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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MARC ANTHONY COLON,

v.

NETHANJAH BREITENBACH,¹ *et al.*,

Respondents.

Case No. 3:18-cv-00490-MMD-CLB

ORDER

I. SUMMARY

Petitioner Marc Anthony Colon was sentenced in Nevada state court to, *inter alia*, life without the possibility of parole after being found guilty of child abuse resulting in substantial bodily harm and first-degree murder. (ECF No. 68-11.) This matter is before this Court for adjudication of the merits of Colon’s counseled second amended petition for writ of habeas corpus under 28 U.S.C. § 2254, which alleges that his trial counsel failed to adequately conduct pre-trial investigations and preparations concerning an alibi witness. (ECF No. 60 (“Petition”).) For the reasons discussed below, the Court denies the Petition and denies a certificate of appealability.

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¹The state corrections department’s inmate locator page states that Colon is incarcerated at Northern Nevada Correctional Center. Nethanjah Breitenbach is the current warden for that facility. At the end of this order, this Court directs the clerk to substitute Nethanjah Breitenbach as a respondent for Respondent R. Baker. See Fed. R. Civ. P. 25(d).

1 **II. BACKGROUND**

2 **A. Factual background²**

3 Enrique Reyes testified that on the morning of January 12, 2006, while looking in
4 a dumpster at an apartment complex in Las Vegas, Nevada, he found the body of a little
5 girl. (ECF No. 67-24 at 134-37.) Dr. Gary Telgenhoff, a forensic pathologist with the Clark
6 County Coroner's Office, performed an autopsy of the girl, who was found to be three
7 years old, and determined that she was malnourished and dehydrated. (ECF No. 67-26
8 at 21, 25, 32.) According to Dr. Telgenhoff, the girl's eyes were sunken within the sockets,
9 she was gaunt, and "[s]he appeared to lack soft tissue in her extremities." (*Id.* at 32.) Dr.
10 Telgenhoff reported that the girl had (1) "bitten or torn" fingers, (2) "many, many different
11 bruises on [her] entire body, in particular, the back, the chest or torso area, the buttocks
12 and to a lesser extent the head," (3) marks indicating that she had been "very roughly
13 grab[bed] under her arms," (4) "a large amount of blood in the abdominal cavity," (5) a
14 torn "duodenum, which is the first part of the small intestine," (6) a tear in her pancreas,
15 and (7) fractured ribs. (*Id.* at 40, 44, 46, 57, 60.) A torn duodenum is caused by something
16 "enter[ing] the abdomen and creat[ing] a substantial amount of force" and, unless
17 successfully treated, would cause a person to die within 24 hours. (*Id.* at 58, 64.) Dr.
18 Telgenhoff determined the girl's cause of death to be blunt-force trauma to the torso. (*Id.*
19 at 67.)

20 Law enforcement got "[a] huge number" of tips regarding the possible identity of
21 the girl, but none of those tips panned out. (ECF No. 67-26 at 133, 144.) Eventually, on
22 February 22, 2006, the mother of Colon's girlfriend and co-defendant, Gladys Perez,
23 contacted law enforcement in California about her missing granddaughter, C.F. (ECF No.
24 67-31 at 189.) After law enforcement in California contacted law enforcement in Las
25 Vegas, Perez's mother was able to confirm that the girl was C.F. (*Id.* at 189, 191.)

26
27 ²The Court makes no credibility or other factual findings regarding the truth or
28 falsity of this trial evidence before the state court. The Court's summary is merely a
backdrop to its consideration of the issue presented in the Petition.

1 In January 2006, Colon and Perez went on a trip from California to Las Vegas with
2 Colon's two daughters, M.C. and M.C., and Perez's two daughters, C.F. and L.F. (ECF
3 No. 67-36 at 31-32.) On January 8, 2006, Colon, Perez, and the four girls stayed at the
4 Stratosphere. (ECF No. 67-39 at 62.) On January 9, 2006, Colon, Perez, and the four
5 girls checked into the Bargain Motel and stayed for three nights. (ECF No. 67-30 at 6, 8,
6 10.) L.F., who was nine years old at the time of the trial in September 2008, testified that
7 while they were at the Bargain Motel, C.F. was sick and vomited. (ECF No. 67-36 at 76,
8 83.) During the night, L.F. heard Colon and her mother arguing about C.F., and the next
9 morning when L.F. woke up, C.F. was gone. (*Id.* at 86, 94-95.) Similarly, M.C., Colon's
10 older daughter who was twelve years old at the time of the trial, testified that while staying
11 at the Bargain Motel, C.F. "started coughing, and then like a few minutes later she started
12 throwing up." (*Id.* at 122, 130.) According to M.C., C.F. "threw up many times." (*Id.* at 132.)
13 The next morning, C.F. was gone, and Colon and Perez told M.C. that they had "dumped
14 [C.F.] off at her grandma's house." (*Id.* at 136.) M.C., Colon's younger daughter who was
15 ten years old at the time of the trial, testified that Colon hit C.F. once on her back "in the
16 middle on the side." (*Id.* at 189, 213.) M.C. was also told that C.F. was with her grandma.
17 (*Id.* at 199.)

18 Colon, Perez, M.C., M.C., and L.F. then drove to Oregon and eventually took a
19 train to Minnesota to stay with Colon's uncle. (ECF No. 67-36 at 47, 54.) After some time,
20 Perez and L.F. left Minnesota to go back to California. (*Id.* at 90.) Law enforcement
21 interviewed M.C. and M.C. at Colon's uncle's house in the presence of Colon's uncle's
22 daughter, A.R. (ECF No. 67-37 at 49.) During her law enforcement interview, M.C., the
23 older sister, stated that Colon "made the bruise on [C.F.]'s back" by punching her. (ECF
24 No. 67-38 at 97-98.) M.C. explained that C.F. started vomiting after Colon hit her, and
25 Colon said "that [C.F.] made too much drama in their lives." (*Id.* at 97.) According to M.C.,
26 Colon had his hand in a fist and "was very angry."³ (*Id.* at 98.) And during her law
27

28 ³M.C.'s trial testimony varied from her law enforcement interview statements, and she testified at the trial that the police told her to lie and say that Colon had hit C.F. (ECF

1 enforcement interview, M.C., the younger sister, told law enforcement that Colon hit C.F.
2 (*Id.* at 102.) Law enforcement also interviewed L.F., and she said that Colon “socked”
3 C.F. (*Id.* at 132.)

4 Law enforcement interviewed Colon, and when asked if he was responsible for
5 C.F.’s death, Colon replied, “that’s not my kid.” (ECF No. 67-38 at 114.) Colon was asked
6 who put C.F. in the dumpster, and he responded, “I never left the apartment.” (*Id.*) Colon
7 was also asked if he ever hit any kids, and he stated, “I never hit *my* kids.” (*Id.* at 116
8 (emphasis added).) Colon explained that C.F. was sick the night of January 11 into
9 January 12, 2006, and he and Perez decided to take her to the hospital. (*Id.* at 117-118.)
10 Perez got C.F. dressed, and it was then that they noticed that C.F. was not breathing. (*Id.*
11 at 118.) Colon told law enforcement that C.F.’s “death was a result of domestic violence.”
12 (*Id.* at 120.) In a letter written to Perez after his arrest, Colon stated ““20 minutes, Gladys.
13 All that shit happened in 20 minutes and nobody heard nothing. None of the girls were
14 up.”” (*Id.* at 141.)

15 **B. Procedural background**

16 The jury found Colon guilty of child abuse resulting in substantial bodily harm and
17 first-degree murder committed during the perpetration or attempted perpetration of child
18 abuse. (ECF No. 67-47.) The jury sentenced Colon to life in prison without the possibility
19 of parole. (ECF No. 68-1.) Colon appealed, and the Nevada Supreme Court affirmed
20 Colon’s judgment of conviction on September 29, 2011. (ECF No. 68-41.) Colon moved
21 for rehearing and for en banc reconsideration, but the Nevada Supreme Court denied
22 both requests. (ECF Nos. 68-45, 68-49.) Remittitur issued on March 20, 2012. (ECF No.
23 68-50.)

24 Colon petitioned for state postconviction relief. (ECF Nos. 69-1, 69-13.) The state
25 court denied Colon relief without an evidentiary hearing on April 19, 2016. (ECF No. 69-

26 _____
27 No. 67-36 at 149-150.) Notably, Colon’s sister, who flew with M.C. and M.C. back to
28 California from Minnesota, testified that once M.C. learned “what could potentially happen
to her father, her story changed.” (ECF No. 67-37 at 96.)

1 21.) Colon appealed, and the Nevada Court of Appeals affirmed on September 13, 2017.
2 (ECF No. 69-46.) Remittitur issued on October 10, 2017. (ECF No. 69-47.)

3 Colon commenced this federal habeas corpus action on or about September 4,
4 2018. (ECF No. 1.) This Court appointed counsel for Colon, and counsel filed an amended
5 petition on July 15, 2019. (ECF Nos. 9, 15.) Colon’s counsel withdrew, and this Court
6 appointed Colon new counsel on May 12, 2022. (ECF No. 38, 44, 46.) Colon’s new
7 counsel filed this Petition on June 5, 2023. (ECF No. 60.) Respondents answered the
8 Petition on October 2, 2023, and Colon replied on October 30, 2023. (ECF Nos. 73, 74.)

9 **III. GOVERNING STANDARD OF REVIEW**

10 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in
11 habeas corpus cases under the Antiterrorism and Effective Death Penalty Act (“AEDPA”):

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

15 (1) resulted in a decision that was contrary to, or involved an
16 unreasonable application of, clearly established Federal law, as
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 A state court decision is contrary to clearly established Supreme Court precedent, within
21 the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the
22 governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a
23 set of facts that are materially indistinguishable from a decision of [the Supreme] Court.”
24 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,
25 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision
26 is an unreasonable application of clearly established Supreme Court precedent within the
27 meaning of 28 U.S.C. § 2254(d) “if the state court identifies the correct governing legal
28 principle from [the Supreme] Court’s decisions but unreasonably applies that principle to

1 the facts of the prisoner's case." *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). "The
2 'unreasonable application' clause requires the state court decision to be more than
3 incorrect or erroneous. The state court's application of clearly established law must be
4 objectively unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation
5 omitted).

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

16 **IV. DISCUSSION**

17 In his sole ground for relief, Colon argues that his rights under the Fourth, Fifth,
18 Sixth, and Fourteenth Amendments were violated by his trial counsel's failure to
19 adequately conduct pre-trial investigations and preparations concerning his alibi defense.
20 (ECF No. 60 at 13.) Specifically, Colon alleges that his counsel was deficient in: (1) failing
21 to prepare his alibi witness for cross-examination; (2) offering an alibi defense during
22 opening statements that counsel failed to deliver during trial; and (3) failing to interview
23 and present other alibi witnesses. (*Id.*)

24 **A. Background information**

25 Before the trial, on July 18, 2006, two defense investigators interviewed Alejandra
26 Carbajal, Colon's ex-girlfriend who lived in Las Vegas and had custody of their son. (ECF
27 No. 69-13 at 163.) During that interview, Carbajal stated Colon "had showed up to [her]
28 Nana's house to visit [her] and Josiah, his son" in January of 2006. (*Id.* at 170.) Carbajal

1 explained that this two-hour visit took place at “night time” and the following people were
2 present: Nick Platt, Aaron Buck, Nicki Buck, and Anthony Buck. (*Id.* at 164-65.) Colon
3 came back the following day at “nighttime” for 3 to 4 hours, and the same people were
4 present. (*Id.* at 165.)

5 Before the trial, Colon’s counsel filed a “reservation of right to claim alibi.” (ECF
6 No. 66-36.) During his opening statement at the trial, Colon’s counsel summarized
7 Colon’s defense as follows: “the evidence will show you that it’s actually [Perez] that killed
8 her child when [Colon] was gone.” (ECF No. 67-24 at 132.) In support of this defense,
9 Colon’s counsel told the jury that M.C. told the grand jury that: (1) Perez had hit C.F. while
10 “her daddy had gone to get something to eat[;]” and (2) the person residing in the motel
11 room above Colon and Perez at the Bargain Motel stated that she heard a woman
12 mistreating children and “didn’t hear a man.” (*Id.* at 123-124.) Regarding Carbajal, Colon’s
13 counsel explained the following:

14 [W]hat we know about Alex Carbajal is that the State went and
15 interviewed her, recorded a statement. . . . And she describes how Mr.
Colon was in fact over there, she thought between three and five hours.

16 The prosecutors also interviewed some of her - - Ms. Carbajal’s
17 relatives who also saw Mr. Colon there. They sort of dispute the time period.
18 Maybe it’s an hour and a half, maybe it’s two hours, or maybe, like Ms.
19 Carbajal says, it’s three to five hours. The point that you will see in this case
is that on the 11th of January when this horrible event is happening[,] he’s
not there. He’s gone. He’s at Alex Carbajal’s house. And none of the parties
will dispute that Mr. Colon is gone for a period of time on the 11th.

20 (*Id.* at 129-130.)

21 Colon called Carbajal as a witness at the trial. (ECF No. 67-39 at 47.) Carbajal
22 testified on direct examination that she saw Colon for “[a]bout two hours” in Las Vegas
23 “on [her] uncle’s birthday, around the 12th” of January 2006. (*Id.* at 48, 50, 51.) During
24 Carbajal’s cross-examination, the following colloquy occurred:

25 Q. And you believed that he came over to your grandmother’s house,
26 he, meaning Marc Anthony Colon, came over on your uncle’s
birthday or around your uncle’s birthday?

27 A. Around. I don’t think it was on his birthday because I would have
remembered that, but around there, I think.

28 Q. Could it have been the day after his birthday?

A. No. It was before.

1 Q. Was it the immediate day before?
A. I'm not sure.
2 Q. Could it have been two days before?
A. I'm not sure.
3 Q. Could it have been within a week of your uncle's birthday?
A. It was close. It was close.
4 Q. Within a day or two?
A. I would say maybe.
5 Q. You're not exactly sure precisely - -
A. No.
6 Q. - - whether it was - - you know for sure it was not on the 12th because
you would remember that for sure?
7 A. Right.
8 Q. Could have been the 11th - -
A. Yeah.
9 Q. - - correct? Could it have been the 10th?
A. I'm not sure.
10 Q. Okay. You're not even sure if it was the 9th; is that fair to say?
A. Yes.
11 Q. Is it possible it was the 8th?
A. I'm not sure.

12 (*Id.* at 55-57.) During cross-examination, Carbajal also testified that when she saw Colon,
13 he told her that he was staying at the Stratosphere, indicating that she likely saw Colon
14 on January 8, 2006. (*Id.* at 61.) Regarding the timing of Colon's visit, Carbajal stated that
15 it was approximately from 6:00 p.m. until 8:00 p.m. (*Id.* at 63-64.)

16 During closing arguments, Colon's counsel made the following comments
17 regarding Carbajal:

18 Now I want to talk about Alex Carbajal because I told you in opening
19 argument he's gone seeing Alex Carbajal. Well, put her on the witness
20 stand. And what did she say? She said, I remember he was there because
21 it was my uncle's birthday. It was like January 12th. And then she said, I
22 remember he said he was going to Stratosphere. So [the prosecutor]
23 showed that the Stratosphere was on the wrong day. It couldn't be the 11th,
24 right? And she - - I would have to argue to you that she's probably just
saying something. Okay. Do you know what? It proves something. It proves
something. Do you know how easy it would be to, let's say, coach
somebody to come in here and say, I remember my uncle's birthday was
on the 12th of January and I remember it was distinctly - - it was the night
before? How hard would that be? That's not what she said, is it?

25 She came in. She told the truth. She came in, she tried to tell you the best
26 she could. So can I now argue to you it was the 11th? I would contend,
27 ladies and gentlemen, from the evidence that you should consider that it
was the 11th? Can I show you that it was proved? No, because I think [the
28 prosecutor] did an excellent job showing that it could be another day,
specifically the date of Stratosphere.

1 (ECF No. 67-44 at 24-25.)

2 During Colon's state postconviction proceedings, a private investigator interviewed
3 Carbajal. (ECF No. 69-13 at 229.) During that interview, Carbajal stated the following: (1)
4 "at no time did Mr. Colon's attorney or investigator give her a copy of any statements that
5 she had made," (2) "at no time did Mr. Colon's attorney ask her to review any statements
6 she had made," (3) "before she testified, Mr. Colon's attorney did not go over any
7 questions that he was going to ask her," (4) "Mr. Colon's attorney did not ever tell her that
8 the exact date of Mr. Colon's visit with her was crucial to his case," and (5) "Mr. Colon's
9 lawyer did not do anything to prepare her for her testimony or cross-examination." (*Id.* at
10 229-230.)

11 **B. Legal standard for ineffective assistance of counsel**

12 In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for
13 analysis of claims of ineffective assistance of counsel requiring the petitioner to
14 demonstrate: (1) that the attorney's "representation fell below an objective standard of
15 reasonableness[;]" and (2) that the attorney's deficient performance prejudiced the
16 defendant such that "there is a reasonable probability that, but for counsel's
17 unprofessional errors, the result of the proceeding would have been different." 466 U.S.
18 668, 688, 694 (1984). A court considering a claim of ineffective assistance of counsel
19 must apply a "strong presumption that counsel's conduct falls within the wide range of
20 reasonable professional assistance." *Id.* at 689. The petitioner's burden is to show "that
21 counsel made errors so serious that counsel was not functioning as the 'counsel'
22 guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, to establish
23 prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the
24 errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather,
25 the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose
26 result is reliable." *Id.* at 687.

27 Where a state district court previously adjudicated the claim of ineffective
28 assistance of counsel under *Strickland*, establishing that the decision was unreasonable

1 is especially difficult. See *Richter*, 562 U.S. at 104-05. In *Richter*, the United States
2 Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential, and
3 when the two apply in tandem, review is doubly so. See *id.* at 105; see also *Cheney v.*
4 *Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (“When a federal court reviews a state
5 court’s *Strickland* determination under AEDPA, both AEDPA and *Strickland*’s deferential
6 standards apply; hence, the Supreme Court’s description of the standard as doubly
7 deferential.”) (internal quotation marks omitted). The Supreme Court further clarified that,
8 “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were reasonable.
9 The question is whether there is any reasonable argument that counsel satisfied
10 *Strickland*’s deferential standard.” *Richter*, 562 U.S. at 105.

11 **C. State court determination**

12 In affirming the denial of his state habeas petition, the Nevada Court of Appeals
13 held:

14 Colon argues his trial counsel failed to adequately investigate
15 Colon’s alibi witness or prepare the witness to testify at trial. Colon further
16 argues counsel should have investigated additional witnesses to support
17 his alibi. Colon fails to demonstrate the district court erred by denying these
18 claims.

19 During the trial, Colon’s alibi witness testified Colon attended a party
20 during his visit to Las Vegas, but was unsure of the exact date. The alibi
21 witness acknowledged she had previously stated the party was on the same
22 day the victim died, but when confronted with further information regarding
23 Colon’s whereabouts during his time in Las Vegas, she recognized the party
24 might not have been on the same day as the victim’s death.

25 The district court concluded counsel interviewed the witness prior to
26 trial and questioned the alibi witness at length regarding her recollection of
27 events. The district court found Colon failed to demonstrate counsel acted
28 in an objectively unreasonable manner regarding the alibi witness. In
addition, the district court found Colon did not demonstrate counsel would
have discovered favorable information had counsel undertaken reasonably
diligent investigation regarding the alibi witness or any additional potential
alibi witnesses, given the overwhelming evidence of Colon’s guilt produced
at trial. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a
petitioner claiming counsel did not conduct an adequate investigation must
specify what a more thorough investigation would have uncovered). The
record before this court supports the district court’s conclusion in this
regard.

1 Moreover, we note the Nevada Supreme Court has already
2 concluded the question of Colon's guilt in this matter was not close, *Colon*
3 *v. State*, Docket No. 53019 (Order of Affirmance, September 29, 2011), and
4 our review of the record demonstrates there was significant evidence of
5 Colon's guilt produced at trial, particularly in light of the statements to the
6 police made by Colon's daughters, asserting Colon hit the victim and was
7 at the hotel room the night the victim died. Given the significant evidence of
8 Colon's guilt, Colon fails to demonstrate a reasonable probability of a
9 different outcome at trial had counsel further investigated alibi witnesses or
10 prepared the alibi witness to testify at trial. Therefore, we conclude the
11 district court did not err in denying these claims.

12 (ECF No. 69-46 at 4-5.)

13 **D. Analysis**

14 As the Nevada Court of Appeals reasonably concluded, Colon fails to demonstrate
15 prejudice regarding his counsel's alleged deficiency. Indeed, due to the timeline of events,
16 Colon's alibi defense was tenuous. And even if Colon's counsel had done a better job of
17 presenting Colon's alibi defense—by either: (1) further supporting the defense with
18 testimony from other witnesses regarding Colon's visit with Carbajal on January 11, 2006;
19 or (2) preventing the damaging evidence produced during cross-examination that Colon's
20 visit with Carbajal was actually on January 8, 2006—Colon's alibi defense would still have
21 been weak. *See Murtishaw v. Woodford*, 255 F.3d 926, 940 (9th Cir. 2001) (“[I]n order to
22 determine whether counsel's errors prejudiced the outcome of the trial, it is essential to
23 compare the evidence that actually was presented to the jury with the evidence that might
24 have been presented had counsel acted differently.”) (internal quotation marks omitted);
25 *Hernandez v. Chappell*, 923 F.3d 544, 554 (9th Cir. 2019) (“The strength of the evidence
26 of Hernandez's intent to rape and kill contrasts sharply with the relatively weak evidence
27 that might have been presented had counsel acted differently.”) (internal quotation marks
28 omitted).

 In a letter Colon wrote to Perez after his arrest, he indicated that the fatal abuse of
C.F. happened at night when “[n]one of the girls were up.” (ECF No. 67-38 at 141.) There
was then evidence that Perez went to a Walgreens on January 12, 2006, at 3:45 a.m.
and bought “Pedialyte and baby medicine for a sick baby.” (ECF No. 67-37 at 4, 8, 9.)

1 C.F. was found in the dumpster less than four hours later at 7:30 a.m. (ECF No. 67-24 at
2 149.) Dr. Telgenhoff testified that “most likely timing” regarding “the life expectancy of
3 somebody with a severed duodenum” is “a number of hours.” (ECF No. 67-26 at 64.)
4 Based on this aggregate evidence, C.F.’s duodenum was likely severed sometime during
5 the late hours of January 11 or the early hours of January 12, 2006. Consequently, even
6 if Colon’s visit with Carbajal occurred on January 11, 2006, as he asserted, it appears
7 from the record that the visit took place before the fatal abuse of C.F. In fact, Carbajal
8 testified that Colon’s visit took place from approximately 6:00 p.m. until 8:00 p.m. (ECF
9 No. 67-39 at 63-64.) As such, even if his counsel had done a more proficient job of
10 showing that Colon was away from the motel room on the evening of January 11, 2006,
11 such a showing would not prove that Colon could not have caused C.F.’s fatal injuries.

12 Moreover, as the Nevada Court of Appeals reasonably concluded, there was
13 significant evidence of Colon’s guilt produced at the trial. Law enforcement officers
14 testified that M.C., M.C., and L.F. all stated during their law enforcement interviews that
15 Colon had hit C.F. (See ECF No. 67-37 at 97-98, 102, 132.) Moreover, during his law
16 enforcement interview, Colon did not outright deny causing C.F.’s death and admitted to
17 being present in the motel room at the time of the fatal abuse, explaining that he “never
18 left the apartment” and C.F.’s “death was a result of domestic violence.” (ECF No. 67-38
19 at 114, 120.)

20 Accordingly, the Nevada Court of Appeals’ determination that Colon failed to
21 demonstrate a reasonable probability of a different outcome at trial had his counsel further
22 investigated alibi witnesses or prepared Carbajal to testify at trial constituted an
23 objectively reasonable application of *Strickland’s* prejudice prong and was not based on
24 an unreasonable determination of the facts. Colon is not entitled to federal habeas relief.

25 **V. CERTIFICATE OF APPEALABILITY**

26 This is a final order adverse to Colon. Rule 11 of the Rules Governing Section
27 2254 Cases requires this Court to issue or deny a certificate of appealability (“COA”). This
28 Court has *sua sponte* evaluated the claims within the petition for suitability for the

1 issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65
2 (9th Cir. 2002). Under 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
3 “has made a substantial showing of the denial of a constitutional right.” With respect to
4 claims rejected on the merits, a petitioner “must demonstrate that reasonable jurists would
5 find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*
6 *v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4
7 (1983)). Applying this standard, this Court finds that a certificate of appealability is
8 unwarranted.⁴


9 **VI. CONCLUSION**

10 It is therefore ordered that the second amended petition for a writ of habeas corpus
11 under 28 U.S.C. § 2254 (ECF No. 60) is denied.

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

13 The Clerk of Court is directed to: (1) substitute Nethanjah Breitenbach for
14 Respondent R. Baker; (2) enter judgment accordingly; and (3) close this case.

15 DATED THIS 16th Day of November 2023.

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19 _____
MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

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24 _____
25 ⁴Colon requests that this Court conduct an evidentiary hearing. (ECF No. 60 at
26 23.) Colon fails to demonstrate that he is entitled to an evidentiary hearing. See 28 U.S.C.
27 § 2254(e)(2). Further, this Court has already determined that Colon is not entitled to relief,
28 and neither further factual development nor any evidence that may be proffered at an
evidentiary hearing would affect this Court’s reasons for denying relief. See *Schriro v.*
Landrigan, 550 U.S. 465, 474 (2007) (“[I]f the record refutes the applicant’s factual
allegations or otherwise precludes habeas relief, a district court is not required to hold an
evidentiary hearing.”). Colon’s request for an evidentiary hearing is denied.