

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JACK J. BATTLE,

Case No. 3:16-cv-00242-MMD-WGC

v.

Petitioner.

## ORDER

WARDEN BYRNE, *et al.*,

## Respondents.

14 This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254  
15 comes before the Court for consideration of the remaining grounds of the petition on the  
16 merits. (ECF No. 1.) Respondents have answered (ECF No. 14), and petitioner has  
17 replied (ECF No. 15).

## I. BACKGROUND

19 On July 6, 2011, petitioner went to trial on one count of burglary and one count of  
20 robbery with use of a deadly weapon with assistance of a child for the theft of three  
21 items from a Toys 'R' Us store on the evening of February 1, 2011. (Exhs. 10 & 11.)<sup>1</sup>

22 At trial, store manager Wendy Martinez testified that on the night in question,  
23 petitioner came into the store by himself and headed into the electronics department.  
24 (Exh. 11 (Tr. 116-18).) A short time later, a group consisting of one adult woman and  
25 three or four younger girls ranging from 7 to 17 entered and walked into a different part  
26 of the store. (*Id.* at 122.)

<sup>27</sup> \_\_\_\_\_  
<sup>28</sup> <sup>1</sup>The exhibits cited in this order, which comprise the relevant state court record, are located at ECF Nos. 9-10.

1 Petitioner returned to the front of the store with two large items. (*Id.* at 123.)  
2 Martinez offered him a cart, which he accepted and began pushing toward the door. (*Id.*  
3 at 123-25.) Petitioner remained standing by the cart, near the door, which made  
4 Martinez suspicious. (*Id.* at 125-27.) After asking Martinez why she was looking at him,  
5 petitioner said, "I can take anything I fucking really want to." (*Id.* at 128-29.)

6 Petitioner went back into the store and returned with the woman and girls. (*Id.* at  
7 130-32.) The minors were carrying three items of store merchandise, and the group  
8 walked toward the entrance door. (*Id.* at 131-34.) The girls placed the items on a shelf.  
9 (*Id.* at 134-35.) As Martinez went to retrieve them, the girls grabbed the items back and  
10 said, "[w]e're going to go ahead and take this." (*Id.* at 135-36.) The group, including  
11 petitioner, then started walking toward the entrance door again. (*Id.* at 136.) Martinez,  
12 who was between the group and the exit door, told them they had to go out the exit and  
13 that she "would like to have [her] merchandise back if they were not going to pay for it."  
14 (*Id.*) As the group turned and walked toward the exit door, petitioner got in front,  
15 approached Martinez, and said, four times, "Don't touch my fucking girls." (*Id.* at 137-  
16 38.) As petitioner approached, Martinez observed something silver or gray in his hand,  
17 which she "had no doubt in [her] mind" was a knife. (*Id.* at 138-41.) The rest of the group  
18 passed around Martinez and petitioner and out the door, merchandise still in hand. (*Id.*  
19 at 141.)

20 Martinez followed the group as they left. (*Id.* at 141.) Petitioner told her, again, "I  
21 told you I could take whatever I fucking well wanted." (*Id.* at 142.) The woman and  
22 children got into a car and left. (*Id.* at 143-44.) As they did, petitioner walked back into  
23 the store and stood between Martinez and the window, apparently in an attempt to block  
24 Martinez from seeing their car. (*Id.* at 144.) Petitioner said a third time, "I told you I could  
25 take whatever I fucking well wanted to." (*Id.* at 145.)

26 On cross-examination, Martinez testified that she was not 100% sure petitioner  
27 had had a knife; on redirect she stated she was only 35% sure. (*Id.* at 172-78, 185.)

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1 Following this testimony, the State amended the information to remove the deadly  
2 weapon enhancement. (Exh. 14.)

3 Petitioner also took the stand. Before he did, a hearing took place in his presence  
4 about whether the State could ask him about an incident that occurred four days before  
5 the Toys 'R' Us incident in which petitioner and his children had stolen items from a K-  
6 Mart. (Exh. 12 (Tr. 20).) The court held that the State could not go into the incident  
7 unless the petitioner opened the door by talking about it. (*Id.* at 21.) The court  
8 admonished petitioner to listen closely to his attorney's questions because if he started  
9 talking about something he was not asked, he might open the door. (*Id.*)

10 On the stand, petitioner testified that he did not know his daughters were taking  
11 unpaid items out of the store and that he believed Martinez might put her hands on  
12 them. (*Id.* at 33-35.) He testified that after the confrontation with Martinez, he got into his  
13 car and sped home, where the girls had already arrived. (*Id.* at 38.) Counsel then asked  
14 petitioner, “[n]ow, when you arrived were the children — you said the children are  
15 already there. Were they — you said they were in the living room?” (Exh. 12 (Tr. 39).)  
16 Petitioner responded:

17 Yeah, my girlfriend made pozole, so everybody was making dinner for —  
18 bowls and they were all laughing and giggling and being kids. So I came  
19 through the door, first things first: what the hell's going on? are you guys  
20 idiots? I cursed at them, I did. And I was very upset, pissed off. Me and my  
21 oldest daughter, Raven, who was also with me at the Toys 'R' Us, I was  
22 mad at her. I was yelling at her to the top of my lungs. We got in a fight.  
23 'Cause nobody has anything dad. Nobody has anything dad. We didn't  
24 take nothing dad. Right. So I'm very, very, very, very mad. So I go  
upstairs. I go into my bedroom. I shut the door so I could take a time out  
for me because I know ***I've never had any problems with my kids***  
***doing anything like this of this nature.*** They're kids. And I said, you  
know what, that's it man, now I'm pissed off. So I went to the room I laid  
down.”

25 (*Id.*) (emphasis added).

26 Before cross-examination, the court conducted a bench conference in which the  
27 prosecutor argued that by claiming his children had never stolen anything, petitioner  
28 had opened the door to the K-Mart incident. (*Id.* at 49-50.) Defense counsel objected,  
arguing the evidence was not admissible because petitioner had not put his character at

1 issue and the incident reflected only on the children's characters. (*Id.* at 52-53.) The  
2 court deferred its ruling but it indicated it would probably come in as impeachment  
3 evidence, not character evidence. (*Id.* at 53-54.)

4 The prosecutor then began cross-examination, during which she asked the  
5 petitioner whether he had "ever been with [his] children walking down an aisle where  
6 they've stole something other than a grape." (*Id.* at 125.) Petitioner answered no. (*Id.*)  
7 The prosecutor again asked the court, during a bench conference, whether she could  
8 go into the K-Mart case. (*Id.* at 126.) Petitioner's counsel indicated that he had never  
9 seen the police report for the case.<sup>2</sup> (*Id.* at 126-27.) The court again deferred ruling so  
10 that defense counsel could look at the report. (*Id.* at 127-30.)

11 Following further cross-examination, the court held a hearing in petitioner's  
12 presence. (*Id.* at 135.) At the outset, the court advised petitioner not to interrupt. (*Id.*)  
13 Petitioner, nevertheless, interrupted several times. (*Id.* at 136, 138.) The court then  
14 ordered that he be removed from the courtroom for the duration of the hearing. (*Id.* at  
15 138-39.)

16 Before petitioner was removed, the prosecutor argued that, although the police  
17 report did not identify who was with petitioner during the K-Mart incident, evidence was  
18 introduced at his trial that the children were there and participated in the theft, and  
19 petitioner had moreover admitted their involvement in a statement to the police. The  
20 prosecutor made her offer of proof based on representations by the district attorney who  
21 had prosecuted the K-Mart case. (*Id.* at 137.) Petitioner, as he was being removed,  
22 interjected several times that the children were not involved. (*Id.* at 138-39.)

23 Petitioner's counsel argued that the only evidence of the incident was the police  
24 report and that the report did not identify who was with petitioner. (*Id.* at 140.)

25 The trial court held that the district attorney's representations were sufficient and  
26 concluded that the State could ask petitioner about the incident insofar as it involved

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28 <sup>2</sup>The prosecutor indicated she had not disclosed the report earlier because it was  
admissible only as impeachment evidence and she did not know petitioner was going to  
testify. (Exh. 12 (Tr. 126-27).)

1 use of his children during a theft and threats petitioner made to K-Mart employees that  
2 they could not stop him from taking anything. (*Id.* at 140-47.) The court barred  
3 presentation of any extrinsic evidence about the incident or questions regarding the use  
4 of a knife during it. (*Id.* at 142-47.)

5 Petitioner was brought back into the courtroom, and the court admonished him  
6 about his conduct. As the court did, petitioner continued to interrupt. (See *id.* at 148-53.)  
7 The jury was then brought back in and instructed that the evidence it was about to hear  
8 could be considered only insofar as it bore on petitioner's credibility. (*Id.* at 154.)

9 The prosecutor asked petitioner whether he recalled being at K-Mart when one of  
10 his children, in his presence, took a bottle of perfume and he took a bottle of cologne  
11 and a jug of milk. (*Id.* at 155.) Petitioner said no, that he took the milk and the cologne,  
12 his kids weren't involved but that he did steal the jug of milk in front of one of the  
13 children, "which was not appropriate." (*Id.* at 155-56.) When the prosecutor began to  
14 ask, "isn't it true that when employees confronted you and tried to stop you, that you told  
15 them that you would take — that," petitioner interrupted, stating, "Oh there was a knife  
16 involved in that one." (*Id.* at 156.) Petitioner made several more comments about the  
17 knife, despite there being no questions about it and despite counsel trying to stop him.  
18 (*Id.* at 156-58). The court immediately struck everything petitioner said — including his  
19 several knife comments — as nonresponsive. (*Id.* at 156-58.)

20 Following the three-day trial, petitioner was acquitted of burglary but convicted of  
21 robbery with use of a child. (Exh. 15.) The state court sentenced petitioner to a term of  
22 five to fifteen years on the robbery charge and a consecutive term of two to five years  
23 on the use-of-child enhancement. (Exh. 19.)

24 Petitioner appealed. (ECF No. 20 & 21.) The Nevada Supreme Court affirmed.  
25 (ECF No. 23.) Thereafter, petitioner filed a state postconviction petition for habeas  
26 corpus relief. (ECF No. 25.) After the trial court denied the petition, the Nevada  
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1 Supreme Court reversed and remanded for appointment of counsel.<sup>3</sup> (Exh. 33.) After  
2 counsel was appointed and filed a supplemental memorandum in support of the petition  
3 (Exhs. 34 & 36), the trial court again denied the petition (Exh. 39). On appeal, the  
4 Nevada Court of Appeals affirmed. (Exh. 43.)

5 Petitioner filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254  
6 in May 2016. The petition asserted three grounds for relief. After respondents moved to  
7 dismiss Grounds 1(b), 2(b), 2(c) and 2(d) as unexhausted (ECF No. 9), petitioner filed a  
8 notice electing to “withdraw unexhausted grounds 1(b) and (2) . . . and . . . sole[ly]  
9 proceed on exhausted Ground 1(a),” (ECF No. 11). The Court entered an order  
10 dismissing Ground 1(b) and Ground 2, after inferring that petitioner also wanted to  
11 proceed on exhausted Ground 3 in addition to Ground 1(a). (ECF No. 13.) Respondents  
12 thereafter answered the petition, and petitioner replied.

13 As a preliminary matter, the Court concludes that Ground 2 was improperly  
14 dismissed in its entirety. Petitioner exhausted Ground 2(a) in state court. He moved to  
15 withdraw “unexhausted ground[] . . . 2.” Liberally construing the petitioner’s filing, the  
16 Court concludes that his intent was to withdraw only the unexhausted portions of  
17 Ground 2 — Grounds 2(b), 2(c) and 2(d). Accordingly, the Court hereby reinstates  
18 Ground 2(a) and will consider that claim on the merits with the other surviving claims of  
19 the petition.<sup>4</sup>

20 **II. STANDARD**

21 28 U.S.C. § 2254(d) provides the legal standards for this court’s consideration of  
22 the merits of the petition in this case:

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23 <sup>3</sup>The Court notes that while the Nevada Supreme Court concluded appointment  
24 of counsel was necessary in light of petitioner’s allegations of mental health issues, the  
25 trial court and the Nevada Court of Appeals later found that, even with assistance of  
counsel, petitioner had failed to substantiate his claim that he had mental health issues.  
(Exhs. 33, 39 & 43.)

26 <sup>4</sup>The Court does so without seeking an answer from respondents, particularly as  
27 Ground 2(a) is essentially covered in Ground 1. Petitioner has filed repeated motions to  
expedite in this case, indicating that he would not be in favor of further delay. The Court  
28 concludes that it does not require an answer to Ground 2(a) in order to evaluate its  
merits.

1 An application for a writ of habeas corpus on behalf of a person in custody  
2 pursuant to the judgment of a State court shall not be granted with respect  
3 to any claim that was adjudicated on the merits in State court proceedings  
4 unless the adjudication of the claim –  
5

6 (1) resulted in a decision that was contrary to, or involved an  
7 unreasonable application of, clearly established Federal law, as  
8 determined by the Supreme Court of the United States; or  
9 (2) resulted in a decision that was based on an unreasonable  
10 determination of the facts in light of the evidence presented in the  
11 State court proceeding.

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

24 A state court decision is contrary to clearly established Supreme Court  
25 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that  
26 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state  
27 court confronts a set of facts that are materially indistinguishable from a decision of [the  
28 Supreme Court] and nevertheless arrives at a result different from [the Supreme  
Court’s] precedent.” *Andrade*, 538 U.S. 63 (quoting *Williams v. Taylor*, 529 U.S. 362,  
405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

29 A state court decision is an unreasonable application of clearly established  
30 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court  
31

1 identifies the correct governing legal principle from [the Supreme Court's] decisions but  
2 unreasonably applies that principle to the facts of the prisoner's case." *Andrade*, 538  
3 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause  
4 requires the state court decision to be more than incorrect or erroneous; the state  
5 court's application of clearly established law must be objectively unreasonable. *Id.*  
6 (quoting *Williams*, 529 U.S. at 409).

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

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

20 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at  
21 972.

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

26 As the state courts reached the merits of petitioner's claims, their decisions are  
27 entitled to deference under AEDPA and may not be disturbed unless they were ones  
28 "with which no fairminded jurist could agree." *Davis v. Ayala*, -- U.S. --, 135 S. Ct. 2187,  
2208 (2015).

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1           **III. DISCUSSION**

2           **1. Ground 1(a)**

3           In Ground 1(a), petitioner asserts that his rights to due process, a fair trial and  
4 effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments was  
5 violated by cumulative error. (ECF No. 1 at 3.) The only cumulative error claim  
6 exhausted in state court was a claim based on the cumulative error of counsel. (ECF  
7 No. 13 at 1.) Thus, that is the only claim remaining to be considered on the merits.<sup>5</sup>

8           Ineffective assistance of counsel claims are governed by the two-part test  
9 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the  
10 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the  
11 burden of demonstrating that (1) the attorney made errors so serious that he or she was  
12 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the  
13 deficient performance prejudiced the defense. *Williams v. Taylor*, 529 U.S. 362, 390-91  
14 (2000) (citing *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant  
15 must show that counsel’s representation fell below an objective standard of  
16 reasonableness. *Id.* To establish prejudice, the defendant must show that there is a  
17 reasonable probability that, but for counsel’s unprofessional errors, the result of the  
18 proceeding would have been different. *Id.* A reasonable probability is “probability  
19 sufficient to undermine confidence in the outcome.” *Id.* Additionally, any review of the  
20 attorney’s performance must be “highly deferential” and must adopt counsel’s  
21 perspective at the time of the challenged conduct, in order to avoid the distorting effects  
22 of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner’s burden to overcome the  
23 presumption that counsel’s actions might be considered sound trial strategy. *Id.*

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26           <sup>5</sup>The Court notes that Ground 1(a) can be read to assert a general cumulative  
27 error claim and that the Court did not explicitly dismiss that portion of Ground 1(a) in its  
28 order on the respondents’ motion to dismiss. However, the claim is unexhausted and  
petitioner’s notice clearly reflected a desire to proceed only on his exhausted claims.  
(ECF No. 11.) Thus, any general claim of cumulative error contained in Ground 1(a) has  
been effectively withdrawn.

1        Ineffective assistance of counsel under Strickland requires a showing of deficient  
2 performance of counsel resulting in prejudice, “with performance being measured  
3 against an objective standard of reasonableness, . . . under prevailing professional  
4 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations  
5 omitted).

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

11       The United States Supreme Court has described federal review of a state  
12 supreme court’s decision on a claim of ineffective assistance of counsel as “doubly  
13 deferential.” *Cullen*, 563 U.S. at 189. The Supreme Court emphasized that: “We take a  
14 ‘highly deferential’ look at counsel’s performance . . . through the ‘deferential lens of §  
15 2254(d).’” *Id.* at 190 (internal citations omitted). Moreover, federal habeas review of an  
16 ineffective assistance of counsel claim is limited to the record before the state court that  
17 adjudicated the claim on the merits. *Id.* at 181-89. The United States Supreme Court  
18 has specifically reaffirmed the extensive deference owed to a state court’s decision  
19 regarding claims of ineffective assistance of counsel:

20       Establishing that a state court’s application of *Strickland* was  
21 unreasonable under § 2254(d) is all the more difficult. The standards  
22 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at  
23 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.  
24 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review  
25 is “doubly” so, *Knowles*, 556 U.S. at \_\_\_, 129 S.Ct. at 1420. The  
26 *Strickland* standard is a general one, so the range of reasonable  
applications is substantial. 556 U.S. at \_\_\_, 129 S.Ct. at 1420. Federal  
habeas courts must guard against the danger of equating  
unreasonableness under *Strickland* with unreasonableness under §  
2254(d). When § 2254(d) applies, the question is whether there is any  
reasonable argument that counsel satisfied *Strickland*’s deferential  
standard.

27       *Harrington*, 562 U.S. at 105. “A court considering a claim of ineffective assistance of  
28 counsel must apply a ‘strong presumption’ that counsel’s representation was within the

1 ‘wide range’ of reasonable professional assistance.” *Id.* at 104 (quoting *Strickland*, 466  
2 U.S. at 689). “The question is whether an attorney’s representation amounted to  
3 incompetence under prevailing professional norms, not whether it deviated from best  
4 practices or most common custom.” *Id.* at 105 (internal quotations and citations  
5 omitted).

6 As respondents point out, the petition itself does not identify the alleged errors  
7 comprising petitioner’s cumulative error claim. In his state post-conviction petition and  
8 appeal, petitioner argued that: (1) trial counsel was ineffective for failing to have a  
9 competency evaluation performed on him; (2) trial counsel failed to consult with  
10 petitioner’s counsel in the K-Mart case and review Martinez’s testimony at a *Petrocelli*  
11 hearing therein in order to effectively cross examine her; (3) trial counsel’s failure to  
12 investigate the K-Mart case also prevented him from effectively advising petitioner with  
13 respect to his decision to testify, including explaining what facts or statements might  
14 open the door to questions about the K-Mart incident; (4) trial counsel failed to explain  
15 the scope of the State’s impeachment involving the K-Mart case; and (5) appellate  
16 counsel failed to file a petition for rehearing.

17 The Nevada Court of Appeals upheld the rejection of petitioner’s cumulative error  
18 claim on the grounds that he had not demonstrated counsel’s performance was  
19 deficient in any respect. (Exh. 43 at 4.)<sup>6</sup> The Nevada Court of Appeals upheld each of  
20 the trial court’s decisions on the ineffective assistance claims as “supported by  
21 substantial evidence and . . . not clearly wrong,” noting further that petitioner “failed to  
22 demonstrate he was prejudiced by counsel’s representation.” (*Id.*)

23 Petitioner’s first claim was that counsel was ineffective for failing to have a  
24 competency evaluation performed on him. The Nevada Court of Appeals essentially  
25 adopted the trial court’s findings as to this claim, accurately summarizing them as  
26 follows:

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27  
28 <sup>6</sup>Citation is to the page of the original document.

1 Battle's competency claim was a bare allegation which was insufficient to  
2 prove counsel's ineffectiveness. The only evidence he presented of his  
3 alleged incompetence were statements he pulled from the record and  
4 presented out of context. Battle's direct-examination was coherent and his  
5 few nonresponsive answers appear to have been given for strategic  
6 reasons. Battle's cross-examination testimony was combative,  
manipulative, and difficult, but this behavior did not provide a basis for  
determining he was legally incompetent to stand trial. Furthermore, Battle  
made no showing that a competency evaluation would have revealed he  
was incompetent to stand trial or would have provided evidence helpful in  
mitigating his sentence.

(Exh. 43 at 2; see also Exh. 39 at 4-5.) The state courts' rejection of this claim was not objectively unreasonable. Even with counsel representing him in his state postconviction proceedings, petitioner proffered no evidence that he was incompetent to stand trial or that he had any mental health issues at all. He therefore established neither deficient performance nor prejudice with respect to this claim.

12 Petitioner's second claim was that counsel was ineffective for failing to review  
13 Martinez's prior testimony. The Nevada Court of Appeals adopted the trial court's  
14 findings, which it accurately summarized as follows:

15 The district court found Battle failed to allege specific facts as to what  
16 value Martinez's *Petrocelli* hearing testimony may have had and how it  
17 would have impacted the outcome of the trial. Counsel's cross-  
18 examination of Martinez without using her *Petrocelli* testimony was so  
19 effective that the State dropped the deadly weapon enhancement. And  
counsel would have been remiss in cross-examining Martinez about her  
*Petrocelli* hearing testimony because the examination would have opened  
the door to the admission of damaging evidence. Accordingly, Battle failed  
to demonstrate prejudice in this regard.

20 (Exh. 43 at 2-3; see also Exh. 39 at 5-6.) The state courts' rejection of this claim was not  
21 objectively unreasonable. Petitioner has not established that any of Martinez's prior  
22 testimony would have been helpful to his case, and it was reasonable for counsel to  
23 avoid using it at trial because doing so could have opened the door to questions about  
24 the case in which the testimony was provided — the K-Mart case. Petitioner has  
25 therefore failed to establish deficient performance or prejudice with respect to this claim.

26 Petitioner's third claim was that trial counsel failed to investigate the K-Mart case,  
27 which prevented him from effectively advising petitioner with respect to his decision to

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1 testify, including explaining what facts or statements might open the door to questions  
2 about the incident. The trial court's findings rejecting this claim were as follows:<sup>7</sup>

3 Battle contends that his trial counsel failed to adequately prepare and  
4 investigate because he did not review the police report and declaration of  
5 arrest from C271504. This Court finds that Battle cannot establish that  
6 counsel acted unreasonably or that he was prejudiced. Moreover, Battle  
7 does not allege any specific facts regarding prejudice to his case.  
8 Although counsel may not have seen the report prior to Battle's testimony,  
9 counsel did review the report prior to this Court allowing any questions  
10 regarding the other case. Once counsel had time to review the police  
11 report, this Court held a hearing on the admission of the evidence outside  
12 the presence of the jury.

13 The Court finds that counsel made a cogent argument that the evidence  
14 the State sought to admit was improper character evidence because his  
15 comments addressed only the character of his daughters, not of his own  
16 actions; that it was overly prejudicial; and that the lack of specifics  
17 regarding the parties involved in the other incident in the report indicated  
18 that it was not sufficient to support the State's position. This Court ruled  
19 that it was impeachment evidence and was admissible only because  
20 Battle opened the door by testifying that his children had "never" done  
21 anything of this nature and that he had never been with his children when  
22 they had stolen anything more than a grape. Battle is the one who opened  
23 the door for the admission of the evidence, despite repeated warnings not  
24 to do so. Moreover, this Court finds that Battle was well aware of the  
25 possibility of being impeached with the facts of his 'other case.' Battle was  
26 warned on the record that his testimony could open the door to  
27 impeachment, and he was specifically warned by this Court before he  
28 testified that evidence regarding the other case would be inadmissible  
unless he opened the door. Accordingly, this Court finds that Battle cannot  
establish prejudice because it was his own actions, not the actions of  
counsel, which opened the door to impeachment evidence admitted over  
counsel's cogent objection. Moreover, this Court finds that Battle has not  
established that, had counsel viewed the police report prior to trial, the  
outcome of the trial would have been different. As such, Battle's claim fails  
because he has failed to establish the prejudice prong under *Strickland*.

21 (Exh. 39 at 6-7.) The state courts' rejection of this claim was not objectively  
22 unreasonable.

23 Petitioner himself opened the door by testifying that his children had never stolen  
24 anything before, spontaneously and not in response to any question of his counsel, after  
25 being advised not to talk about the K-Mart incident and to answer only his counsel's

26 <sup>7</sup>While it generally upheld rejection of petitioner's failure to investigate claim, the  
27 Nevada Court of Appeals did not specifically discuss petitioner's assertion that the  
28 failure prevented his attorney from adequately counseling him regarding his decision to  
testify. The trial court's opinion is therefore the last reasoned state court decision on this  
claim.

1 questions.<sup>8</sup> Given petitioner's clear penchant during trial to answer questions that were  
2 not asked, there is no reasonable probability that even if counsel had advised petitioner  
3 to avoid making such claims that petitioner would have heeded his advice. Further,  
4 counsel made the best arguments he could make to avoid admission of the evidence,  
5 and petitioner has not shown that the arguments would have been more effective had  
6 counsel known more about the K-Mart case. Moreover, even assuming counsel's  
7 performance was deficient and that he could have prevented petitioner from opening the  
8 door had he investigated the case, the Court is not persuaded that the outcome of the  
9 trial would have been any different had that evidence not come in. The State was not  
10 allowed to present extrinsic evidence about the K-Mart incident, and petitioner denied  
11 on the stand that the children were involved. If the jury otherwise found petitioner  
12 credible, it is reasonably likely they would have believed his denial, as well. As is clear,  
13 the jury found Martinez's testimony credible. And Martinez testified that petitioner  
14 repeatedly told her he could take anything he wanted as his children walked out of the  
15 store with unpaid merchandise. Her testimony alone was sufficient to support the  
16 conviction in this case. Accordingly, petitioner cannot establish prejudice from counsel's  
17 failure to investigate.

18 Petitioner's fourth claim was that counsel was ineffective for failing to explain to  
19 him the scope of the impeachment questions the court authorized the prosecutor to ask.  
20 The Nevada Court of Appeals accurately summarized the trial court's decision on this  
21 claim as follows:

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23 <sup>8</sup>In his reply, petitioner maintains that his children were *not* involved in the K-Mart  
24 incident. (ECF No. 15 at 2.) This assertion was never presented to the Nevada  
25 Supreme Court, (see Exh. 41), and thus is neither exhausted nor incorporated by  
26 reference in the petition. The Court will not consider claims raised for the first time in  
27 reply, *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not  
28 consider arguments raised for the first time in a reply brief."), and cannot at any rate  
decide this unexhausted claim. Nevertheless, the Court notes that if it is true that his  
children were not involved, he cannot establish ineffective assistance of counsel. If  
there were no indication petitioner's children were involved in the K-Mart theft, counsel  
would have had no reason to believe that petitioner could open the door to the incident  
by claiming his children had never stolen anything. Thus, petitioner would not be able to  
establish either deficient performance or prejudice.

1       The district court found Battle was removed from the courtroom during the  
2       hearing on the impeachment evidence because he refused to stop  
3       interrupting the hearing despite numerous warnings. Even if counsel had  
4       requested time to discuss the impeachment questions with Battle, the  
5       district court would not have granted the request because Battle had been  
6       repeatedly admonished to answer only the questions asked, not to  
7       interrupt, and he would not be granted a mistrial. And Battle cannot  
8       demonstrate prejudice because his testimony regarding the knife was  
9       stricken, the jury had previously received a limiting instruction, and the  
10       deadly weapon enhancement had already been dropped.

11       (Exh. 43 at 3; *see also* Exh. 39 at 7-8.)

12       The state courts' rejection of this claim was not objectively unreasonable. By the  
13       time the hearing in which the scope of impeachment was discussed was taking place,  
14       petitioner had already opened the door to the evidence. Thus, the only potential harm  
15       that occurred due to petitioner's ignorance of the scope of impeachment was that he —  
16       again repeatedly — mentioned that a knife was involved in the K-Mart incident. The  
17       Court would point out that petitioner's comments were unsolicited and repeated despite  
18       attempts of the court and counsel to reign him in. Moreover, the comments were  
19       stricken and the jury had been instructed to consider the incident only as it pertained to  
20       petitioner's credibility; petitioner's use of a knife was irrelevant to his credibility. Finally,  
21       petitioner's removal from the courtroom during the impeachment discussion was a result  
22       of his own actions, and the trial court indicated that given his behavior any request from  
23       counsel to confer with petitioner would have been denied. Having reviewed the trial  
24       record, this Court is persuaded that this is not an unreasonable determination of the  
25       facts. Accordingly, petitioner has established neither deficient performance nor  
26       prejudice with respect to this claim.

27       Finally, petitioner asserts that appellate counsel was ineffective for failing to file a  
28       petition for rehearing. The Nevada Court of Appeals accurately summarized the trial  
29       court's finding with respect to this claim as follows:

30       The district court found Battle failed to explain what facts the Nevada  
31       Supreme Court mistakenly relied upon or what law the Nevada Supreme  
32       Court misapprehend [sic]. Instead, Battle merely summarized the contents  
33       of his argument on appeal and the Nevada Supreme Court's decision  
34       regarding his argument. Accordingly, Battle failed to establish counsel's

1        performance was deficient or prejudice arising from counsel's  
2        performance.

3        (Exh. 43 at 3-4; *see also* Exh. 39 at 8-9.) The state courts' rejection of this claim was not  
4        objectively unreasonable. On direct appeal, petitioner had argued that the use of a child  
5        enhancement requires that the children assist the adult with the *adult's* criminal scheme,  
6        not the other way around, and that the trial court had erred in rejecting an instruction to  
7        this effect — his theory of the case instruction. (Exh. 21 at 8-18.)<sup>9</sup> In his postconviction  
8        petition, petitioner argued that the Nevada Supreme Court had misapprehended this  
9        argument as a sufficiency of the evidence argument. (Exh. 41.)

10       Petitioner cannot show deficient performance or prejudice. The Nevada Supreme  
11       Court addressed the petitioner's claim, holding that the petitioner's proposed instruction  
12       on his "theory of the case" "contained incorrect statements of the law." (Exh. 43 at 3.)<sup>10</sup>  
13       It was therefore not deficient for counsel to fail to file a petition for rehearing nor, for the  
14       same reason, did such failure prejudice petitioner.

15       For all the above reasons, the state courts' decision to reject petitioner's  
16       cumulative error claim based on counsel's conduct was not objectively unreasonable.  
17       Petitioner failed to show any deficient performance. But even if some or all of the above  
18       alleged errors constituted deficient performance, petitioner cannot, in light of all the  
19       evidence presented at trial, establish that they caused him prejudice in the cumulative.  
20       Petitioner is not therefore entitled to relief on Ground 1(a).

21       **2.       Ground 2(a)**

22       Ground 2(a) asserts that petitioner's counsel was ineffective for failing to obtain a  
23       competency evaluation of plaintiff. As discussed above, the Nevada Court of Appeals  
24       affirmed the rejection of this claim on the grounds that it was a bare allegation  
25       unsupported by any evidence that petitioner was incompetent to stand trial, and the  
26       ///

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27       <sup>9</sup>Citation is to page in the original document.

28       <sup>10</sup>*Id.*

1 Court does not find this determination objectively unreasonable. (Exh. 43 at 2.)  
2 Petitioner is not therefore entitled to relief under Ground 2(a).

3 **3. Ground 3**

4 In Ground 3, petitioner asserts that the trial court failed to properly instruct the  
5 jury on *actus reus* and *mens rea* requirement of the crime of robbery with the assistance  
6 of a child and improperly denied petitioner's proposed theory of case instructions,  
7 violating his Fifth, Sixth and Fourteenth Amendment rights to adequate jury instructions.  
8 (ECF No. 1 at 7.) This claim is related to the ineffective assistance of appellate counsel  
9 claim discussed above. The Nevada Supreme Court rejected this claim as follows:

10 In support of his argument that the jury was not properly instructed, Battle  
11 claims that a conviction for robbery with the assistance of a child requires  
12 proof of specific intent. We disagree. "This court reviews a district court's  
13 decision to issue or not issue a particular jury instruction for an abuse of  
14 discretion." Here, Battle's proposed instructions contained incorrect  
15 statements of the law. Additionally, robbery is a general intent crime, and  
16 NRS 193.162 does not require proof of a specific intent. And although the  
17 jury was not provided with a definition of "with the assistance of a child,"  
18 we conclude that the phrase does not have a technical legal meaning and  
19 the words were used in their commonly understood, ordinary sense  
20 requiring no further explanation. Therefore, we conclude that the district  
21 court did not abuse its discretion in the settling of jury instructions.

22 (Exh. 23 at 3-4 (internal citations omitted).) The state courts' decision was not contrary  
23 to, or an unreasonable application of, clearly established federal law.

24 As an initial matter, errors of state law are not cognizable on federal habeas  
25 review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Thus, petitioner cannot challenge  
26 the Nevada Supreme Court's holdings that robbery is a general intent crime and that  
27 "assistance of a child" does not require a technical legal definition, or its implicit  
28 rejection of petitioner's claim that the assistance of a child enhancement applies only  
when a child helps an adult commit the adult's crime.

29 To obtain federal habeas relief based on an improper jury instruction, petitioner  
30 must establish that the instruction so infected the entire trial that the resulting conviction  
31 violates due process. *Masoner v. Thurman*, 996 F.2d 1003, 1006 (9th Cir.1993); *Estelle*  
32 *v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The

1 question is whether the instructional “error, in the whole context of the particular case,  
2 had a substantial and injurious effect on the jury’s verdict.” *Calderon v. Coleman*, 525  
3 US. 141, 147 (1998). Where a petitioner alleges that the trial court refused to give an  
4 instruction, his burden is “especially heavy”; “[a]n omission, or an incomplete instruction,  
5 is less likely to be prejudicial than a misstatement of the law.” *Henderson*, 431 U.S. at  
6 155. In reviewing jury instructions, the court inquires as to whether the instructions as a  
7 whole were misleading or inadequate to guide the jury’s deliberation. *United States v.*  
8 *Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir. 2003) (citing *United States v. Frega*, 179  
9 F.3d 793, 806 n. 16 (9th Cir.1999) (internal citations omitted). “[A] single instruction to a  
10 jury may not be judged in artificial isolation, but must be viewed in the context of the  
11 overall charge.” *Boyde v. California*, 494 U.S. 370, 378 (1990). “[N]ot every ambiguity,  
12 inconsistency, or deficiency in a jury instruction rises to the level of a due process  
13 violation.” *Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

14 Petitioner has not established that the court’s failure to give instructions on the  
15 *actus reus* and *mens rea* of robbery “with the assistance of a child” rendered his trial  
16 fundamentally unfair, particularly as his proposed instructions misstated state law.  
17 Accordingly, petitioner is not entitled to relief on Ground 3.

18 As a final matter, the Court notes that petitioner’s reply contains several  
19 arguments or claims that were either withdrawn after the Court found them unexhausted  
20 or do not appear in the petition at all, including sufficiency of the evidence, due process  
21 and fair trial based on petitioner’s being restrained to the witness chair, due process and  
22 fair trial based on bias of the presiding trial court judge, ineffective assistance of counsel  
23 claims based on the failure to investigate, interview witnesses or prepare a defense,  
24 overall cumulative error, and due process and fair trial based on the state court’s  
25 admission of the K-Mart incident without sufficient proof. (See ECF No. 15 at 1, 5-9.)  
26 Again, the Court will not consider any claims that have been withdrawn or that were  
27 raised for the first time in reply. *Zamani*, 491 F.3d at 997.

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1           **IV. CERTIFICATE OF APPEALABILITY**

2           In order to proceed with an appeal, petitioner must receive a certificate of  
3 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*  
4 *Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236  
5 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial  
6 showing of the denial of a constitutional right” to warrant a certificate of appealability.  
7 *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The  
8 petitioner must demonstrate that reasonable jurists would find the district court’s  
9 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529  
10 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of  
11 demonstrating that the issues are debatable among jurists of reason; that a court could  
12 resolve the issues differently; or that the questions are adequate to deserve  
13 encouragement to proceed further. *Id.*

14           The Court has considered the issues raised by petitioner, with respect to whether  
15 they satisfy the standard for issuance of a certificate of appealability, and determines  
16 that none meet that standard. The Court will therefore deny petitioner a certificate of  
17 appealability.

18           **V. CONCLUSION**

19           In accordance with the foregoing, it is hereby ordered that the petition for writ of  
20 habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied on its merits, and  
21 this action is therefore dismissed with prejudice.

22           It is further ordered that petitioner’s latest motion to expedite (ECF No. 23), filed  
23 on March 30, 2018, is denied as moot.

24           It is further ordered that the Court denies petitioner a certificate of appealability,  
25 as reasonable jurists would not find the Court’s decision to be debateable or wrong, for  
26 the reasons discussed herein.

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1        It is further ordered that the Clerk of Court enter final judgment accordingly and  
2 close this case.

3        DATED THIS 10<sup>th</sup> day of April 2018.



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5        MIRANDA M. DU  
6        UNITED STATES DISTRICT JUDGE  
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