

1

2

## UNITED STATES DISTRICT COURT

3

## DISTRICT OF NEVADA

4

\* \* \*

5

VALLIER WILLIAM TOMPKINS,

Case No. 3:16-cv-00444-MMD-WGC

6

Petitioner,

ORDER

7

v.

8

WARDEN BACA, et al.,

9

Respondents.

10

11 **I. INTRODUCTION**

12 This habeas corpus action, brought by Petitioner Vallier William Tompkins, is  
13 before the Court for resolution of the claims remaining in Tompkins's second amended  
14 habeas petition. The Court will deny Tompkins's habeas petition, will deny him a  
15 certificate of appealability, and will direct the Clerk of the Court to enter judgment  
16 accordingly.

17 **II. BACKGROUND**

18 On July 3, 2012, Tompkins was charged by complaint in a Reno justice court with  
19 three counts of sexual assault, one count of battery with intent to commit sexual assault,  
20 and one count of burglary. (Criminal Complaint, Ex. 15 (ECF No. 22-15).) The justice  
21 court ordered a competency evaluation. (Order for Competency Evaluations, Ex. 16 (ECF  
22 No. 22-16).) Two competency evaluation reports concluded that Tompkins was  
23 competent to stand trial, and the state district court made a finding to that effect.  
24 (Competency Evaluation, Ex. 17 (ECF No. 22-17); Competency Evaluation, Ex. 19 (ECF  
25 No. 22-19); Order of Competency and Returning Matter to Justice Court, Ex. 21 (ECF No.  
26 22-21).) Tompkins waived the preliminary hearing. (Waiver of Preliminary Examination,  
27 Ex. 24 (ECF No. 22-24).) On September 13, 2012, the State charged Tompkins by  
28 information with three counts of sexual assault. (Information, Ex. 23 (ECF No. 22-23).)

1 Tompkins was arraigned on September 20, 2012, and he pled guilty to each of the three  
2 sexual assault charges. (Transcript of Arraignment, Ex. 25 (ECF No. 22-25); see also  
3 Guilty Plea Memorandum, Ex. 26 (ECF No. 22-26).) On October 25, 2012, the court  
4 sentenced Tompkins to three consecutive terms of ten years to life in prison (with the first  
5 term running concurrent with a sentence imposed in a separate case). (Transcript of  
6 Sentencing, Ex. 30 (ECF No. 23-4).) The judgment of conviction was filed on October 30,  
7 2012. (Judgment, Ex. 31 (ECF No. 23-5).) Tompkins did not appeal from the judgment of  
8 conviction.

9 On July 11, 2013, Tompkins filed a petition for writ of habeas corpus in the state  
10 district court. (Petition for Writ of Habeas Corpus, Ex. 39 (ECF No. 23-13).) The court  
11 appointed counsel for Tompkins. (See Order Granting in Forma Pauperis and  
12 Appointment of Counsel, Ex. 41 (ECF No. 23-15); Recommendation and Order for  
13 Appointment of Counsel, Ex. 42 (ECF No. 23-16).) On May 27, 2015, the state district  
14 court granted the State's motion to dismiss, and dismissed the petition, determining that  
15 the record showed each of Tompkins' claims to be meritless. (Order Dismissing Petition  
16 for Writ of Habeas Corpus, Ex. 63 (ECF No. 24-19).) Tompkins appealed, and the Nevada  
17 Court of Appeals affirmed on February 17, 2016. (Order of Affirmance, Ex. 77 (ECF No.  
18 24-33).) The remittitur issued on March 15, 2016. (See Remittitur, Ex. 78 (ECF No. 24-  
19 34).)

20 This Court received a pro se petition for writ of habeas corpus from Tompkins,  
21 initiating this action, on July 26, 2016 (ECF No. 4). The Court appointed counsel, and,  
22 with counsel, Tompkins filed a first amended habeas petition on August 3, 2016. (Order  
23 entered July 27, 2016 (ECF No. 3); First Amended Petition for Writ of Habeas Corpus  
24 (ECF No. 7).)

25 On June 19, 2017, Tompkins filed a second amended petition for writ of habeas  
26 corpus—now his operative petition—asserting the following claims:

27 Ground 1: "Tompkins' guilty plea was not entered into knowingly,  
28 intelligently, or voluntarily," in violation of his federal constitutional rights.

1 Ground 2: “Tompkins was denied his right to the effective assistance of  
counsel,” in violation of his federal constitutional rights.

2 Ground 2(1): “Trial counsel failed to advise Tompkins of his right to  
3 appeal.”

4 Ground 2(2): “Trial counsel failed to adequately investigate.”

5 Ground 2(3): “Trial counsel failed to explain the nature and  
consequences of the guilty plea to Tompkins.”

6 Ground 2(4): “Trial counsel had a conflict of interest in representing  
7 Tompkins.”

8 Ground 2(5): “Trial counsel failed to object to highly prejudicial victim  
impact evidence.”

9 Ground 3: “Improper victim impact evidence was admitted against  
10 Tompkins at his sentencing hearing,” in violation of his federal constitutional  
rights.

11 Ground 4: “The cumulative effect of the errors in this case deprived  
12 Tompkins of his right to due process,” in violation of his federal constitutional  
rights.

13 (Second Amended Petition for Writ of Habeas Corpus (ECF No. 21).)

14 On August 18, 2017, Respondents filed a motion to dismiss (ECF No. 30).  
15 Tompkins filed an opposition to the motion to dismiss on November 8, 2017 (ECF No.  
16 36). On November 21, 2017, Tompkins filed a declaration (ECF No. 39) stating that he  
17 abandons Ground 2(2) of his second amended petition—his claim that his trial counsel  
18 was ineffective for not properly investigating the case. Respondents filed a reply in  
19 support of the motion to dismiss on December 15, 2017 (ECF No. 40). The Court ruled  
20 on the motion to dismiss on March 8, 2018 (ECF No. 41). The Court dismissed Ground  
21 2(2). With respect to the part of Ground 1 found to be unexhausted—all of Ground 1  
22 except Tompkins’s claims that that his plea was not knowing, intelligent, and voluntary  
23 because the trial court did not advise him of his right to appeal or the possibility of a plea  
24 under *North Carolina v. Alford*, 400 U.S. 25 (1970)—the Court required Tompkins to file  
25 either a notice stating that he abandons the unexhausted claims or a motion for a stay  
26 while he exhausts the claims in state court. In all other respects, the Court denied the  
27 motion to dismiss.

28 ///

1 On April 30, 2018, Tompkins filed a notice stating that he abandons the  
2 unexhausted portion of Ground 1 (ECF Nos.44, 45).

3 On August 9, 2018, Respondents filed an answer (ECF No. 48), responding to  
4 Tompkins's remaining claims. On November 19, 2018, Tompkins filed a reply to the  
5 answer (ECF No. 51).

### 6 **III. DISCUSSION**

#### 7 **A. Standard of Review**

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

10 An application for a writ of habeas corpus on behalf of a person in custody  
11 pursuant to the judgment of a State court shall not be granted with respect  
12 to any claim that was adjudicated on the merits in State court proceedings  
13 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  
16 determined by the Supreme Court of the United States; or

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

20 28 U.S.C. § 2254(d).

21 A state court decision is contrary to clearly established Supreme Court precedent,  
22 within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts  
23 the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts  
24 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]  
25 and nevertheless arrives at a result different from [the Supreme Court's] precedent."  
26 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,  
27 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

28 A state court decision is an unreasonable application of clearly established  
Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) "if the state court  
identifies the correct governing legal principle from [the Supreme Court's] decisions but  
unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S.

1 at 75 (quoting Williams, 529 U.S. at 413). The “unreasonable application” clause requires  
2 the state court decision to be more than incorrect or erroneous; the state court’s  
3 application of clearly established law must be objectively unreasonable. Id. (quoting  
4 Williams, 529 U.S. at 409).

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

15 **B. Ground 1**

16 In Ground 1, Tompkins claims that, in violation of his federal constitutional rights,  
17 his guilty plea was not entered into knowingly, intelligently and voluntarily. (See Second  
18 Amended Petition (ECF No. 21) at 6-8.) In the order entered March 8, 2018, resolving the  
19 motion to dismiss, the Court found that Ground 1 is unexhausted in state court, except  
20 for the claims that Tompkins’s plea was not knowing, intelligent, and voluntary because  
21 the trial court did not advise him of his right to appeal or the possibility of a plea under  
22 North Carolina v. Alford, 400 U.S. 25 (1970). (See Order entered March 8, 2018 (ECF  
23 No. 41) at 4-5.) Tompkins subsequently abandoned the unexhausted parts of Ground 1.  
24 (Notice to Court of Petitioner’s Formal Declaration of Abandonment (ECF No. 44);  
25 Petitioner’s Declaration of Abandonment (ECF No. 45).)

26 In Tompkins’s state habeas action, the district court denied Tompkins relief, ruling  
27 as follows on these claims:

28 The Petition argues the Court did not advise the Petitioner of his right  
to appeal, and he did not knowingly intelligently, or voluntarily waive his right

1 to appeal. The Petitioner executed a guilty plea memorandum (“the Plea  
2 Memorandum”) on September 21, 2012, in which the Petitioner affirmed  
3 that he offered his plea freely, voluntarily and knowingly. The Plea  
4 Memorandum also included the agreement the Petitioner understood he  
5 had the right to appeal from adverse rulings on pretrial motions only if the  
6 State and the Court consented to that right to appeal. This demonstrates  
7 the Petitioner was advised of his appeal rights prior to sentencing.

8 NRS 177.075(2) provides when a court imposes sentence upon a  
9 defendant who has not pleaded guilty and is without counsel the court shall  
10 advise the defendant of his right to appeal. NRS 177.075(2) has no  
11 application to the present case because the Petitioner plead guilty and was  
12 represented by counsel during the plea negotiations. It is the duty of counsel  
13 in certain, not all, circumstances to advise a defendant who pleads guilty to  
14 the right of appeal. *Thomas v. State*, [979 P.2d 222, 223-24 (Nev. 1999)].  
15 The Petition does not contend this is an ineffective assistance of counsel  
16 claim.

17 The Petition cites no statutory or case authorities in Nevada that  
18 obligate a court to inform an individual who pleads guilty to his right to  
19 appeal during sentencing. The Opposition also did not provide any authority  
20 in support or explanation of the argument. The Court need not consider an  
21 issue which is not meaningfully briefed. *Badillo v. Am. Brands*, [16 P.3d 435,  
22 440 (Nev. 2001)]; see also, DCR 13(3); *Edwards v. Emperor’s Gardens*  
23 *Rest.*, [130 P.3d 1280, 1288 n.38 (Nev. 2006)] (declining to consider claims  
24 not cogently argued or supported with relevant authority).

25 \* \* \*

26 The Petitioner pleaded guilty. There is no reason in the record as to  
27 why the Petitioner should have been canvassed regarding the meaning of  
28 the Alford Plea. The Opposition did not provide information or argument why  
the Petitioner should have been canvassed about the Alford Plea. As  
discussed above, the Court need not consider an issue which is not  
meaningfully briefed. *Badillo*, [16 P.3d at 440].

(Order Dismissing Petition for Writ of Habeas Corpus, Ex. 63 at 5-6 (ECF No. 24-19 at 6-  
7).) And, on Tompkins’s appeal in that case, the Nevada Court of Appeals ruled as  
follows:

In his petition, Tompkins alleged his counsel was ineffective for  
failing to permit him to testify before the justice court because he could have  
pursued an insanity defense based upon being awake for 20 straight days  
and for having a conflict of interest because a parent of the victim allegedly  
worked at the public defender’s office. Tompkins also alleged he was not  
advised of his right to pursue a direct appeal, the district court erred by  
considering prejudicial letters from the victims in this matter, and his guilty  
plea was not entered knowingly and voluntarily because the meaning of an  
Alford plea was not explained to him. [Footnote: *North Carolina v. Alford*,  
400 U.S. 25 (1970).] Tompkins also asserted the guilty plea agreement did  
not contain a certificate of counsel as required by NRS 174.063.

Here, the district court reviewed the parties’ pleadings and made the  
following findings: Tompkins waived his right to a preliminary hearing, and

1 therefore, Tompkins' claim regarding testifying at that hearing was belied by  
2 the record. The victim's family member actually worked for the Washoe  
3 County District Attorney's Office, not the public defender's office, and  
4 therefore, Tompkins' claim regarding a conflict of interest was belied by the  
5 record. Tompkins was advised of his right to pursue a direct appeal and  
6 Tompkins did not demonstrate any further duty existed to inform him  
7 regarding an appeal. NRS 176.015(3) permitted the district court to consider  
8 the victim impact letters during the sentencing hearing. [Footnote: We also  
9 note Tompkins' claim regarding the district court's consideration of victim  
10 impact letters at the sentencing hearing is not properly raised in a  
11 postconviction petition for a writ of habeas corpus stemming from a guilty  
12 plea. See NRS 34.810(1)(a). Nevertheless, the district court properly denied  
13 relief for this claim. See Wyatt v. State, [468 P.2d 338, 341 (Nev. 1970).]  
14 Tompkins entered a standard guilty plea, and Tompkins did not  
15 demonstrate there was any duty to explain an Alford plea to him. Tompkins  
16 did not demonstrate manifest injustice sufficient to warrant setting aside his  
17 guilty plea. Based on those findings, the district court concluded all of  
18 Tompkins' claims were either belied by the record or were not supported by  
19 sufficient specific facts which would entitle Tompkins to relief if true.  
20 Accordingly, the district court declined to conduct an evidentiary hearing  
21 and dismissed the petition. See Rubio, [194 P.3d at 1233-34 & n.53].

22 On appeal, Tompkins lists the claims he raised below and the  
23 conclusions of the district court. However, [Tompkins] does not identify any  
24 errors he believes the district court made in its conclusions. See Maresca  
25 v. State, [748 P.2d 3, 6 (Nev. 1987)] (explaining it is the appellant's  
26 responsibility to present relevant authority and cogent argument). Our  
27 review reveals the record supports the district court's decision to dismiss  
28 the petition without conducting an evidentiary hearing and Tompkins has  
not demonstrated the district court abused its discretion in this regard.

(Order of Affirmance, Ex. 77 at 1-3 (ECF No. 24-33 at 2-4).)

29 This Court determines that the remaining claims in Ground 1 are meritless, and  
30 that the state court's denial of relief on the claims was reasonable. The federal  
31 constitutional guarantee of due process of law requires that a guilty plea be knowing,  
32 intelligent, and voluntary. See Brady v. United States, 397 U.S. 742, 748 (1970); Boykin  
33 v. Alabama, 395 U.S. 238, 242 (1969); United States v. Delgado-Ramos, 635 F.3d 1237,  
34 1239 (9th Cir. 2011). "The voluntariness of [a petitioner's] guilty plea can be determined  
35 only by considering all of the relevant circumstances surrounding it." Brady, 397 U.S. at  
36 749. Those circumstances include "the subjective state of mind of the defendant . . . ."  
37 laea v. Sunn, 800 F.2d 861, 866 (9th Cir. 1986). Addressing the "standard as to the  
38 voluntariness of guilty pleas," the Supreme Court has stated:

(A) plea of guilty entered by one fully aware of the direct consequences,  
including the actual value of any commitments made to him by the court,  
prosecutor, or his own counsel, must stand unless induced by threats (or

1 promises to discontinue improper harassment), misrepresentation  
(including unfulfilled or unfulfillable promises), or perhaps by promises that  
2 are by their nature improper as having no proper relationship to the  
prosecutor's business (e.g. bribes).

3 Brady, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir.  
4 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)); see also *Alford*, 400 U.S.  
5 at 31 (noting that the "longstanding test for determining the validity of a guilty plea is  
6 'whether the plea represents a voluntary and intelligent choice among the alternative  
7 courses of action open to the defendant.'").

8 In *Blackledge v. Allison*, the Supreme Court addressed the evidentiary weight of  
9 the record of a plea proceeding when the plea is subsequently subject to a collateral  
10 challenge. While noting that the defendant's representations at the time of his guilty plea  
11 are not "invariably insurmountable" when challenging the voluntariness of his plea, the  
12 Court stated that, nonetheless, the defendant's representations, as well as any findings  
13 made by the judge accepting the plea, "constitute a formidable barrier in any subsequent  
14 collateral proceedings" and that "[s]olemn declarations in open court carry a strong  
15 presumption of verity." 431 U.S. 63, 74 (1977); see also *Muth v. Fondren*, 676 F.3d 815,  
16 821 (9th Cir. 2012); *Little v. Crawford*, 449 F.3d 1075, 1081 (9th Cir. 2006).

17 Here, the Nevada appellate court accurately noted that *Tompkins* was in fact  
18 informed of his right to appeal. (Guilty Plea Memorandum, Ex. 26 at 3 (ECF No. 23 at 4);  
19 see also *id.* at 6 (ECF No. 23 at 7) ("My attorney has advised me that if I wish to appeal,  
20 any appeal, if applicable to my case, must be filed within thirty days of my sentence and/or  
21 judgment.") And, the state court reasonably determined that, under the circumstances,  
22 there was no requirement that *Tompkins* be notified of the nature of an *Alford* plea.  
23 Furthermore, *Tompkins* has not shown that notification regarding the right to appeal and  
24 the nature of an *Alford* plea had any bearing on the knowing, intelligent, and voluntary  
25 character of his guilty plea. The state court's ruling on this claim was not contrary to, or  
26 an unreasonable application of, clearly established federal law, as determined by the  
27 Supreme Court, and was not based on an unreasonable determination of the facts in light

28 ///



1 of the evidence. See 28 U.S.C. § 2254(d). The Court will deny Tompkins habeas corpus  
2 relief with respect to Ground 1.

3 **C. Ground 2**

4 In Ground 2, Tompkins claims that, in violation of his federal constitutional rights,  
5 he was denied his right to the effective assistance of counsel. (Second Amended Petition  
6 (ECF No. 21) at 8-14.) There are four sub-claims remaining in Ground 2. In Ground 2(1),  
7 Tompkins claims that his trial counsel failed to advise him of his right to appeal. (Id. at 9.)  
8 In Ground 2(3), Tompkins claims that his trial counsel failed to explain to him the nature  
9 and consequences of the guilty plea. (Id. at 11-13.) In Ground 2(4), Tompkins claims that  
10 his trial counsel had a conflict of interest in representing him. (Id. at 13-14.) And, in Ground  
11 2(5), Tompkins claims that his trial counsel failed to object to highly prejudicial victim  
12 impact evidence. (Id. at 14.)

13 Tompkins raised these remaining claims on the appeal in his state habeas action,  
14 and the Nevada Court of Appeals affirmed the denial of relief on the claims. (ECF No. 24-  
15 33 at 2-4 (Order of Affirmance) (relevant portion quoted in full, above).) The Court finds  
16 that the ruling of the Nevada Court of Appeals was reasonable.

17 In *Strickland v. Washington*, the Supreme Court propounded a two prong test for  
18 analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate  
19 (1) that the attorney's representation "fell below an objective standard of reasonableness,"  
20 and (2) that the attorney's deficient performance prejudiced the defendant such that "there  
21 is a reasonable probability that, but for counsel's unprofessional errors, the result of the  
22 proceeding would have been different." 466 U.S. 668, 688, 694 (1984). A court  
23 considering a claim of ineffective assistance of counsel must apply a "strong presumption"  
24 that counsel's representation was within the "wide range" of reasonable professional  
25 assistance. Id. at 689. The petitioner's burden is to show "that counsel made errors so  
26 serious that counsel was not functioning as the 'counsel' guaranteed the defendant by  
27 the Sixth Amendment." Id. at 687. And, to establish prejudice under *Strickland*, it is not  
28 enough for the habeas petitioner "to show that the errors had some conceivable effect on

1 the outcome of the proceeding.” *Id.* at 693. When the ineffective assistance of counsel  
2 claim is based on a challenge to a guilty plea, the Strickland prejudice prong requires the  
3 petitioner to demonstrate “that there is a reasonable probability that, but for counsel’s  
4 errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v.*  
5 *Lockhart*, 474 U.S. 52, 59 (1985). In analyzing a claim of ineffective assistance of counsel  
6 under Strickland, a court may first consider either the question of deficient performance  
7 or the question of prejudice; if the petitioner fails to satisfy one element of the claim, the  
8 court need not consider the other. See *Strickland*, 466 U.S. at 697.

9       Regarding Ground 2(1), again, the Nevada courts accurately determined that  
10 Tompkins was in fact informed of his right to appeal. (Guilty Plea Memorandum, Ex. 26  
11 at 3 (ECF No. 23 at 4); see also *id.* at 6 (ECF No. 23 at 7) (“My attorney has advised me  
12 that if I wish to appeal, any appeal, if applicable to my case, must be filed within thirty  
13 days of my sentence and/or judgment.”).) Moreover, Tompkins has not identified, with  
14 any specificity, any meritorious issue that he would have raised on a direct appeal  
15 following his guilty plea and the entry of the criminal judgment. (Reply (ECF No. 51) at 5-  
16 9.)

17       Regarding Ground 2(4), the Nevada court reasonably determined that Tompkins’s  
18 trial counsel did not have a conflict of interest. The most Tompkins shows in this regard  
19 is that his counsel “knew” the victim’s father, who was apparently an employee of the  
20 district attorney; it was not unreasonable for the state court to conclude that this fell short  
21 of establishing a conflict of interest resulting in ineffective assistance of counsel.

22       Regarding Ground 2(5), as is discussed below with respect to Ground 3, the state  
23 appellate court determined that the admission of victim impact evidence at Tompkins’s  
24 sentencing did not violate state law, and Tompkins has made no showing that it violated  
25 his federal constitutional rights; therefore, Tompkins’s counsel was not ineffective for not  
26 objecting to the admission of that evidence, and Tompkins was not prejudiced by his  
27 counsel not objecting.

28 ///

1 Ground 2(3) is a general claim that “[t]rial counsel failed to explain the nature and  
2 consequences of the guilty plea to Tompkins.” (Second Amended Petition (ECF No. 21)  
3 at 11-13.) Considering the plea agreement (ECF No. 11), the transcript of the arraignment  
4 and change of plea (ECF No. 10), the transcript of the sentencing (ECF No. 12), and all  
5 the other exhibits in this case, and as stated elsewhere in this order regarding Tompkins’s  
6 more specific claims, the Court determines that the Nevada Court of Appeals was not  
7 unreasonable in ruling that Tompkins’s trial counsel was not ineffective with respect to  
8 explaining the guilty plea to Tompkins, and that Tompkins’s guilty pleas was, as a result,  
9 knowing, intelligent, and voluntary.

10 This Court, then, finds that the Nevada appellate court’s rulings on Tompkins’s  
11 ineffective assistance of counsel claims were not contrary to, or an unreasonable  
12 application of, clearly established federal law, as determined by the Supreme Court, and  
13 were not based on an unreasonable determination of the facts in light of the evidence.  
14 See 28 U.S.C. § 2254(d). The Court will deny Tompkins habeas corpus relief with respect  
15 to Grounds 2(1), 2(3), 2(4) and 2(5).

16 **D. Ground 3**

17 In Ground 3, Tompkins claims that improper victim impact evidence was admitted  
18 at his sentencing hearing, in violation of his federal constitutional rights. (Second  
19 Amended Petition (ECF No. 21) at 15.)

20 On the appeal in Tompkins’s state habeas action, the Nevada Court of Appeals  
21 ruled that “NRS 176.015(3) permitted the district court to consider the victim impact letters  
22 during the sentencing hearing.” (ECF No. 24-33 at 2 (Order of Affirmance).)

23 To the extent that the Nevada Court of Appeals ruled that Nevada law allowed the  
24 admission of the victim impact evidence, that ruling is a state court’s construction of state  
25 law, is authoritative, and is not subject to review in this federal habeas corpus action. See  
26 *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Bonin v. Calderon*, 59 F.3d 815, 841 (9th  
27 Cir. 1995). Beyond that, the admission of evidence in a criminal case does not provide a  
28 basis for habeas relief unless it rendered the proceeding fundamentally unfair in violation

1 of the petitioner's right to due process of law. See *Johnson v. Sublett*, 63 F.3d 926, 930  
2 (9th Cir. 1995) (citing *Estelle*, 502 U.S. at 67). Federal courts review such alleged due  
3 process violations for whether the admission of evidence "so infected the entire trial that  
4 the resulting conviction violates due process." *Estelle*, 502 U.S. at 72. A habeas petitioner  
5 "bears a heavy burden in showing a due process violation based on an evidentiary  
6 decision." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir.), *as amended on reh'g*, 421  
7 F.3d 1154 (9th Cir. 2005). The Nevada Court of Appeals did not discuss Tompkins's claim  
8 that the admission of the victim impact evidence violated his federal constitutional rights,  
9 but it plainly was not unreasonable for that court to determine that it did not.

10 The state court's ruling on this claim was not contrary to, or an unreasonable  
11 application of, clearly established federal law, as determined by the Supreme Court, and  
12 was not based on an unreasonable determination of the facts in light of the evidence. See  
13 28 U.S.C. § 2254(d). The Court will deny Tompkins habeas corpus relief with respect to  
14 Ground 3.

15 **E. Ground 4**

16 Finally, in Ground 4, Tompkins claims that the cumulative effect of the errors in his  
17 case deprived him of his federal constitutional right to due process of law. (Second  
18 Amended Petition (ECF No. 21) at 15-16.) As is discussed above, the Court finds no error;  
19 therefore, there are not multiple errors to consider cumulatively, and Ground 4 fails. The  
20 Court will deny Tompkins habeas corpus relief on Ground 4.

21 **IV. CERTIFICATE OF APPEALABILITY**

22 The standard for the issuance of a certificate of appealability requires a "substantial  
23 showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court  
24 has interpreted 28 U.S.C. § 2253(c) as follows:

25 Where a district court has rejected the constitutional claims on the merits,  
26 the showing required to satisfy § 2253(c) is straightforward: The petitioner  
27 must demonstrate that reasonable jurists would find the district court's  
28 assessment of the constitutional claims debatable or wrong.

1 Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074,  
2 1077-79 (9th Cir. 2000).

3 Applying this standard, the Court finds that a certificate of appealability is  
4 unwarranted in this case. The Court will deny Tompkins a certificate of appealability.

5 **V. CONCLUSION**

6 It is therefore ordered that the Second Amended Petition for Writ of Habeas Corpus  
7 (ECF No. 21) is denied.

8 It is further ordered that Petitioner is denied a certificate of appealability.

9 It is further ordered that the Clerk of the Court is directed to enter judgment  
10 accordingly.

11 DATED THIS 20<sup>th</sup> day of June 2019.

12  
13   
14 \_\_\_\_\_  
15 MIRANDA M. DU  
16 UNITED STATES DISTRICT JUDGE  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28