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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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BALMORE ALEXANDER VILLATORO,

Case No. 3:14-cv-00467-RCJ-WGC

10

Petitioner,

ORDER

v.

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ROBERT LEGRAND, et al.,

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Respondents.

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Petitioner Balmore Alexander Villatoro's counseled, amended 28 U.S.C. § 2254 habeas petition is before the court for disposition of the merits of the remaining grounds (ECF No. 9).

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I. Procedural History and Background

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As set forth in this court's order granting respondents' motion to dismiss in part, on May 15, 2009, a jury convicted Villatoro of two counts of sexual assault (exhibit 22).¹

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The state district court sentenced Villatoro to two terms of ten years to life, to run

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concurrently. Exh. 23. Judgment of conviction was filed on August 4, 2009. Id. The

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Nevada Supreme Court affirmed the convictions on September 29, 2010, and remittitur

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issued on October 27, 2010. Exhs. 28, 29.

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¹ Exhibits referenced in this order are exhibits to petitioner's first-amended petition, ECF No. 9, and are found at ECF Nos. 10-13.

1 After an evidentiary hearing, the state district court denied Villatoro's postconviction
2 petition on June 27, 2013, the Nevada Supreme Court affirmed the denial on July 22,
3 2014, and remittitur issued on August 18, 2014. Exhs. 40, 41, 46, 47.

4 On or about September 8, 2014, Villatoro dispatched his federal habeas corpus
5 petition for mailing (ECF No. 4). This court appointed counsel, and the first-amended
6 petition was filed on April 9, 2015 (ECF No. 9). On March 4, 2016, this court granted
7 respondents' motion to dismiss in part, concluding that ground 2 was unexhausted (ECF
8 No. 25). Villatoro filed a motion for stay and abeyance, which this court denied (ECF
9 Nos. 28, 29, 31). Villatoro then filed a declaration of abandonment of ground 2 (ECF
10 No. 32). Respondents answered grounds 1, 3, and 4 (ECF No. 36), and Villatoro
11 replied (ECF No. 37).

12 **II. Legal Standard -- AEDPA Standard of Review**

13 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
14 Act (AEDPA), provides the legal standards for this court's consideration of the petition in
15 this case:

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

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

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

23 The AEDPA "modified a federal habeas court's role in reviewing state prisoner
24 applications in order to prevent federal habeas 'retrials' and to ensure that state-court
25 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
26 685, 693-694 (2002). This court's ability to grant a writ is limited to cases where "there is
27 no possibility fair-minded jurists could disagree that the state court's decision conflicts
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1 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
2 Supreme Court has emphasized “that even a strong case for relief does not mean the
3 state court's contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
4 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
5 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
6 state-court rulings, which demands that state-court decisions be given the benefit of the
7 doubt”) (internal quotation marks and citations omitted).

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

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

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

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

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

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

16 **III. Remaining Grounds**

17 **a. Prosecutorial Misconduct Claim**

18 Villatoro alleges in ground 1 that the prosecutor committed misconduct in her
19 opening statement, and the court failed to remedy the error by granting a mistrial or
20 giving a proposed curative instruction to the jury in violation of his Fifth, Sixth, and
21 Fourteenth Amendment rights to due process and a fair trial (ECF No. 9, pp. 8-13).
22 Villatoro argues that the prosecutor improperly and baselessly suggested that Villatoro’s
23 defense counsel had coached Villatoro’s girlfriend, a key witness, on her trial testimony.

24 In reviewing prosecutorial misconduct claims, the narrow issue the federal habeas
25 court may consider is whether there was a violation of due process, not whether there
26 was misconduct under the court’s broad exercise of supervisory power. Darden v.
27 Wainwright, 477 U.S. 168, 181 (1986). It is “not enough that the prosecutors’ remarks
28 were undesirable or even universally condemned[,] [t]he relevant question is whether
the prosecutor’s comments so ‘infected the trial with unfairness as to make the resulting
conviction a denial of due process.’” Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir.

1 2005) (quoting Darden, 477 U.S. at 181). The ultimate question before the court is not
2 whether misconduct denied a fair trial, but whether the state court's resolution of the
3 claim was an unreasonable application of clearly established federal law under 28
4 U.S.C. § 2254(d)(1). *Furman v. Wood*, 190 F.3d 1002, 1006 (9th Cir. 1999).

5 The trial testimony of both the victim, Tracy Runnels, and Villatoro's girlfriend, Arlee
6 Brown, reflected the following. Runnels and Brown were co-workers and went out
7 drinking together one evening. Exh 18, pp. 32-49; exh. 19, pp. 95-115. They drank
8 heavily, and Villatoro joined them at some point and was also drinking. Later, Villatoro
9 drove all three to Runnels' apartment, but she realized that she did not have her keys.
10 Runnels tried to call her roommate several times but was unable to reach her. Brown
11 suggested that Runnels stay the night in Brown and Villatoro's home. Runnels was very
12 intoxicated and agreed. They had to stop the car on the way because Runnels felt ill,
13 and she vomited repeatedly in a casino or gas station bathroom. When they reached
14 Brown and Villatoro's home, Runnels vomited at least twice more. Brown or Brown and
15 Villatoro made up a pull-out sofa bed in the living room, left a wastebasket near Runnels
16 in case she felt sick, and Runnels passed out on the bed. Brown and Villatoro went to
17 bed in the master bedroom. *Id.*

18 Runnels testified that when she fell asleep or passed out she was wearing a dress
19 and a sweater. Exh. 18, pp. 50-64. She woke up in the middle of the night because
20 she felt a sharp pain in her vaginal area and pressure on top of her. The top of her
21 dress was pulled down, the bottom of her dress was pulled up, and her bra and
22 underwear were off. She had not removed any of the clothing herself. Villatoro was on
23 top of her and was having sexual intercourse with her. After she told him to stop about
24 three times he stopped and put her underwear back on her. Runnels then blacked out
25 again. She woke up about 7 in the morning and was completely dressed. She thought
26 maybe it was some strange dream but when she got up her back hurt and she had
27 genital pain. Runnels woke up Brown to take her home. As they were driving, Runnels
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1 told Brown that she had a memory of Villatoro in bed with her, but that when she drinks
2 she has weird dreams and she wasn't sure if it was a dream. When Runnels got home
3 she noticed blood on the back of her dress. When she showered she had a strong,
4 stinging pain in her vaginal area. She called Brown and said she had blood all over her
5 and she also called her mom to let her know that she thought she might have been
6 assaulted. Runnels went with her mother to the hospital where she underwent an exam
7 and spoke with police. Id. On cross-examination Runnels acknowledged that when she
8 woke up in the morning she did not run, scream, call the police, or tell Brown that
9 Villatoro had raped her. Id. at 66.

10 A criminalist at the Washoe County Crime Laboratory testified that Villatoro or any of
11 his paternal relatives could not be excluded as the source of the DNA from an external
12 swab of Runnels' genitalia. Exh. 19, p. 81.

13 Brown testified that she and Villatoro went to the bedroom, Villatoro wanted to have
14 sex and Brown refused. Exh. 19, pp. 116-166. She stated that they had a physical
15 fight; she was kicking and hitting him. Villatoro finally said he would not touch her, and
16 they went to sleep. Brown said that she did not remember having sex that night, but
17 that her underwear was on inside out in the morning, and therefore, she assumed that
18 she and Villatoro must have engaged in some sort of sexual activity that night. Brown
19 admitted that when she was interviewed by police the next morning she did not tell them
20 that her underwear was inside out and that she thought maybe she had had sex with
21 Villatoro. Brown testified that what she told police was that she was mad at Villatoro,
22 that they had argued and that they had not had sex. She further testified that Runnels
23 called her later that morning from the hospital and told Brown something about bleeding
24 and that it had to do with Villatoro. Brown dropped her children off at daycare and
25 returned home to find Villatoro in the shower. She said this was unusual, that he had
26 "no reason to jump up and take a shower," and that he typically would not shower at
27 that time of day unless he was going to work. Brown then confronted Villatoro. He
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1 initially denied that anything happened. Then he told Brown that he “went down on”
2 [had oral sex with] Runnels, and when he realized what he was doing he went to the
3 bathroom and threw up. Brown admitted that she did not tell that to the police; she
4 explained that this was because she did not think it was important at the time. Id.

5 A police officer who went to Brown and Villatoro’s in the morning testified. Exh. 19,
6 pp. 167-188. He stated that Brown told him the following: after Runnels called Brown
7 from the hospital, Brown dropped her kids at daycare and went home. Brown told the
8 officer that Villatoro had stripped the sheets off the pull-out sofa bed, put the bed away
9 and returned the cushions to the sofa. Villatoro was in the shower. Brown told the
10 officer that this was unusual behavior for Villatoro, especially after a long night of
11 drinking. Brown said that when she demanded that Villatoro tell her what happened, he
12 said that “she [Brown] wouldn’t give it up to him so he went out and got it from out in the
13 living room.” Id. at 178. The officer asked Brown to come to the police station to give a
14 statement. The officer stated that Brown became vague and evasive when he
15 questioned her at the station. Id.

16 A registered nurse who works as an independent contractor for Washoe County as a
17 sexual assault nurse examiner testified that she examined Runnels. Exh. 19, pp. 189-
18 220. She testified that Runnels had multiple vaginal injuries and that sustaining multiple
19 injuries is consistent with non-consensual sex. Id.

20 With respect to Villatoro’s claim in federal ground 1, during opening statements, the
21 prosecutor said:

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23 You’ll find out Arlee’s [Brown’s] story changes from what she told the
24 police before the preliminary hearing. She [Arlee] starts, she goes down
25 with the defendant. And they go together to the Public Defender’s Office.
26 And while they’re down there, they meet with one of his defense attorneys,
27 and the the, the defendant and Arlee Brown watch the defendant’s
28 confession. They watch Arlee Brown’s interview, they watch the victim’s
interview, they read the entire police file. And then after all that –

Exh. 14, pp. 22-23. At that point, the defense objected.

1 After a discussion at the bench, the judge excused the jury for the rest of the day. Id.
2 at 23. After the jury left, the judge described what had happened:

3
4 The record should reflect that Ms. Druckman [the prosecutor] has a
5 power point slide, and it states: Joanna Roberts, the defendant's lawyer,
6 and then bullet point: Met with the defendant and Arlee Brown in her office
7 and discussed the case with them together. Bullet point: She allowed the
8 defendant and Arlee Brown to mutually watch everyone's interviews.
9 Discuss them.

10 And then there was an objection. And then Court stopped the
11 proceedings.

12 Id. at 24. The prosecutor acknowledged that later bullet points in her presentation
13 concerned defense counsel's purported review of medical records and police reports
14 with the defendant and with Arlee Brown. Id. at 26.

15 The defense moved for a mistrial, arguing that the state had falsely portrayed
16 defense counsel as coaching Brown. Id. at 35.

17 The district court denied the request but ordered the prosecutor to remove any
18 reference to Ms. Roberts in the power point presentation. Id. at 36-37. The court further
19 noted that "[i]n my years of being a trial judge, I've never, ever had a prosecutor do this.
20 This is bizarre. It – and it's totally unnecessary." Id. at 36. The court admonished the
21 State "that if you try to pull this stunt ever again, or, in this trial, I will grant a mistrial, and
22 I will refer it to the State bar." Id. at 37.

23 When trial resumed the next day, the defense renewed its motion for mistrial. Exh.
24 18, pp. 1-8. The court again noted the "inappropriate behavior" of the prosecutor but
25 denied the motion. Id. at 9.

26 In the alternative, defense counsel then requested the following curative instruction:

27 The prosecutor made certain uncalled for insinuations about defense
28 counsel. The prosecutor's improper remarks amount to an attempt to
prejudice you against the defendant. The prosecutor presented opening
statements. During that presentation an objection was made by defense
counsel. The prosecutor engaged in improper argument which unfairly
disparaged the motive of defense counsel. You are to disregard any
references made by the prosecutor regarding defense counsel Joanna
Roberts. Nothing counsel says during opening statement is evidence. The

1 Court will remedy the misconduct of the prosecutor outside the presence
2 of the jury.

3 Were you to believe the unwarranted insinuations and convict the
4 defendant on the basis of them, I will have to declare a mistrial. Therefore,
5 you must disregard these improper, unsupported remarks.

6 Id. at 14-15. The judge denied this request.

7 The jury returned, and the court addressed the jury:

8 Before we continue with opening statements, the Court wants to
9 remind you that the statements and arguments of the attorneys are not
10 evidence in this case. You have received no evidence or heard no
11 testimony in this case. And throughout the trial I will be, as the law
12 requires, I must remind you at every break that you are not to form any
13 ultimate conclusion regarding this case until you have heard all of the
14 testimony, the sworn testimony from the witness stand, that you have
15 received all of the evidence that will be admitted by the Court pursuant to
16 law, and that you have been instructed on the case.

17 But again, the arguments, the statements, the questioning of the
18 lawyers, the chatter back and forth between the lawyers, that's not
19 evidence.

20 Id. at 20-21.

21 Affirming the convictions on direct appeal, the Nevada Supreme Court concluded
22 that the district court did not err in denying the motion for mistrial and rejecting the
23 proposed jury instruction to correct an instance of misconduct. Exh. 29, p. 3. The state
24 supreme court reasoned that “[g]iven the passing nature of the prosecutor’s insinuation
25 and the district court’s instruction to the jury, we find no abuse of discretion in either the
26 denial of Villatoro’s motion or the rejection of his proposed jury instruction.” Id.

27 This court concludes that Villatoro has not demonstrated that federal habeas relief is
28 warranted on this claim. He has not demonstrated that this brief statement made during
opening argument so infected the trial with unfairness as to make it a violation of due
process. Defense counsel objected, and the court quickly halted the State’s improper
comments and admonished the State outside of the jury’s presence. The court then
reminded the jury that opening statements are not evidence. Moreover, while the
prosecutor improperly interjected the public defender into her opening statement, Arlee

1 Brown was thoroughly questioned on direct and cross. The record reflects that the jury
2 had ample opportunity to assess her credibility. Villatoro has failed to show that the
3 Nevada Supreme Court's decision was contrary to, or involved an unreasonable
4 application of, clearly established federal law, as determined by the U.S. Supreme
5 Court, or was based on an unreasonable determination of the facts in light of the
6 evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal
7 habeas relief is denied as to ground 1.

8 **b. Ineffective Assistance of Trial Counsel Claims**

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

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

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

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

23
24 Establishing that a state court’s application of Strickland was
25 unreasonable under § 2254(d) is all the more difficult. The standards
26 created by Strickland and § 2254(d) are both “highly deferential,” *id.* at 689,
27 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059,
28 138 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)

1 applies, the question is whether there is any reasonable argument that
2 counsel satisfied Strickland's deferential standard.

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

9 **Ground 3**

10 Villatoro claims that defense counsel rendered ineffective assistance in violation of
11 his Sixth and Fourteenth Amendment rights when they failed to seek a DNA expert for
12 trial (ECF No. 9, pp. 14-15).

13 Washoe County crime laboratory personnel testified at trial that "[p]ositive results for
14 the presumptive presence of semen" were found when swabs from Runnels' genital
15 area were analyzed. Exh. 19, p. 40. Defense counsel asked an analyst if she could tell
16 whether the DNA on a sample came from saliva or semen, and the analyst replied: "we
17 are not able to tell where that DNA came from." Id. at 87.

18 Villatoro now argues that his trial counsel should have conducted further
19 investigation to determine whether this evidence could be consistent with Villatoro's
20 claim that he only engaged in consensual cunnilingus with Runnels and whether two
21 other men could have been the source of the semen (ECF No. 9, p. 14).

22 In its order affirming the denial of Villatoro's state postconviction habeas petition, the
23 Nevada Supreme Court concluded that Villatoro failed to demonstrate deficiency or
24 prejudice, reasoning:

25 Appellant's defense was that the sexual contact was consensual;
26 therefore, evidence of another person having had similar contact with the
27 victim would have been irrelevant. Further, appellant did not say why
28 counsel should have doubted and thus sought to impeach the victim's
statement that she had not recently been sexually active. Thus even if his
claims were true, appellant would not have been entitled to relief. See
Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984)

1 (holding that a petitioner is not entitled to an evidentiary hearing where his
2 claims are unsupported by specific factual allegations that, if true, would
3 have entitled him to relief). We therefore conclude that the district court did
4 not err in denying this claim without an evidentiary hearing.

5 Exh. 46, p. 3.

6 Villatoro's claim here fails. The defense theory of the case was that he and Runnels
7 engaged in consensual oral sex. Thus, defense counsel elicited testimony that it was
8 not possible to determine whether the DNA was from saliva or semen in order to
9 support the theory that the DNA was not from semen. A crime lab analyst testified that
10 Villatoro could not be excluded as the source of the DNA. As the Nevada Supreme
11 Court pointed out, any evidence that other DNA was also identified was not relevant.

12 Villatoro has not demonstrated that the Nevada Supreme Court's decision on federal
13 ground 3 was contrary to, or involved an unreasonable application of, Strickland, or was
14 based on an unreasonable determination of the facts in light of the evidence presented
15 in the state court proceeding. 28 U.S.C. § 2254(d). Accordingly, ground 3 is denied.

16 **Ground 4**

17 Villatoro contends that trial counsel was ineffective for failing to proffer a reasonable
18 curative instruction in response to the prosecutor's improper statements during opening
19 arguments (ECF No. 9, p. 16). He asserts that the instruction defense counsel
20 proffered was above and beyond what was appropriate under the circumstances, that
21 the court would have given the jury a more reasonable instruction, and that it is
22 reasonably probable that the outcome of trial would have been different.

23 The curative instruction the defense proffered is set forth above in the discussion of
24 ground 1. Affirming the denial of the state postconviction petition, the Nevada Supreme
25 Court again held that Villatoro failed to demonstrate deficiency or prejudice. Exh. 46, p.
26 3. The state supreme court pointed out that Villatoro did not "state what instruction
27 counsel should have requested that would have had the desired effect of both
28 alleviating the misconduct and not calling it to the jury's attention." Id.

1 Villatoro has not explained what instruction should have been requested and has not
2 shown a reasonable probability of a different outcome of trial. He has not demonstrated
3 that the Nevada Supreme Court's decision on federal ground 4 was contrary to, or
4 involved an unreasonable application of, Strickland, or was based on an unreasonable
5 determination of the facts in light of the evidence presented in the state court
6 proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to ground 4.

7 Therefore, the petition is denied in its entirety.

8 **IV. Certificate of Appealability**

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

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

22 Having reviewed its determinations and rulings in adjudicating Villatoro's petition, the
23 court finds that none of those rulings meets the Slack standard. The court therefore
24 declines to issue a certificate of appealability for its resolution of any of Villatoro's
25 claims.

26 **V. Conclusion**

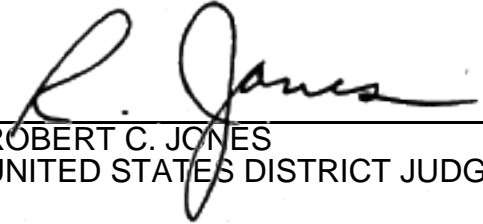
27 **IT IS THEREFORE ORDERED** that the amended petition (ECF No. 9) is **DENIED** in
28 its entirety.

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

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

DATED: This 6th day of November, 2018.



ROBERT C. JONES
UNITED STATES DISTRICT JUDGE