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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

COLBERT NICHOLS,

Case No. 3:13-cv-00671-MMD-WGC

Petitioner,

ORDER

v.

ISIDRO BACA,¹ *et al.*,

Respondents.

I. SUMMARY

Petitioner Colbert Nichols, who was found guilty of second-degree murder with the use of a deadly weapon and was sentenced to consecutive terms of 10 to 25 years in prison for the murder conviction and two to five years in prison for the deadly weapon enhancement, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (See ECF Nos. 5, 22-1.) This matter is before the Court for adjudication of the merits of Nichols' counseled, third amended petition, which alleges that the state district court violated his right to present a defense by rejecting his proposed jury instructions and right to confrontation by admitting an autopsy report and related testimony. (ECF No. 57 ("Petition").) For the reasons discussed below, the Court denies the Petition and a Certificate of Appealability.

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¹Nichols initiated this habeas proceeding while he was incarcerated. (See ECF No. 5.) Nichols was released on parole on September 25, 2019. (See ECF No. 77 at 6.)

1 **II. BACKGROUND²**

2 Kevin Emmert testified that he lived in Las Vegas, Nevada with Jeff Becker on
3 September 23, 2007. (ECF No. 62-16 at 33, 41.) That morning, Nichols picked up Emmert
4 and Becker in his suburban and hired them as day laborers to repave a church parking
5 lot. (*Id.* at 34; ECF No. 63-1 at 29.) After working for a few hours, the three men drove to
6 Lake Mead so that Emmert and Becker could assist Nichols with his sailboat and then
7 enjoy some time boating and drinking alcohol. (ECF No. 62-16 at 34–35.) Following the
8 excursion at Lake Mead, the three men drove to the Backstop Sports Pub in Boulder City,
9 Nevada to watch a football game, drink alcohol, and eat. (*Id.* at 35.)

10 While at the pub, Emmert testified that Nichols reserved a hotel room nearby at
11 the Railroad Pass Casino for himself, Emmert, and Becker so that they could continue
12 working on the church parking lot, which was near the pub and casino, the following day.
13 (ECF No. 62-16 at 36.) After Nichols and another patron at the pub got into a verbal
14 altercation, Nichols was asked to leave. (*Id.* at 3–5, 37.) Becker, who grabbed Nichols’
15 keys, and Emmert followed Nichols out of the pub. (*Id.* at 37.) Becker was initially going
16 to drive the suburban to the Railroad Pass Casino with Emmert in the front passenger
17 seat and Nichols in the back passenger seat. (*Id.*) However, Nichols insisted on driving,
18 and Nichols and Becker traded seats after Becker could not find the correct key on
19 Nichols’ keyring. (*Id.*)

20 According to Emmert, Becker was upset that Nichols insisted on driving because
21 Becker did not like being told what to do. (ECF No. 62-16 at 37) About halfway to the
22 hotel, Nichols talked about paying Becker and Emmert for the next few days of work, and
23 somehow the conversation turned to the fact that Nichols’ children were the beneficiaries
24 of his life insurance policies. (*Id.*) Becker commented “something like what if you don’t

25
26 ²The Court makes no credibility findings or other factual findings regarding the truth
27 or falsity of this summary of the evidence from the state court. The Court’s summary is
28 merely a backdrop to its consideration of the issues presented in the case. Any absence
of mention of a specific piece of evidence does not signify the Court overlooked it in
considering Nichols’ claims.

1 have no kids to give them to.” (*Id.*) Nichols “was insulted or took [Becker’s question as a
2 threat], pulled the vehicle over in the emergency part of the freeway and asked [Becker]
3 to go home, get out the vehicle and go home.” (*Id.* at 38.) Becker refused, and Nichols
4 started driving again after Emmert attempted to calm everyone down. (*Id.*)

5 According to Emmert, as they arrived at the Railroad Pass Casino, Becker, “being
6 the bully that he [was], pissed [Nichols] off again.” (ECF No. 62-16 at 39.) Nichols pulled
7 the suburban over in the outskirts of the parking lot and told Becker to go home. (*Id.*)
8 Becker refused, and Nichols “pull[ed] out a \$20 big and thr[e]w[] it at him,” which “just
9 pissed [Becker] off even more.” (*Id.*) Becker exited the suburban “ready to kick [Nichols’]
10 ass,” Nichols grabbed his knife on his dashboard, and “they met at the [driver’s] door”
11 ready to fight. (*Id.* at 39–40.) As Becker was coming in to punch Nichols, Nichols
12 sidestepped and stabbed Becker with the knife. (*Id.* at 39.)

13 Emmert testified that Becker got into the driver’s seat of the suburban and drove
14 off with Emmert still in the front passenger seat. (ECF No. 62-16 at 40.) Becker passed
15 out while driving, so Emmert continued driving to a nearby CVS pharmacy where he ran
16 inside to get help for Becker. (*Id.*) Paramedics arrived, but Becker died shortly thereafter
17 from two stab wounds to his chest that perforated his heart and left lung. (*Id.*; *see also*
18 ECF No. 63-1 at 13.)

19 After Becker and Emmert drove away in Nichols’ suburban, Nichols walked to the
20 Railroad Pass Casino where he was approached by a security officer. (ECF No. 62-16 at
21 8.) Nichols, who had injuries to his mouth and was holding the sheathed knife, told the
22 security officer that he had used the knife in self-defense. (*Id.* at 9, 11, 13.) Nichols told
23 the officer that he exited the suburban, opened the front passenger door, told Emmert to
24 get out of the vehicle, tried to pull Emmert out of the vehicle, and then ran back to the
25 driver’s side of the vehicle because Becker had climbed into the driver’s seat from the
26 rear passenger seat. (*Id.* at 11.) Nichols said he stabbed Becker after Becker “started to
27 punch at him, to kick at him, and began to drive off with [Nichols’] vehicle.” (*Id.*)

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1 Later, during his interview with detectives, Nichols explained that when they arrived
2 at the Railroad Pass Casino, Becker punched him in the back of the head. (ECF No. 63-
3 1 at 19.) Becker then ran around to the driver's side of the vehicle, and confronted Nichols
4 "face to face outside the vehicle." (*Id.*) Becker punched Nichols a couple of times, and
5 Nichols stabbed Becker. (*Id.*)

6 Nichols testified at the trial that Becker was agitated at him "for not letting him
7 drive," telling Nichols he did not "have any business telling [him] what to do" and he
8 "should think twice about that kind of stuff." (ECF No. 63-1 at 32.) Nichols told Becker that
9 he was not afraid of him, saying "[w]hat's the worst thing that can happen. I'm toast, my
10 family gets a check for a million dollars and you end up in jail." (*Id.* at 38.) Becker
11 responded, "what if you don't have any kids to collect that life insurance money, who's
12 going to get it then?" (*Id.* at 33.) Becker indicated he knew where Nichols lived, so Nichols
13 took Becker's comment as a threat against his family. (*Id.* at 33.) Nichols pulled the vehicle
14 over and told Becker to get out. (*Id.*) Emmert told Nichols he was "sure that [Becker] didn't
15 mean like he was going to go up to your house and kill your kids or something like that.
16 And [Becker] said damn straight I meant it." (*Id.*)

17 After Nichols started driving again, Becker hit Nichols in the back of the head. (ECF
18 No. 63-1 at 33.) Nichols pulled over again and told Becker to get out of the vehicle "or
19 [he] was going to have him arrested." (*Id.* at 33.) Emmert told him that he could not just
20 leave Becker in the middle of nowhere, so Nichols gave Becker \$20. (*Id.*) Becker then
21 "got out in front of the truck right middle next to the bumper, and from there he just bolted
22 at [Nichols], and he screamed at [him]" that he was "going to kick [Nichols] white trash
23 ass." (*Id.*) Nichols "was sitting in the truck at that point" thinking that Becker "was going to
24 put the hurt on [him]." (*Id.*) Nichols grabbed his knife "to provide a deterrent to [Becker],"
25 thinking that "if he saw [him] with the knife, he would have the common sense not to
26 continue." (*Id.* at 34.) Becker opened the driver's door, pinned Nichols against the vehicle,
27 and they "grappl[ed] for the knife." (*Id.* at 34, 43.) Nichols stabbed Becker, Becker
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1 punched Nichols twice in the mouth, and as Nichols was going down, he stabbed Becker
2 again. (*Id.* at 34.)

3 The jury found Nichols guilty of second-degree murder with the use of a deadly
4 weapon. (ECF No. 63-8.) Nichols' challenge to his conviction was denied on direct appeal.
5 (ECF No. 22-9.)

6 **III. LEGAL STANDARD**

7 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in
8 habeas corpus cases under the Antiterrorism and Effective Death Penalty Act
9 ("AEDPA"):

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

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

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

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

1 incorrect or erroneous. The state court’s application of clearly established law must be
2 objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409–10) (internal citation
3 omitted).

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

14 **IV. DISCUSSION**

15 **A. Ground 1**

16 In ground 1, Nichols alleges that the state district court violated his Sixth
17 Amendment rights by rejecting his theory of defense jury instructions. (ECF No. 57 at
18 7.) Specifically, the state district court refused to provide two modified instructions
19 proposed by Nichols: a heat-of-passion instruction and a self-defense instruction. (ECF
20 No. 77 at 17.)

21 **1. Heat-of-passion instruction**

22 Jury Instruction No. 15 instructed the jury as follows:

23 The heat of passion which will reduce a homicide to manslaughter
24 must be such a passion as naturally would be aroused in the mind of a [sic]
25 ordinarily reasonable person in the same circumstances. A defendant is not
26 permitted to set up his own standard of conduct and to justify or excuse
27 himself because his passions were aroused, unless the circumstances in
28 which he was placed and the facts that confronted him were such as also
would have aroused the passion of the ordinarily reasonable man, if likewise
situated.

1 The State has the burden to prove beyond a reasonable doubt that
2 the defendant did not act in the heat of passion with the requisite legal
 provocation.

3 (ECF No. 63-6 at 16.)

4 Nichols requested the following in lieu of Jury Instruction No. 15:

5 The heat of passion which will reduce an *unlawful* homicide to
6 manslaughter must be such a passion as naturally would be aroused in the
7 mind of an ordinarily reasonable person in the same circumstances. A
8 defendant is not permitted to set up his own standard of conduct and to
9 justify or excuse himself because his passions were aroused, unless the
 circumstances in which he was placed and the facts that confronted him
 were such as also would have aroused the passions of the ordinarily
 reasonable man, if likewise situated.

10 *If you find beyond a reasonable doubt that the defendant committed*
11 *an unlawful killing*, the State has the burden to prove beyond a reasonable
12 doubt that the defendant did not act in the heat of passion with the requisite
 legal provocation.

13 (ECF No. 63-5 at 3 (emphases added to show addition of requested language).)

14 **2. Self-defense instruction**

15 Jury Instruction No. 23 instructed the jury as follows:

16 The right of self-defense is not available to an original aggressor, that
17 is a person who has sought a quarrel with the design to force a deadly issue
18 and thus through his fraud, contrivance or fault, to create a real or apparent
 necessity for making a felonious assault.

19 However, where a person without voluntarily seeking, provoking,
20 inviting, or willingly engaging in a difficulty of his own free will, is attacked
21 by an assailant, he has the right to stand his ground and need not retreat
 when faced with the threat of deadly force or great bodily injury.

22 (ECF No. 63-6 at 24.)

23 Nichols requested that the following in lieu of Jury Instruction No. 23:

24 The right of self-defense is not available to an original aggressor, that
25 is a person who has sought a quarrel with the design to force a deadly issue
26 and thus through his fraud, contrivance, or fault, to create a real or apparent
 necessity for making a felonious assault.

1 *Unless he is the original aggressor, a person who reasonably*
2 *believes that he is about to be killed or seriously injured by his assailant*
 does not have a duty to retreat, even if he could retreat in complete safety.

3 (ECF No. 63-5 at 4 (emphasis added to show change in requested language).)

4 **3. Background information**

5 The following colloquy occurred regarding Nichols' two proposed instructions:

6 THE COURT: And do you have any other ones that you wish to
7 propose?

8 [Nichols' counsel]: Yes, your Honor. As to instruction number 15, I
9 would - -
 . . .

10 THE COURT: . . . 15 is the if you find beyond a reasonable doubt,
11 and we have the unlawful homicide. Do you want the unlawful version or
12 the lawful version. [sic]

13 [Nichols' counsel]: I want the unlawful version.

14 THE COURT: I got it. I gave it to Sandy.

15 [Nichols' counsel]: Okay.

16 [Prosecutor]: Well, I'm objecting to that version, then.

17 THE COURT: But I'm not giving that. He's making it a court exhibit.
18 He's arguing he wants it. I gave the one that didn't have the unlawful
19 language.

20 [Nichols' counsel]: And also, it's my understanding that you are
 striking line nine - -

21 THE COURT: And picking up with - -

22 [Nichols' counsel]: - - of that last paragraph.

23 THE COURT: Right. I'm taking out if you find beyond a reasonable
24 doubt and just starting with the State has the burden. So go ahead and put
25 your - - put what you want on the record.

26 [Nichols' counsel]: Your Honor, for the record, I think that that is just
27 a very clear statement of the law on manslaughter that the jury has to find
28 beyond a reasonable doubt that the defendant committed an unlawful killing
 and then it goes into the burden related to the heat of passion, I think. If they

1 found that it is a lawful homicide, then there's no evaluation whether heat of
2 passion is involved or not.

3 THE COURT: Okay, [prosecutor].

4 [Prosecutor]: And Judge, I think that the instruction that the defense
5 is entitled to under the Crawford (phonetic) case that [Nichols' counsel]
6 proposed is basically an instruction that informs the jury that the burden is
7 upon the State in proving the heat of passions and the manslaughter issue.
8 And so I think that as it's written in the instructions that we've proposed, it
9 suffices and say that, and we don't need to stress anymore because there
10 are plenty of other instructions that talk about the burden of proof and what
11 the jury has to find and so I think that that complies with the Crawford
12 decision and it says it in a way that's not confusing. The instruction that
13 [Nichols' counsel] proposed, in my mind, sounded duplicatus [sic] and
14 confusing.

15 THE COURT: Okay. Then the other one that you wish to propose,
16 [Nichols' counsel], was the one involving instruction number 23.

17 [Nichols' counsel]: Correct, your Honor.

18 THE COURT: And that's the retreat and complete safety, and I have
19 that, and I'll give that to Sandy. And go ahead and make your position on
20 that.

21 [Nichols' counsel]: Your Honor, I will start by just referencing again
22 the Crawford decision, and in that the Supreme Court indicates as follows:
23 And it's talking about a jury instruction - - actually the language that we dealt
24 with in number 15, but the principle applies to 23.

25 THE COURT: Okay.

26 [Nichols' counsel]: And the court says that although this instruction
27 was technically correct it had been given, the jurors were not expressly
28 instructed that, and then it goes into some more details. And it says that - -
it goes onto [sic] say even though the - - this principle of law could be
inferred from the general instructions, this court has held that the district
court may not refuse a proposed instruction on the ground that the legal
principle it provides may be inferred from other instructions. Jurors should
neither be expected to be legal experts nor make legal references with
respect to the meaning of the law. Rather, they should be provided with
applicable legal principles by accurate, clear and complete instructions
specifically tailored to the facts and circumstances of the case. So now
jumping to the case that deals with the duty to retreat, which is the
Colverson (phonetic) case.

1 That case in the conclusion under the holding of the main opinion states:
2 We further hold that a person who as a reasonable person that he is about
3 to be killed or seriously injured by his assailant does not have a duty to
4 retreat unless he is the original aggressor. The district court erred [sic]
5 when it instructed the jury that the appellant had a duty to retreat if he could
6 have safely withdrawn from the encounter. That's why it was overturned
7 because the court in that case had specifically said that there was a duty.
8 This case clearly says there is no duty, an[d] we are asking that that
9 principle be clearly articulated in this instruction by us adding the phrase
10 even if he could retreat in complete safety corresponds exactly with the
11 state of the law and it does not allow the jury to infer that because the State
12 didn't say that he had a duty to retreat. Well, then there must not be a duty
13 to retreat which is what the State is arguing that they're not introducing an
14 instruction that says that he had the duty, so it's out there and the jury has
15 to infer and they are not legal experts. They don't know the Colverson
16 [case], and then we talked about in the concurring decision because it
17 specifically addresses this issue. Justice Rose (phonetic) wanted to change
18 it to as follows: I would require a nonaggressor [sic] to retreat if he or she
19 could do so in complete safety. This differs somewhat from the majority's
20 position that a nonaggressor [sic] does not have to retreat even though he
21 or she could do so with complete safety. So, your Honor, the state of the
22 law is there's no duty to retreat even if you could do so in complete safety.
23 That is not covered in any of these jury instructions, and it is way too
24 complicated or obtuse for these jurors to be expected to infer that.

15 THE COURT: Okay.

16 [Nichols' counsel]: So with that said, that phrase should be included.

17 THE COURT: And then we also included at your request not only
18 danger of being killed, but also being serious bodily injury.

19 [Nichols' counsel]: Correct.

20 THE COURT: We added that at your request.

21 [Nichols' counsel]: Yes.

22 THE COURT: [Prosecutor], respond, please.

23 [Prosecutor]: Yes, Judge. I think that the instructions as provided by
24 the Court say that there's no duty to retreat. And I think that certainly
25 [Nichols' counsel] is free to argue whatever he wants to argue on that
26 principle, and as I see the - - as I read the Colverson case which we should
27 cite is 106 Nevada 484. It's a 1990 case. In that case it sounds like the
28 district court instructed the jury that that defendant did have a duty to retreat
if he could have done so safely. We're not giving such an instruction. We
are instructing this jury on the fact that the defendant had absolutely no duty

1 to retreat under any circumstance. And so certainly, I think that the
2 instruction as stated complies with the state of the law, and I wanted to just
3 put the cite to Crawford on the record as well because we talked about a
4 Crawford case.

5 THE COURT: And we talked about Runion (phonetic) too. We took
6 a lot of these instructions out of Runion.

7 [Prosecutor]: I don't know if I have - - oh, Crawford is 121 Nevada
8 Advance 74. It's a 2005 case. And Runion - -

9 (Off the record colloquy.)

10 THE COURT: I know the Supreme Court knows where to find
11 Runion. I'm not worried. Okay. Other than those, is there anything else you
12 want to propose?

13 [Nichols' counsel]: No, your Honor, but if she said something very
14 telling. She said that the instructions were [sic] providing say that there's no
15 duty to retreat under any circumstances. If they want to add that phrase, we
16 can add that phrase, but that is not what the instruction say. They don't say
17 under any circumstances. And - -

18 [Prosecutor]: Judge, I'm paraphrasing. The way it's written, it says
19 there's no duty to retreat. That means there's no duty to retreat, period. It's
20 very clear what that means. And certainly, [Nichols' counsel] can argue that
21 it means there's [no] duty to retreat no matter what the circumstance
22 because that's what that means in and of itself.

23 [Nichols' counsel]: Again, the principle is that the jurors are supposed
24 to be given the law as clear as we can, and by indicating that there is no
25 duty to retreat even if he could retreat in complete safety, that's the state of
26 the law and it should be clear to them.

27

28 [Nichols' counsel]: Your Honor, have you made a ruling on the
instruction 23 yet.

THE COURT: Yes. I have. I'm not adding the safety issue. The safety
- - the - - I'm not adding the language that you're requiring.

[Nichols' counsel]: And just for the record, if we have to appeal this,
what's the basis of that?

THE COURT: The basis is as I read the case of the specific language
in the case that was overturned, it is not necessary to put that in here.

(ECF No. 63-3 at 13-15.)

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4. Standard for review of a denial of a defense instruction

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). “[T]he Constitution [also] guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

The gist of Nichols’ argument is that the state district court prevented him from establishing his defense theory by denying his proposed instructions. *See Mathews v. United States*, 485 U.S. 58, 63 (1988) (“As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.”); *see also Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004) (“Failure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable.”); *Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) (“[T]he state court’s failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to a present a defense.”).

To be entitled to federal habeas relief, Nichols must demonstrate that the state district court’s decision to omit his proposed jury instructions “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *see also Byrd v. Lewis*, 566 F.3d 855, 860 (9th Cir. 2009) (explaining that “to obtain relief, [Petitioner] must show that the alleged instructional error had substantial and injurious effect or influence in determining the jury’s verdict” (internal quotation marks omitted).)

5. State court determination

In affirming Nichols’ judgment of conviction, the Nevada Supreme Court held:

Nichols argues that the district court erred in refusing to give his proposed heat-of-passion instruction and a modified self-defense instruction. Although Nichols’ proposed instructions were correct statements of law, we conclude that the principles of law described in

1 Nichols' proposed instructions were "fully, accurately, and expressly stated
2 in the other instructions." *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d
3 582, 589 (2005). Therefore, we conclude that the district court did not abuse
its discretion in denying the requested instructions. *See id.* at 748, 121 P.3d
at 585.

4 (ECF No. 22-9 at 5–6.)

5 **6. Conclusion**

6 **a. Heat-of-passion instruction**

7 As discussed, Nichols requested the following in lieu of Jury Instruction No. 15:

8 The heat of passion which will reduce an *unlawful* homicide to
9 manslaughter must be such a passion as naturally would be aroused in the
10 mind of an ordinarily reasonable person in the same circumstances. A
defendant is not permitted to set up his own standard of conduct and to
11 justify or excuse himself because his passions were aroused, unless the
circumstances in which he was placed and the facts that confronted him
12 were such as also would have aroused the passions of the ordinarily
reasonable man, if likewise situated.

13 *If you find beyond a reasonable doubt that the defendant committed*
14 *an unlawful killing*, the State has the burden to prove beyond a reasonable
15 doubt that the defendant did not act in the heat of passion with the requisite
legal provocation.

16 (ECF No. 63-5 at 3 (emphases added to show addition of requested language).)

17 Nichols argues that the "unlawful" qualifier in the first sentence of the first
18 paragraph of his proposed instruction was necessary because only an unlawful killing—
19 as compared to a legally excusable or justifiable killing—can amount to manslaughter.
20 (ECF No. 77 at 22.) As such, Nichols contends that Jury Instruction No. 15 as given
21 ambiguously indicated that he could be convicted of manslaughter even if the jury found
22 that he acted in self-defense. (*Id.*)

23 As the Nevada Supreme Court, the final arbiter of Nevada law, concluded,
24 Nichols' "unlawful" qualifier was a correct statement of Nevada law. *See* NRS §
25 200.040(1) ("Manslaughter is the *unlawful* killing of a human being, without malice
26 express or implied, and without any mixture of deliberation" (emphasis added).).
27 However, Jury Instruction No. 14 informed the jury that "[v]oluntary [m]anslaughter is the
28 *unlawful* killing of a human being." (ECF No. 63-6 at 15 (emphasis added).) Moreover,

1 the jury was instructed that “[t]he killing of another person in self-defense is justified and
2 not unlawful.” (ECF No. 63-6 at 20.) Accordingly, as the Nevada Supreme Court
3 reasonably determined, the jury was accurately instructed through other instructions that
4 voluntary manslaughter was an unlawful killing such that it could not find Nichols guilty
5 of manslaughter if it found he acted in self-defense. *See Estelle v. McGuire*, 502 U.S.
6 62, 72 (1991) (explaining that when reviewing jury instructions, this court considers that
7 jury instruction “in the context of the instructions as a whole and the trial record”); see
8 also *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995) (“Whether a constitutional
9 violation has occurred will depend upon the evidence in the case and the overall
10 instructions given to the jury.”).

11 Regarding the clause added to the beginning of the second paragraph of his
12 proposed instruction, Nichols argues that it clarified that the jury was only to consider
13 whether he committed voluntary manslaughter if it first found that he did not act in self-
14 defense. (ECF No. 77 at 23 (citing *Hill v. State*, 647 P.2d 370, 371 (Nev. 1982) (“Without
15 doubt, the burden of proving absence of justification or excuse for the homicide resides
16 with the state.”))).) However, the jury was instructed in Jury Instruction No. 4 that it “must
17 decide if [Nichols was] guilty of any offense and, if so, of which offense,” including
18 “murder of the first degree, murder of the second degree and voluntary manslaughter.”
19 (ECF No. 63-6 at 5.) Thus, as the Nevada Supreme Court reasonably determined, the
20 jury was accurately instructed through other instructions that it was to first consider
21 whether Nichols acted in self-defense before moving on to considering the offenses.
22 *See Estelle*, 502 U.S. at 72; *Duckett*, 67 F.3d at 745.

23 **b. Self-defense instruction**

24 As discussed, Nichols requested the following instruction in lieu of Jury
25 Instruction No. 23:

26 The right of self-defense is not available to an original aggressor, that
27 is a person who has sought a quarrel with the design to force a deadly issue
28 and thus through his fraud, contrivance, or fault, to create a real or apparent
necessity for making a felonious assault.

1 *Unless he is the original aggressor, a person who reasonably*
2 *believes that he is about to be killed or seriously injured by his assailant*
3 *does not have a duty to retreat, even if he could retreat in complete safety.*

4 (ECF No. 63-5 at 4 (emphasis added to show change in requested language).) The
5 second paragraph of Jury Instruction No. 23 provided that “where a person without
6 voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free
7 will, is attacked by an assailant, he has the right to stand his ground and need not retreat
8 when faced with the threat of deadly force or great bodily injury.”³ (ECF No. 63-6 at 24.)

9 Nichols’ proposed jury instruction, as compared to Jury Instruction No. 23, thus
10 added the statement that retreating was not required “even if he could have done so in
11 complete safety.” (ECF No. 77 at 24.) Although Nichols’ proposed instruction may have
12 been an accurate statement of Nevada law, as the Nevada Supreme Court reasonably
13 determined,⁴ Jury Instruction No. 23, as given, was also a correct statement of Nevada
14 law and complied with the Nevada Supreme Court’s sample self-defense jury instruction

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16 ³Nichols cites to his direct appeal opening brief for the language contained in Jury
17 Instruction No. 23. (*See* ECF No. 57 at 9 (citing ECF No. 22-2 at 15); *see also* ECF No.
18 77 at 26.) However, his direct appeal opening brief quoted the second paragraph of Jury
19 Instruction No. 23 incorrectly. (*Compare* ECF No. 22-2 at 15 (Nichols’ direct appeal
20 opening brief quoting the second paragraph in Jury Instruction No. 23 as follows: “A
21 person who reasonably believes that he is about to be killed or seriously injured by his
22 assailant does not have a duty to retreat unless he is the original aggressor”) *with* ECF
23 No. 63-6 at 24 (showing that the second paragraph of Jury Instruction No. 23 as provided
to the jury read as follows: “However, where a person without voluntarily seeking,
provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by
an assailant, he has the right to stand his ground and need not retreat when faced with
the threat of deadly force or great bodily injury.”).)

24 ⁴*See State v. Grimmitt*, 112 P. 273, 273 (Nev. 1910) (establishing that a person
25 “need not flee for safety, but has the right to stand his ground and slay his adversary”);
26 *Culverson v. State*, 797 P.2d 238, 240-41 (Nev. 1990) (holding that “a person, who is not
27 the original aggressor, has no duty to retreat before using deadly force, if a reasonable
28 person in the position of the non-aggressor would believe that his assailant is about to kill
him or cause him serious bodily harm”). Notably, the language “complete safety” appears
only in dicta. *See Culverson*, 797 P.2d at 240 (explaining that “it is often quite difficult for
a jury to determine whether a person should reasonably believe that he may retreat from
a violent attack in complete safety”).

1 regarding retreat.⁵ See *Runion v. State*, 13 P.3d 52, 59 (Nev. 2000) (providing “sample
2 instructions for consideration by the district courts in future case where a criminal
3 defendant asserts self-defense”). Therefore, as the Nevada Supreme Court also
4 reasonably determined, the jury was accurately instructed on Nichols’ theory of defense
5 that he was not required to retreat.

6 Because the Nevada Supreme Court’s determination regarding Nichols’
7 proposed jury instructions on his theory of defense was neither contrary to nor an
8 objectively unreasonable application of clearly established federal law or based on an
9 unreasonable determination of the facts, Nichols is not entitled to federal habeas relief
10 for ground 1.

11 **B. Ground 2**

12 In ground 2, Nichols alleges that the state district court violated his Sixth
13 Amendment right to confrontation by admitting the testimony of a medical examiner and
14 the autopsy report without the testimony of the doctor who prepared that report. (ECF
15 No. 57 at 11.)

16 **1. Background information**

17 The State attempted to admit Becker’s autopsy report through Dr. Jacqueline
18 Benjamin, a Clark County medical examiner. (ECF No. 63-1 at 11-12.) Dr. Benjamin did
19 not perform the autopsy or prepare the report; rather, the autopsy and corresponding
20 report were done by Dr. Peter Cupaczech. (*Id.* at 12.) Dr. Benjamin explained that Clark
21 County medical examiners “will testify for each other if someone is out, either out of state,
22 they’re on vacation or they have other responsibilities.” (*Id.*)

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25 ⁵Not only did Jury Instruction No. 23 mirror the Nevada Supreme Court’s sample
26 self-defense jury instruction regarding retreat, but it also added “or great bodily injury” to
27 the end of the second paragraph at Nichols’ counsel’s request. Compare ECF No. 63-6
28 at 24 (“ . . . he has the right to stand his ground and need not retreat when faced with the
threat of deadly force or great bodily injury”) with *Runion*, 13 P.3d at 59 (“ . . . he has the
right to stand his ground and need not retreat when faced with the threat of deadly force.”).
This additional language benefitted Nichols.

1 Nichols' counsel objected to the admission of the autopsy report through Dr.
2 Benjamin, explaining "she wasn't there for the autopsy, she didn't do the autopsy, my
3 client is entitled to full and effective cross-examination opportunities for State's
4 witnesses." (ECF No. 63-1 at 12.) Nichols' counsel elaborated: "I will not be able to cross-
5 examine her on any details of this autopsy because she didn't do it, she wasn't there, and
6 all that she can talk to are the printed words on that paper of the doctor who actually did
7 it." (*Id.*) The state district court overruled the objection. (*Id.* at 13.)

8 **2. Standard for Confrontation Clause violation**

9 The Sixth Amendment's Confrontation Clause provides: "In all criminal
10 prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses
11 against him." "[A] primary interest secured by [the Confrontation Clause] is the right of
12 cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *see also Kentucky*
13 *v. Stincer*, 482 U.S. 730, 739 (1987) ("[T]he Confrontation Clause's functional purpose
14 i[s] ensuring a defendant an opportunity for cross-examination."). The Confrontation
15 Clause bars "admission of testimonial statements of a witness who did not appear at
16 trial unless he was unavailable to testify, and the defendant had had a prior opportunity
17 for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). If a
18 Confrontation Clause violation occurs, federal habeas relief is proper only if the violation
19 "had substantial and injurious effect or influence in determining the jury's verdict."
20 *Brecht*, 507 U.S. at 637-38; *see also Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir.
21 2002) ("A Confrontation Clause violation is subject to harmless error analysis.").

22 **3. State court determination**

23 In affirming Nichols' judgment of conviction, the Nevada Supreme Court held:

24 Nichols argues that the district court erred in admitting the medical
25 examiner's report through the testimony of a witness who was not present
26 at the autopsy in violation of the Confrontation Clause because the medical
27 examiner who performed the autopsy was not available to be cross-
28 examined. *See Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct.
2527 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); *Medina v. State*,
122 Nev. 346, 143 P.3d 471 (2006). He further contends that the district

1 court erred in admitting the testimony of a medical examiner who did not
2 perform the autopsy.

3 We conclude that the district court did not abuse its discretion in
4 admitting Dr. Benjamin's expert testimony. Dr. Benjamin testified as an
5 expert witness to matters "within the scope of [her specialized] knowledge,"
6 NRS 50.275, based on facts or data "made known to [her] at or before the
7 hearing," NRS 50.285(1), that are "of a type reasonably relied upon by
8 experts in forming opinions or inferences" and therefore "need not be
9 admissible in evidence," NRS 50.285(2). Even assuming that the autopsy
10 report was testimonial hearsay and therefore the admission of the report or
11 testimony regarding facts contained in the report violated Nichols'
12 confrontation rights,

13 [FN1] We note that other courts are split on the issue of
14 whether autopsy reports are testimonial under *Crawford v.*
15 *Washington*, 541 U.S. 36 (2004). Compare *U.S. v. De La*
16 *Cruz*, 514 F.3d 121, 133 (1st Cir. 2008) (concluding that
17 autopsy reports fall within business records hearsay
18 exception and that "business records are expressly excluded
19 from the reach of *Crawford*"), *cert. denied*, ___ U.S. ___, 129
20 S.Ct. 2858 (2009), and *U.S. v. Feliz*, 467 F.3d 227, 233-37
21 (2d Cir. 2006) (similar), with *People v. Dungo*, 98 Cal. Rptr.
22 3d 702, 704-05 (Ct. App. 2009) (concluding that under
23 *Melendez-Dias*, an autopsy report is testimonial), *review*
24 *granted and opinion superseded* (December 2, 2009), *People*
25 *v. Lonsby*, 707 N.W.2d 610, 619-21 (Mich. Ct. App. 2005)
26 (concluding that notes and report prepared by nontestifying
27 crime lab serologist's testimony violated defendant's
28 confrontation rights), *State v. Johnson*, 756 N.W.2d 883, 889-
92 (Minn. Ct. App. 2008) (similar but as to autopsy report),
People v. Rawlins, 884 N.E.2d 1019, 1033-35 (N.Y. 2008)
(similar but as to fingerprint reports), *cert. denied subnom.*
Meekins v. New York, ___ U.S. ___, 129 S.Ct. 2856 (2009), and
State v. Locklear, 681 S.E.2d 293, 304-05 (N.C. 2009) (similar
but as to pathologist report). We decline to reach the issue as
doing so is unnecessary to a resolution of this appeal.

we conclude that the error was harmless. The facts concerning the matter
in which the victim died were uncontested, and there was ample evidence
in the form of testimony and autopsy photographs that the victim died as a
result of the stab wounds.

(ECF No. 22-9 at 4-5.)⁶

⁶Nichols argues that the Nevada Supreme Court did not adjudicate his constitutional claim on its merits, so this court should review this ground *de novo*. (ECF

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4. Conclusion

In June 2009, between Nichols’ trial and the Nevada Supreme Court’s affirmation of his judgment of conviction on direct appeal, the Supreme Court of the United States held that “analysts’ affidavits [are] testimonial statements,” so “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (emphasis in original) (internal quotation marks omitted). However, the testimonial nature of an autopsy was not evaluated by the United States Supreme Court. As such, at the time Nichols’ direct appeal was decided,⁷ the Nevada Supreme Court’s ultimate denial of relief on Nichols’

No. 77 at 32-33.) Although the Nevada Supreme Court did not decide whether Nichols’ Confrontation Clause rights were violated, it did not decline to analyze the violation as Nichols contends. Rather, the Nevada Supreme Court performed a thorough evaluation of the “split on the issue of whether autopsy reports are testimonial.” (ECF No. 22-9 at 5 n.1.) Under AEDPA, an adjudication on the merits is “a decision finally resolving the parties’ claims . . . that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.” *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004) (alteration in original). The Nevada Supreme Court resolved Nichols’ Confrontation Clause claim on the substance of the claim by assuming that the autopsy report was testimonial and then conducting a harmless error analysis. Thus, because the Nevada Supreme Court adjudicated this claim, the Court reviews ground 2 under AEDPA’s deferential standard of review.

Nichols also argues that the Nevada Supreme Court made an unreasonable determination of the facts when it found that Dr. Benjamin testified as an expert because she was not testifying as an expert with respect to the testimonial parts of the autopsy report. (ECF No. 77 at 41.) The Court disagrees. Dr. Benjamin testified to more than just the autopsy report, and that testimony was based on her medical examiner expertise. For example, Dr. Benjamin testified about what body tissues the knife would have gone through in perforating Becker’s heart and lung, the force required for the knife to have perforated Becker’s heart, the definition of homicide “from an examiner’s standpoint,” and the metabolizing of alcohol by the liver. (ECF No. 63-1 at 13-15.)

⁷The United States Supreme Court had not decided *Bullcoming v. New Mexico* or *Williams v. Illinois* at the time of Nichols’ direct appeal. See *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (holding that “the Confrontation Clause [does not] permit[] the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification . . . unless the analyst is unavailable at trial, and the accused

1 Confrontation Clause claim regarding the autopsy report and Dr. Benjamin's testimony
2 about that report was not contrary to, or an unreasonable application of, clearly
3 established law as determined by the Supreme Court of the United States.

4 Further, the harmless-error standard applied by the Nevada Supreme Court
5 appears to be the harmless-error standard for federal constitutional violations articulated
6 in *Chapman v. California*, 386 U.S. 18 (1967). The applicable test for whether a federal
7 constitutional error was harmless varies with the procedural posture of the case. *Davis*
8 *v. Ayala*, 576 U.S. 257, 267 (2015). On a direct appeal, the standard from *Chapman*
9 governs. Under *Chapman*, the burden is on the prosecution to prove beyond a
10 reasonable doubt that the error did not contribute to the verdict, such that the reviewing
11 court must be able to declare a belief that the error was harmless beyond a reasonable
12 doubt. 386 U.S. at 24. Under *Chapman*, an error is not harmless if there is a reasonable
13 possibility that the error might have contributed to the conviction. *See id.* In contrast, on
14 collateral review, such as in the present petition, the standard from *Brecht v.*
15 *Abrahamson*, 507 U.S. 619, (1993), instead controls.

16 Under *Brecht*, the record must demonstrate that the error resulted in actual
17 prejudice. *See, e.g., Ayala*, 576 U.S. at 267. Federal habeas relief is appropriate under
18 this standard only if the court has grave doubt whether the trial error had a substantial
19 and injurious effect or influence in determining the jury's verdict. *See id.* at 267-68.
20 *Brecht* requires more than *Chapman's* reasonable possibility that the error might have
21 contributed to the conviction, and the court instead must find that the defendant
22 sustained actual prejudice from the error. *See id.* at 268. Under AEDPA, a federal court
23 may not overturn a state court harmless-error determination unless the state court
24 applied the *Chapman* standard in an objectively unreasonable manner. However,
25 application of the *Brecht* standard subsumes the inquiry of whether the state court's

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27 had an opportunity, pretrial, to cross-examine the particular scientist"); *Williams v. Illinois*,
28 567 U.S. 50 (2012) (holding that the admission of a test that was not prepared to furnish
evidence against a specific individual did not implicate the Confrontation Clause).
Notably, *Bullcoming* and *Williams* did not specifically address autopsy reports.

1 application of the *Chapman* standard was objectively unreasonable. *See Ayala*, 567
2 U.S. at 268. That is, if the record demonstrates that the error was not harmless under
3 *Brecht*, the petitioner will have established that the state court’s application of *Chapman*
4 was objectively unreasonable under AEDPA’s deferential standard of review. *See, e.g.,*
5 *Fry v. Pliker*, 551 U.S. 112, 119-20 (2007); *Hall v. Haws*, 861 F.3d 977, 992 (9th Cir.
6 2017).

7 Here, the Nevada Supreme Court reasonably concluded that the record fails to
8 demonstrate that Nichols sustained actual prejudice from the alleged error. The autopsy
9 report and Dr. Benjamin’s testimony discussed the manner of Becker’s death—
10 homicide—and the cause of his death—the stab wounds to the chest. (*See* ECF Nos.
11 63-1 at 13-14; 22-6 at 14-20.) However, as the Nevada Supreme Court reasonably
12 noted, there was ample evidence that Becker died from the stab wounds, not from some
13 intervening incident.

14 Nichols admitted to stabbing Becker. (*See* ECF No. 63-1 at 46.) Emmert testified
15 that Becker passed out from his injuries while driving to the hospital, and the paramedics
16 took Becker in an ambulance from the CVS pharmacy. (ECF No. 62-16 at 40.) Lucina
17 Courtney, an employee at the CVS pharmacy, testified that she applied pressure to
18 Becker’s wounds as he was sitting in the driver’s seat of the Suburban before the
19 paramedics arrived. (ECF No. 62-16 at 28-30.) And Detective Chad Mitchell with the
20 Henderson Police Department testified that he observed Becker’s body at the hospital
21 on the night of the stabbing and “was notified by the paramedics that [Becker] had died.”
22 (ECF No. 63-1 at 9-10.) Detective Mitchell attended the autopsy and laid the foundation
23 for the autopsy photographs, which showed the stab wounds “underneath the left breast
24 and . . . on the left side of [the] torso,” to be admitted at the trial. (*Id.* at 10-11.)

25 Given these facts, there was not a reasonable probability that the jury would have
26 arrived at a different verdict had the state district court excluded the autopsy report and
27 Dr. Benjamin’s testimony. Accordingly, because any error was harmless under the
28 *Brecht* standard, the Nevada Supreme Court’s application of the harmless-error

1 standard was neither contrary to nor an objectively unreasonable application of clearly
2 established federal law. Nichols is not entitled to federal habeas relief for ground 2.⁸

3 **V. CERTIFICATE OF APPEALABILITY**

4 This is a final order adverse to Nichols. Rule 11 of the Rules Governing Section
5 2254 Cases requires this court to issue or deny a certificate of appealability (“COA”).
6 Therefore, the Court has *sua sponte* evaluated the claims within the petition for suitability
7 for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851,
8 864–65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when
9 the petitioner “has made a substantial showing of the denial of a constitutional right.” With
10 respect to claims rejected on the merits, a petitioner “must demonstrate that reasonable
11 jurists would find the district court’s assessment of the constitutional claims debatable or
12 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S.
13 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists
14 could debate (1) whether the petition states a valid claim of the denial of a constitutional
15 right and (2) whether the court’s procedural ruling was correct. *See id.*

16 Applying these standards, the Court finds that a certificate of appealability is
17 unwarranted.

18 **VI. CONCLUSION**

19 It is therefore ordered that the petition for a writ of habeas corpus pursuant to 28
20 U.S.C. § 2254 (ECF No. 57) is denied.

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

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25 ⁸Nichols requests that this court “[c]onduct an evidentiary hearing at which proof
26 may be offered concerning the allegations in [his] amended petition and any defenses
27 that may be raised by respondents.” (ECF No. 57 at 14.) Nichols fails to explain what
28 evidence would be presented at an evidentiary hearing. Furthermore, the Court has
determined that Nichols is not entitled to relief, and neither further factual development
nor any evidence that may be proffered at an evidentiary hearing would affect the Court’s
reasons for denying relief. Nichols’ request for an evidentiary hearing is denied.

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The Clerk of Court is directed to enter judgment accordingly and close this case.
DATED THIS 1st Day of November 2021.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE