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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

8 \* \* \*

9 AARON NEWMON,

Case No. 3:13-cv-00383-MMD-WGC

10 Petitioner,

11 v.

ORDER

12 RENEE BAKER, *et al.*,

13 Respondents.  
14

15 Before the Court for decision is a habeas corpus petition under 28 U.S.C. § 2254  
16 brought by Aaron Newmon, a Nevada prisoner.

17 **I. PROCEDURAL BACKGROUND<sup>1</sup>**

18 Newmon was convicted in Nevada's Seventh Judicial District Court, pursuant to  
19 a jury verdict, of battery by a prisoner in relation to an incident at Ely State Prison in  
20 May of 2005. The court adjudicated Newmon a habitual criminal and sentenced him to a  
21 minimum of five (5) and a maximum of twenty (20) years in the Nevada Department of  
22 Corrections. The judgment and sentence was filed on April 8, 2009. Newmon appealed.

23 The Nevada Supreme Court entered its order of affirmance on December 4,  
24 2009. On January 19, 2010, Newmon filed a post-conviction petition for habeas corpus  
25 and a motion for appointment of counsel. With the assistance of appointed counsel,  
26 Newmon filed a supplemental brief raising additional claims.

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28 <sup>1</sup>Except where indicated, this procedural background is derived from the exhibits  
provided by the respondents at ECF No. 12.

1 On November 21, 2011, the state district court conducted an evidentiary hearing  
2 on the petition. On September 12, 2012, the district court filed its order denying  
3 Newmon's petition. Newmon appealed. On June 12, 2013, the Nevada Supreme Court  
4 entered an order affirming the denial of Newmon's state habeas corpus petition.

5 On July 17, 2013, this Court received Newmon's original *pro se* federal habeas  
6 corpus petition. Pursuant to this Court's screening order, Newmon filed an amended  
7 petition on December 9, 2013. The respondents filed an answer to the amended  
8 petition, in response to which Newmon filed a traverse.

## 9 **II. STANDARDS OF REVIEW**

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

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

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

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

18 28 U.S.C. § 2254(d).

19 A decision of a state court is "contrary to" clearly established federal law if the  
20 state court arrives at a conclusion opposite that reached by the Supreme Court on a  
21 question of law or if the state court decides a case differently than the Supreme Court  
22 has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-  
23 06 (2000). An "unreasonable application" occurs when "a state-court decision  
24 unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case."  
25 *Id.* at 409. "[A] federal habeas court may not 'issue the writ simply because that court  
26 concludes in its independent judgment that the relevant state-court decision applied  
27 clearly established federal law erroneously or incorrectly.'" *Id.* at 411.

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1       The Supreme Court has explained that “[a] federal court’s collateral review of a  
2 state-court decision must be consistent with the respect due state courts in our federal  
3 system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a  
4 ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-  
5 court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773  
6 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*,  
7 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination that a claim lacks  
8 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on  
9 the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101  
10 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court  
11 has emphasized “that even a strong case for relief does not mean the state court’s  
12 contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75  
13 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA  
14 standard as “a difficult to meet and highly deferential standard for evaluating state-court  
15 rulings, which demands that state-court decisions be given the benefit of the doubt”)  
16 (internal quotation marks and citations omitted).

17       “[A] federal court may not second-guess a state court’s fact-finding process  
18 unless, after review of the state-court record, it determines that the state court was not  
19 merely wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9<sup>th</sup> Cir.  
20 2004); *see also Miller-El*, 537 U.S. at 340 (“[A] decision adjudicated on the merits in a  
21 state court and based on a factual determination will not be overturned on factual  
22 grounds unless objectively unreasonable in light of the evidence presented in the state-  
23 court proceeding, § 2254(d)(2).”).

24       Because *de novo* review is more favorable to the petitioner, federal courts can  
25 *deny* writs of habeas corpus under § 2254 by engaging in *de novo* review rather than  
26 applying the deferential AEDPA standard. *Berghuis v. Thompkins*, 560 U.S. 370, 390  
27 (2010).

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### 1     **III.     DISCUSSION**

2           Newmon's petition advances six grounds in which he claims that he received  
3     ineffective assistance of counsel in violation of his constitutional rights. Ineffective  
4     assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668  
5     (1984). Under *Strickland*, a petitioner must satisfy two prongs to obtain habeas relief —  
6     deficient performance by counsel and prejudice. 466 U.S. at 687. With respect to the  
7     performance prong, a petitioner must carry the burden of demonstrating that his  
8     counsel's performance was so deficient that it fell below an "objective standard of  
9     reasonableness." *Id.* at 688. A reviewing court "must indulge a 'strong presumption' that  
10    counsel's conduct falls within the wide range of reasonable professional assistance  
11    because it is all too easy to conclude that a particular act or omission of counsel was  
12    unreasonable in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685, 702 (2002)  
13    (quoting *Strickland*, 466 U.S. at 689).

14           With respect to the prejudice prong, the court "must ask if the defendant has met  
15    the burden of showing that the decision reached would reasonably likely have been  
16    different absent [counsel's] errors." *Strickland*, 466 U.S. at 696. Put another way, a  
17    habeas petitioner "must show that there is a reasonable probability that, but for  
18    counsel's unprofessional errors, the result of the proceeding would have been different."  
19    *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in  
20    the outcome," and "[a]n assessment of the likelihood of a result more favorable to the  
21    defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,'  
22    and the like." *Id.* at 694-95.

23           The Court in *Strickland* emphasized that the ultimate focus of an ineffective  
24    assistance of counsel inquiry must be on the fundamental fairness of the proceeding  
25    whose result is being challenged. *Id.* If the defendant makes an insufficient showing as  
26    to either one of the two *Strickland* components, the reviewing court need not address  
27    the other component. *Id.* at 697.

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1           **A.     Ground One**

2           In Ground One, Newmon alleges that he received ineffective assistance of  
3 counsel (IAC) because his trial counsel failed to advise and counsel him in good faith. In  
4 support of this claim, Newmon alleges that counsel recommended that he accept a plea  
5 offer (under which he would receive a one to five-year sentence) based on an incident  
6 report that counsel had received from the prosecutor. Newmon contends this was faulty  
7 advice because the incident report was not admissible evidence and, in fact, was not  
8 presented by the State at trial.

9           This claim fails under *Strickland*. “[A]s a general rule, defense counsel has the  
10 duty to communicate formal offers from the prosecution to accept a plea on terms and  
11 conditions that may be favorable to the accused.” *Missouri v. Frye*, 132 S. Ct. 1399,  
12 1408 (2012). The record does not support Newmon’s allegation that counsel  
13 encouraged him to accept the offer based on erroneous advice. But even if that were  
14 the case, the fact that counsel advised Newmon to *accept* the plea offer precludes a  
15 finding of *Strickland* prejudice because the plea offer turned out to be far more favorable  
16 than the eventual outcome of the proceeding. In short, Newmon cannot show a  
17 reasonable probability that, but for counsel’s deficient performance, the outcome of the  
18 proceeding would have been more favorable to him.

19           Ground One is denied.

20           **B.     Ground Two**

21           In Ground Two, Newmon alleges that he received ineffective assistance of  
22 counsel because counsel failed to seek a change of venue and present facts relevant to  
23 jury bias. In particular, Newmon contends that he could not get a fair trial in Ely,  
24 Nevada, because of the influence Ely State Prison has on the community. Newmon also  
25 notes that Ely is a very small town with almost no minorities and that venire members  
26 were involved in, or had ties to, law enforcement.

27           Due process requires that the trial court grant a defendant's motion for a change  
28 of venue when the trial court is unable to seat an impartial jury because of prejudicial

1 pretrial publicity or an inflamed community atmosphere. *Harris v. Pulley*, 885 F.2d 1354,  
2 1361 (9<sup>th</sup> Cir.1988). To support a motion to transfer venue based on lack of impartiality  
3 in the jury pool, a criminal defendant must show either presumed or actual prejudice.  
4 *Gallego v. McDaniel*, 124 F.3d 1065, 1070 (9<sup>th</sup> Cir.1997).

5 Here, Newmon has not alleged facts that can be construed as actual or  
6 presumed prejudice of the type that warranted a change of venue. Actual prejudice is  
7 present only where “the jurors demonstrated actual partiality or hostility that could not  
8 be laid aside.” *Harris*, 885 F.3d at 1363. Newmon cites to no such instances in the state  
9 court record. Prejudice is to be presumed only in extreme circumstances where the  
10 record demonstrates the trial venue was saturated with prejudicial and inflammatory  
11 publicity about the crime. *Daniels v. Woodford*, 428 F.3d 1181, 1211 (9<sup>th</sup> Cir. 2005);;  
12 *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9<sup>th</sup> Cir. 1998), (“[P]rejudice is rarely  
13 presumed because saturation defines conditions found only in extreme situations.”);  
14 *Gallego*, 124 F.3d at 1070. Newmon’s allegations do not indicate that such  
15 circumstances surrounded his trial.

16 In the absence of a showing that a motion for change of venue had any chance  
17 of success, Ground Two must be denied. See *Styers v. Schriro*, 547 F.3d 1026, 1030  
18 (9<sup>th</sup> Cir. 2008) (noting that, to establish ineffective assistance of counsel based on  
19 counsel’s failure to file a motion for change of venue, a habeas petitioner must show a  
20 reasonable probability that such a motion would have been granted).

### 21 **C. Ground Three**

22 In Ground Three, Newmon alleges that he received ineffective assistance of  
23 counsel because counsel failed to dispute information contained in the pre-sentence  
24 report, specifically, Newmon’s prison disciplinary history. Newmon claims that prison  
25 disciplinary reports are unreliable because correctional officers are both the accusers  
26 and the finders of guilt and the standard of proof is merely “some evidence.” He cites to  
27 an incident in which he claims he was found guilty of an assault he did not commit.

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1 At the sentencing hearing, Newmon's counsel argued to the court as follows:

2 [W]ith respect to his disciplinary history, the statement by the state  
3 is that Mr. Newmon is not a model prisoner, and that's correct. And when  
4 you first look at this, it is a rather lengthy disciplinary history, but I would  
5 point out a couple of things. One is certainly that the disciplinary system is  
6 not akin to the criminal justice system that we have here. There are no  
7 rules of evidence that are followed. And he is accused by a correctional  
8 officer, prosecuted by a correctional officer, and judged by a correctional  
9 officer. And when you look at the — and without, as I said, the rules of  
10 evidence, and when you look at many of these charges, and while there  
11 are quite a few of them, you find that a number of them are things like  
12 delaying, disobedience, abusive language, and that kind of thing.

13 ECF No. 12-21 at 5.<sup>2</sup> Newmon has not specified what additional steps counsel should  
14 have taken to challenge the prison disciplinary history. Moreover, the trial court  
15 indicated that its sentencing decision was based more upon the seriousness of  
16 Newmon's criminal convictions rather than his prison record. *Id.* at 5-6. Accordingly,  
17 Newmon has demonstrated neither the deficient performance, nor the prejudice  
18 necessary to obtain relief under *Strickland*.

19 Ground Three is denied.

20 **D. Ground Four**

21 In Ground Four, Newmon alleges that he received ineffective assistance of  
22 counsel because counsel failed to call the victim (Otties Matthews) and a nurse at Ely  
23 State Prison (Angela Gregersen) as defense witnesses at trial. According to Newmon,  
24 Gregersen could have discredited Correctional Officer Zimmer's preliminary hearing  
25 testimony that he examined Newmon after the alleged assault and found no marks,  
26 cuts, or bruises. Newmon contends that Matthews would have supported Newmon's  
27 defense of self-defense by affirming that he (Matthews) was the aggressor.

28 The State called Gregersen as a witness for the prosecution. ECF No. 12-19 at  
29 23-25. She testified about the results of her post-fight examinations of both Matthews  
30 and Newmon. Defense counsel cross-examined Gregersen on this testimony. *Id.* at 25-  
31 26. Newmon has not demonstrated how the presentation of Gregersen's testimony as a

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<sup>2</sup>References to page numbers for ECF documents are based on ECF pagination.

1 State's witness rather than a defense witness may have adversely impacted the  
2 outcome of his case.

3 With regard to the failure to call Matthews, both trial counsel and Matthews  
4 testified at Newmon's state post-conviction hearing. ECF No. 12-35. In its order denying  
5 post-conviction relief, the state district court addressed the issue as follows:

6 Attorney Brown made a conscious decision not to call the victim to  
7 testify at trial against Petitioner. At the evidentiary hearing, Attorney Brown  
8 iterated his concern that the victim's testimony would substantially harm  
9 Petitioner's claims of self-defense. Attorney Brown expressed concern that  
10 the victim's testimony could make Petitioner's behavior appear to be  
11 inspired by revenge, instead of self-defense. At the evidentiary hearing,  
12 the victim testified that he was the aggressor, but that he did not want to  
13 admit fault for fear of criminal liability. Now that the statute of limitations  
has run, the victim appears to have no qualms with admitting his role in  
the incident. However, it cannot be said that Attorney Brown erred for  
failing to call the victim during the trial. At the time, the victim's story was  
completely different from what it is today. Attorney Brown made a sound  
strategy to prevent the jurors from hearing potentially devastating  
testimony from the victim. Because Attorney Brown's strategy decision is  
entirely reasonable, there is no error.

14 Assuming, *arguendo*, that Attorney Brown had erred for failing to  
15 introduce evidence pertaining to Petitioner's self-defense claim or for  
16 failing to call the victim to testify, Petitioner's claim would still fail. Had the  
17 victim's criminal history been admitted, it is likely that Petitioner's criminal  
18 history would have followed, demonstrating his propensity towards violent  
19 behavior. The victim testified that his story, at the time of trial, was that  
20 Petitioner was the aggressor. Had he testified, it can be assumed that he  
21 would have iterated the same. There is no evidence that the outcome of  
22 the case would have been different if evidence of the victim's testimony  
23 and criminal history were admitted. In stark contrast, the evidence  
24 suggests that had the victim testified, Petitioner's claims of self-defense  
25 would have had substantially less credibility. Finally, with the introduction  
of the victim's and Petitioner's criminal histories, the jury would have  
realized both had checkered pasts involving violent crimes. It is likely that  
in those circumstances, the jury would have let the evidence speak for  
itself — that the victim was handcuffed at the time the altercation occurred  
and that Petitioner was not handcuffed. Officers saw Petitioner striking the  
victim and did not see the victim do anything except attempt to shield his  
body from the blows. Petitioner had blood on his hands that did not appear  
to be from any wounds he sustained. The victim reported that Petitioner  
was the aggressor. Therefore, Petition has failed to establish that actual  
prejudice occurred because there is no evidence that the results of the  
trial would have been different.

26 Petitioner has failed to demonstrate that Attorney Brown's conduct  
27 was deficient, or that prejudice occurred, for counsel's failure to introduce  
the victim's criminal record or the victim's testimony.

28 ECF No. 12-38 at 19-21 (citations to the record omitted).



1 In affirming the lower court's decision, the Nevada Supreme Court addressed  
2 Newmon's IAC claim as follows:

3 Newmon contends that the district court erred by not finding that  
4 trial counsel was ineffective for failing to present additional evidence  
5 relevant to his theory of self-defense. Newmon specifically claims that  
6 counsel should have called the victim to testify and introduced evidence  
7 pertaining to his "violent propensities" and criminal history. We disagree  
8 with Newmon's contention.

9 When reviewing the district court's resolution of an ineffective-  
10 assistance claim, we give deference to the court's factual findings if they  
11 are supported by substantial evidence and not clearly wrong but review  
12 the court's application of the law to those facts de novo. *Lader v. Warden*,  
13 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Here, the district court  
14 conducted an evidentiary hearing, heard testimony from the victim and  
15 Newmon's trial counsel, and concluded that counsel's performance was  
16 not deficient and Newmon failed to demonstrate prejudice. *See Strickland*  
17 *v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Kirksey v. State*, 112  
18 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). The district court's finding is  
19 supported by substantial evidence and not clearly wrong, and Newmon  
20 has not demonstrated that the district court erred as a matter of law.  
21 Therefore, we conclude that the district court did not err by rejecting  
22 Newmon's claim.

23 ECF No. 12-42 at 2-3 (footnote omitted).

24 The Nevada courts applied the correct federal law standard in adjudicating the  
25 claim. Newmon has not shown the state court's decision was an unreasonable  
26 application of that standard or based on an unreasonable determination of the facts.  
27 Thus, 2254(d) requires this court to defer to the state court decision.

28 Ground Four is denied.

#### 29 **E. Ground Five**

30 In Ground Five, Newmon alleges that he received ineffective assistance of  
31 counsel because counsel failed "to address courtroom official bias." ECF No. 7 at 23. In  
32 support of this claim, Newmon claims that he notified the court that the clothing he was  
33 issued to wear at trial did not fit properly and was not clean, but that his counsel did not  
34 assist him in rectifying the problem. He also asserts that the bailiff, who was involved in  
35 issuing the clothing, was a former corrections officer at Ely State Prison.

36 ///

37 ///

1 The trial transcript includes the following exchange:

2 THE COURT: Okay. Which brings us to the next issue. Mr.

3 Newmon, I understand that you want your — some sort of restraining

4 device for your hair, is that correct?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. And Mr. Collard, you've got one, correct? He

7 can have it. He can restrain his hair.

8 THE COURT: Now the next issue I understand is clothing.

9 THE DEFENDANT: Yes.

10 THE COURT: I understand that you have been provided with

11 civilian clothing and you don't want to wear it?

12 THE DEFENDANT: It's not necessarily I don't want to wear it. It's

13 because the sizes are incorrect. You know, I guess they — I know the —

14 as far as the facility, you know, I was coming to court, you know, even

15 though I'm sure they was notified like two or three weeks ago.

16 And I told them, you know, I'm five-two. I need my sizes. You know,

17 I need to be measured. And no one ever came to get my sizes or anything

18 like that. And they brought me down here assuming what my size was

19 without even asking me, you know, and the size must be incorrect. I

20 mean, I don't even know my own size unless I look at my t-shirts and my

21 boxers, so I know they don't know it, so it's going to be slouchy and it's

22 going to be unpresentable. And I'm not going to wear that.

23 And not only that, my hair — my hair — I asked them to let me put

24 a rubber band in my hair, and they told me no, because there's some type

25 of security issue, which I know that's not —

26 THE COURT: Okay. Well, I've already heard that, I've already dealt

27 with that issue, and you're going to be able to put your hair with that

28 whatever you call it.

THE DEFENDANT: Yeah.

THE COURT: It's not a rubber band. What do you call it?

THE CLERK: A scrunchy.

THE COURT: A scrunchy. And the Court notes that it's not fluffy

and it's not bright colors. From here it looks like — what is it — a

stretchable rubber band, is what it looks like, but it's not rubber, right?

Okay. So that issue's already taken care of.

Okay. As far as the clothing, what sort of clothes — anybody know,

what sort of clothing is it?

1 THE BAILIFF: I think the shirt will fit, for sure. And the pants, we  
2 would have to try them on, but we pretty much knew his size, Your Honor.

3 THE COURT: Okay. Well, this is going to be your choice. We're  
4 going to take another recess real soon here, and you can go back, you  
5 can put those clothes on. Then bring him back into court and I'll make a  
6 record about whether the clothes fit or not, and then it'll be your choice.  
7 You can either wear what you've got on or you can wear the clothes that  
8 they provided you. Nobody's going to make you wear your orange  
9 jumpsuit. All right?

10 THE DEFENDANT: All right.

11 THE COURT: But you're also not going to — if the clothes fit you  
12 and you look presentable, then you don't get to decide. All right? I get to  
13 decide.

14 Are there any other issues?

15 THE PROSECUTOR: No, sir.

16 THE COURT: There was one more. What was it about the shoes?

17 THE DEFENDANT: Yeah, my shoes.

18 THE COURT: Okay. What sort of shoes are you wearing now?

19 THE DEFENDANT: Some type of State boots. And I have shoes in  
20 my property in Ely, but they refused to give them to me. So that's my last  
21 issue.

22 THE COURT: All right. The Court notes that the counsel tables are  
23 draped, and the drapes go all the way to the carpet. So no juror is going to  
24 see — you could have bunny slippers and the jurors would not see them.  
25 Okay? So the shoes are not an issue.

26 Okay. Go try your clothes on, and we'll reconvene.

27 . . .

28 THE COURT: Please be seated. Court is back in session, and the  
defendant is in the clothes — is that short or long sleeved?

THE DEFENDANT: Short.

THE COURT: Okay. The Court notes that he's wearing a short-  
sleeved white shirt that is clean and pressed and is presentable. The  
pant's [sic] I don't know what he's wearing because I can't see and neither  
can the jurors. Do they fit?

THE DEFENDANT: Yeah, they fit.

ECF No. 12-19 at 5.

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1 Newmon has not shown a violation of his constitutional rights arising from  
2 counsel's failure to address the issue of his appearance. While a defendant "may not be  
3 compelled to be tried before a jury in identifiable prison clothes," he does not have a  
4 right to demand specific attire. *United States v. Rogers*, 769 F.2d 1418, 1420 (9<sup>th</sup>  
5 Cir.1985). Counsel did not have recognized legal grounds to support an objection to  
6 Newmon's clothing or appearance. In his reply, Newmon argues that the trial judge's  
7 point that the jurors could not see shoes was not valid because the jurors could see  
8 them when he got up to testify. However, he has not established that the jurors could  
9 identify the shoes as "prison" shoes.

10 Moreover, given the nature of the crime at issue and the evidence presented at  
11 trial, the jury was certainly aware of Newmon's incarceration, independent of what he  
12 was wearing at trial. Thus, he cannot show that he suffered prejudice as a result of  
13 counsel's failure to object to his appearance.

14 Ground Five is denied.

15 **F. Ground Six**

16 In Ground Six, Newmon alleges that he received ineffective assistance of  
17 counsel because counsel failed to challenge the prosecutor's reference to a video while  
18 presenting the testimony of Nurse Gregersen. The prosecutor called Gregersen as a  
19 rebuttal witness and asked her if she remembered what the victim was wearing when  
20 she examined him.<sup>3</sup> ECF No. 12-19 at 30. In doing so, the prosecutor asked if she  
21 remembered seeing a video of the examination in the prosecutor's office. *Id.* Newmon  
22 contends the reference to the video was prosecutorial misconduct because the video  
23 was never presented to the jury and he did not have an opportunity to review it.

24 This claim is plainly without merit. Newmon claims that prison regulations  
25 prevented him from seeing the video, but he has made no showing that his counsel was  
26

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27 <sup>3</sup>Newmon alleges in his petition that Gregersen was questioned about what he —  
28 i.e., Newmon — was wearing but the transcript indicates that she was asked about what  
the victim, Matthews, was wearing.

1 prevented from seeing the video. In addition, this court discerns no prejudice arising  
2 from the prosecutor's brief reference to the video. Ground Six is denied.

3 **IV. CONCLUSION**

4 For the reasons set forth above, Newmon's petition for habeas relief is denied.

5 *Certificate of Appealability*

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

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

19 Having reviewed its determinations and rulings in adjudicating Newmon's  
20 petition, the court declines to issue a certificate of appealability for its resolution of any  
21 procedural issues or any of Newmon's habeas claims.

22 It is therefore ordered that petitioner's amended petition for writ of habeas corpus  
23 (ECF No. 7) is denied. The Clerk will enter judgment accordingly.

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

25 DATED THIS 18<sup>th</sup> day of July 2016.

26  
27   
28 MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE