability**

26 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
27 Governing Section 2254 Cases requires this court to issue or deny a certificate of
28 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within

1 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
2 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

3 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has
4 made a substantial showing of the denial of a constitutional right." With respect to
5 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
6 would find the district court's assessment of the constitutional claims debatable or
7 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
8 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
9 jurists could debate (1) whether the petition states a valid claim of the denial of a
10 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

11 Having reviewed its determinations and rulings in adjudicating Lions' petition, the
12 court finds that none of those rulings meets the *Slack* standard. The court therefore
13 declines to issue a certificate of appealability for its resolution of any of Lions' claims.

14 **V. Conclusion**

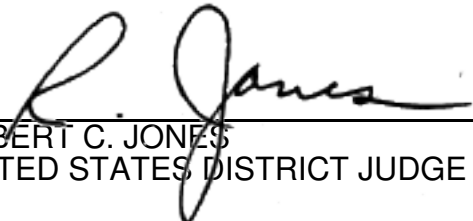
15 **IT IS THEREFORE ORDERED** that the petition (ECF No. 10) is **DENIED** in its
16 entirety.

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

18 **IT IS FURTHER ORDERED** that petitioner's motion for status check (ECF No. 42) is
19 **DENIED** as moot.

20 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and
21 close this case.

22
23
24
25 Dated: This 12th day of December, 2016.

26
27 
28 ROBERT C. JONES
UNITED STATES DISTRICT JUDGE