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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FERNANDO GALLEGOS,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:15-cv-00254-RCJ-CLB

ORDER

Fernando Gallegos' third-amended 28 U.S.C. § 2254 petition for writ of habeas corpus is before the court for adjudication on the merits (ECF No. 42).

I. Background & Procedural History

On November 22, 2008, a jury convicted Gallegos of first-degree murder for the stabbing death of a man in a Reno motel (exhibit 28).¹ A separate penalty hearing was then held before the jury, and Gallegos was sentenced to life in prison without the possibility of parole. Exh. 31. Judgment of conviction was entered on March 11, 2009. Exh. 34.

The Nevada Supreme Court affirmed Gallegos' conviction on September 28, 2010. Exh. 4. On April 15, 2015, the Nevada Court of Appeals affirmed the denial of Gallegos' state postconviction petition. Exh. 8. Remittitur issued on May 11, 2015. Exh. 56.

¹ Exhibits 1-8 are exhibits to petitioner's first-amended petition, ECF No. 11, and are found at ECF No. 12. Exhibits 9-57 are exhibits to petitioner's second-amended petition, ECF No. 23, and are found at ECF Nos. 24-26, 28. Exhibits 58-169 are exhibits to respondents' first motion to dismiss, ECF No. 30, and are found at 31-34.

1 Gallegos dispatched his federal habeas petition for filing on or about May 10,
2 2015 (ECF No. 6). This court appointed the Federal Public Defender as counsel for
3 Gallegos. Gallegos ultimately filed a counseled, third-amended petition on May 4, 2017
4 (ECF No. 42). Respondents have now answered the remaining claims, and Gallegos
5 has replied (ECF Nos. 69, 81).

6 **II. Legal Standard—Antiterrorism and Effective Death Penalty Act**
7 **(AEDPA)**

8 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
9 Act (AEDPA), provides the legal standards for this court’s consideration of the petition in
10 this case:

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

14 (1) resulted in a decision that was contrary to, or involved an
15 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 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
19 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court
20 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
21 685, 693-694 (2002). This court’s ability to grant a writ is limited to cases where “there is
22 no possibility fair-minded jurists could disagree that the state court’s decision conflicts
23 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
24 Supreme Court has emphasized “that even a strong case for relief does not mean the
25 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
26 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
27 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
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1 state-court rulings, which demands that state-court decisions be given the benefit of the
2 doubt”) (internal quotation marks and citations omitted).

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

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

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

25
26 [I]n concluding that a state-court finding is unsupported by
27 substantial evidence in the state-court record, it is not enough that we
28 would reverse in similar circumstances if this were an appeal from a
district court decision. Rather, we must be convinced that an appellate
panel, applying the normal standards of appellate review, could not
reasonably conclude that the finding is supported by the record.

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

4 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
5 correct unless rebutted by clear and convincing evidence. The petitioner bears the
6 burden of proving by a preponderance of the evidence that he is entitled to habeas
7 relief. *Cullen*, 563 U.S. at 181. Finally, in conducting an AEDPA analysis, this court
8 looks to the last reasoned state-court decision. *Murray v. Schriro*, 745 F.3d 984, 996
9 (9th Cir. 2014).

10 A state prisoner is entitled to federal habeas relief only if he is being held in custody
11 in violation of the constitution, laws or treaties of the United States. 28 U.S.C. §
12 2254(a). Unless an issue of federal constitutional or statutory law is implicated by the
13 facts presented, the claim is not cognizable under federal habeas corpus. *Estelle v.*
14 *McGuire*, 502 U.S. 62, 68 (1991). A petitioner may not transform a state-law issue into
15 a federal one merely by asserting a violation of due process. *Langford v. Day*, 110 F.3d
16 1380, 1381 (9th Cir. 1996). Alleged errors in the interpretation or application of state
17 law do not warrant habeas relief. *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir.
18 2004).

19 **III. Trial Testimony**

20 The State argued at trial that Gallegos and Antonio Barajas entered Gordon Stine's
21 motel room because Gallegos was looking for drugs. There was a fight, and Gallegos
22 stabbed Stine in the neck.

23 Roger Fletcher testified that he was staying in the room across from Gordon Stine at
24 the time in question. Exh. 19, pt. 1, pp. 158-172. He stated that he was in his room at
25 about 2 or 3pm when he heard noises that sounded like the door to Stine's room was
26 being forced open or like someone was rushing into the room. He heard Stine
27 screaming at the top of his lungs: "I have no dope, man. I have no dope." He heard the
28 voice say something like "Ow." Then he heard wrestling noises, then silence. Fletcher

1 peeked out of his window when he heard the door to Stine's room open and he saw two
2 men, possibly Hispanic, from the back as they left the room and ran down the stairs. On
3 cross-examination Fletcher acknowledged that he had never spoken with Stine, and he
4 did not know for sure that it was Stine's voice he heard yelling.

5 Investigator Candis Potts testified. Exh. 19, pt. 1, pp. exh. 19, pt. 2, pp. 55-87. She
6 took photos of abrasions on Gallegos' forehead and right hand. Photos she took of
7 Antonio Barajas showed no signs that he had been in a physical altercation. Potts
8 acknowledged on cross that if Barajas had stabbed Stine without warning that that could
9 have resulted in Barajas having no physical signs of having been in a fist fight. She also
10 testified that there was no evidence that the motel room door or lock had been broken.

11 Charles Hobbs testified that on the afternoon in question Gallegos and Barajas
12 showed up at his residence and asked Hobbs to get rid of a knife. Exh. 19, pt. 2, pp. 87-
13 120. Hobbs took the knife and placed it in his sink. Gallegos said to Barajas "I shouldn't
14 have gone back, it's a mess." Gallegos asked Hobbs if there was any blood on
15 Gallegos' sweatshirt. Hobbs told him yes, so he took off the sweatshirt and washed his
16 hands. Gallegos was on his cell phone, but it wasn't working so he got another phone
17 from Barajas. Hobbs said he sprayed some bleach on the knife then dropped it in a vent
18 right outside his residence. He put the clothing that Gallegos and Barajas had removed
19 into a bag and put the bag in his room. The next day detectives questioned him, and he
20 gave them the clothing and told them where he had put the knife.

21 Taunya Owens testified. Exh. 19, pt. 2, pp. 121-139. She said that Gallegos wanted
22 to know if she knew anyone who would be interested in buying a motored scooter from
23 him because he had stabbed someone in the neck and needed to get out of town. On
24 cross examination Owens said that in her experience Gallegos would exaggerate and
25 brag about things he didn't do, and she didn't really think he had stabbed anyone.

26 John Herbaugh testified that he had been good friends with Stine for several years.
27 Exh. 19, pt. 2, pp. 140-175. Exh. 21, pp. 6-26. Herbaugh stated that two days before
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1 the murder he purchased a cell phone from Gallegos' girlfriend, who wanted the money
2 to buy drugs. After the girlfriend had left, Gallegos was knocking at Herbaugh's door.
3 He didn't answer. The next day he was talking to Stine on the phone and told Stine that
4 he didn't trust Gallegos and his girlfriend, and he didn't think Stine should trust them
5 either. The day after that, on the night in question, around 7pm Herbaugh saw that he
6 had missed a call from Stine. He returned the call, and Gallegos answered. Herbaugh
7 did not speak to him but listened to a voicemail from Gallegos; he said "I worked over
8 Gordon. So you want to come out and play?" On cross examination Herbaugh agreed
9 that he could not exactly decipher what Gallegos said on the message; he thought he
10 might also have said something like "I partnered with Gordon." Herbaugh
11 acknowledged that after he told Stine to stay away from Gallegos, Stine said: "Let's go
12 after him."

13 Christi Weiss testified that she was Herbaugh's girlfriend. Exh. 21, pp. 27-39. Weiss
14 said that on the night in question she walked in to hear the end of a conversation
15 Herbaugh was having on his cell phone. After he hung up, he told Weiss, "That was G
16 [Gallegos]. I don't know why G has got Gordon's phone." She stated that she never saw
17 or heard of Stine selling drugs. On cross-examination she acknowledged that Stine
18 used drugs sometimes and would come to her for marijuana and methamphetamine.

19 Antonio Barajas testified. Exh. 21, pp. 40-201. He said that on the day in question,
20 he and Gallegos were walking around downtown Reno. They ended up at the Knights
21 Inn, where Stine was staying. Barajas was following Gallegos up the stairs to the
22 second or third floor. Gallegos went to a motel room; Barajas did not know if the door
23 had been opened or closed because he stopped to tie his shoes. He just heard
24 Gallegos and another man arguing. Barajas went into the motel room and closed the
25 door. Gallegos and the man argued heatedly, and then grabbed each other and began
26 physically fighting. They were punching each other, fell to the ground and continued to
27 wrestle and punch each other. Then the other man turned toward Barajas and came at
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1 him, swinging. Barajas punched him several times in the face. At some point, Stine fell
2 back on the bed and said "I'm cool. I'm done. I don't want to fight anymore." Stine had
3 blood on his nose and mouth. Gallegos ran out of the room, and Barajas followed.
4 Barajas followed Gallegos to a house; Barajas did not know the house or the man who
5 was there. Barajas took off his sweatshirt because it had blood on it. He wasn't paying
6 attention to what Gallegos was doing or saying. Barajas' tennis shoes had blood on
7 them. He took them off and threw them away; the man at the house gave him some
8 slippers and he started walking back to his girlfriend's motel room. A white van pulled up
9 with 4 men and Gallegos. Barajas got in and they dropped him at the motel. Barajas
10 went to the motel room. His girlfriend and Gallegos' girlfriend were there. He told
11 Gallegos' girlfriend that she had to leave. Barajas said that he did not have a knife with
12 him that day. He testified that he did not see Gallegos stab Stine, and he did not see a
13 knife in Gallegos' hand. Barajas testified that he did not stab Stine.

14 On cross examination Barajas testified that he sometimes carries a knife that his
15 girlfriend gave him. He reiterated that he did not stab Stine. On redirect Barajas stated
16 that he did not have that knife in his possession during the incident.

17 Barajas' girlfriend Geez Taylor testified. Exh. 21, pp. 202-222, 234-237; exh. 23, pp.
18 7-25. She echoed that she and Barajas were hanging out in their motel room on the day
19 in question when Gallegos and his girlfriend came by. Barajas left with Gallegos.
20 Barajas returned about an hour later; he no longer had his sweatshirt or shoes and he
21 appeared shaken and nervous. To her knowledge, Barajas had not been carrying a
22 knife. Taylor asked Barajas repeatedly what had happened, but he did not respond.
23 Taylor said that Barajas finally said several times "G fucked up." Exh. 21, p. 222.

24 Reno police detective John Ferguson testified that after executing a search warrant
25 at Gallegos' residence, Gallegos voluntarily accompanied the officer to the police station
26 for an interview. Exh. 23, pp. 104-170, 173-211. The officer stated that he asked
27 Gallegos if he had ever been over to the motel where Stine was staying. Stine was
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1 killed on a Monday, and Gallegos changed his story multiple times regarding where and
2 with whom he'd been on Saturday, Sunday, and Monday. *See, e.g., id.* at 165-169.
3 Gallegos maintained that he'd never been at the motel where Stine was staying. He
4 kept telling the officer that he did not use Stine's cell phone the day he was killed. Then
5 he said, "I used the phone one time, but I didn't threaten nobody or nothing like that."
6 The detective noted that he had never mentioned anything about a threat. *Id.* at 167.
7 First, Gallegos said his girlfriend Tanya Burgess gave him the phone, then he said that
8 Barajas gave him the phone. The detective played the message to Gallegos. The
9 detective understood the message to say: "Hey mother fucker. This is G right here. But
10 me and Gordo (inaudible) still want to play, we'll play (inaudible)." Gallegos
11 acknowledged that he was known as "G," but denied that it was him speaking on the
12 message. Then he admitted to leaving the message, but said he left it for John
13 Herbaugh, his girlfriend's friend. He felt that Herbaugh was being disrespectful to his
14 girlfriend. The detective told him that Taunya Owens told police that Gallegos bragged
15 that he had stabbed someone in the neck. Gallegos denied it and terminated the
16 interview shortly after. The detective said ok and left the room. Gallegos was still being
17 videotaped and said to himself "I'm gonna kill myself." *Id.* at 163. Gallegos began to
18 hyperventilate and complained of chest pains. He was ultimately transported to the
19 hospital.

20 Tanya Burgess testified that Gallegos was her boyfriend during the time in question.
21 Exh. 23, pp. 211-276; exh. 27, pp. 12-80. The day Stine was killed Burgess and
22 Gallegos went to the motel where Barajas and his girlfriend Taylor were staying.
23 Barajas and Gallegos left at some point for about an hour saying they had to take care
24 of some business. When they returned, Burgess said that Gallegos was in a very
25 different, strange mood; she knew something had happened. Gallegos was using a
26 phone with a dragon on it that she'd never seen before. Gallegos no longer had the
27 sweatshirt on that he had left in. She said that later in the day Gallegos told her that he
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1 and Barajas were fighting Stine and that Gallegos took the knife and put it through
2 Gordon's throat. Gallegos said it was Stine's jugular vein, and dark blood started
3 coming out of his mouth. Burgess identified the knife at trial as belonging to Gallegos
4 and said he sleeps with the knife every night. Burgess testified that Gallegos tried to call
5 her friend John Herbaugh on Stine's cell phone. Burgess knew it was Stine's because
6 she had gone to Stine's room on a different day and used it to make a couple of calls.
7 Burgess also said that when she first talked to detectives, she told them that when
8 Gallegos told her he had stabbed Gordon Stine, she didn't believe him because "G is all
9 talk." Exh. 23, p. 264.

10 Burgess testified that later that evening Gallegos continued to talk about killing Stine;
11 Gallegos told her they'd gone to Hobbs' house and left his sweatshirt and hid the knife
12 in the heater vent there.

14 IV. Instant Petition

15 Ground 1

16 Gallegos asserts that the jury instructions were misleading and failed to give effect to
17 all elements necessary for conviction in violation of his Fifth and Fourteenth Amendment
18 rights to due process and a fair trial (ECF No. 42, pp. 15-21).

19 To obtain relief based on an error in instructing the jury, a habeas petitioner must
20 show the "instruction by itself so infected the entire trial that the resulting conviction
21 violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citing *Cupp v.*
22 *Naughten*, 414 U.S. 141, 147 (1973)). Where the defect is the failure to give an
23 instruction, the inquiry is the same, but the burden is even heavier because an omitted
24 or incomplete instruction is less likely to be prejudicial than an instruction that misstates
25 the law. See *Henderson v. Kibbe*, 431 U.S. 145, 155-157 (1977); see also *Estelle*, 502
26 U.S. at 72. The federal constitution requires the State to prove every element of the
27 charged offense. See *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (holding that a
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1 defendant is deprived of due process if a jury instruction has, or jury instructions have,
2 “the effect of relieving the State of the burden of proof enunciated. . . on the critical
3 question of the petitioner’s state of mind”); accord *Francis v. Franklin*, 471 U.S. 307, 326
4 (1985) (reaffirming “the rule of *Sandstrom* and the wellspring due process principles
5 from which it was drawn”); see also *In re Winship*, 9 397 U.S. 358, 364 (1970) (“the Due
6 Process Clause protects the accused against conviction except upon proof beyond a
7 reasonable doubt of every fact necessary to constitute the crime with which he is
8 charged”).

9 The State pursued two theories of first-degree murder—willful premeditation and
10 deliberation and felony murder. Exh. 24, Jury Instruction nos. 22-32.

11 Jury Instruction No. 22:

12 The elements of the crime of Murder with a Deadly Weapon are:

- 13
- 14 1. On January 21, 2008;
 - 15 2. in Washoe County, Nevada;
 - 16 3. the defendant did willfully and unlawfully;
 - 17 4. kill Gordon Stine, a human being;
 - 18 5. with malice aforethought, either express or implied;
 - 19 6. or during the perpetration of a burglary;
 - 20 7. with a deadly weapon.

21 Jury Instruction No. 23:

22 Murder is divided into two degrees.

23 Murder of the first degree is murder which is willful, deliberate and
premeditated.

24 Murder of the second degree is all other kinds of murder.

25 Instruction No. 24 described murder in the first degree as:

26 murder which is perpetrated by means of any kind of willful, deliberate,
and premeditated killing. All three elements—willfulness, deliberation, and
premeditation—must be proven beyond a reasonable doubt before an
accused can be convicted of first-degree murder.

27 Jury Instruction No. 27 states:

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1 The Amended Information alleges two alternative theories of Murder,
2 as allowed by law. The second paragraph of the Amended Information
3 alleges the defendant committed the murder pursuant to the so-called
"felony murder" rule. The elements of felony murder are:

- 4 1) The defendant did willfully and unlawfully;
- 5 2) kill a person;
- 6 3) during the perpetration of a burglary.

7 In regard to the felony murder alternative, the State is not required to
8 prove that the killing was committed with malice, premeditation, or
deliberation. The State is only required to prove the elements set forth
above.

9 Jury Instruction No. 28 lists the five elements of burglary:

- 10 1. The defendant, individually or in joint participation with others;
- 11 2. by day or night;
- 12 3. did enter any room, apartment or tenement;
- 13 4. with the intent to commit larceny, assault or battery on any person;
- 14 5. in Washoe County, Nevada.

15 Gallegos argues that the definition of first-degree murder and the listing of the
16 elements necessary to prove the crime is unclear.

17 Gallegos did not object to the instructions; therefore, the Nevada Supreme Court
18 reviewed them on appeal for plain error. Exh. 4, pp. 8-9. The court rejected Gallegos'
19 challenges to the first-degree murder instructions:

20 Jury instruction no. 22 informed the jury on the elements of murder. It
21 stated that the jury could find Gallegos guilty of murder if he willfully and
22 unlawfully killed Stine with malice aforethought, either express or implied,
23 or during the perpetration of a burglary with a deadly weapon. Jury
24 instruction no. 23 further instructed the jury that first-degree murder is
25 "murder which is willful, deliberate and premeditated." Jury instruction nos.
26 24 through 26 specifically defined willfulness, deliberation, premeditation,
27 malice aforethought, express malice, and implied malice. Therefore, the
28 jury instructions distinctively defined the difference between first-degree
murder and second-degree murder. The jury instructions specifically
stated that first-degree murder required the elements of deliberation and
premeditation. Further, jury instruction no. 24, which defined first-degree
murder, was an exact duplicate of the instruction we instructed district
courts to use in cases where defendants are charged with first-degree
murder based on willful, deliberate, and premeditated killing. *Byford v.*
State, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000). Accordingly,
the jury instructions concerning first-degree murder were correct

1 statements of the law and, therefore, we determine that the district court
2 did not commit plain error in providing the jury with jury instruction nos. 22
through 26.

3 *Id.* at 9.

4 The first-degree murder instructions were duplicates of long-approved Nevada jury
5 instructions and correct statements of the law. Gallegos has failed to demonstrate that
6 the Nevada Supreme Court's decision on federal ground 1 was contrary to, or involved
7 an unreasonable application of, clearly established federal law, as determined by the
8 U.S. Supreme Court, or was based on an unreasonable determination of the facts in
9 light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).
10 Ground 1, therefore, is denied.

11 **Ground 4(a)**

12 Gallegos argues that his trial counsel was ineffective for failing to object to
13 prosecutorial misconduct during closing argument in violation of his Sixth Amendment
14 right to effective assistance of counsel (ECF No. 42, pp. 30-33). Ineffective assistance
15 of counsel (IAC) claims are governed by the two-part test announced in *Strickland v.*
16 *Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
17 petitioner claiming ineffective assistance of counsel has the burden of demonstrating
18 that (1) the attorney made errors so serious that he or she was not functioning as the
19 "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance
20 prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing *Strickland*, 466 U.S. at
21 687). To establish ineffectiveness, the defendant must show that counsel's
22 representation fell below an objective standard of reasonableness. *Id.* To establish
23 prejudice, the defendant must show that there is a reasonable probability that, but for
24 counsel's unprofessional errors, the result of the proceeding would have been different.
25 *Id.* A reasonable probability is "probability sufficient to undermine confidence in the
26 outcome." *Id.* Additionally, any review of the attorney's performance must be "highly
27 deferential" and must adopt counsel's perspective at the time of the challenged conduct,
28 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the

1 petitioner's burden to overcome the presumption that counsel's actions might be
2 considered sound trial strategy. *Id.*

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

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

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

27
28 Establishing that a state court's application of *Strickland* was
unreasonable under § 2254(d) is all the more difficult. The standards

1 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at
2 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), and
3 when the two apply in tandem, review is “doubly” so, *Knowles*, 556 U.S. at
4 ---, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the
5 range of reasonable applications is substantial. 556 U.S. at ---, 129 S.Ct.
6 at 1420. Federal habeas courts must guard against the danger of equating
unreasonableness under *Strickland* with unreasonableness under §
2254(d). When § 2254(d) applies, the question is whether there is any
reasonable argument that counsel satisfied *Strickland’s* deferential
standard.

7 *Harrington*, 562 U.S. at 105. “A court considering a claim of ineffective assistance
8 of counsel must apply a ‘strong presumption’ that counsel’s representation was within
9 the ‘wide range’ of reasonable professional assistance.” *Id.* at 104 (quoting *Strickland*,
10 466 U.S. at 689). “The question is whether an attorney’s representation amounted to
11 incompetence under prevailing professional norms, not whether it deviated from best
12 practices or most common custom.” *Id.* (internal quotations and citations omitted).

13 Here, Gallegos asserts that the prosecution made numerous false statements in
14 closing arguments and that his counsel failed to object. He alleges the following:

15 The prosecutor misstated the trial evidence by arguing that the final five words of
16 Gordon Stine were: “I ain’t got no dope. I don’t have any dope. And then he heard ‘Ow.’
17 And then he heard silence.” See exh. 27, p. 186. The witness who testified to hearing
18 these utterances was staying in the motel room across from Stine and had never met or
19 had a conversation with Stine. See exh. 19, p. 167. The witness stated that he could not
20 be sure it was Stine speaking.

21 The prosecutor represented this same witness’ testimony as describing the two
22 men who left the room as Hispanic-looking males, but the witness testified that the
23 males may have been Hispanic; he was not sure. See exh. 27, p. 186; exh. 19, pp. 163,
24 169.

25 The prosecutor maintained that Charles Hobbs testified that both Gallegos and
26 Barajas washed their hands and used bleach to clean the knife allegedly used in the
27 stabbing. See exh. 27, p. 187. But Hobbs’ testimony was that he placed the knife in his
28 sink. See exh. 19, pt. 2, pp. 94, 96, 97, 99. After placing the knife in the sink, Hobbs

1 washed his hands and cleaned the knife with bleach. Gallegos and Barajas washed
2 their hands approximately five minutes after Hobbs washed his hands. Hobbs saw
3 neither Barajas nor Gallegos use bleach on their hands.

4 The prosecution suggested Gallegos' pants were covered in blood when there
5 was only a small spot of blood on them. See exh. 27, p. 202 ("They're bloody denim
6 pants, and they have Gordon Stine on them because every drop of blood is Gordon
7 Stine, what's left of him."); accord *id.* at 209-210 ("[Gallegos] was wearing part of
8 Gordon Stine's life on his pants").

9 The prosecution argued in closing that Gallegos bragged to Taunya Owens
10 about stabbing Gordon Stine ("Stine") in the neck, inferring that he was bragging about
11 allegedly murdering Stine: "Taunya Owens testifies that the defendant tried to sell her
12 that scooter." Exh. 27, p. 189. "He said 'I have to do this because I stabbed someone in
13 the neck and the law will be looking for me.'" *Id.* The prosecutor stated that defense
14 counsel "asked her, 'Did you think he was bragging?' She said, 'I didn't know. He brags
15 a lot. He was calm when he said this.'" The prosecutor argued: "But we saw the
16 evidence in this case. You all saw it. And it wasn't a brag, it wasn't a boast. It was the
17 truth. And that's nothing to brag about." *Id.*

18 Finally, Gallegos argues that trial counsel failed to object to the prosecutor's use
19 of Gallegos' gang moniker "G" (short for Gangster) in his closing argument. See, e.g.,
20 exh. 27, p. 208 (That's G's World . . . He's a stand-up guy, that G.).

21 During the closing arguments for the defense, counsel stressed the uncertainty
22 and inconsistencies of witness testimony and identification and clarified that only a small
23 spot of blood was found on Gallegos' jeans. Exh. 27, p. 222-264.

24 Affirming the denial of Gallegos' state postconviction habeas corpus petition, the
25 Nevada Supreme Court adopted the state district court's findings regarding this claim:

- 26
27 (1) The prosecutor corrected his statement that a witness "said he
28 heard what he thought to be a door being kicked in" by further
remarking that "it was not a quiet entry." (2) The prosecutor merely

1 asked the jury to conclude that his interpretation of the evidence
2 was reasonable when he stated “I submit to you [that the witness
3 heard] some of the final words of [the victim]. “I ain’t got no dope. I
4 don’t have any dope.” And he heard “ow.” (3) Trial counsel
5 responded to the prosecutor’s statement about a witness’
6 description of the males as being Hispanic by exploiting the
7 uncertainty of the witness and the nature of the identification during
8 his closing argument. (4) The prosecutor’s characterization of
9 statements that Gallegos made to a witness as the truth, rather
10 than boasts, was permissible and there was no objection that trial
11 counsel could make. (5) The prosecutor’s statement that Gallegos
12 and Barajas “washed their hands and used bleach to take [the
13 victim’s] blood off the knife: reflected the prosecutor’s theory that
14 the two worked in concert and did not prejudice Gallegos. (6) Trial
15 counsel responded to the prosecutor’s statement that “They’re
16 bloody denim pants and they have [the victim’s] blood on them’ by
17 stressing that it was single drop of blood the size of a dime during
18 his closing argument. And (7) Gallegos failed to show that he was
19 prejudiced or that trial counsel’s performance fell below a
20 reasonable standard.

21 Exh. 8, p. 4. The Nevada Supreme Court concluded that substantial evidence
22 supported the state district court’s factual findings, that the findings were not clearly
23 wrong, and that Gallegos failed to demonstrate that the district court erred as a matter
24 of law. *Id.* Gallegos has failed to demonstrate that the Nevada Supreme Court’s
25 decision on federal ground 4(a) was contrary to or involved an unreasonable application
26 of *Strickland* or was based on an unreasonable determination of the facts in light of the
27 evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The court
28 denies federal habeas relief on ground 4(a).

Ground 2

Gallegos contends that the accumulation of errors and abuses of discretion during
his sentencing proceeding before the jury violated his Eighth Amendment right to be
free from cruel and unusual punishment and his Fourteenth Amendment due process
rights (ECF No. 42, pp. 21-28).

The Due Process Clause of the United States Constitution forbids a sentencing
authority from acting vindictively. *Cf North Carolina v. Pearce*, 395 U.S. 711, 725 12

1 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794, 799 (1989)
2 (explaining the Due Process Clause prohibits infliction of harsher punishment for
3 exercising constitutional right).

4 In December 2008, the state district court held a penalty-phase hearing in front of
5 the jury who convicted Gallegos. Exh. 32. At the outset of the hearing, outside the
6 presence of the jury, defense counsel objected that the State planned to introduce prior
7 criminal acts of Gallegos that dated back further than 10 years. Counsel argued that
8 charges or convictions from that long ago were not relevant. The State acknowledged
9 that they intended to have a detective from the Reno Police Department (RPD) Repeat
10 Offender Program (ROP) testify about police records dating back to 1982 involving
11 violent crimes by Gallegos. They argued that they wanted to demonstrate that each
12 time Gallegos has been released from prison he engaged in violent criminal activity
13 almost immediately. The court ruled that the criminal history was relevant: "If you're
14 talking about knives in the past, if you're talking about nail stabbing in the past, violence,
15 that type of thing, I'm going to let it in." *Id.* at 8.

16 ROP detective Reed Thomas testified that a person must have 4 felony convictions
17 to be considered for ROP monitoring. *Id.* at 14-40. He said that Gallegos had been a
18 ROP target since 2005 and has 5 prior felony convictions. The court overruled a
19 defense objection that Thomas should not be allowed to testify about a 1992 conviction
20 with which he was familiar only because he read the police report. Thomas then
21 described the incident: officers responded to a domestic dispute; Gallegos' girlfriend did
22 not want to talk to the police, but her mouth was bleeding, so officers took Gallegos into
23 custody. After Gallegos was removed from the scene, his girlfriend told police that
24 several days earlier Gallegos had stabbed her several times in the leg with an ice pick.
25 She showed officers injuries consistent with such a stabbing. Another person on the
26 scene had a puncture wound to his chest and two puncture wounds to his abdomen. He
27 told police that Gallegos and his girlfriend were arguing, the person attempted to
28

1 intervene when Gallegos began punching his girlfriend in the mouth, and Gallegos
2 picked up a nail off the floor and stabbed the person in the upper chest and lower
3 abdomen. Gallegos was arrested; he ultimately was convicted for stabbing the third
4 person, but the charges involving his girlfriend were dismissed.

5 Thomas testified that Gallegos had four other felony convictions: a 1982 burglary;
6 1983 battery with a deadly weapon; 1983 possession of stolen motor vehicle; and 1998
7 grand larceny. He also testified that Gallegos had three gross misdemeanor convictions:
8 1981 conspiracy to commit grand larceny; 2005 battery upon a police officer; and 2006
9 attempted possession of a stolen motor vehicle. For the two most recent gross
10 misdemeanors, Gallegos was sentenced to the maximum sentence of 12 months in jail.

11 Thomas estimated that out of 700 ROP targets, he would put Gallegos in the top
12 10% of the most violent.

13 Retired RPD detective Judy Holladay also testified that in 2005 she went to talk to
14 Gallegos as he was a crime suspect. *Id.* at 41-46. They spoke briefly and then she told
15 him he was under arrest. When she placed her hand on his arm to put him in handcuffs,
16 he started struggling with her and then punched her in the throat.

17 Barbara LePage, the victim's sister, testified. *Id.* at 47-57. In response to the
18 prosecutor's question, she stated that she believed a sentence of life without parole was
19 appropriate—that it was a just punishment and that it would get a violent criminal off the
20 streets. Another sister, Shari Vullo, also testified that she felt that Gallegos should never
21 be able to hold his family again. *Id.* at 62. The third sister Lori Stine read a statement
22 she had prepared. *Id.* at 65-70.

23 The Nevada Supreme Court considered whether it was an abuse of discretion to
24 admit Gallegos' criminal history and to allow certain victim impact testimony:

25
26 The sentencing hearing

27 Gallegos contends that the district court abused its discretion and violated
28 his due process rights when it admitted his criminal history and allowed
victim impact testimony during the sentencing hearing before the jury. We

1 address Gallegos's criminal history and then turn to the victim impact
2 testimony.

3 Standard of review

4 The district court's decision to admit particular evidence during the penalty
5 phase is within the sound discretion of the district court and "will not be
6 disturbed absent an abuse of [that] discretion." *Wesley v. State*, 112 Nev.
503, 519, 916 P.2d 793, 804 (1996).

7 Gallegos' criminal history

8 Gallegos asserts that the district court abused its discretion in admitting
9 evidence of Gallegos' prior felony and gross misdemeanor convictions
because they were unduly prejudicial.

10 Where a defendant is found guilty of first-degree murder, the district court
11 must conduct a separate penalty hearing. NRS 175.552(1). "During the
12 hearing, evidence may be presented concerning. . . any other matter
13 which the court deems relevant to the sentence, whether or not the
14 evidence is ordinarily admissible." NRS 175.552(3). Evidence of the
15 defendant's character and specific instances of conduct is admissible in
the penalty phase, but the evidence must be relevant and the danger of
unfair prejudice must not substantially outweigh its probative value.
Pellegrini v. State, 104 Nev. 625, 630-31, 764 P.2d 484, 488 (1988).

16 Consequently, "[o]ther criminal conduct may properly be considered at the
17 sentencing hearing, even though the defendant was never charged or
18 convicted of it." *Sheriff v. Morfin*, 107 Nev. 557, 560, 816 P.2d 453, 455
19 (1991). Consideration of a defendant's uncharged crimes and prior
20 criminal history "is solely for the purpose of gaining a fuller assessment of
the defendant's 'life, health, habits, conduct, and mental and moral
propensities.'" *Denson v. State*, 112 Nev. 489, 494, 915 P.2d 284, 287
(1996) (quoting *Williams v. New York*, 337 U.S. 241, 245 (1949)).

21 During the penalty phase, the State introduced certified judgments of
22 conviction for Gallegos' five prior felony convictions and three prior gross
23 misdemeanor convictions. The State elicited testimony from Detective
24 Reed Thomas concerning the facts surrounding Gallegos' 1992 conviction
25 for battery with a deadly weapon. Detective Thomas also testified that
26 Gallegos was a target of the Repeat Offender Program and one of the
worst offenders in the program. Finally, the State presented Officer Judy
Holladay's testimony regarding the facts surrounding Gallegos' 2005
conviction for battery on a police officer.

27 We determine that the evidence presented during the penalty hearing was
28 relevant, had a high probative value in showing Gallegos' propensity to
commit crime and acts of violence, and was not unduly prejudicial. It

1 demonstrated that Gallegos had a lengthy criminal history that began in
2 1981 and that, despite numerous convictions and incarcerations, he has
3 not been rehabilitated or deterred from criminal behavior. Further,
4 Detective Thomas' and Officer Holladay's testimony concerning Gallegos'
5 battery convictions showed that, over time, Gallegos has become more
6 violent and dangerous to society. Therefore, Gallegos' overall criminal
7 history and propensity for violence was relevant to the sentence and had a
8 high probative value in gaining a full assessment of Gallegos' 'life, health,
9 habits, conduct, and mental and moral propensities." *Id.* (quoting *Williams*
10 *v. New York*, 337 U.S. 241, 245 (1949)).

11 Accordingly, we conclude that the district court did not abuse its discretion
12 in admitting Detective Thomas' and Officer Holladay's testimony and
13 evidence of Gallegos' prior felony and gross misdemeanor convictions.

14 Victim impact testimony

15 Gallegos contends that the district court abused its discretion when it
16 allowed Stine's sisters to "recommend" a sentence to the jury. Specifically,
17 he argues that a victim may not express an opinion regarding a
18 defendant's sentence during a noncapital sentencing hearing before a
19 jury.

20 In Nevada, "before imposing sentence, the court shall afford the victim an
21 opportunity to . . . [r]easonably express any views concerning the crime,
22 the person responsible, the impact of the crime on the victim and the need
23 for restitution." NRS 176.015(3)(b).

24 In *Randell v. State*, 109 Nev. 5, 846 P.2d 278 (1993), we had the
25 opportunity to address the breadth of NRS 176.015 and the proper use of
26 victim impact testimony in noncapital cases. In *Randell*, the defendant was
27 convicted of first-degree murder. 109 Nev. at 6, 846 P.2d at 279. During
28 the sentencing hearing, the district court permitted a victim to express his
views as to the amount of prison time he felt the defendant should receive.
Id. The district court ultimately sentenced the defendant to a life term
without the possibility of parole. *Id.*

On appeal, the issue presented was whether the district court erred when
it allowed the victim to recommend a sentence for the defendant. *Id.* We
concluded that it was not. *Id.* at 7, 846 P.2d at 280. In reaching our
holding, we distinguished United States Supreme Court precedent
concerning the use of victim impact evidence on two grounds; namely,
that the United States Supreme Court's holdings were (1) expressly limited
to capital cases, and (2) involved jury sentencing determinations. *Id.* at 7-
8, 846 P.2d at 280. As part of the basis of our reasoning, we recognized
that a "district court is capable of listening to the victim's feelings without
being subjected to an overwhelming influence by the victim in making its
sentencing decision." *Randell*, 109 Nev. at 8, 846 P.2d at 280.

1 Accordingly, we held that NRS 176.015 was deemed broad enough to
2 encompass the victim's views about sentencing and that "[a] victim may
3 express an opinion regarding the defendant's sentence in a noncapital
4 case." *Id.* at 8, 846 P.2d at 280.

4 During the penalty hearing, the court allowed Stine's sisters to
5 "recommend" to the jury that Gallegos be sentenced to life in prison
6 without the possibility of parole. Although the sentencing body in *Randell*
7 was a judge and not a jury, as is the case here, we have repeatedly
8 reaffirmed *Randell* and conclude that its general holding applies here.
9 *E.g., Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001) ("A
10 victim can express an opinion regarding the defendant's sentence only in
11 noncapital cases."). Moreover, NRS 176.015 is broad and does not
12 differentiate between sentencing bodies, i.e. judges and juries; rather, it
13 plainly permits the victim to "[r]easonably express any views concerning .
14 . the person responsible." NRS 176.015(3)(b). Because *Randell* holds that
15 a victim may express an opinion regarding the defendant's sentence in a
16 noncapital case, and NRS 176.015 does not differentiate between
17 sentencing bodies, we determine that the district court did not abuse its
18 discretion when it allowed Stine's sisters to express an opinion regarding
19 Gallegos' sentence.

14 Exh. 4, pp. 13-17.

15 The criminal history and victim impact testimony introduced was all well within the
16 parameters of Nevada law. Thus, the court concludes that Garcia has failed to
17 demonstrate that the Nevada Supreme Court's decision on federal ground 2 was
18 contrary to, or involved an unreasonable application of, clearly established federal law,
19 as determined by the U.S. Supreme Court, or was based on an unreasonable
20 determination of the facts in light of the evidence presented in the state court
21 proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to ground 2.

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

23 V. **Certificate of Appealability**

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

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

9 Having reviewed its determinations and rulings in adjudicating Gallegos' petition, the
10 court finds that reasonable jurists would not find its determination of any grounds to be
11 debatable pursuant to *Slack*. The court therefore declines to issue a certificate of
12 appealability.

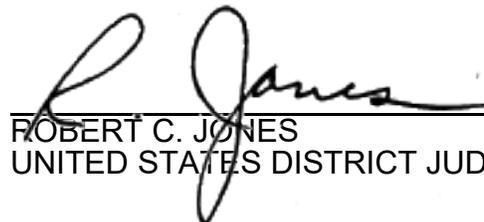
13 VI. **Conclusion**

14 **IT IS THEREFORE ORDERED** that the amended petition (ECF No. 42) is **DENIED**
15 in its entirety.

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

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

19
20 DATED: 7 day of September 2021.

21
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23 
24 ROBERT C. JONES
25 UNITED STATES DISTRICT JUDGE
26
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28