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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-99002
D.C. No. 3:05-cv-00087-RCJ-WGC

[Filed November 3, 2017]

PAUL L. BROWNING, *Petitioner-Appellant*,	)
v.	)
RENEE BAKER, Warden; ADAM PAUL LAXALT, Attorney General of the State of Nevada, *Respondents-Appellees.*	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, Senior District Judge, Presiding

Argued and Submitted March 16, 2017
San Francisco, California

Filed September 20, 2017
Amended November 3, 2017

Before: Kim McLane Wardlaw, Ronald M. Gould, and Consuelo M. Callahan, Circuit Judges.

Order;
Opinion by Judge Gould;
Dissent by Judge Callahan

SUMMARY*

Habeas Corpus

The panel filed an order in which (1) Judges Wardlaw and Gould amended their September 20, 2017, majority opinion in Paul Browning's appeal from the denial of his habeas corpus petition; (2) Judge Callahan objected to any basis for expanding the COA, and stood by her dissent; and (3) the panel denied a Petition for Panel Rehearing.

In the opinion, the panel affirmed the district court's denial of Browning's habeas corpus petition as to his escape conviction; reversed the district court's denial of the petition as to Browning's convictions of burglary, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon; and remanded for further proceedings.

Browning contended that the prosecutor withheld material evidence favorable to the defense in violation of his constitutional rights as described in *Brady v. Maryland*, 373 U.S. 83 (1963), and presented false and misleading evidence at trial in violation of his constitutional rights as described in *Napue v. Illinois*, 360 U.S. 264 (1959). The panel held that an officer's

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

shoeprint observation, a witness's expectation of a benefit for his testimony, and the precise description of the assailant's hairstyle received from the victim were all favorable to Browning under *Brady*. The panel held that Browning's *Napue* claim fails because it was not clearly established at the time of Supreme Court of Nevada's decision that a police officer's knowledge of false or misleading testimony would be imputed to the prosecution. For the *Brady* evidence, except for the witness's expectation of a benefit for his testimony, the Supreme Court of Nevada did not explicitly address whether this evidence was favorable to Browning. The panel held that had the Supreme Court of Nevada not viewed the evidence as favorable to the defense, it would have been an unreasonable application of Supreme Court precedent. The panel also held that it was an objectively unreasonable application of Supreme Court precedent to hold that the *Brady* materiality standard was not met here, and therefore concluded that the district court should have granted habeas relief on Browning's *Brady* claims.

Browning also contended that he was denied his right to effective assistance of trial counsel due to inadequate pretrial investigation and preparation. Granting Browning's motion to expand the certificate of appealability, and explaining that the court considers counsel's conduct *as a whole* to determine whether it was constitutionally adequate, the panel wrote that the district court erred by limiting the COA to particular "claims" that counsel's failure to investigate particular avenues of evidence were deficient. The panel held that Browning's trial counsel unreasonably failed to investigate Browning's case, and that the Supreme Court of Nevada unreasonably

concluded that Browning failed to prove just that. The panel amended the opinion to state that because Browning's ineffective of assistance of counsel claims succeed on other grounds, it need not address other alleged deficiencies argued by Browning in support of an expansion of the COA. The panel held that the Supreme Court of Nevada's conclusion that any deficient performance did not prejudice Browning was objectively unreasonable.

The panel concluded that Browning is entitled to a writ of habeas corpus with respect to his convictions of burglary, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. The panel wrote that Browning is not entitled to relief as to his escape conviction because he offered no reason to call its validity into question.

Dissenting in part, Judge Callahan wrote that a meaningful application of the deferential standard of review under AEDPA compels the conclusion that the Nevada Supreme Court was not objectively unreasonable in rejecting Browning's ineffective assistance of counsel claim as well as his claims under *Brady* and *Napue*.

COUNSEL

Timothy K. Ford (argued) and Tiffany Cartwright, MacDonald Hoague & Bayless, Seattle, Washington; Mark A. Larrañaga and Jacqueline K. Walsh, Walsh & Larrañaga, Seattle, Washington; for Petitioner-Appellant.

Victor-Hugo Schulze II (argued), Senior Deputy Attorney General; Thom Gover, Chief Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office

of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

Maureen P. Alger and Lori R. Mason, Cooley LLP, Palo Alto, California; Reed A. Smith, Cooley LLP, New York, New York; for Amicus Curiae The Innocence Network.

ORDER

Judges Wardlaw and Gould **AMEND** their majority opinion in the above captioned case filed September 20, 2017 as follows:

The paragraph on page 55 of the slip opinion that begins with the sentence <Finally, Browning lists in a footnote of his brief a litany of other asserted deficiencies in Pike's representation.> shall be deleted in its entirety and replaced with the following language:

<Finally, in arguing for an expansion of the COA, Browning lists a number of other alleged deficiencies in Pike's representation. Because we find that Browning's ineffective assistance of counsel claim succeeds on other grounds, we do not here assess these other alleged deficiencies.>

Existing footnote 19 shall be inserted in its entirety after <Pike's representation.> in the above-inserted text.

Judge Callahan objects to any basis for expanding the COA, does not concur in amending the majority opinion, and stands by her dissent.

Judges Wardlaw, Gould, and Callahan vote to deny the Petition for Panel Rehearing.

The Petition for Panel Rehearing is **DENIED**. No further petitions for panel rehearing or rehearing en banc will be accepted.

IT IS SO ORDERED.

OPINION

GOULD, Circuit Judge:

Nevada state prisoner Paul Browning appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In 1986, a Nevada jury found Browning guilty of four crimes involving the robbery and murder of Hugo Elsen in a Las Vegas jewelry store. The jury sentenced Browning to death.

In his habeas corpus petition, Browning challenges his convictions. He asserts that he is entitled to habeas relief on two grounds: prosecutorial misconduct and ineffective assistance of trial counsel ("IAC"). Browning contends that the prosecutor in his case withheld material evidence favorable to the defense and presented false and misleading evidence at trial. He also contends that his trial counsel's pretrial investigation and preparation were constitutionally inadequate. The Supreme Court of Nevada previously rejected these claims.

Under this procedural posture, a federal court's role is limited. Our role is only "to guard against extreme malfunctions in the state criminal justice systems." *Davis v. Ayala*, 135 S. Ct. 2187, 2202 (2015) (internal quotation marks omitted). In Paul Browning's case, a mixture of disturbing prosecutorial misconduct and woefully inadequate assistance of counsel produced just that. Because the Supreme Court of Nevada

unreasonably applied clearly established Supreme Court precedent in denying some of Browning's claims, we reverse the district court's denial of habeas relief and remand for further proceedings.

I

We start with the factual background: Between 4:00 p.m. and 4:30 p.m. on November 8, 1985, Hugo Elsen was stabbed to death during a robbery of the jewelry store he operated with his wife, Josy Elsen. Soon after this brutal murder, police officers arrested Paul Browning as the primary suspect. Browning was staying at the Normandy Motel, located a few blocks from the Elsens' store. The state charged Browning with (1) burglary, (2) robbery with the use of a deadly weapon, (3) murder with the use of a deadly weapon, and (4) escape. Because the public defenders' office was representing a potential witness in Browning's case, the court appointed former Clark County prosecutor Randall Pike to represent Browning. At the time of his appointment, Pike had been practicing as a defense attorney for less than a year. He represented in a state habeas proceeding that Browning may have been his first capital defendant.[1]

Browning pleaded not guilty. The court scheduled trial for March 3, 1986. A week before that date, the prosecution requested a continuance, explaining that it was not prepared to begin trial because someone in its office had written the wrong trial date in the case file. Over the defense's objection, the court granted the

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[1] In contrast, Pike had prosecuted four death penalty cases in his three years working for the Clark County district attorney.

continuance. Because of the delay, Browning sought dismissal of his case from the Supreme Court of Nevada and federal court. He was unsuccessful. In the meantime, Pike lost contact with Browning's girlfriend, Marsha Gaylord—an essential witness for Browning's trial defense, according to Pike. Trial commenced on December 9, 1986, with Gaylord still unreachable.

A

The prosecution's first witness was Josy Elsen, the spouse of the victim. Josy testified that in the late afternoon of November 8, 1985, she was napping in a back room of the jewelry store when she heard commotion in the showroom. She awoke, entered the showroom, and saw a black man with a blue cap holding a knife and kneeling over Hugo. Hugo and the assailant were in the opposite corner of the room, and a showcase stood between them and Josy. All Josy could see was the side of the assailant's head and hair that "puffed" out of the back of his cap. Josy at once ran through the back door of the jewelry store, knocked on the window of an office next door, and asked the occupants to call the police. Debra Coe, an employee in that office, then accompanied Josy back into the jewelry store through the back entrance; victim Hugo was lying in the same corner in a pool of blood, but the assailant was gone. Later that night, police brought spouse Josy to a station, where she positively identified many pieces of jewelry as coming from her store. At trial, Josy identified a picture of a blue hat with the word "Hollywood" written on the front as the one she saw the assailant wearing in the showroom.

Josy testified that in December 1985, a month after Hugo's murder, police called her back to the station

and presented her with a photographic lineup of twelve black men. The officers placed Browning's picture—taken in November 1985—in the "#5" position. According to an officer's report, Josy "immediately" explained to the officers that she thought she would not be able to identify the assailant because "she only saw him for a very slight moment from the side." Nonetheless, Josy examined the photos and stated that the men in photos #1, #6, and #11 had hair "somewhat like" the assailant's. She did not then indicate any recognition of Browning's photo. Yet at trial, when Josy was asked to identify the man who had killed Hugo, she said that, although she had a limited view of the assailant, she was certain that it was Browning.

The prosecution also called a business neighbor and witness, Debra Coe. Coe testified that when Josy Elsen frantically arrived at Coe's office, Coe ran to the front window to see if she could see anyone leaving the Elsens' store. Coe saw a man run by her office from the direction of the jewelry shop, but later that day told the officers that the man had not come out of the Elsens' store and instead "must have run past it." She told the officers that it was "hard for [her] to see how he could've come out of the door and was running at the angles he was at." She initially told the officers that the man she saw was white, but in a later interview the same day said he was "definitely black." In the interview, Coe stated, "when I see a black person, that they all look the same." At trial, Coe described the man as black, about six feet tall and 27 years old, with a mustache and hair sticking out about an inch beyond a blue cap. She also said he was wearing Levi's and a dark blue jacket. When asked at trial if she truly believed that all black people "look the same," Coe said

she did not. Coe admitted, however, that she did not "really know any black persons personally."

Coe testified that later on the evening of November 8, an officer asked her to accompany him around the corner to "identify the man that they had picked up." Coe obliged, and a minute or two later, an officer pulled up in a police vehicle. The police first showed her someone whom Coe stated was "definitely not" the man she had seen. The officers then presented Browning, who was shirtless and in handcuffs. Browning had a large Afro-style haircut. Coe indicated to the officers that she "thought" Browning was the person she had seen running by her office, but she "would have been able to identify him better if he had the hat on and the jacket." According to Coe, during the showup, Browning's hair was "pressed down" as if he had been wearing a hat.

At trial, Coe testified that she was now "sure" Browning was the man she had seen running by her office on November 8, 1985. When Pike asked her how, a year after her equivocal identification on the night of the crime, she was so sure that it was Browning that she had seen, Coe stated that she had "had time to think about it." Coe also identified the blue "Hollywood" hat as the one worn by the man who ran by her office.

The prosecution also called Charles Woods, who in 1985 operated a jewelry store three doors down from the Elsens' store. Woods was standing outside his store with a friend around 4:30 p.m. when he saw a man jogging towards him. The man was not holding anything, and had no blood on him. The man passed Woods within touching distance. Woods told police that

the man he saw was about six-feet tall, slim, muscular, about 180 pounds, and was wearing dark pants, a light-colored shirt, and a "darker color" hat. When shown a picture of the Hollywood hat at trial, Woods said that it was not the hat he saw the man wearing, which was more of a "beret sort of thing."

Woods testified that the officers at the scene asked him to join Coe at the nearby corner to "stick around and identify" a suspect. When police presented Woods with a shirtless and handcuffed Browning, Woods identified Browning as the man who ran by Woods earlier that day.

The prosecution then called Randy Wolfe. Randy and his wife, Vanessa Wolfe, lived in the same motel where Browning was staying. Randy testified that between 4:00 p.m. and 4:30 p.m. on November 8, 1985, he was working on his landlady's car when Browning yelled his name from the motel's upper level. Randy went upstairs and found Browning in the Wolfes' apartment sitting on the bed and wearing a tan windbreaker and the Hollywood hat. Jewelry had been dumped on the bed. According to Randy Wolfe, Browning told Randy that he had just robbed a jewelry store and thought he had killed someone. Browning also told Randy that he planned to use the jewelry to get Gaylord out of jail. Randy told Browning that he wanted nothing to do with the murder, and was going to go finish working on his landlady's car and then get some heroin. Browning asked if Randy would get some heroin for him too. On his way down the stairs, Randy encountered Vanessa, whom he instructed to keep Browning "cool" while Randy found the police. Randy then located the crime scene and led several officers

back to his apartment. Randy testified that when the officers got there, they promptly arrested Browning, and that after they removed Browning from the apartment, Randy found a cup under his sink filled with additional jewelry.

Randy Wolfe made several admissions during his testimony that bore on his credibility. He admitted that he and Vanessa were addicted to heroin and cocaine, and that he would break into cars to support their habits. He had prior convictions for selling a controlled substance and prison escape. He also admitted that he had kept some of the jewelry he claimed he found under his sink, and lied during Browning's preliminary hearing by stating that he did not keep any of it.

Before the time of Browning's trial, Randy had been charged with possession of stolen property, a charge unrelated to the Elsens' stolen jewelry. Prior to Randy's testimony at trial in Browning's case, the state permitted Randy to plead to a lesser charge of attempted possession of stolen property, for which he faced one to five years in prison. Despite Randy Wolfe's failure to appear in court almost thirty times in the past, he was released on his own recognizance before Browning's trial. Randy Wolfe testified, however, that he had not received "anything" for his testimony against Browning, and that no one had promised that his sentence might be "diminished" if he testified. The prosecutor in Browning's case, Daniel Seaton, was not the prosecutor in Randy's case.

The prosecution next called Vanessa Wolfe. Around 1977, Vanessa and Gaylord, Browning's girlfriend at the time of the murder, had lived in southern California, where they ran con games and "bilk[ed]

people out of their money." At the time of Browning's trial, Vanessa worked as a prostitute in Las Vegas. On the afternoon of November 8, 1985, Vanessa was bringing a client to the Wolfes' apartment when she encountered Randy on the stairs. Randy told Vanessa about what Browning had done, and that Browning was going to take Vanessa hostage if Randy called the police. Vanessa then entered the apartment. Browning was inside, shaking water off of a knife. The Hollywood hat and tan windbreaker were on the floor. Browning instructed Vanessa to throw the knife and hat on the roof, but instead she put the knife in a pizza box under the stairs and threw the hat in a dumpster. Police arrived soon after.

Officer David Radcliffe also testified for the prosecution. He said that he arrived at the Elsens' store to find Hugo Elsen conscious, but in an "extremely serious" condition. Hugo told Radcliffe that a black man wearing a blue baseball cap had stabbed him. Radcliffe then joined some officers standing outside of the storefront, and soon after, Randy Wolfe approached him. Radcliffe had known Randy for several years because Randy was a regular narcotics user. Randy led Radcliffe and several other officers to Randy's apartment, which the officers forcibly entered. Inside, they found Browning sitting on the corner of the bed. Pieces of jewelry were scattered along the floor on the opposite side of the room from the bed.

The prosecution also called several forensics specialists to testify about evidence at the crime scene. Identification specialist David Horn testified that three of the showcase counters in the store had been "disturbed," and that the merchant-side sliding glass of

one of the showcases had been broken. Horn lifted "approximately twenty some odd" fingerprints from the scene. Two were most relevant: one from the top glass of one of the counters, and another from a fragment of the counter's broken sliding-glass door. A different fingerprint examiner concluded that these two prints matched Browning's.

Horn also testified that he observed bloody tennis shoe-style shoeprints leading away from the corner where Hugo was lying and towards the store's front door. After leaving the scene, Horn compared the shoeprints to the loafers Browning was wearing when he was arrested; they did not match. Horn testified that paramedics and off-duty officers often wear tennis shoes at crime scenes, so he did not think any further investigation into the source of the shoeprints was necessary.

State criminalist Minoru Aoki testified that Hugo had Type B blood. Blood had been found on the tan jacket that was lying on the floor in the Wolfes' apartment, and it too was type B. Aoki did not test Randy Wolfe or Vanessa Wolfe's blood type.

Pathologist Giles Green testified that the knife recovered from the pizza box under the stairs at the Normandy Motel was "consistent" with the wound configurations in Hugo's body, but "nothing about that knife t[old him] that the knife made those wounds."

Browning's trial counsel, Randall Pike, called three witnesses. First was Bradley Hoffman, who operated a store two doors down from the Elsens' store. Hoffman testified that around 4:00 p.m. on the day of the crime, he saw a man walking down the street towards the

Elsens' store. The man was Cuban, "probably five seven, slight build," and wearing Levi's jeans, the shirt that Hoffman vaguely recalled as plaid, and a blue baseball cap. Later that night, officers brought Hoffman to the showup with Coe and Woods, and presented him with a shirtless Browning. Hoffman stated that Browning's hair, a "medium sized Afro," did not appear as though Browning had recently been wearing a hat. He also stated at trial that the Hollywood hat was not the one worn by the man he saw walking towards the Elsens' store.

Pike also called Officer Gregory Branon, who testified that he was "one of the first two officers" to arrive at the scene. Branon received a description of the suspect: a "black male, adult in his late twenties, wearing a blue baseball cap, blue windbreaker-type jacket, blue Levi's[,] . . . medium complexioned, bore a mustache and what was described as a shoulder length J[h]eri-type curl." Pike did not ask Branon who gave him that description.

Last, Pike called Annie Yates—a hair stylist—who testified to the difference between a Jheri Curl (the assailant's hairstyle as described to Officer Branon), and an Afro (Browning's hairstyle on November 8, 1985). Yates stated that a Jheri Curl requires the use of chemicals, whereas an Afro does not. Pike presented Yates with the twelve-person photographic array previously shown to Josy Elsen, which had Browning at position #5. Yates stated that pictures #1, #2, #4, and #10 had Jheri Curls.

In his closing, Seaton laid out his theory: Browning robbed the jewelry store to bail Gaylord out of jail because he relied on her prostitution income to feed his

heroin addition. Seaton's closing argument was incendiary, but Pike rarely objected. Seaton began by characterizing the presumption of innocence as follows:

> Now we are talking about that wonderful constitutional element called the presumption of innocence, we are now talking about piercing that veil, dropping that facade because, in fact, as a person sits in a courtroom he may not be innocent. He may be guilty.
>
> [Browning] has the presumption of innocence. And, of course, it is one when his guilt is shown that the farce of that presumption is known and it's been done in this case.

Seaton gave the following description of Browning's murder of Hugo Elsen:

> [Browning, t]his man whose girlfriend prostituted for him so he could get drugs, money to get drugs, this man who took heroin, he wanted Randy Wolfe to get him to cop some heroin for him after the murder. He shot the life of Hugo Elsen right up his arm. That's what he was doing that day. That's what we have here.

Seaton also described Josy Elsen's identification of Browning at trial as "as good as you can ask for." Anticipating that Pike would argue that Browning's hair on the night of the murder (an Afro) did not match the assailant's hairstyle as described to Officer Branon (a Jheri Curl), Seaton explained that Officer Branon received the description from "some white person" who did not understand "the true definition" of a Jheri Curl. Seaton concluded by saying that it was the jury's "duty to go out, decide that and come back in here and tell

[Browning] just exactly that, that he's the one that has to pay for these crimes."

Pike's closing argument set forth a theory that the Wolfes' friend, a Cuban man, committed the robbery-murder, and the Wolfes were now framing Browning.

The jury found Browning guilty on all four counts[2] and sentenced him to death. Browning directly appealed to the Supreme Court of Nevada, which affirmed. *Browning v. State*, 757 P.2d 351 (Nev. 1988).

B

Browning filed a petition for a writ of habeas corpus in Nevada state district court, arguing in relevant part that Seaton had withheld exculpatory evidence from the defense and that Pike was ineffective by failing to perform an adequate investigation before trial. The petition included three new pieces of evidence. First, the state stipulated that post-conviction DNA analysis had proven that the blood on the tan windbreaker found in the Wolfes' apartment did not belong to Hugo Elsen. Second, a forensics report indicated that Hugo Elsen's wounds did not "coherently coincide" with the knife found in the pizza box under the stairs at the Normandy Motel. Third, a forensics report suggested

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[2] The prosecution also presented evidence that once Browning was brought to the police station on the night of November 8, 1985, he escaped from the interview room where he was being held. He was caught before he left the police station building. As explained below, *see* Section V, *infra*, because Browning's petition provides no basis for challenging his escape conviction, our analysis focuses only on his robbery- and murder-related convictions.

that the bloody shoeprints were too large to belong to Josy Elsen or Debra Coe.

The Nevada district court held an evidentiary hearing, at which attorneys Jason Isaacs and Daniel Lamb represented Browning. Robert Shomer, a forensic psychologist, testified that Josy Elsen's identification of Browning as the assailant was questionable because (1) her in-court identification of Browning was 14 months after the incident; (2) the stress of the moment might have made her memory more vivid, but no more accurate; (3) the in-court identification was extremely suggestive because Browning was the sole available "choice"; (4) cross-racial identifications are unreliable (Josy is white, Browning is black); and (5) Josy's observation of Browning's picture during the photo array in December 1985 may have implanted Browning's face in Josy's memory and prompted a false in-court identification. Shomer also criticized Coe's identification, explaining that (1) the 14-month gap between Coe's observations and the trial likely distorted her memory; (2) Coe initially reported to the police that the man she saw did not appear to come from the Elsens' store, and Shomer suggested that Coe probably did not focus intently on his characteristics; (3) Coe had reported to the police that the man she saw was white, but one of the officers' statements to Coe that the suspect was black might have impacted Coe's memory; and (4) given the highly suggestive procedures of the in-person showup on the night of November 8, 1985, Coe's identification was, at best, equivocal. Finally, Shomer criticized Woods's identification because (1) Woods stated that he saw nothing notable about the man who ran towards him on the afternoon of November 8, 1985, suggesting that Woods did not

pay close attention to the man's appearance; and (2) the showup was particularly suggestive in light of the officers' telling Woods that they had a suspect whom they wanted Woods to identify.

Browning's counsel then called Michael Sweedo, a fingerprint examiner and crime scene analyst, to give his opinion on the officers' forensic investigation. Sweedo testified that Browning's fingerprints on the showcase glass could have been the result of Browning leaning over the case. Sweedo noted that it was unusual that there were no other identifications on the remaining twenty-some latent prints lifted from the crime scene. Sweedo also said that it was abnormal that the officers did not investigate the source of the bloody shoeprints.

Browning's attorneys then called Pike, Browning's trial counsel. Pike told the court that Marsha Gaylord would have testified to two crucial pieces of evidence that never came out at trial: (1) Gaylord and Browning had been in the Elsens' store prior to November 8, 1985, which could have explained the presence of Browning's fingerprints in the store; and (2) the Wolfes had a friend that was of Cuban descent. Pike could not call Gaylord as a witness, however, because she "disappeared" after the initial trial continuance. Pike asserted that he tried to locate Gaylord by using Martin Schopp, his investigator. Other than Browning himself, Gaylord was the only person who knew that Browning had been in the Elsens' store before November 8, 1985.

Pike then described his investigation of Browning's case. He explained that although he visited the Elsens' store after it was cleaned and reopened to the public,

he never went when it was a crime scene. Pike explained that, to avoid becoming a witness himself, he had Schopp conduct all witness interviews. Pike did not have Schopp interview the Wolfes before trial, despite Pike's knowing that the Wolfes were "long time informants." Pike suggested that any inquiry into whether the Wolfes were receiving a benefit for their testimonies would have been futile because, in 1986, plea bargaining was "informal," and "basically, there were a lot of things that were done just with passive agreement." At some point prior to trial, Pike was told that the Wolfes had falsely accused a man named Jerold Morell of assaulting Vanessa with a knife, but Pike could not recall making any attempt to locate Morell.

Pike did not retain a fingerprint expert because, as a former prosecutor, he "knew" all of the state's forensics witnesses and relied on informal conversations with them. Pike said that he could trust the state's main fingerprints expert to be "straight" with him.

Pike did not conduct any investigation into the source of the bloody shoeprints, and never authorized any interviews to determine when the responding officers observed the shoeprints. He explained that if he investigated the shoeprints' source and determined that they belonged to one of the paramedics, he would not be able to argue that the shoeprints exculpated Browning as the murderer. Pike characterized his overall trial strategy as "overcasting a shadow of doubt, as opposed to proving" Browning's innocence.

Before trial, Pike was told that a man named Thomas Stamps had information suggesting that

Randy Wolfe and another man, Mike Hines, were attempting to sell some of the jewelry stolen from the Elsens' store. Pike could not recall why he did not have Schopp interview Stamps. Pike also could not recall why he did not instruct Schopp to interview Martha Haygard (the Wolfes' landlady), who had seen the Wolfes with a Cuban individual. Nor could Pike recall why he had not followed up on Coe's initial statement to the police that the man whom she saw running by her office was white, not black.

Investigator Martin Schopp also testified at the state habeas hearing. Schopp performed "substantially all the investigative work" for Browning's defense. Schopp, however, did not have autonomy—Pike directed all of his inquiries. While the court appointed Schopp soon after Browning's arrest, Schopp was not contacted to perform any work until five months later, when Browning himself reached out. Schopp testified that such a significant delay was unusual and likely allowed evidence to get cold. Pike did not give Schopp a discovery file until August 1986—ten months after Browning's arrest—and the file included only police reports and a voluntary statement by Randy Wolfe. Pike gave Schopp no other information to create a foundation for his investigation. Schopp performed a total of 12 hours of investigative services for Pike—a number Schopp thought was low under the circumstances. Pike limited Schopp's investigation by denying Schopp's requests for additional investigation funds. Schopp and Pike spoke no more than five times, and each time only briefly.

Shopp explained that after preparing a preliminary report—which included a statement from Haygard that

she saw the Wolfes wearing "big gold wedding bands" after the robbery—he felt that there were various other leads to follow. He requested that Pike permit him to interview the Wolfes and Thomas Stamps. He also wanted to interview Jerold Morell, who had told Pike that the Wolfes falsely accused him of sexually assaulting Vanessa with a knife. (A jury acquitted Morrell of those accusations.) Pike denied each of these investigation requests. Pike also never asked Schopp to interview any police officers or detectives. In Schopp's opinion, the investigation into Browning's case was never "completed."

Browning's state habeas counsel also called prosecutor Daniel Seaton. Seaton testified that after Browning was convicted of the robbery-murder, Seaton gave Randy Wolfe two concrete benefits. First, he helped Randy get a drywalling job. Second, and more importantly, before Randy was sentenced on his conviction for attempted possession of stolen property, Seaton spoke to the sentencing judge on Randy's behalf. At Randy's sentencing hearing, the judge explained that Seaton had told him that Randy was "a witness in a recent trial," and in light of Randy's being "somewhat helpful" to the prosecution on "several occasions," Seaton felt Randy "deserve[d] something positive for doing that." The judge later noted that Seaton told him that Randy "more than fulfilled his obligation" in Browning's trial "and as a matter of fact put himself in some jeopardy and deserves something for it." In light of Seaton's statements to the sentencing judge, the prosecution in Randy's case withdrew its recommendation of five years imprisonment. The judge imposed only probation.

At the state habeas hearing, Seaton testified that he never promised Randy any benefits in exchange for his testimony against Browning, and decided to speak to Randy's sentencing judge only after Browning was convicted. Seaton admitted, however, that he had engaged in off-the-record plea bargaining in the past in at least one other case. Seaton also admitted that after he learned that the Wolfes kept some of the Elsens' stolen jewelry, Seaton did not impound the jewelry or instruct anyone else to do so. Nor did the state prosecute the Wolfes with any crime relating to the jewelry they kept.

Browning's state habeas counsel also called Officer Branon. Branon testified that he and another officer were the first to arrive at the crime scene—before paramedics or other officers entered the Elsens' store. Upon arrival, Branon immediately noticed bloody shoeprints on the floor. Branon encountered Hugo Elsen lying in the corner of the store. Hugo was scared, but lucid. In Branon's original report, he wrote that the assailant had a Jheri Curl-type hairstyle. As noted above, Branon never explained at Browning's trial who gave him that description, and the speaker was not revealed. During the state habeas hearing, however, Branon explained that it was victim Hugo Elsen himself who had given the description. Branon also testified that Hugo did not use the term "Jheri Curl" when describing the assailant; rather, Hugo described the assailant's hair as shoulder length, loosely curled, and wet. It was Branon—who is black—who first used the term Jheri Curl to describe the assailant's hair. When shown pictures and a video of Browning from the night of November 8, 1985, Branon stated that Browning's hair was a "four inch Afro with braids on

top of it," and could not be described as a Jheri Curl or shoulder length, loosely curled, and wet. The revealed testimony about the victim's description of the murderer's hair raised a critical identification issue.

Finally, Browning himself testified at his state habeas hearing. He told the court that on November 8, 1985, around 4:00 p.m., he was walking down the street when he saw Randy Wolfe driving a yellow Datsun. Browning asked Wolfe for a ride downtown, and as he approached, a Cuban man—whom Browning knew as Randy's friend—pushed Browning out of the way and entered the car. The Cuban man was wearing both the Hollywood hat and tan jacket found in the Wolfes' apartment when Browning was arrested. Randy told Browning to meet him back at the Wolfes' motel room, and then drove off.

C

The state district court denied Browning's habeas petition on December 7, 2001, and filed its findings of fact and conclusions of law on October 24, 2002. Browning appealed to the Supreme Court of Nevada, which on June 10, 2004 affirmed the denial of Browning's challenge to his convictions, but reversed the district court's denial of Browning's challenge to his sentence. *Browning v. State*, 91 P.3d 39 (Nev. 2004). On remand, a jury again sentenced Browning to death. Browning appealed to the Supreme Court of Nevada, which affirmed. *Browning v. State*, 188 P.3d 60 (Nev. 2008). The United States Supreme Court denied a subsequent petition for a writ of certiorari. *Browning v. Nevada*, 556 U.S. 1134 (2009).

While he was being resentenced, Browning filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada. On November 28, 2011, Browning filed his Fifth Amended Petition, the operative version before our court now. After Browning abandoned several unexhausted claims, the district court denied Browning's petition in full on August 1, 2014. The district court granted Certificates of Appealability ("COA") on the following issues: (1) whether the prosecution's failure to produce evidence relating to the bloody shoeprints constituted a violation of Browning's rights as described in *Brady v. Maryland*, 373 U.S. 83 (1963), and/or *Napue v. Illinois*, 360 U.S. 264 (1959); (2) whether evidence impeaching Randy Wolfe's credibility was withheld in violation of Browning's rights under *Brady*; and (3) whether Pike was ineffective in light of his failure to investigate the source of the bloody shoeprints, Hugo Elsen's description of the assailant, and the credibility of Browning's accusers. Browning timely appealed.[3]

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[3] Browning has moved for expansion of the COA to include three additional issues. For the reasons set forth below, *see* Section IV.A, *infra*, we GRANT Browning's motion in part and expand the COA to include the issue of whether Browning's trial counsel was ineffective because of his overall failure to investigate Browning's case. Browning also seeks to expand the COA to include: (1) whether the trial court improperly instructed the jury on the element of deliberation, and (2) whether the prosecutor's statements during closing argument violated Browning's rights under the Due Process Clause. Because Browning has not "made a substantial showing of the denial of a constitutional right" for either issue, we DENY the motion in part as to those claims. 28 U.S.C. § 2253(c)(2).

II

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and "review de novo the district court's dismissal of a habeas petition." *Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court adjudicates a petitioner's federal law claim on the merits, a federal court may grant habeas relief only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[4]

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). "A state court's decision can involve an unreasonable application of Federal law if it either [(1)] correctly

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[4] As the dissent notes, this deferential AEDPA standard is occasionally described as allowing habeas relief only when the state court's conclusions are so unreasonable that there is no "possibility of fair-minded disagreement." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). The existence of cases post-dating AEDPA where the Supreme Court has granted habeas relief over dissent, however, suggest that this language is not to be construed as requiring unanimity, or as suggesting that jurists who disagree with a grant of habeas relief are not fair-minded. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930 (2007) (a 5–4 decision holding that the state court unreasonably applied *Ford v Wainright*, 477 U.S. 399 (1986)) and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (a 5–4 decision holding that the state court unreasonably applied clearly established Supreme Court precedents requiring a sentencing jury in a capital case to be able to consider all mitigating evidence).

identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or [(2)] extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002) (internal quotation marks omitted).

Browning asks that we review some of his claims de novo rather than with deference to the Supreme Court of Nevada. He contends that the Supreme Court of Nevada's rulings were not on the merits, and that its reasoning was based on standards contrary to federal law. *See* 28 U.S.C. § 2254(d). Because we hold that Browning is entitled to relief based on an unreasonable application of United States Supreme Court precedent, we need not, and do not, address whether the Supreme Court of Nevada's decisions were on the merits or contrary to federal law.

III

Under *Brady*, prosecutors are responsible for disclosing "evidence that is both favorable to the accused and material either to guilt or to punishment." *United States v. Bagley*, 473 U.S. 667, 674 (1985) (internal quotation marks omitted). The failure to turn over such evidence violates due process. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam). The prosecutor's duty to disclose material evidence favorable to the defense "is applicable even though there has been no request by the accused, and . . . encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citation omitted).

Under *Napue*, convictions obtained through the use of false testimony also violate due process. 360 U.S. at 269. A violation occurs whether the prosecutor solicits false statements or merely allows false testimony to go uncorrected. *Id.* The constitutional prohibition applies even when the testimony is relevant only to a witness's credibility, *id.*, and where the testimony misrepresents the truth, *see Miller v. Pate*, 386 U.S. 1, 6 (1967) (prosecutor "deliberately misrepresented the truth" by presenting testimony that shorts with large reddish-brown stains tested positive for blood, while leaving out that the stains were made by paint).

For claims under *Brady*, the prosecutor's personal knowledge does not define the limits of constitutional liability. *Brady* imposes a duty on prosecutors to learn of material exculpatory and impeachment evidence in the possession of state agents, such as police officers. *See Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) ("*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995))).

In the Ninth Circuit, the same is true for claims under *Napue*. First, in *Giglio v. United States*, the Supreme Court held that it would impute to an entire prosecution office one prosecutor's knowledge that a government witness's testimony was false, even though the prosecutor with knowledge of the false testimony was not the trial attorney on the case. 405 U.S. 150, 154 (1972). Then, in *Jackson v. Brown*, we applied the same principle to police officers with knowledge that trial testimony offered by the government was false,

holding that "*Napue* and *Giglio* make perfectly clear that the constitutional prohibition on the 'knowing' use of perjured testimony applies when any of the State's representatives would know the testimony was false." 513 F.3d 1057, 1075 (9th Cir. 2008).

However, the dispositive question on the *Napue* claim here is what "clearly established Federal law, as determined by the Supreme Court of the United States," says on the issue. *See* 28 U.S.C. § 2254(d)(1). We recently answered that question. Despite our holding in *Jackson*, we held in *Reis-Campos v. Biter* that "it is not clearly established that a police officer's knowledge of false testimony may be attributed to the prosecution under *Napue*." 832 F.3d 968, 977 (9th Cir. 2016).

As the habeas petition in *Jackson* was filed before AEDPA's effective date, *Jackson* did not directly address whether there was clearly established Supreme Court precedent as required by 28 U.S.C. § 2254(d)(1). As such, *Reis-Campos*—a case decided under the AEDPA standard—is controlling on that question. *See* 832 F.3d at 973.

The district court granted a COA as to whether the prosecution violated (1) *Brady* or *Napue* with respect to Officer Branon's undisclosed observation of the bloody shoeprints, and (2) *Brady* with respect to evidence of an undisclosed benefit for Randy Wolfe's testimony. We expand the COA to include a third claim: whether the prosecutor violated *Brady* by not disclosing the actual description that Hugo Elsen gave to Officer Branon of

the assailant's hair.[5] We first address whether each piece of evidence was exculpatory, triggering a potential duty to disclose under *Brady*, and for the shoeprint evidence, whether it involved the prosecution's knowing presentation of misleading testimony in violation of *Napue*. We then turn to materiality.

A

The bloody shoeprints. At trial, Browning argued that the bloody shoeprints—which did not match the shoes Browning was wearing when he was arrested—demonstrated that someone else committed the murder. The prosecution responded with Officer Horn's testimony that responding paramedics and off-duty detectives often wear tennis shoes at crime scenes, misleadingly suggesting that the shoeprints came from them. But during the state habeas hearing,

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[5] We expand the COA to cover this claim because we conclude that reasonable jurists could disagree with the district court's ruling that not disclosing Hugo's precise description of the hair did not violate *Brady*. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017). As we explain in this opinion, the prosecution's failure to disclose that evidence was in violation of *Brady*.

The state argues that we lack jurisdiction to expand the COA in this manner because Browning did not explicitly include the hair description issue in the section of his brief labeled "uncertified issues." We disagree. When the content of a brief covers an uncertified issue, "we may treat it as a request to expand the scope of the certificate of appealability." *Robertson v. Pichon*, 849 F.3d 1173, 1187 (9th Cir. 2017) (quoting *Delgadillo v. Woodford*, 527 F.3d 919, 930 (9th Cir. 2008)). Though Browning did not style his hair-description arguments as a request to expand the COA, he nonetheless thoroughly discussed the issue. We construe that discussion as a request to further expand the COA.

Branon testified that he and Officer Robertson were the first responders at the store, before the paramedics or other officers, and that the shoeprints were there when he arrived. Branon's observation of the shoeprints was directly contrary to Horn's suggestion that paramedics or other officers left the prints. Had Branon's observation been disclosed, Browning could have used that evidence to bolster his contention that the shoeprints were left by the real killer. This makes Branon's observation exculpatory under *Brady*. *See Kyles*, 514 U.S. at 441 (undisclosed witness observation did not match defendant, and so was exculpatory). And, under *Brady*, Branon's knowledge of the shoeprints is imputed to the government as a whole. *See Youngblood*, 547 U.S. at 869–70.

Browning contends that the prosecution's handling of the shoeprint evidence similarly implicates *Napue*. He asserts that Branon's observation, which was written in Branon's original report, made Horn's testimony that paramedics or off-duty detectives often wear tennis shoes misleading, because it suggested a source of the shoeprints that could not have been true. *See Miller*, 386 U.S. at 6–7. But there is no evidence suggesting that the prosecution knew that Horn misrepresented the truth. And, as we held in *Reis-Campos*, it is not clearly established under Supreme Court precedent (and was not clearly established under Supreme Court precedent on June 10, 2004, the date of the Supreme Court of Nevada's decision rejecting Browning's *Napue* claim) that the prosecution had a duty to learn from Branon about his observation. *See* 832 F.3d at 977. Browning contends that the evidence suggests Horn knew that his testimony was misleading. But this theory runs into the same

obstacle: it is not, and was not on June 10, 2004, clearly established that Horn's knowledge would be imputed to the prosecution. The record before the Supreme Court of Nevada does not suggest that the prosecution knew that Horn's testimony was false or misleading. As a result, Browning has not shown that the Supreme Court of Nevada unreasonably applied clearly established Supreme Court precedent in denying his *Napue* claim.

Benefit for Randy Wolfe's Testimony. When Pike learned that Randy had been allowed to plead guilty in an unrelated case to a lesser charge of attempted possession of stolen property, Pike moved for a continuance in Browning's case to investigate whether Randy and Seaton had made a deal. Seaton responded in court: "I can tell the court categorically . . . there has never been any plea bargaining with Randy Wolfe regarding this case." At Browning's trial, Randy similarly testified that he had not been promised anything for his testimony, including any promise of a more lenient sentence on his recent conviction. But after Browning's trial, Seaton spoke with Randy's sentencing judge on Randy's behalf. This led Randy's prosecutor to withdraw his recommendation of five years, and the judge to sentence Randy to only probation. The Supreme Court of Nevada held that this constituted withholding of impeachment evidence favorable to Browning at his trial,[6] Browning, 91 P.3d at 54–55, and the state does not dispute that conclusion.

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[6] The Supreme Court of Nevada held that while impeachment evidence was withheld, that information was not material. *Browning*, 91 P.3d at 55.

While the Supreme Court of Nevada explicitly concluded that Seaton improperly withheld evidence in this context, it never specified precisely what evidence the prosecution should have disclosed. It stated:

> [T]he prosecutor withheld information regarding benefits given to an important witness for the State, Randy Wolfe. . . . [A]t th[e] time [of trial], Wolfe was the defendant in a separate criminal prosecution, and the prosecutor admitted at the post-conviction evidentiary hearing that after Browning's trial he told the district judge assigned to Wolfe's case that Wolfe had helped in prosecuting Browning . . . . Though the prosecutor maintained that he acted unilaterally and never made any deal with Wolfe, this information still should have been disclosed to the defense. Under *Brady*, even if the State and a witness have not made an explicit agreement, the State is required to disclose to the defense any evidence implying an agreement or an understanding.

Id. (citing *Jimenez v. State*, 918 P.2d 687, 694–95 (Nev. 1996)). The only way this information could be "evidence implying an agreement or an understanding" would be if Randy *knew* that Seaton was contemplating speaking to Randy's sentencing judge. If Randy did not know, then Seaton's intentions would have had no impact on Randy's motivations to tell the truth, or not, at trial. We therefore read the Supreme Court of Nevada's decision as concluding that Randy knew that Seaton might help reduce his sentence if he testified

against Browning.[7] It is that piece of evidence—Randy's expectation of a potential benefit in exchange for his testimony—that constituted impeachment evidence that should have been disclosed to Pike. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 300 (1991) (recognizing that benefits conferred by authorities may motivate a witness to lie).

Hugo Elsen's Description of the Killer's Hair. Browning's hairstyle at the time of the robbery was an Afro. At trial, Officer Branon testified that he received a description of the suspect at the scene as sporting a

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[7] The dissent reasons that this determination by the Supreme Court of Nevada was "not based on any facts in the record," and that the Supreme Court of Nevada therefore "engaged in an unreasonable determination of the facts" in violation of 28 U.S.C. § 2254(d)(2). But at no point in this case has the state challenged the Supreme Court of Nevada's ruling on that point. We also do not see how it could. The federal habeas statutes provide a mechanism by which state prisoners can challenge on federal grounds the authority behind their detention by state officers. They do not provide a means for federal courts to engage in error correction of state court rulings that favor defendants. The statutory language makes this plain: 28 U.S.C. § 2254(d)(2) states that "[a]n application for a writ of habeas corpus . . . shall not be granted with respect to any claim . . . unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Also, 28 U.S.C. § 2254(e)(1) states "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." These statutory principles are limitations on federal courts' power to grant habeas relief. We do not understand how the dissent wrings from these provisions an affirmative power to rule that a state court erred in doing too little to justify its detention of a petitioner.

"shoulder length J[h]eri-type curl." At closing, the prosecution argued that whoever gave this description to Branon did not know the difference between a Jheri Curl and an Afro. But during the state habeas hearing, Branon testified that the description he was given did not actually include the words "Jheri Curl." Rather, Hugo told him that the assailant's hair was "shoulder length," "loosely curled," and "wet." Branon, who is African American, then interpreted those words to mean a Jheri Curl, and used that term in his original report.

Neither "Jheri Curl" nor "shoulder length," "loosely curled," and "wet" are descriptions of an Afro. But only "Jheri Curl" is susceptible to the argument that the speaker could have seen an Afro and used the wrong term because he was unfamiliar with African American hairstyles. Had the prosecution disclosed before trial that victim Hugo Elsen's description of his assailant's hair was not a "shoulder length J[h]eri-type curl," but "shoulder length," "loosely curled," and "wet," Browning could have easily refuted the prosecution's argument. This makes the exact words Hugo used to describe his assailant evidence favorable to the defense under *Brady*.[8]

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[8] The dissent calls this a "novel view" of *Brady*. According to the dissent, our analysis "extends the state's obligations into the murky zone of *interpretations* of otherwise neutral facts." But facts do not exist in a vacuum. Their exculpatory value invariably depends on the interpretations offered, and the theories pressed, by the parties. Consider, for example, one of the pieces of *Brady* material in *Kyles*. 514 U.S. 419. The prosecution in that case did not disclose to the defense a list of the cars parked in the parking lot where the victim was killed, a list which did not include the defendant's car. *Id.* at 450. The Supreme Court held that the list

We hold that Officer Branon's shoeprint observation, Randy's understanding that Seaton was considering speaking with Randy's sentencing judge in exchange for Randy's testimony against Browning, and the precise hair description Branon received from Hugo Elsen were all favorable to Browning under *Brady*. We also hold that Browning's *Napue* claim fails because it was not clearly established at the time of the Supreme Court of Nevada's decision that a police officer's knowledge of false or misleading testimony would be imputed to the prosecution.

For the *Brady* evidence, except for Randy's expectation of a benefit for his testimony, the Supreme Court of Nevada did not explicitly address whether this evidence was favorable to Browning. But in light of our above analysis, we hold that had the Supreme Court of Nevada not viewed the evidence as favorable to the defense, it would have been an unreasonable application of Supreme Court precedent.

B

We turn now to materiality as an element of the *Brady* claims. Under *Brady*, evidence is material "if there is a reasonable probability that, had the evidence

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was exculpatory in part because the prosecution "argued to the jury[] that the killer drove to the lot and left his car there." *Id.* Had the prosecution instead argued that the killer walked to the scene of the crime, the list of cars would have had less exculpatory value to the defense. Likewise here, the prosecution's argument that the speaker did not know the difference between a Jheri Curl and an Afro affected the exculpatory value of Hugo's precise words. We offer a straightforward application of clearly established *Brady* principles, not a "novel interpretation."

been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. When there are multiple *Brady* claims, the Supreme Court instructs that we consider materiality "collectively." *Kyles*, 514 U.S. at 436. We must imagine that every piece of suppressed evidence had been disclosed, and then ask whether, assuming those disclosures, there is a reasonable probability that the jury would have reached a different result. *See, e.g.*, *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017); *Cone v. Bell*, 556 U.S. 449, 473–74 (2009).

Applying this procedure to the facts before us, and incorporating AEDPA deference, we address the following question: Imagine that the prosecution had disclosed (1) that Officer Branon observed that the shoeprints existed before paramedics or other officers arrived; (2) that Randy expected a benefit for his testimony; and (3) that Hugo Elsen described the assailant as having shoulder length, loosely curled, and wet hair, rather than a Jheri Curl. Was it objectively unreasonable for the Supreme Court of Nevada to conclude that there was not a reasonable probability that the jury would have reached a different result?

We conclude that the answer is yes. Officer Branon's undisclosed shoeprint observation disproves the prosecution's primary rebuttal against Browning's strongest piece of evidence that someone else killed Hugo. The undisclosed evidence of a benefit for Randy's testimony adds a powerful reason to disbelieve him and his wife, the prosecution's most critical witnesses. And the undisclosed evidence of Hugo's exact dying words

defeats the prosecution's central argument against its probativeness.

Also, the prosecution's trial evidence was remarkably weak. Its case relied on flawed identifications and the Wolfes' unreliable testimony. And the physical evidence was just as consistent with Browning having been framed as with him being the killer.

We conclude that it was an objectively unreasonable application of Supreme Court precedent to hold that the *Brady* materiality standard was not met here. Below, we discuss materiality in more detail, analyzing the relevant evidence at trial piece-by-piece, with an aim to showing the probable ultimate effect on the jury's decision.

The Bloody Shoeprints. Browning's trial theory was that someone else killed Hugo Elsen. The shoeprints leading from Hugo to the front door lent strong support to this theory. But Officer Horn's testimony suggesting that paramedics or other officers could have left the shoeprints gave the jury a reason to disregard strong evidence raising questions of reasonable doubt. Had the prosecution disclosed Branon's observation about the shoeprints, the source of several bloody shoeprints would remain a mystery. This means the jury would have been left with powerful evidence that Browning was not the killer.

In its briefing, the state responds that Officer Branon's observation was not so helpful for Browning's defense because the shoeprints could have been made by Josy Elsen or Debra Coe. But that is pure speculation. The prosecution had the opportunity to

offer at trial evidence that Josy or Coe made the shoeprints, but either chose not to do so or did not have such evidence. We cannot now assume such evidence exists. *See Miller-El v. Cockrell*, 537 U.S. 322, 345 (2003) ("Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it." (internal quotation marks omitted)). In any event, as the district court noted, it is unlikely that either Josy or Coe was the source of the prints because there is no evidence that either of them went anywhere near the store's front door after Hugo was stabbed. There are also photos in the trial record of the shoeprints next to a ruler. Examining the photos as if we were the jury viewing them as exhibits at trial, the shoeprints appear to us larger than those of a typical woman's shoe.[9]

At oral argument, counsel for the state proffered a different theory. He asserted that there were in fact two sets of prints: one set around Hugo Elsen's body, and another leading from the body to the front door. *See* Oral Arg., *Browning v. Baker*, No. 15-99002 (Mar. 16, 2017) at 23:00–23:47, https://www.youtube.com/watch?v=8va4fhOsWZ8. Counsel argued that the shoeprints Officer Branon referred to in his testimony

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[9] In the state habeas proceeding, Browning argued the same point but with expert testimony. He submitted a report from forensics examiner Michael Sweedo that stated that the shoeprints were too big to have been made by the typical woman's tennis shoe. This evidence was not part of the original trial record, and we are doubtful that we may consider it in determining materiality under *Brady*. Nevertheless, we need not decide the issue because the *Brady* violations here were material without considering post-trial revelations.

were only those immediately surrounding Hugo's body, which Josy or Coe may have created while giving aid to Hugo. *Id.* at 23:50–24:20. According to his theory, the other prints—which led from the body to the front door—were left later by paramedics. *Id.* at 24:22–24:55. But the state did not raise this argument in its briefing before this court (or apparently in any court); it has thus long been forfeited. *See Harger v. Dep't of Labor*, 569 F.3d 898, 904 n.9 (9th Cir. 2009); Fed. R. App. P. 28(b).[10]

A final possibility, one the parties do not discuss but that the jury might have considered, was that Browning made the shoeprints, but then changed his shoes before being arrested. But like the theory that Josy or Coe left the prints, there is no evidence to support this possibility. The prosecution never found any such shoes in the Wolfes' or Browning's apartments, nor any other shoe that matched the prints.

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[10] Moreover, the record does not support this new theory. Counsel seemed to derive the theory from the particular words chosen by Officers Branon and Horn in describing the location of the shoeprints. At the state habeas hearing, Branon testified that the shoeprints were "near" Hugo, while Michael Sweedo, reading from Horn's police report, stated that the prints led from Hugo's body to the front door. We are unpersuaded. A description of shoeprints "near" a body could easily mean shoeprints leading from that body to another part of the room. The state also presents no other evidence, such as different tread patterns in the shoeprints, to support the two-sets theory. And we have already explained why the evidence does not support Josy or Coe having left any of the shoeprints.

The bloody shoeprints were strong evidence that Browning was not the killer. Had the prosecution disclosed Branon's observation, that strong evidence would have gone unrebutted.

Benefit for Randy Wolfe's Testimony. Randy and Vanessa Wolfe were the prosecution's most important witnesses. They were the original accusers, the source of the alleged murder knife, and the source of Browning's alleged confession. It is fair to say that had the jury not credited the Wolfes' testimony, Browning would not have been convicted.

The jury had plenty of reasons not to believe the Wolfes. The Wolfes admitted that they used heroin and cocaine,[11] that Vanessa was a prostitute, and that Randy stole property. Randy had prior convictions, including a recent conviction for which he would soon be sentenced. Randy admitted to keeping some of the stolen jewelry and lying about it at Browning's preliminary hearing. Vanessa testified that she used to "bilk people out of their money."

Given this mountain of evidence providing potential reasons to doubt the Wolfes' credibility, getting just one juror to change his or her mind about the truth of the Wolfes' testimony likely would not have required much. *See Agurs*, 427 U.S. at 113 ("[I]f the verdict is already of questionable validity, additional evidence of

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[11] The Wolfes' use of drugs is relevant to their credibility because it indicates that in the past they engaged in illegal activity. However, that the Wolfes were physically addicted to drugs is not here relevant to their credibility. *See United States v. Kizer*, 569 F.2d 504, 506 (9th Cir. 1978).

relatively minor importance might be sufficient to create a reasonable doubt.").

Evidence suggesting that Randy was expecting leniency in his sentencing in exchange for his testimony against Browning could have accomplished this task. And, it could have done so without being merely cumulative of the impeachment evidence already in the record. Evidence that Randy was expecting a benefit for his testimony would have revealed that the Wolfes had a "direct, personal stake in [Browning]'s conviction." *Id*. at 683. The other impeachment evidence concerning the Wolfes' criminal activity and penchant for lying suggested to the jury that the Wolfes were untrustworthy. But evidence suggesting that Randy had a personal stake in Browning's conviction would have shown the jury why the Wolfes would lie in this particular case. *See Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010) ("The undisclosed benefits that the informant received added significantly to the benefits that were disclosed and certainly would have cast a shadow on the informant's credibility. Thus, their suppression was material." (internal quotation marks and alterations omitted)). Such evidence would have been uniquely impeaching, and if disclosed, may have broken the camel's back and persuaded the jury to disbelieve the Wolfes. Without the Wolfes, the prosecution had no case.[12]

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[12] The dissent contends that, when engaging in this analysis, "our role is not to reweigh the evidence and make fresh credibility determinations." We disagree that this argument is controlling. To determine whether the jury would have been swayed by additional evidence, we must put ourselves in the shoes of the jurors and ask whether the same result would be reached if presented with this

Hugo Elsen's Description of the Assailant's Hair. Had the prosecution disclosed the precise words Hugo used to describe his assailant's hair, the prosecution's argument that the source of the description must not have known the difference between a Jheri Curl and an Afro would have failed, leaving the jury with no reason to disregard Hugo's description. Hugo's precise description—wet, shoulder length, and loosely curled—significantly undermines the case against Browning. The description was markedly different from Browning's hair on the day of the murder—an Afro—and, according to Branon, Hugo was lucid when he gave it. Moreover, it was unlikely that Hugo was mistaken about his description in light of Branon's "meticulous" questioning. Hugo also had the closest and most accurate view of the assailant's hair, while, as discussed below, every other eyewitness identification was seriously flawed. Hugo's vivid description of a hairstyle so different from Browning's presented substantial reason to doubt that Browning was the one who stabbed Hugo. If the jury no longer had reason to reject that description, and the jury knew that the description came from the victim, it would have raised grave doubt about the prosecution's theory of the case.

Identifications. The identifications presented at trial were significantly flawed. Two of the three original positive identifications were equivocal at best, and the officers' presentation procedures were textbook

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new, hypothetical trial record. There is no way to do that without making fresh credibility determinations, particularly when the new evidence is impeachment evidence, and is therefore relevant only because of its tendency to affect credibility.

examples of suggestive techniques. *See United States v. Wade*, 388 U.S. 218, 228 (1967) ("A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.").

Josy Elsen saw only the side of the assailant's head after waking from a nap. She told officers it was unlikely that she would be able to identify the assailant because she saw him only for a moment, and never saw his face. During the photo lineup, Josy pointed to three photos of men that were not Browning, saying only that their hair resembled the assailant's. While Josy identified Browning at trial, it was only after seeing Browning at more than a dozen preliminary hearings, and at each he was presented as the accused. Josy's identification deserves, at most, minimal weight.[13]

Coe's identification was not much better. An officer presented Coe with Browning—who was shirtless and handcuffed—and said, "We think we have a suspect. Is this him?" At this point, Browning's appearance, the

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[13] Browning argues that Josy never positively identified Browning at trial, and that the state conceded as much during state habeas proceeding. However, Browning has not provided the Court with any documentation regarding the state's supposed concession. The prosecution did significantly overstate Josy's identification, saying that she pointed at Browning and said, "That's the man who was kneeling over my husband," when in fact Josy had merely said that Browning was in the courtroom. The identification was not, as Prosecutor Seaton maintained, "as good as you can ask for." Nevertheless, we agree with the trial court that Josy identified Browning at trial.

officer's question, and the form of the showup rendered the procedures highly suggestive and any resulting identification of little evidentiary value. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."), *abrogated on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987). Coe then said that she only "thought" Browning was whom she had seen running by her office. This was despite initially telling police that the man she saw was white and did not look as if he came from the Elsens' store. Coe also told police that "when [she] see[s] a black person, [] they all look the same," giving less reason for confidence in her already uncertain identification. Coe said at trial that after having had "time to think about it," she was sure that it was Browning that she saw. But her in-court identification says far less than her equivocal contemporaneous one. *Cf. Gilbert v. California*, 388 U.S. 263, 272 (1967) (tying admissibility of in-court identification in part to the constitutionality of a pretrial identification).

Woods gave a positive identification of Browning at the scene. But police used the same suggestive procedure they did with Coe. They told Woods that they had a suspect and then presented Browning wearing only pants, and not as part of a multi-person lineup. Again, these procedures cast doubt on the answer they produced.[14]

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[14] Hoffman was subject to the same suggestive procedure as well, but curiously, no party at trial squarely asked him whether Browning was the same man he had seen earlier walking towards the Elsens' store. Nevertheless, Hoffman's trial testimony hints at

Not counting the far-after-the-fact and suggestive in-court identifications, the only unequivocal identification of Browning at the time of the crime was Woods's, in response to a suggestive, one-person showup. But even crediting Woods's identification, it tells us almost nothing about who killed Hugo Elsen. Woods stated that he saw Browning jogging towards him (and away from the Elsens' store), getting within touching distance. *Browning was not carrying anything and had no blood on him.* We do not understand how Woods's identification and description of Browning—no blood on him and nothing in his hands—would support an inference that Browning had just brutally stabbed a man to death and stolen 70 pieces of jewelry. The only thing that Woods's identification, if credited, proves is that Browning was a few blocks from his residence around 4:30 p.m. on November 8, 1985.

The Jewelry. When police arrested Browning in the Wolfes' apartment, they found many pieces of the stolen jewelry in the same room as Browning. However, the rest of the jewelry was turned over later by the Wolfes (except for the items Randy kept for himself). There was no evidence at trial that Browning's fingerprints were on any of the stolen jewelry. The jewelry evidence is just as consistent with the Wolfes framing Browning for the murder as it is with Browning being guilty.

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what his answer would have been. He testified that the man he saw was wearing a hat, and that Browning did not appear as though he had recently been wearing a hat. Hoffman also told police that the man he saw was "Cuban," supporting Browning's defense theory that the Wolfes and their Cuban friend framed him for the murder.

Browning's Appearance When Arrested. The Elsens, Coe, Hoffman, and Woods gave somewhat similar descriptions of the clothes on the man they saw. Josy and Hugo Elsen both described a man wearing a blue cap. Coe described a blue cap, Levi's, and a dark blue jacket. Woods described dark pants, a light-colored shirt, and a "darker color" hat—a "beret sort of thing." Hoffman described Levi's, a shirt that he vaguely recalled as plaid, and a blue baseball cap. When police arrested Browning, he was not wearing any jacket, any shirt, or any hat. The shoes Browning was wearing did not match the bloody shoeprints at the crime scene, and there was no evidence that Browning had any blood on him. Police recovered a blue hat in the dumpster outside the Normandy Motel, but again, this discovery was just as consistent with the Wolfes being responsible for the murder as Browning.

Fingerprints. Officer Horn lifted "twenty some odd" fingerprints from the scene, two of which matched Browning's prints. One of Browning's prints was from the top glass of one of the disturbed counters, and the other was from a fragment of the counter's broken sliding-glass door. However, the store was only two blocks from Browning's residence, and there was no evidence as to how long the prints had been present. *See Mikes v. Borg*, 947 F.2d 353, 361 (9th Cir. 1991) ("[I]n a case resting upon the premise that the defendant impressed his fingerprints on an object at the time of the commission of the crime and supported solely by evidence that the defendant's fingerprints were found on that object, the record must contain sufficient evidence . . . that the defendant touched the object *during the commission of the crime*."). Browning could have visited the store at some earlier point. Or he

could have been involved in the robbery, while someone else—say Randy Wolfe or the Wolfes' Cuban friend—committed the murder. *Cf. Wearry*, 136 S. Ct. at 1006 ("[T]he evidence the dissent cites suggests, at most, that someone in Wearry's group of friends may have committed the crime, and that Wearry may have been involved in events related to the murder *after* it occurred.").

Steven Scarborough, who examined the fingerprints, also testified that he compared the approximately twenty fingerprints lifted from the scene against only Browning's and Hugo Elsen's. This left no evidence about whether any of the prints matched Randy or Vanessa Wolfe, or any other possible suspect. Moreover, the prosecution did not present any evidence that the fingerprints were bloody or that blood was on the glass. Had Browning stabbed Hugo and then broken the case and stolen the jewelry as the prosecution suggested, the fingerprints likely would have had blood on them.

The fingerprint evidence is probably the strongest evidence against Browning. But it is by no means decisive, and we conclude that it is not enough to avoid the otherwise substantial reasonable doubt created by the shoeprint evidence, the evidence that Randy expected a benefit for his testimony, and Hugo's description of the assailant's hair.[15]

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[15] In the state habeas proceeding, Browning presented expert testimony that it was possible that the print on top of the glass case could have come from someone leaning over the case, and that the print found on the shard of glass on the floor behind the counter could be consistent with someone pushing the glass door

Blood-Spotted Jacket. Vanessa Wolfe identified a tan windbreaker found in her apartment as belonging to Browning. Criminalist Minoru Aoki testified that blood found on the jacket was type B, the same blood type as Hugo Elsen's. The prosecution argued at trial that the jacket proved that Browning was the killer. But Aoki's testimony only showed that the blood on the jacket was the same type as Hugo Elsen's (out of four types), not that there was a DNA match.[16] The jacket did not match any of the descriptions given by the identification witnesses, who all said the jacket they saw was blue. And even if the killer had worn the jacket, there was no reason to believe that Browning was wearing the jacket on November 8, 1985. The jacket was found in the Wolfes' apartment, tying it just as easily to Randy or his Cuban friend as to Browning. The jacket was a zero-sum for the prosecution's case.

The Knife. Vanessa Wolfe testified that she saw Browning shaking water off of a knife in her apartment, and that he asked her to help get rid of it. But there was no blood or fingerprints found on the knife, and apart from Vanessa's testimony, no other

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open. Defense counsel Pike also testified at the habeas hearing that he had planned to call Browning's girlfriend, Marsha Gaylord, to testify that she had been in the jewelry store with Browning prior to the day of the crime, but that Pike was unable to do so because Gaylord had disappeared. As already discussed, we grant relief without deciding whether such post-trial evidence bears on materiality under *Brady*.

[16] In the state habeas proceeding, the parties stipulated that post-trial DNA testing revealed that the blood on the jacket conclusively did not belong to Hugo Elsen. Again, we do not rely on this post-trial evidence.

evidence tying the knife to the murder. Dr. Giles Green testified that Hugo's wounds could have been made by the knife, but nothing made him think that that particular knife was the murder weapon.[17] Even if there had been some physical evidence connecting the knife to the murder, there was still no such evidence that Browning had even touched it. Indeed, the knife, like the tan jacket, is just as consistent with the Wolfes or a friend of theirs committing the murder as with Browning being the killer. Outside of Vanessa's testimony, the knife adds nothing to the prosecution's case.

In sum, the jewelry, the knife, and the tan jacket all failed to tie Browning to the murder. The identifications were flawed and mostly equivocal. There were endless reasons to distrust the Wolfes. When arrested, Browning was not wearing any clothing described by the eyewitnesses, and there was no evidence that Browning had any blood on him. All the prosecution had left was the fingerprints. But even with those, there was no evidence about how long the prints had been present, and no evidence that the other prints from the scene did not match either of the Wolfes or their Cuban friend. The upshot is that the prosecution presented a fundamentally weak case. Add Officer Branon's observation of the shoeprints, thus leaving unanswered significant evidence that someone besides Browning, Josy, Coe, a paramedic, or a police officer was in the store with Hugo while he was

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[17] In the state habeas proceeding, Browning introduced a forensics report indicating that Hugo Elsen's wounds "do not coherently coincide" with the knife found in the Wolfe's apartment. We do not rely on this evidence.

bleeding; add evidence that the prosecution was planning to help its best witness in an unrelated sentencing, suggesting a motive for the witness and his wife to lie at trial; add an unrebutted closeup description from the victim that did not match the defendant; and that fundamentally weak case collapses under the weight of its reasonable doubt. "Even if the jury—armed with all of this new evidence—*could* have voted to convict [Browning], we have no confidence that it *would* have done so." *Wearry*, 136 S. Ct. at 1007 (internal quotation marks omitted). And yet Browning sits on death row. We conclude that there is a reasonable probability that had the concealed evidence not been withheld, the jury would have reached a different result.

We also hold that this result is the only objectively reasonable conclusion. Whatever confidence the Supreme Court of Nevada found in Browning's verdict, it was not a confidence that was objectively reasonable. The strength of the undisclosed evidence is too great, and the remainder of the trial record too weak. "'[F]airness' cannot be stretched to the point of calling this a fair trial." *Kyles*, 514 U.S. at 454. The district court should have granted habeas relief on Browning's *Brady* claims.

IV

Browning also asserts that he was denied his right to effective assistance of trial counsel. To show a violation of that right, Browning must demonstrate that (1) Pike's performance was deficient, and (2) that deficiency prejudiced Browning. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because AEDPA guides our review, we ask whether the Supreme Court

of Nevada "applied *Strickland* to the facts of [t]his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002). We conclude that it did.

A

We first clarify the scope of Browning's IAC claim on appeal. In its order, the district court limited the COA to particular "claims" that Pike's failure to investigate particular avenues of evidence were deficient. The district court granted COAs on whether Pike's failure to investigate (1) the source of the bloody shoeprint, (2) the Wolfes' credibility as witnesses, and/or (3) Hugo Elsen's actual description of the assailant to Officer Branon each constituted individual instances of ineffective assistance of counsel. Limiting the COA in this manner was error.

Browning is entitled to a COA if he "has made a substantial showing of the denial of a *constitutional right*." 28 U.S.C. § 2253(c)(2) (emphasis added). Browning's habeas petition asserts that he was denied the constitutional right of effective trial counsel. This right is a guarantee of effective counsel *in toto*—it promises that counsel will perform reasonably. While an individual claiming IAC "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," *Strickland*, 466 U.S. at 690, the court considers counsel's conduct *as a whole* to determine whether it was constitutionally adequate, *see, e.g.*, *id*; *Wong v. Belmontes*, 558 U.S. 15, 17 (2009) ("In light of the variety of circumstances faced by defense counsel and the range of legitimate decisions regarding how best to represent a criminal defendant, the performance inquiry necessarily turns on whether counsel's

assistance was reasonable considering all the circumstances." (internal quotation marks and alterations omitted)). The district court distorted this inquiry by separating Browning's IAC argument into individual "claims" of IAC corresponding to particular instances of Pike's conduct. This approach was misguided. Rather, the IAC portion of the COA should have been crafted at a higher level of generality.

Browning asks us to expand the COA to include whether he "was denied effective assistance of counsel by his trial lawyer's wholesale failure to investigate and prepare for trial." Because this articulation more appropriately frames the constitutional right Browning's petition contends was violated, and because—as explained below—he "has made a substantial showing of the denial" of that right, 28 U.S.C. § 2253(c)(2), we GRANT his motion to expand the COA to include that issue.

B

The first element of an IAC claim requires Browning to show that his counsel's performance was "deficient," or more precisely, "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Browning may not rely on generalities in making this showing; he must point us to specific instances of Pike's conduct that demonstrate incompetent performance. *Id.* at 690. Because Browning asserts that Pike failed to adequately investigate the case, Browning must show that Pike violated his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The ABA Standards for Criminal Justice in effect during

Browning's trial, to which the Supreme Court has "long . . . referred as guides to determining what is reasonable," *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks omitted), help clarify Pike's investigatory obligations. They included "the duty . . . to conduct a prompt investigation of the circumstances of the case . . . includ[ing] efforts to secure information in the possession of the prosecution and law enforcement authorities." ABA Standards for Criminal Justice, Standard 4-4.1 (2d ed. 1980); *see also Summerlin v. Schriro*, 427 F.3d 623, 629–30 (9th Cir. 2005) (en banc) ("The standards in effect at the time of Summerlin's trial [which occurred prior to Browning's] clearly described the criminal defense lawyer's duty to investigate . . .").

We examine Pike's performance in a "highly deferential" manner, "indulg[ing] a strong presumption that [Pike's] conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Moreover, because we are operating under AEDPA deference, our review is "doubly deferential[,] . . . tak[ing] a highly deferential look at counsel's performance, through the deferential lens of § 2254(d)." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (citation and internal quotation marks omitted). Browning therefore must show more than "a strong case for relief"—he must demonstrate that "there is no possibility fairminded jurists could disagree that the state courts decision conflicts with" Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). We conclude Browning has made this showing.

Browning first points us to Pike's failure to interview Officer Branon prior to calling Branon to

testify at trial. The Supreme Court of Nevada concluded that this was deficient performance, *Browning*, 91 P.3d at 46, and we agree. We have previously assumed without deciding that "it ordinarily falls below the *Strickland* level of required competence to put a witness on the stand without interviewing him." *Jackson v. Calderon*, 211 F.3d 1148, 1160 (9th Cir. 2000). Because the government does not challenge the Supreme Court of Nevada's conclusion on this point, we need not decide whether failing to interview a witness before calling him to the stand invariably constitutes objectively unreasonable representation, and do not disturb the Supreme Court of Nevada's conclusion that it did in this case.

Browning also argues that Pike's failure to investigate the source of the bloody shoeprints constituted deficient performance. At the state habeas hearing, Pike explained this decision by noting that if he attempted to determine the source of the shoeprints and discovered that the source was paramedics or responding officers, he would disprove his own theory that the prints were left by the assailant (who was someone other than Browning). In other words, Pike apparently chose not to investigate the source of the shoeprints because he thought Browning was guilty, and thus assumed the shoeprints had been left by paramedics and other responders. The Supreme Court of Nevada held that this was a reasonable tactic, explaining, "[a]s long as the source of the prints was unknown, counsel could argue to the jury that the actual murderer had left them." *Browning*, 91 P.3d at 46.

On this issue, the Supreme Court of Nevada unreasonably applied *Strickland*'s deficiency standard by blindly accepting Pike's strategy. "Counsel cannot justify a failure to investigate simply by invoking strategy. . . . Under *Strickland*, counsel's investigation must determine strategy, not the other way around." *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017). Pike's invocation of strategy here is an extreme instance of strategy determining investigation. If a defense attorney's "fear of learning the truth" rendered every decision not to investigate a reasonable tactic, even the most egregious failures to investigate a client's case would be protected from constitutional scrutiny. Even worse, under the Supreme Court of Nevada's reasoning, a criminal defendant's entitlement to a reasonable investigation would depend on his attorney's uninformed, gut-based intuition about his client's guilt. In other words, according to the Supreme Court of Nevada, if your criminal attorney does not believe your story, your attorney need not investigate your case. The Sixth Amendment required more in 1986, and still does today.

To be sure, a decision not to investigate particular facts may be reasonable *when the attorney has reason to believe* doing so would reveal inculpatory evidence. In *Richter*, for example, the defendant argued that his attorney should have had a blood expert test a pool of blood from the crime scene to determine whether it was a mixture of two victims' blood. 562 U.S. at 108. Such a result would have dramatically bolstered the defense's theory. *See id.* But the test could have also *disproved* the defense's theory by only detecting a single blood source. *See id.* The Court explained that the defendant's attorney decided not to test the blood

because he "had reason to question the truth of his client's account" in light of the client's prior false statements. *Id*. Because of the "serious risk" that the test would expose the defense's theory "as an invention," defense counsel's decision was reasonable. *Id.*

Here, the facts are the opposite. Pike had no reason to disbelieve Browning's assertions that he had been framed by the Wolfes. And more importantly, contrary to Pike's fears, there was little risk that investigation into the source of the shoeprints could damage Browning's defense theory. Had Pike interviewed Branon before calling him to the stand, Pike could have asked him whether paramedics or police officers had entered the store before Branon's arrival. If Branon's answer was "no," this would have bolstered Browning's theory. But even if Branon had responded "yes," Pike could have decided *then* to inquire no further, and still would have inflicted no harm on his theory. Pike thus had no reason to fear that any inquiry into the source of the shoeprint would damage his case. While "[a]n attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense," *id.* at 108, the reverse is also true: the obligation to investigate, recognized by *Strickland*, exists when there is no reason to believe doing so would be fruitless or harmful.[18]

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[18] Browning offers a different but related argument: the Supreme Court of Nevada's conclusion that Pike's performance was deficient due to his failure to interview Branon *at all* requires a holding that Pike was deficient for not asking Branon about the shoeprints. Because there was a deficiency in not interviewing Branon at all, we need not decide if any particular questions were needed to be asked.

Browning also asserts that Pike's performance was deficient because Pike never interviewed the Wolfes before trial. When asked about this at the state habeas hearing, Pike explained that he had a policy of never personally interviewing witnesses to prevent becoming a witness himself. Rather, he had Martin Schopp conduct all interviews. The Supreme Court of Nevada concluded that this was a reasonable strategy. *Browning*, 91 P.3d at 46.

There can be no doubt that Pike's policy of not personally interviewing witnesses was reasonable. But that policy in no way explains why Pike rejected Schopp's request to interview the Wolfes. Merely articulating a reasonable strategy in response to a deficiency argument does not end the inquiry when that strategy does not explain the decision itself. *See* Wayne R. Lafave, et al., *Criminal Procedure* § 11.10(c), at 797 (6th ed. 2016) ("Of course, a decision apparently based on a tactical judgment is not therefore rendered immune from an incompetency challenge."). Pike gave *no explanation* for why Schopp could not conduct the interview himself. Yet the Supreme Court of Nevada concluded that Pike's no-personal-interviews strategy explained his decision to not subject the Wolfes to interviews. That conclusion makes no sense and is objectively unreasonable.

Finally, in arguing for an expansion of the COA, Browning lists a number of other alleged deficiencies in Pike's representation.[19] Because we find that

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[19] These include: Pike's not offering evidence at trial that Browning had no blood, cuts, or scrapes on his body when he was arrested; failing to secure Gaylord's testimony; not challenging the

Browning's ineffective assistance of counsel claim succeeds on other grounds, we do not here assess these other alleged deficiencies.

Our IAC analysis is based on the fundamental obligations of each attorney, and is not a product of hindsight. *See Bell*, 535 U.S. at 702. Pike had "countless ways" to investigate adequately Browning's case. We do not limit him to just "one technique or approach." *Richter*, 562 U.S. at 106. And to be sure, Pike's "poking holes" and "casting shadows" strategy could have been appropriate under the right circumstances. *See id.* at 109 ("To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates."). But to reach the conclusion that this strategy was reasonable, Pike first had an obligation "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Here, Pike did neither. His failure to investigate what happened on November 8, 1985, "so undermined the proper functioning of the adversarial process that [Browning's] trial cannot be relied on as having produced a just result." *Id.* at 686.

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prosecution's assertion that when they entered the Wolfes' apartment Browning was "surrounded" by jewelry; not objecting to the prosecutor's improper closing statements; not bringing out at trial that Browning had no heroin in his body when he was arrested; not objecting to Seaton's claim that the tan jacket had Hugo Elsen's blood on it; not presenting evidence demonstrating that Gaylord was not in jail on November 8, 1985; never obtaining a forensic evaluation of the knife; and never getting a witness to testify that Randy Wolfe tried to sell the jewelry.

We conclude that Pike unreasonably failed to investigate Browning's case, and that the Supreme Court of Nevada unreasonably concluded that Browning failed to prove just that.

C

We now consider whether the unprofessional deficiencies identified above prejudiced Browning. Despite its differing terminology, prejudice in the IAC context mirrors the materiality standard under *Brady*. We ask whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *see Gentry v. Sinclair*, 705 F.3d 884, 906 (9th Cir. 2013) ("*Brady* materiality and *Strickland* prejudice are the same."). To meet this standard, Browning must demonstrate a reasonable probability that had Pike conducted an adequate investigation, "at least one juror would have harbored reasonable doubt about" Browning's guilt. *Buck v. Davis*, 137 S. Ct. 759, 776 (2017). Because we defer to the Supreme Court of Nevada's decision under AEDPA, our ultimate inquiry is whether that court's conclusion that any deficient performance by Pike did not prejudice Browning was objectively unreasonable. We conclude that it was.

We have already explained in detail why the prosecution's case against Browning was quite weak. In fact, because the standards of materiality for *Brady* and *Strickland* are the same, our materiality analysis above is in large part identical to the assessment of the prejudicial effect of Pike's ineffective assistance. But while we will not repeat that analysis here, we cannot just incorporate the materiality section above in its entirety. The evidence to consider in the IAC context

differs in one important aspect: even if Schopp had interviewed the Wolfes, there is no reason to believe that Randy would have made any mention of his expectation that he would receive leniency in exchange for his testimony against Browning. After all, Randy stated explicitly at Browning's trial that he was not anticipating any such benefit. We therefore consider, for purposes of assessing prejudice in the context of Browning's IAC claim, the following facts that would have been available to Browning had Pike engaged in an adequate investigation: (1) that the shoeprints could not have been created by a paramedic or responding officer, and (2) that Hugo Elsen described his assailant not as having a Jheri Curl, but as having shoulder-length, wet, loosely-curled hair. As discussed above, this evidence would have had a significant impact on Browning's case. The bloody shoeprints were the only evidence left in the store during the period between the robbery and the arrival of the first-responders, and the evidence does not support that the shoeprints were left by Josy Elsen or Debra Coe. This leaves Browning with evidence that someone else—not Browning, not Josy, not Coe—was in the store with Hugo Elsen before the arrival of the first-responders. Such evidence would have been significantly and uniquely exculpatory. *Cf. Richter*, 562 U.S. at 112 (rejecting petitioner's prejudice claim because it "established nothing more than a theoretical possibility" that petitioner's defense theory was true); *Pinholster*, 563 U.S. at 200–01 (rejecting petitioner's prejudice claim because the evidence at issue was duplicative of other evidence presented to the jury).

And Hugo's description of his assailant's hair is powerful evidence of Browning's innocence. As stated

above, Hugo's view and description of the assailant suffers from none of the flaws inherent in each of the other eyewitness accounts involved in this case. Officer Branon said it was not possible that Hugo was mistaken about his description of the assailant. And Woods's description of Browning running towards him on the sidewalk away from the Elsens' store—with not a drop of blood on him or a piece of jewelry in his hands —is, if anything, supportive of Browning's innocence.

As described in great detail above, the prosecution's evidence was far from overwhelming. There is a strong possibility that had Pike offered the evidence he would have obtained if he had made a reasonable investigation, at least one juror would have harbored reasonable doubt. Browning would have so substantially benefitted from that evidence that it was objectively unreasonable for the Supreme Court of Nevada to conclude to the contrary.

V

Our conclusions above regarding Browning's claims under *Brady* and *Strickland* involve only his convictions relating to the robbery and murder of Hugo Elsen. They do not affect the validity of his escape conviction. It is not clear from Browning's habeas petition whether he challenges his escape conviction. But even assuming he means to challenge that conviction, he has identified no exculpatory evidence withheld that would have affected the jury's decision to convict him of escape under Nev. Rev. Stat. § 212.090. And while Pike's investigation into Browning's case was deficient, Browning points to no evidence that Pike would have obtained had he reasonably investigated the case that would have affected the jury's decision on

the escape count. In sum, while Browning has demonstrated that he is entitled to habeas relief from his murder- and robbery-related convictions, he is not entitled to relief from his escape conviction.

VI

The Supreme Court of Nevada's denial of Browning's claims under *Brady* and *Strickland* constituted an unreasonable application of clearly established Supreme Court precedent. Browning is entitled to a writ of habeas corpus with respect to his convictions of burglary, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. Because Browning has offered no reason to call the validity of his escape conviction into question, he is not entitled to habeas relief as to that conviction.

We **AFFIRM in part, REVERSE in part, and REMAND** to the district court for further proceedings consistent with this decision.

CALLAHAN, Circuit Judge, dissenting in part:

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "circumscribe[s]" a federal court's role in reviewing a habeas claim that was "adjudicated on the merits in State court proceedings." *Johnson v. Williams*, 568 U.S. 289, 298 (2013) (quoting 28 U.S.C. § 2254(d)); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). The Supreme Court has made clear, time and again, that our task is limited to deciding whether the state court was "objectively unreasonable" in its application of federal law, as determined by the United States Supreme Court, or in its determination of the facts that were before the trial court. *See Lockyear v. Andrade*,

538 U.S. 63, 75 (2003); *see also Johnson*, 133 S. Ct. at 1094.

Today's majority gives short shrift to the Supreme Court's admonitions. Along the way, it misapplies Supreme Court case law, embarks on its own fact-finding mission, and overrules the jury's credibility determinations. A meaningful application of our deferential standard of review under AEDPA, by contrast, compels the conclusion that the Nevada Supreme Court was not objectively unreasonable in rejecting Browning's Ineffective Assistance of Counsel ("IAC") claim, as well as his claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959). I respectfully dissent and would deny Browning's habeas petition.[1]

I. Background

Sometime between 4:00 p.m. and 4:30 p.m. on November 8, 1985, Hugo Elsen was stabbed to death inside his jewelry store. In the course of the murder, the assailant smashed a glass display case and stole some 72 pieces of jewelry.

The police immediately identified Browning as a suspect based on eyewitness accounts and circumstantial evidence. Three individuals identified Browning at or near the jewelry store around the time of the murder. Hugo's wife, Josy, actually witnessed the murder. She saw a "black man with a blue cap" raise a knife over Hugo. While she got only a side view of the attacker, she noted that his hair "was a little bit

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[1] I concur in the majority's rejection of Browning's *Napue* claim and in its affirmance of his escape conviction.

puffed out on the bottom" of his cap. That description was consistent with Browning's Afro-like hairstyle. Police later recovered a blue cap with the word "Hollywood" on it in a dumpster near Browning's motel room. At trial, Josy identified that cap as the one worn by the killer. Presented with a photographic lineup approximately a month after the murder, which included a photo of Browning, Josy did not choose Browning's photo. However, when confronted with Browning in person at trial, Josy gave a positive identification of Browning as the assailant.

After Josy witnessed the murder, she ran out the back of the shop to the business next door and asked someone to call the police. Debra Coe was in the neighboring office, located just south of the Elsens' store. When Josy told her that "there was a man standing over Hugo with a knife," Coe went to the front of her office and saw a black man running "south." Coe identified the man as wearing a blue cap, a jacket, and Levi's, with hair sticking out about an inch from underneath the cap. At trial, Coe identified the blue "Hollywood" cap—presented as a state trial exhibit—as the one worn by the person she saw run by her office.

Later the same day, the police presented Coe with two men. She stated that the first man was "definitely not" the person she saw. The police then presented Browning, who was wearing no cap, shirt, or jacket. Coe said she "thought" Browning was the person she saw run by her office, but that she would have been more certain had he been wearing the cap and jacket. She noted, however, that his hair was "pressed down" as though he had been wearing a cap. When asked if she could be "more sure in [her] mind," Coe said "[n]o,

I wouldn't think so, no . . . . they all look the same and that's just what I think when I see a black person, that they all look the same." Coe retracted this statement at trial, testifying that she did not really think that all black people looked the same. At trial, Coe positively identified Browning as the man she saw run by her office.

Charles Woods owned a jewelry store three doors south of the Elsens' shop. At around 4:30 p.m., he was standing outside the front of his store when he saw a black man jogging toward him. The man was wearing a dark-colored, "beret"-style cap, a light-colored shirt, and dark pants. Later that day, the police presented Woods with Browning, as they did with Coe, and Woods positively identified Browning as the man he saw. He also positively identified Browning at trial, though, unlike Josy and Coe, he testified that the hat found near Browning was not the same one worn by Browning.

Bradley Hoffman owned a store two doors from the Elsens'. At trial, he testified that he saw a man walk by his shop and approach the Elsens' store about 20 minutes before the robbery-murder. He described the man as a Cuban, with a slight build, wearing Levi's jeans and a blue baseball cap. Like Coe and Woods, Hoffman was presented with Browning by the police later that day. He stated that Browning was not the man he saw. He also testified that the blue "Hollywood" cap recovered by the police, and positively identified by Josy and Coe, was not the cap worn by the man he saw.

Hugo also identified his assailant. Officer David Radcliffe was one of the first officers on the scene. He found Hugo lying in a pool of blood and in an

"extremely serious" condition. Hugo identified his attacker as "a black man wearing a blue baseball cap." Officer Gregory Branon also arrived early on the scene, and he, too, received a description of the attacker from Hugo. Hugo stated that the suspect was a "black male" who was "wearing a blue baseball cap, blue windbreaker-type jacket, blue Levi's" and who had "shoulder length" hair. At trial, Branon testified that the description he received[2] included a description of the attacker's hair as a "J[h]eri-type curl."

Besides the eyewitness identifications, two witnesses—Randy Wolfe and his wife, Vanessa—testified that Browning confessed to them to committing the crime. At the time, the Wolfes, as well as Browning and his girlfriend, Marcia Gaylord, resided at the Normandy Motel. The two couples were acquainted. According to Randy, shortly after the robbery-murder, Randy found Browning in the Wolfes' room, wearing a blue "Hollywood" cap and surrounded by some of the stolen jewelry. Browning admitted to Randy to stealing the jewelry and killing Hugo. Randy then left to get the police, at which point Vanessa entered the room. According to Vanessa, she found Browning with a knife, and saw the "Hollywood" cap on the floor. Like Josy and Coe, Vanessa identified the state's trial exhibit as the cap she saw near Browning.

According to Vanessa, Browning asked her to help him dispose of the evidence. Vanessa threw his shirt and cap in a dumpster and hid the knife in a small closet under the stairway of the motel. The police later

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[2] Branon did not identify Hugo as the source of the description until post-conviction proceedings some 15 years later.

recovered the items. At trial, expert testimony established that the knife was "consistent" with Hugo's wounds. Browning was arrested in the Wolfes' motel room approximately half an hour after the murder. Several pieces of the stolen jewelry were in the room with him, as well as a tan jacket.

The prosecution also presented physical evidence. The tan jacket had blood on it, which was later identified as Type B—Hugo's blood type. Browning's fingerprints were also found at the crime scene. Identification Specialist David Horn testified at trial that several of the showcase counters had been "disturbed," and that a glass door on the vendor's side of one of the counters was broken. Browning's prints were found on top of one of the counters and also on a fragment from the vendor-side glass door, which is the employee area.

Several pieces of exculpatory evidence were presented at trial. Horn testified to finding bloody shoeprints leading from Hugo's body to the front door of the Elsens' store. Those prints were consistent with a tennis shoe and did not match the shoes Browning was wearing at the time of his arrest. Browning's trial counsel, Randall Pike, also called a hairstyle expert to testify to the difference between a Jheri curl and an Afro. Branon had testified that the description he received was of a person with "shoulder-length," "J[h]eri curl" hair, whereas Browning had an Afro-style haircut. Pike presented the hairstylist with the same photographic lineup that the police showed Josy. She stated that four of the photos depicted individuals with Jheri curls—none of them was Browning.

Finally, the jury was presented with substantial evidence relevant to the Wolfes' credibility. The jury knew that the Wolfes were habitual heroin and cocaine users, that Vanessa was a prostitute, that Randy had several prior convictions, that Randy was awaiting sentencing in another case, that Vanessa used to "bilk people out of their money," that Randy had kept some of the stolen jewelry, and that Randy had lied under oath about doing so at a preliminary hearing.

Ultimately, the exculpatory evidence was not enough to create reasonable doubt in any of the jurors' minds. A Nevada jury found Browning guilty of four counts related to a robbery and murder at a Las Vegas jewelry store and sentenced him to death. *See Browning v. State*, 757 P.2d 351 (Nev. 1988).

II. Procedural History

In 2004, the Nevada Supreme Court affirmed Browning's conviction in a state habeas proceeding. *Browning v. State*, 91 P.3d 39 (Nev. 2004). Browning argued, as is relevant to the instant appeal, that the prosecution withheld *Brady* material—i.e., exculpatory evidence—and that his trial counsel, Randall Pike, provided ineffective assistance for failing to adequately investigate his case. *See id.* at 45, 54.

As is relevant here, Browning identified three pieces of allegedly exculpatory evidence in the state court post-conviction proceedings. First, he argued that the prosecution should have disclosed Officer Branon's observation that the bloody shoeprints at the crime scene predated the arrival of police and other first responders. *Id.* at 55. Second, he argued that the prosecution should have disclosed that the term "Jheri

curl" came from a black police officer (Branon), rather than the white victim. *Id.* Third, he claimed that the prosecution withheld information regarding a benefit given to Randy Wolfe.[3] *Id*. at 54–55.

Browning also argued that Pike was ineffective for, among other things, failing to interview Branon. *Id.* at 46. Browning reasoned that had Pike done so, he would have discovered that the bloody shoeprints could not have been left by first responders, and that Hugo's description of his attacker's hair did not include the term "Jheri curl." *Id.* Moreover, Browning argued that Pike should have interviewed the Wolfes, as they were the prosecution's key witnesses. *Id.*

The Nevada Supreme Court upheld Browning's guilty verdict.[4] As to Browning's IAC claim, the court ruled that it was a reasonable trial strategy to not interview Branon to discover his knowledge of the bloody shoeprints. *Id.* at 46. Pike's investigation was

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[3] Pretrial, the prosecution stipulated that Randy was not promised anything for his testimony, a point that Randy confirmed on the stand. *See Browning*, 91 P.3d at 55; Trial Tr. at 4 (Dec. 8, 1986). During post-conviction proceedings, Prosecutor Seaton admitted that after Browning's trial, he told the judge in a case in which Randy was the defendant that Randy had helped with Browning's trial. *Id.* Randy ended up receiving probation for attempted possession of stolen property—a conviction that could have resulted in a 5-year sentence. Seaton also helped Randy secure a job. *Id.*

[4] The Nevada Supreme Court reversed the district court's denial of Browning's challenge to his sentence of death, *Browning*, 91 P.3d at 56, but the jury subsequently reinstated the death sentence on remand and the Nevada Supreme Court affirmed in *Browning v. State*, 188 P.3d 60 (Nev. 2008).

sufficient to determine that the prints did not match Browning. *Id.* The court held that it was a "reasonable, tactical decision to leave the source of the prints uncertain." *Id.* That way, Pike could argue that the real killer was the source. *Id.* Had he investigated further, he may have discovered that first responders were responsible for the prints, thereby neutralizing this defense. *Id.*

As for Pike's failure to interview the Wolfes, the court held that it was a reasonable tactic for Pike to delegate witness interviews to his investigator, lest he interview witnesses personally and risk becoming a percipient witness himself. *Id.* Moreover, Pike's investigator had "gathered enough information to permit [Pike] to adequately cross-examine the Wolfes on their version of events, their drug usage, their informer status, their lying, and their convictions and arrests." *Id.*

Finally, while the court concluded that Pike was deficient for not discovering that "Jheri curl" was Branon's term and not Hugo's, it held that this was not prejudicial because the "issue of Browning's hairstyle was extensively explored at trial." *Id.*

As to Browning's *Brady* claims, the Nevada Supreme Court held that the prosecution should have disclosed the benefit to Randy Wolfe. *Id.* at 54–55. The court reasoned that, "[u]nder *Brady*, even if the State and a witness have not made an explicit agreement, the State is required to disclose to the defense any evidence implying agreement or an understanding." *Id.* at 55. Even so, the court ruled that there was no "reasonable probability of a different result" had the information been disclosed because Randy's "credibility

was extensively challenged at trial." *Id.* The court also rejected Browning's bloody shoeprint *Brady* claim, noting that it had already deemed that information to be immaterial in the IAC context, and that the information was available to the defense had Pike interviewed Branon. *Id.* The court similarly rejected Browning's *Brady* claim regarding the hairstyle evidence, noting that this information was, like the shoeprint evidence, available to the defense. *Id.*

Finally, the Nevada Supreme Court considered whether any errors, considered cumulatively, were prejudicial. *Id.* at 56. As is relevant here, the court considered Pike's failure to discover Hugo's true description of the killer's hair, and the prosecution's failure to turn over impeachment evidence regarding Randy Wolfe. *Id.* It determined that there was no "reasonable probability" that Browning would not have been convicted but for the cumulative effect of the errors. *Id.* The court reasoned that the "evidence of Browning's guilt remains overwhelming." *Id.*

Browning filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada. On November 28, 2011, Browning filed his Fifth Amended Petition, which is the petition before us. On August 1, 2014, the district court denied Browning's petition. The district court granted Certificates of Appealability ("COA") on the issues of (i) whether the prosecution committed a *Brady* or *Napue* violation by failing to turn over information regarding the bloody shoeprints, (ii) whether the prosecution committed a *Brady* violation by failing to turn over evidence of a benefit to Randy Wolfe, and (iii) whether Pike provided ineffective assistance by failing to investigate the

source of the bloody shoeprints, Hugo's description of his attacker's hair, and the Wolfes' credibility. Browning appealed.

III. Standard of Review

We review the district court's decision de novo, while applying AEDPA's "highly deferential standards" to the last reasoned state court decision—here, the Nevada Supreme Court's 2004 denial of post-conviction relief. *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015); *see Reis-Campos v. Biter*, 832 F.3d 968, 973 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1447 (2017). The state court's decision receives binding deference unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" at the time of the state court's decision, or if it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2); *Wiggins*, 539 U.S. at 520.

Surmounting AEDPA deference is "daunting." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). This is by design out of respect for state court proceedings, and is "satisfied in relatively few cases." *Id.*; *see also Williams*, 133 S. Ct. at 1094. "[AEDPA] reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). It is not enough that a federal court determine, in its "independent judgment," that the "state-court decision applied clearly established federal law erroneously or

incorrectly . . . . Rather, that application must be *objectively unreasonable*." *Lockyear*, 538 U.S. at, 75–76 (emphasis added and internal citation omitted). Where "it is possible to read the state court's decision in a way that comports with clearly established federal law . . . we must do so." *Mann v. Ryan*, 828 F.3d 1143, 1157–58 (9th Cir. 2016). In other words, we must uphold a state court determination even if we would have concluded, on de novo review, that the state court committed legal error, so long as a fair-minded jurist could decide otherwise. *See Lockyear*, 538 U.S. at 75–76. To overrule a state court's decision requires that its ultimate conclusion be so unreasonable that it there is *no* "possibility for fairminded disagreement." *Ayala*, 135 S. Ct. at 2199 (internal quotation marks omitted). Finally, a federal court may not review the facts of a case de novo; we must begin with the "presumption" that the state court's factual determinations are correct. *Taylor*, 366 F.3d at 999.

IV. Browning's Claims for Relief

Browning's petition comes down to three pieces of evidence: the description of the assailant provided by the victim, Hugo Elsen; bloody shoeprints leading from Hugo's body; and the benefit received by Randy Wolfe for his testimony. None of this evidence compels a finding that the Nevada Supreme Court was objectively unreasonable in rejecting Browning's petition for post-conviction relief.

First, Hugo's description of the killer was presented to the jury, and the jury knew that the description conflicted with other eyewitness testimony. That the jury did not know the term "Jheri curl" was the testifying officer's and not the victim's did not

appreciably diminish this conflict. Second, Pike's ignorance of the fact that the bloody shoeprints predated the arrival of first responders did not undercut his defense that someone other than Browning committed the murder because he *did* know that the prints did not match Browning. And third, the jury was presented with a cavalcade of impeachment evidence against Randy and Vanessa Wolfe. That the jury did not know that the prosecution would *later* help Randy secure a benefit for his testimony against Browning—a fact that apparently Randy did not even know—makes no difference because it was not reasonably probative of his credibility. And even if it was, the information was, at most, cumulative.

The weakness of the alleged exculpatory evidence is enough to reject Browning's habeas petition on its own. But it positively blanches when set against the substantial evidence inculpating Browning: his fingerprints were found on the vendor's side of a glass display case, which is off-limits to customers; he was found by police with some of the stolen jewelry; numerous eyewitnesses identified him; and he confessed to the Wolfes.

a. Browning Fails to Establish a *Brady* Violation Because the Purported *Brady* Evidence Is Either Not Exculpatory or Not Material

The Nevada Supreme Court decided Browning's *Brady* claim on the merits. We therefore apply AEDPA's deferential standard of review, and may only find a *Brady* violation if the state court's decision was an objectively unreasonable application of Supreme

Court law or an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2).

Under *Brady v. Maryland*, the prosecution must disclose "evidence that is both favorable to the accused and material either to guilt or to punishment." *United States v. Bagley*, 473 U.S. 667, 674 (1985) (internal quotation marks omitted). "'Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (quoting *Cone v. Bell*, 556 U.S. 449, 469–70 (2009)). "'A reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

> Thus, to establish a *Brady* violation, a defendant must prove: 1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching, 2) the evidence was suppressed . . . either willfully or inadvertently, and 3) prejudice resulted, meaning there is a reasonable probability that disclosing the evidence to the defense would have changed the result.

Andrews v. Davis, 798 F.3d 759, 793 (9th Cir. 2015) (internal quotation marks and adjustments omitted) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Bagley*, 473 U.S. at 682).

The Nevada Supreme Court reasonably concluded that no *Brady* violation occurred because the hairstyle and impeachment evidence is not exculpatory, and,

while the shoeprint evidence is exculpatory, a fair-minded jurist could deem it immaterial when viewed collectively with the abundant evidence of Browning's guilt.

i. Whether the Purported *Brady* Material Is Exculpatory

1. The Hairstyle Evidence

The jury did not know that Officer Branon received a description of the assailant from the victim himself. Instead, Branon recounted the description that Hugo gave him, without identifying its source. He told the jury that

> [t]he description we received was black male, adult in his late twenties, wearing a blue baseball cap, blue windbreaker-type jacket, blue Levi's. He was medium complexioned, bore a mustache and what was described as a shoulder length J[h]eri-type curl.

This was a mostly accurate reporting of Hugo's dying declaration, except that the term "J[h]eri-type curl" was Branon's, not Hugo's. Browning argues that the prosecution's failure to turn over the fact that Branon's description came from the victim himself, and that the term "J[h]eri-type curl" was Branon's, not Hugo's, was materially exculpatory.

The Nevada Supreme Court held that no *Brady* violation occurred because the exculpatory information was "reasonably available to the defense." *Browning*, 91 P.3d at 55. And, at any rate, the information did not give rise to a "reasonable probability of a different result." *Browning*, 91 P.3d at 46. This was because the

"issue of Browning's hairstyle was extensively explored at trial." *Id.*

The Nevada Supreme Court's conclusion was not objectively unreasonable because a fair-minded jurist could conclude that the hairstyle evidence was not exculpatory, let alone materially so. *See Ayala*, 124 S. Ct. at 2199. The majority concludes otherwise only by asserting a novel view of *Brady* that extends the state's obligations into the murky zone of *interpretations* of otherwise neutral facts. That "Jheri curl" was Branon's term and not Hugo's does not help Browning. The only basis for deeming this information potentially exculpatory is that Prosecutor Daniel Seaton leveraged its purported source—Hugo, a white male—to argue that the speaker probably confused the terms Afro and Jheri curl. Seaton reasoned that the declarant was just "some white person" who didn't "really know[] the true definition of J[h]eri-curl." But while it is true that the source of the term was a black male, the *evidence* itself is not exculpatory, and the jury was free to disregard Seaton's unsubstantiated speculation as just that.

2. The Benefit to Randy Wolfe for His Testimony

It is undisputed that the prosecution intervened on Randy Wolfe's behalf in a separate trial in which Randy was the defendant *after* Randy testified in Browning's trial. Yet the Nevada Supreme Court determined that the prosecution should have disclosed the benefit to the defense. *Browning*, 91 P.3d at 54–55. The court reasoned that "the State is required to disclose to the defense any evidence implying an agreement or an understanding." *Id.*

It appears that the Nevada Supreme Court's determination was not based on any facts in the record. Both Randy and Prosecutor Seaton stated that there was no plea bargaining with Randy Wolfe regarding Browning's case, and Browning points to nothing in the record showing that Randy expected a benefit for his testimony. The Nevada Supreme Court therefore erred in concluding that the evidence was exculpatory. *See Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014) (quoting 28 U.S.C. § 2254(d)(2)) (state court made an "unreasonable determination of the facts" where "[t]here was nothing in the record that could support" its finding).

The majority correctly notes that the evidence could only be exculpatory if Randy actually expected a benefit for his testimony that was not already disclosed. But the Nevada Supreme Court never made such a finding. Under AEDPA, we are not entitled to weave facts out of whole cloth just to make sense of a state court's determination. *See id*. Because nothing in the record shows that any deal was made—expressly or otherwise—between Seaton and Randy at the time of trial, nothing was suppressed and no *Brady* violation occurred.[5]

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[5] The majority goes to great lengths in an attempt to shore up the Nevada Supreme Court's determination. Besides imputing to that court a finding that it did not make, the majority argues that it doesn't matter anyway because federal courts are powerless to review a state court's findings that favor the habeas petitioner. But the federal habeas statutes are only a one-way ratchet with respect to *who* may seek federal court review. *See* 28 U.S.C. § 2254(a). While only a prisoner may invoke a federal court's jurisdiction to challenge his detention, nothing in the habeas statutes prevents a federal court from reviewing the *entire* record—including facts that

3. The Bloody Shoeprint Evidence

The jury knew that the bloody shoeprints leading from Hugo's body to the front of the Elsens' store did not match the loafers Browning wore at the time of his arrest. But post-conviction testimony also established that Branon knew that the shoeprints were present before first responders arrived at the scene. Under *Brady*, that knowledge is imputed to the prosecution as a whole. *Kyles*, 514 U.S. at 437–38 (the "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Yet Specialist Horn testified that the prints were consistent with tennis shoes, and noted that first responders often wear tennis shoes at crime scenes. The jury was therefore left with the impression that first responders may have left the shoeprints. That was false. Moreover, the prosecution offered no evidence to suggest that someone besides the true killer could have been the source of the prints. Evidence that the shoeprints were present before the first responders arrived was therefore exculpatory.

ii. Whether the Purported *Brady* Evidence is Material

The majority correctly notes that the three *Brady* claims must be considered "collectively" to determine whether they are material. *Kyles*, 514 U.S. at 436; *Turner*, 137 S. Ct. at 1895 (considering the "cumulative

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the state court construed as favorable to the petitioner—once it has properly asserted jurisdiction. The majority cites no authority for the proposition that a state court's factual (or legal) errors are impervious to challenge in such a situation.

effect of the withheld evidence"). Materiality is a determination of whether disclosure of all pieces of exculpatory evidence, taken together, gives rise to a "reasonable probability" of a different outcome. *See Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

The majority concludes that the cumulative effect of three pieces of evidence—Hugo's description of his killer's hairstyle, the source of the bloody shoeprints, and the benefit for Randy Wolfe's testimony—tips the scales in favor of a finding of materiality.[6] The majority's conclusion is not compelled either by the evidence or binding Supreme Court law.

1. The majority errs by assuming that the benefit to Randy Wolfe and the hairstyle evidence is *Brady* material. As discussed (*see* Part IV.a.1, 2), both pieces of evidence are reasonably viewed as not exculpatory and so withholding the information has no material impact on the case. But even if the hairstyle evidence could be deemed exculpatory because its disclosure would have foreclosed Seaton's argument that "some white person" confused the terms "Jheri curl" and "Afro," it was not unreasonable for the Nevada Supreme Court to deem it immaterial. The majority

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[6] Tellingly, the majority arrives at this conclusion only after *sua sponte* expanding the certificate of appealability to include an alleged *Brady* violation not even raised by Browning on appeal: Hugo's description of his assailant's hairstyle. Considering our obligation to consider *Brady* evidence cumulatively to determine its prejudicial effect, it is unclear whether the majority could have found a *Brady* violation if the certificate was limited to the two claims that Browning actually raised before this court.

concedes that all of the words Branon used to describe Browning's hair are inconsistent with an Afro—"Jheri curl," "shoulder length," "loosely curled," and "wet." In other words, Branon's use of the term "Jheri curl" did nothing to diminish the conflict in the eyewitness testimony that was squarely before the jury.[7] On the one hand, Hugo described Browning as having wet, shoulder-length hair. On the other, Josy and Coe described the person they saw as having short hair that "puffed" or stuck out the back of a blue cap. That the jury was also exposed to the term "Jheri curl" does not somehow reconcile these inconsistent accounts.

The term "Jheri curl" also lost its salience over the course of the trial. Browning's counsel presented a hairstyle expert, Annie Yates, who testified to the difference between a Jheri curl and an Afro. Pike then showed her a 12-person photographic array and asked her to identify which persons had Jheri curls. The array included a picture of Browning. Yates stated that four of the persons had Jheri curls, none of whom was Browning. The jury therefore knew that Browning's Afro hairstyle was inconsistent with a Jheri curl. Accordingly, it was not objectively unreasonable for the Nevada Supreme Court to reject the hairstyle *Brady* claim because the hairstyle evidence was not materially exculpatory.

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[7] The majority suggests otherwise, asserting that the "precise words Hugo used to describe his assailant's hair" is material under *Brady* because Hugo's description of his assailant as having shoulder-length hair "was markedly different from Browning's hair on the day of the murder—an Afro." But the defense *did* know that Hugo's description included the term "shoulder-length hair," and that information *was* presented to the jury.

Undeterred, the majority insists that the information was critical to the defense because, it reasons, "Jheri curl" is the only term "susceptible to the argument that the speaker could have seen an Afro and used the wrong term because he was unfamiliar with African American hairstyles." But the fact that Seaton leveraged the term's relative obscurity to spin speculation does not detract from the fact that a fair-minded juror could reasonably dismiss such conjecture as unfounded. *See Ayala*, 135 S. Ct. at 2199. Moreover, Seaton's argument makes no sense, because the description Branon received—and which was before the jury—included the fact that the assailant's hair was "shoulder length." Thus, even if the jury entertained the far-fetched notion that the speaker said "Jheri-curl" when he meant "Afro," it was still faced with a clear conflict in the evidence: was the assailant's hair shoulder-length or in an Afro?

2. As to the bloody shoeprint evidence, the majority chides the Nevada Supreme Court for engaging in "pure speculation" for suggesting that the prints were probably left by Josy or Coe. To be sure, the evidence did not support such a conclusion. But neither did it suggest otherwise. Under AEDPA, our review is limited to the original trial record, *Pinholster*, 563 U.S. at 181, and nothing in that record indicates that the shoeprints were *not* those of Josy or Coe. The majority buries this fundamental rule in a footnote, while simultaneously embarking on its own fact-finding mission, concluding that, based on its review of the images of the shoeprints, "the shoeprints appear to us larger than those of a typical woman's shoe." Tellingly, the majority cites no expert testimony from the trial record to support its observation—because there is

none. Leading with its chin, the majority commits double error under AEDPA: not only does it draw its own evidentiary conclusions, *see Taylor*, 366 F.3d at 999, but it engages in the very "speculation" for which it roundly criticizes the Nevada Supreme Court.

Limiting our review to the trial record, as we must, the shoeprints' provenance is unknown. What *was* known at the time of trial, and what was presented to the jury, was the fact that the shoeprints did not match Browning. In other words, they pointed to someone else, which is consistent with the defense's theory that a black Cuban associate of the Wolfes committed the crime. Had the defense known that the prints predated the arrival of the first responders, its theory would have been the same. And to the extent the information had some exculpatory value by eliminating one innocuous explanation for the prints (i.e., that they were left by first responders), the record does not compel a conclusion that the information was material. Indeed, even had the jury known that first responders were not the source, it could have reasonably inferred that the prints may have been left by a person who was not the killer—e.g., Josy, Coe, or someone else entirely. Either way, while the jury was left speculating about the prints' origin, it knew that they did not incriminate Browning.

3. Finally, even if the shoeprint evidence, viewed in a vacuum, was significant, it is reasonably deemed immaterial when considered collectively with the evidence inculpating Browning. We assess the combined effect of both undisclosed exculpatory evidence *and* the evidence that was before the jury as a whole in determining whether there is a "reasonable

probability" that disclosure of *Brady* material would have changed the outcome. *See Kyles*, 514 U.S. at 437 (materiality of *Brady* evidence is judged according to the "net effect" of the evidence). As the Nevada Supreme Court found, substantial evidence inculpated Browning:

- ***Browning's fingerprints in the Elsens' store***. Browning's fingerprints were found on the disturbed jewelry counter—both on the top side of the glass and on a fragment from the broken sliding-glass door on the vendor's side of the display case. The majority minimizes this fact, which it concedes is "probably the strongest evidence against Browning," by surmising various innocent explanations: the fingerprints could have predated the murder, Browning may have made the prints during the commission of the crime but someone else stabbed Hugo, or the other unidentified prints at the scene could belong to the true killer. But the jury could have easily drawn a contrary conclusion: the fact that Browning's prints were found on a piece of glass broken in the commission of the robbery-murder, and on the *vendor's* side of the glass case, points to his guilt. Combined with the other inculpatory evidence (discussed below), this would not have been an unreasonable inference. *Cf. Mikes v. Borg*, 947 F.2d 353, 361 (9th Cir. 1991) (fingerprints alone—absent evidence that they were made "during the commission of the crime"—are insufficient evidence of guilt where the government's case is "supported *solely* by evidence that the defendant's fingerprints were found on th[e] object" (emphasis added)).

- ***The eyewitness identifications***. Three eyewitnesses—Josy, Coe, and Woods—identified Browning as the person they saw in or near the Elsens' store around the time of the murder. The majority insists the identifications were "flawed" because Josy and Coe were at first equivocal, and the police used a suggestive "show up" identification procedure at the crime scene. But the majority ignores Josy's testimony that the person she saw raise a knife over her husband wore a blue "Hollywood" cap with a "puff[]" of hair protruding out the bottom—an account that fits with Coe's description of the alleged assailant, matches Browning's hairstyle at the time of his arrest, and is consistent with the fact that the same blue cap was found in a dumpster outside the Wolfes' motel room.[8] Moreover, Woods' contemporaneous identification of Browning was unequivocal. A fair-minded jurist could therefore reasonably conclude that the identifications were strong evidence of Browning's guilt.

- ***The jewelry in the motel room***. Police officers discovered Browning with some of the stolen jewelry in the Wolfes' motel room shortly after the murder. The majority notes that Browning's fingerprints were not found on the stolen jewelry, and the rest of the loot was later turned over by the Wolfes. But the jury knew these facts and was

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[8] The majority also does not acknowledge the fact that Coe's identification is consistent with Browning's own admission that he was walking south near the store. However, because Browning testified to this fact only in post-conviction proceedings, I do not consider it in the *Brady* analysis. *See Pinholster*, 563 U.S. at 181.

entitled to infer guilt from this evidence when considered with the other evidence inculpating Browning.

- ***Browning's Confession to Randy and Vanessa Wolfe***. The Wolfes' testimony was devastating to the defense. According to the Wolfes, Browning confessed to them to committing the robbery-murder, and then asked Vanessa to help cover it up.

  To be sure, the Wolfes' testimony was susceptible to substantial impeachment. They were habitual drug users with prior convictions and a penchant for lying. But all of this was presented to the jury. The jury learned that Randy had a history of illegal drug use, used heroin four days before testifying, stole property, used his wife's prostitution to support his drug use, lied under oath in Browning's case about keeping some of the stolen jewelry, had three prior felony convictions, and was awaiting sentencing in a pending case. The jury was entitled to credit the Wolfes' testimony notwithstanding that the Wolfes were, by all accounts, thoroughly unscrupulous characters.

  Tellingly, the majority provides no support for the suggestion that the jury could *not* have reasonably believed the Wolfes. Instead, it speculates that perhaps one more piece of exculpatory evidence—e.g., the source of the bloody shoeprints—would have tipped the scales for at least one juror. But our role is not to reweigh the evidence and make fresh credibility determinations. *See Williams v. Ryan*, 623 F.3d 1258, 1266 (9th Cir. 2010). Because the jury was entitled to credit the Wolfes' testimony, and because that testimony

directly implicated Browning as the murderer, a fair-minded jurist could have concluded that Browning's confession to the Wolfes was strong evidence of his guilt.

- ***The Knife.*** Vanessa Wolfe testified that she found Browning with a knife in her motel room, and that he asked her to help him dispose of it. If the jury believed her, this was compelling evidence inculpating Browning. Moreover, at trial, a prosecution expert testified that Hugo's injuries were "consistent" with wounds made by the knife, though he did not know whether the particular knife recovered by the police was the actual murder weapon.[9]

In sum, the jury had before it substantial evidence inculpating Browning. The majority concludes otherwise only by reweighing the evidence: by deciding that the Wolfes were not credible, dismissing the eyewitness identifications of Browning as "flawed," and minimizing the highly inculpatory fingerprint evidence.[10] In so doing, the majority ignores the

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[9] In post-trial proceedings, the defense submitted an affidavit by Dr. William Chisum in which Dr. Chisum determined that Hugo's wounds did not "coherently coincide" with those of the recovered knife. But that testimony, at most, created a conflict in the evidence. And, at any rate, we are limited to considering the evidence that was before the trial court. *See Pinholster*, 563 U.S. at 181.

[10] The jury likely also considered the tan jacket found with Browning in the Wolfes' motel room, and which the prosecution identified as the jacket worn by Browning in a photograph shown to the jury. The jacket had Type B blood on it, which is the same

presumption owed to the Nevada Supreme Court's factual determinations and decides for itself the strength of the case against Browning. *See Taylor*, 366 F.3d at 1000. That is error. Considering the limited exculpatory value of the shoeprint evidence, combined with the substantial evidence pointing to Browning's guilt, the jury could have convicted Browning even if it was presented with the purported *Brady* material. The Nevada Supreme Court was therefore not objectively unreasonable in rejecting Browning's *Brady* claim.

b. Browning's Ineffective Assistance of Counsel Claim Fails Because the Nevada Supreme Court Was Not Objectively Unreasonable in Concluding That Pike Acted According to a Reasonable Trial Strategy

To prevail on his IAC claim, Browning must show (i) that his trial counsel's assistance fell below an objective standard of reasonableness, and (ii) that but for his counsel's deficient performance, there is a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 691–94 (1984); *accord Hinton v. Alabama*, 134 S. Ct. 1081, 1087–88 (2014); *Wiggins*, 539 U.S. at 521. "A reasonable probability is

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blood type as Hugo. Prosecutor Seaton argued in his rebuttal closing argument that this "proves [Browning's] guilt probably as much as anything." Post-conviction forensic testing revealed, however, that the blood was not Hugo's. Seaton's statement was therefore unfairly prejudicial. Even so, the jury was not left with the unassailable impression that the blood was, in fact, Hugo's. Indeed, Seaton conceded that "[t]here are *other people* in this world with B blood."

a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (internal quotation marks omitted). This is a rigorous standard. The defendant must show both that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *and* that the "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

The Nevada Supreme Court decided Browning's IAC claim on the merits, and therefore our review is governed by AEDPA's deferential review standard. *See Johnson*, 133 S. Ct. at 1094. Because we must also afford counsel's performance a presumption of reasonableness, *Strickland*, 466 U.S. at 690, claims of IAC under AEDPA are "doubly deferential." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). When applying *Strickland* in the AEDPA context, the question is "whether there is a reasonable argument that counsel satisfied *Strickland*'s deferential standard, such that the state court's rejection of the IAC claim was not an unreasonable application of *Strickland*." *Murray v. Schriro*, 746 F.3d 418, 465–66 (9th Cir. 2014) (internal quotation marks and citation omitted).

Browning contends that his trial counsel, Randall Pike, provided ineffective assistance because he (i) did not interview Officer Branon and learn about Hugo's description of his assailant's hairstyle, (ii) did not investigate the source of the bloody shoeprints; and (iii) did not interview the Wolfes. The Nevada Supreme Court agreed on (i), but not on (ii) or (iii). As to (i), the Nevada Supreme Court held that the deficiency was not prejudicial because the hairstyle evidence was

"extensively explored at trial."[11] *Browning*, 91 P.3d at 46.

i. The Hairstyle Evidence

The Nevada Supreme Court noted that, while Pike's performance in not discovering Hugo's true description of his assailant's hair was deficient, the evidentiary conflict was squarely before the jury. *See id.* It concluded that, in light of the conflicting testimony, combined with the "strong evidence of Browning's guilt," there was "no reasonable probability of a different result if counsel had discovered and presented the evidence that 'j[h]eri-curl' was the officer's term, not the victim's." *Id.*

Under AEDPA, our task is to decide whether the Nevada Supreme Court's conclusion that Pike's deficient performance did not prejudice Browning's defense was objectively unreasonable. The majority concludes that it is, noting that "Hugo's description of his assailant's hair is powerful evidence of Browning's innocence." But, as described in the context of Browning's *Brady* claim (*see* Part IV.a, *supra*), the jury *did* hear Hugo's description of his killer's hair, and so the conflict between his account and the accounts of Josy and Coe was squarely presented. The only question is whether there exists a reasonable probability that the jury would have acquitted Browning had it known that "Jheri curl" was Branon's

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[11] I agree with the majority that we must review Pike's performance *as a whole*, and that the district court erred in granting COAs only on specific aspects of Pike's alleged deficient performance. *See* 28 U.S.C. § 2253(c)(2); *see also Wong v. Belmontes*, 558 U.S. 15, 17 (2009).

term and not Hugo's. For the reasons already discussed, the Nevada Supreme Court's determination was not objectively unreasonable because the hairstyle evidence could reasonably be viewed as not exculpatory.

ii. The Bloody Shoeprint Evidence

The Nevada Supreme Court held that it was not deficient performance for Pike to forgo investigating the actual source of the bloody shoeprints. *Id.* at 46. In the post-conviction proceeding, Pike explained that his decision was part of a strategy to "overcast[] a shadow of a doubt," by pointing to someone else—a black Cuban associate of the Wolfes—as the assailant. If he had investigated the true source of the shoeprints, he may have discovered that someone other than the killer—e.g., a first responder—was the true source, which would have undercut this theory. The Nevada Supreme Court reasoned that "[a]s long as the source of the prints was unknown, [Pike] could argue to the jury that the actual murderer had left them." *Browning*, 91 P.3d at 46.

The Nevada Supreme Court was not objectively unreasonable in concluding that Pike executed a reasonable trial strategy based on his investigation of the evidence. An attorney's decision must be "evaluate[d] . . . from counsel's perspective at the time" of the decision, thereby "eliminat[ing] the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. At the time of trial, Pike had gathered enough information to know that the shoeprints did not match his client. It was an open question whether first responders, Josy, Coe, or someone else was the source. Interviewing first responders about their shoes could have resulted in the

discovery that a first responder *was* the source. This is therefore not, as the majority insists, an "extreme instance of strategy determining investigation." To the contrary, it is an example of trial counsel making a "strategic choice[]" after "less than complete investigation" that is rooted in a sound theory of the defense. *See Strickland*, 466 U.S. at 690–91.

The majority relies on *Weeden v. Johnson*, 854 F.3d 1063 (9th Cir. 2017), but that case is not on point. There, a split panel of this court considered counsel's failure to obtain a psychological evaluation of the defendant. *Id.* at 1067–68. The defendant had been convicted of attempted robbery and first degree felony-murder after a botched robbery attempt resulted in the victim's death. *Id.* at 1067. Because the defendant was not present at the crime scene, the prosecution pressed the theory that she planned and facilitated the crime. *Id.* at 1066, 1070. Thus, the defendant's "mental condition was an essential factor in deciding whether she actually had the required mental states for the crime." *Id.* at 1070. Yet defense counsel did not pursue psychological evidence that could have shown that the defendant lacked the requisite mental capacity to plan the robbery. *Id.* at 1068–69. He argued that it was a reasonable tactic to remain ignorant because a psychological profile could have revealed that his client was easily manipulated. *Id.* That may have given the prosecution an opening to argue that even if the defendant "did not understand the magnitude of the robbery, she nonetheless went along with it." *Id.* (internal quotation marks omitted).

The court held that defense counsel had unreasonably "put[] the cart before the horse" by

allowing trial strategy to dictate the scope of the investigation. *Id.* at 1070. While I stand by my dissent in *Weeden*, even on the *Weeden* majority's own terms that case is distinguishable in relevant part. There, counsel conducted *no* investigation on an issue that was central to the prosecution's burden of proof. *See id.* Here, by contrast, Pike collected enough information to know that the shoeprints did not match his client, and this discovery supported his trial strategy of arguing that someone else committed the murder.

Moreover, unlike the defendant's psychological competency in *Weeden*, the importance of discovering the source of the shoeprints was not evident until Branon revealed—some 15 years later—that the prints predated his arrival at the scene. At the time of trial, Pike knew that the prints were exculpatory because they did not match his client, and there was no reason to believe that someone *other than* the true killer was the source. Indeed, Pike may have reasonably assumed that first responders would have exercised care to preserve the crime scene. The fact that first responders did *not* make the prints only became relevant after Horn's testimony suggested that they *may* have been the source. Whether Pike performed adequately is a measure of his own actions in preparing for trial, not a function of misleading testimony introduced by the prosecution. Had Horn not testified about first responders' shoe preferences, Browning would have no claim of deficient performance based on the shoeprint evidence. To the contrary, Pike made clear to the jury the shoeprints' *exculpatory* value.

The majority's reasoning also creates a tension between the prosecution's *Brady* obligations and

defense counsel's performance responsibilities. A *Brady* violation occurs where the prosecution fails to turn over evidence requested by the defense, or where it fails to "*volunteer* exculpatory evidence *never requested*." *Kyles*, 514 U.S. at 433 (emphasis added); *see Strickler*, 527 U.S. at 280. The underlying premise is that some evidence is discoverable by diligent inquiry, while other evidence is not. The shoeprint evidence falls into the latter category because, until Horn's testimony, Pike reasonably did not think to ask whether the prints were left by someone other than the killer. Boiled down, Browning's grievance reduces to a *Brady*, not an IAC, claim.

Finally, in *Weeden*, even if counsel had obtained a psychological report that was unfavorable to his theory of the case, he was not required to disclose it to the prosecution. 854 F.3d at 1070. Nor would an adverse psychological finding have precluded him from arguing, as he did, that the defendant, a 14-year-old girl, could be "easily manipulated by older people" because of her age. *See id.* at 1067 (internal quotation marks omitted). Thus, he arguably had nothing to lose but potentially much to gain by investigating his client's psychological profile. Here, by contrast, had Pike discovered that first responders were actually responsible for the shoeprints, this would have undercut his argument that a black Cuban was the true killer.[12]

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[12] To be sure, it appears that Pike never connected the shoeprints directly to the enigmatic black Cuban. This renders his post-trial explanation for not investigating the prints somewhat suspect. Even so, our task is not to review Pike's performance as if on a direct appeal or to second-guess his intent at the time of trial. We may only reject the state court's determination if Pike's decision

The majority's reliance on *Harrington v. Richter*, a case in which the Supreme Court rejected an IAC claim, is equally puzzling. There, the Court—reversing an en banc decision of this court—upheld a state court's ruling that defense counsel's failure to test blood evidence was a reasonable trial strategy. *Richter*, 562 U.S. at 107–08. Had defense counsel tested the blood, he would have discovered—as post-conviction results revealed—that the evidence supported the defendant's version of events. *See id*. But without the benefit of hindsight, defense counsel faced two possible outcomes from a blood test: a result that corroborated his client's account and one that undermined it. *See id.* at 108. Faced with the "serious risk[]" of an adverse test result, the Court held that the attorney was not required to "pursue an investigation that . . . might be harmful to the defense." *Id.*

Pike faced a similar dilemma here. Investigating the bloody shoeprints could have bolstered his theory—and Browning's account—that a black Cuban murdered Hugo, or it could have undermined it.[13] Only

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cannot be construed by a fair-minded jurist as a "sound trial strategy." *See Strickland*, 466 U.S. at 689; *see also Richter*, 562 U.S. at 110 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

[13] The majority speculates that Pike had nothing to lose by interviewing Branon because no matter what Branon said, that "still would have inflicted no harm on [Pike's] theory" that the black Cuban committed the murder. Not necessarily. In response to a question about whether first responders entered the store before Branon's arrival, Pike could not have ensured that Branon would answer with a simple "yes" and nothing more, as the

in the "harsh light of hindsight" does Pike's strategy appear unreasonable. As in *Richter*, "[i]t was at least arguable that a reasonable attorney could decide to forgo inquiry into the [shoeprint] evidence in the circumstances here." *See Richter*, 562 U.S. at 106.

The majority distinguishes *Richter* on the ground that defense counsel there did not completely trust his client's version of events. *Id.* at 108. According to the majority, this distinction makes all the difference because, here, "Pike had no reason to disbelieve Browning's assertions that he had been framed by the Wolfes."[14] But *Richter* does not teeter on so thin a reed.

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majority assumes. Branon may very well have elaborated, saying something like: "Yes, and they're the reason why there were bloody shoeprints all over the place." This observation also disposes of Browning's argument that Pike should have asked Branon about the prints after Horn's testimony indicated that they may have been left by first responders. Browning suggests that, at that point, at worst Branon could have confirmed Horn's testimony. But Horn did not testify that the first responders *had* made the prints. He only observed that first responders wear tennis shoes to crime scenes. Thus, even after Horn's testimony, Pike could plausibly argue his black-Cuban-did-it theory. Had Pike asked Branon about what he saw when he arrived at the scene, and had Branon told him that the first responders were the source of the prints, Pike would have had significantly less latitude to press this defense. All this is to say that a fair-minded jurist could conclude that Pike was reasonable in seeking to avoid obtaining the shoeprint information by not interviewing Branon.

[14] The majority also makes the bald allegation that Pike "thought Browning was guilty." The record does not appear to support this statement, yet it is key to the majority's ominous warning that condoning Pike's strategy would result in blanket cover for attorneys who shirk their investigatory obligations. The majority reasons that defense counsel need merely cite a belief that their

That counsel there "had reason to question the truth of his client's account" was only one factor considered by the Court. *See id.* at 108 (noting that "*[e]ven apart from* th[e] danger" that the defendant was lying, testing the blood could have "shift[ed] attention to esoteric matters of forensic science, distract the jury from whether Johnson was telling the truth, or transform the case into a battle of the experts" (emphasis added)). Ultimately, the Court rejected the IAC claim because defense counsel's tactic was consistent with a strategy of "try[ing] to cast pervasive suspicion of doubt [rather] than to strive to prove a certainty that exonerates." *Id.* at 109. Same here. Pike, in his words, executed a strategy of "overcasting a shadow of doubt, as opposed to proving." The Nevada Supreme Court's determination that Pike's performance was not deficient for failing to discover the shoeprint evidence was therefore not objectively unreasonable. *See Browning*, 91 P.3d at 46.

iii. The Wolfes

The Nevada Supreme Court concluded that Pike acted reasonably in not interviewing the Wolfes. *Browning*, 91 P.3d at 46. The court noted Pike's policy of delegating the responsibility of interviewing witnesses to his investigator rather than conducting interviews himself, which could have made Pike a

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clients are untrustworthy to justify conducting little or no investigation. This is a red herring: The issue is not whether Pike believed Browning was guilty; it is whether Pike's trial strategy made sense. Had Pike's decision to forgo further investigation of the shoeprints' provenance been untethered to any potential benefit to his client, that decision may very well have constituted inadequate performance. But, as explained, that is not the case.

percipient witness. *Id.* The court concluded that this was a "reasonable tactic." *Id.* But Pike's investigator never interviewed the Wolfes. While he sought permission to do so, Pike denied his requests. The Nevada Supreme Court's conclusion that Browning "has failed to show that counsel was ineffective" because it was "reasonable" to delegate interview responsibility to an investigator was therefore an unreasonable determination of the facts. *See id.*; 28 U.S.C. § 2254(d)(2).

Even so, the Nevada Supreme Court's ultimate conclusion was not unreasonable because Browning fails to show prejudice. *See Richter*, 562 U.S. at 88. Assuming it was deficient performance to not interview the Wolfes, it is unclear how any additional information that Pike may have uncovered would have likely changed the outcome of the trial. As the majority correctly notes, the jury was presented with a "mountain of evidence providing potential reasons to doubt the Wolfes' credibility."[15] The jury knew that the Wolfes had a history of lying, stealing, drug use, and prior convictions. Piling on one more bad act would have simply added to the already formidable "mountain." *See Lewis v. Cardwell*, 609 F.2d 926, 928 (9th Cir. 1979) (counsel's failure to discover impeachment evidence that was merely cumulative did not prejudice the defendant).

Because Browning fails to show how interviewing the Wolfes would have resulted in a "reasonable

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[15] The record indicates that Pike was told, prior to trial, that the Wolfes had, on another occasion, falsely accused someone of committing crimes against Vanessa Wolfe.

probability" of a different outcome, the Nevada Supreme Court was not objectively unreasonable in rejecting Browning's IAC claim on this ground.

V. Conclusion

The role of the federal judiciary in reviewing habeas petitions from state courts is limited, and for good reason. AEDPA, when properly applied, prevents federal courts from unnecessarily intruding on states' broad authority to administer their own criminal justice systems. That is why we are tasked with considering not whether we would decide a case differently, but whether the state court's determination is beyond fair-minded debate. Today's majority repeatedly loses sight of this standard. In light of the substantial evidence inculpating Paul Browning in Hugo Elsen's murder, the limited exculpatory value of the alleged *Brady* material, and the fact that Pike's representation reasonably did not prejudice Browning's defense, I would affirm the district court's denial of Browning's petition for habeas relief. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:05-cv-0087-RCJ-WGC

[Filed August 1, 2014]

PAUL L. BROWNING,
Petitioner,

vs.

RENEE BAKER, *et al.*,
Respondents.

ORDER

Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Paul L. Browning, a Nevada prisoner sentenced to death. The case is before the court for resolution of the merits of the claims remaining in Browning's fifth amended petition for a writ of habeas corpus. The court will deny Browning's petition. The court will grant Browning a certificate of appealability with respect to certain of his claims.

Background Facts and Procedural History

In its June 10, 2004, decision on the appeal in Browning's state habeas corpus action, the Nevada Supreme Court described, as follows, the factual

background of the case, as revealed by the evidence at trial:

> On November 8, 1985, Hugo Elsen was stabbed to death during a robbery of his jewelry store in Las Vegas. His wife, Josy Elsen, was in the back of the store when he was attacked. Hearing noises, she went into the showroom and saw a black man wearing a blue cap squatting over her husband holding a knife. She fled out the back door to the neighboring store and asked the employees there to call the police. She and a neighboring employee, Debra Coe, then returned to the jewelry store where Coe placed a pillow under Elsen's head and covered him with a blanket. Two to four minutes later help arrived. Elsen soon died, after giving a very brief description of the perpetrator as a black man wearing a blue cap with loose curled wet hair. Debra Coe also described a man she had seen leaving the vicinity: he was wearing a blue cap, blue jacket, Levi's, and tennis shoes; was about 27 years old and about six-feet tall; and had hair a little longer than the cap he was wearing and a mustache. Another witness, Charles Woods, identified a person he saw leaving the vicinity as a black man wearing a dark or blue cap and dark trousers, about six-feet tall, and weighing about 180 pounds.
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> Shortly after the crimes, Randy Wolfe approached police and told them that a man was in Wolfe's nearby hotel room with a large amount of jewelry. The police went to the room and found Browning with the jewelry. Browning

was arrested and taken to Coe and Woods for a showup identification. They identified Browning as the man they saw leaving the vicinity of the crimes.

At trial, Vanessa Wolfe, Randy Wolfe's wife, testified for the State to the following. She returned to her hotel room on the day of the crimes and found Browning taking off his clothes. He had a coat, which was either on the floor or on the bed. On the bed was a lot of jewelry with tags, which she helped cut off. Browning asked Vanessa to help him get rid of some of the jewelry and said he thought he had just killed somebody. She helped Browning by throwing the tags and his hat in a nearby dumpster. Browning gave her a knife to dispose of. Instead, she put the knife in a pizza box in a closet under the stairs. The officers assigned to Browning's case testified that they retrieved all of this evidence from the places that Vanessa described. Randy Wolfe also testified that when he went into his hotel room, Browning was sitting on the bed and said that he just robbed a jewelry store and thought that he had killed a man. Investigators found Browning's fingerprints in the jewelry store.

Browning was convicted, pursuant to a jury trial, of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, burglary, and escape. At the penalty hearing, the State presented detailed evidence of his prior felonies for robbery with the use of a knife. Browning's mother testified as a

> mitigating witness. She stated that Browning attended private school as a child, was a very good student and president of the student council, and was very athletically inclined, winning medals in cross-country. She had marital problems, and she and Browning moved to Washington, D.C., where he worked as a doorman for the United States Congress and took paralegal classes at the Library of Congress. After Browning left high school, she had not had much contact with him, but she knew that he was very remorseful for the crimes. Browning spoke in allocution and stated that his involvement with drugs was the reason he was implicated in the crimes. He apologized for the pain that the Elsen and Browning families had suffered. He stated that he did not want to die and that he was innocent.
>
> The jury found five aggravating circumstances: the murder was committed while Browning was engaged in a burglary; the murder was committed while he was engaged in a robbery; he was previously convicted of a felony involving the use or threat of violence; the murder was committed while he was under a sentence of imprisonment; and the murder involved depravity of mind. The jury did not find any mitigating circumstances and returned a sentence of death.

Browning v. State, 120 Nev. 347, 352-53, 91 P.3d 39, 43-44 (2004).

Browning appealed, and, on June 24, 1988, the Nevada Supreme Court affirmed. *Browning v. State,*

104 Nev. 269, 757 P.2d 351 (1988) (a copy of the opinion is in the record at Exhibit 91 (ECF No. 59-65, pp. 2-8)).[1] [2]

On May 17, 1989, Browning filed, in the state district court, a petition for post-conviction relief. Exhibit 105 (ECF Nos. 59-68, 59-69, 59-70). The state district court held an evidentiary hearing. Exhibits 161, 179-83 (ECF Nos. 59-102, 59-103, 59-128 - 59-150). Browning's petition was denied. Exhibits 208, 230 (ECF Nos. 59-167, pp. 18-19, and 59-171).

Browning appealed, and, on June 10, 2004, the Nevada Supreme Court affirmed in part, vacated in part, and remanded the case to the state district court for further proceedings. *Browning v. State*, 120 Nev. 347, 91 P.3d 39 (2004) (copy in record at Exhibit 264 (ECF No. 59-184, pp. 18-51)). The court ruled that Browning's appellate counsel had been ineffective for failing to challenge the "depravity of mind" aggravating circumstance, and, therefore, vacated Browning's death sentence and remanded the case for a new penalty hearing. *Id*.

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[1] The exhibits referred to in this order by number only, as "Exhibit 1," "Exhibit 2," etc., were filed by respondents, and are found in the record at ECF Nos. 59 and 119.

[2] Within ECF, with respect to documents filed during the early stages of this case (*e.g.* ECF No. 59), there is a discrepancy between the document numbers shown on the docket and the document numbers shown on the tops of the documents themselves. In this order, in such cases, the court refers to the document numbers that appear on the tops of the documents themselves.

On the remand from the Nevada Supreme Court, Browning's new penalty hearing was conducted, before a jury, from April 10 through 14, 2006. Exhibits 335-45 (ECF Nos. 59-195 - 59-201). The jury returned a verdict imposing the sentence of death, and a judgment imposing the death sentence was entered on August 22, 2006. Exhibit 343 (ECF No. 59-201, p. 34) (verdict); Exhibit 360 (ECF No. 59-205, pp. 45-47) (judgment).

Browning appealed, and on July 24, 2008, the Nevada Supreme Court affirmed. *Browning v. State*, 124 Nev. 517, 188 P.3d 60 (2008) (copy in record at Exhibit 384 (ECF No. 119-3, pp. 4-37)).

On February 10, 2005, Browning initiated this federal habeas corpus action. The court appointed the Federal Public Defender (FPD) to represent Browning, and counsel appeared on his behalf on August 18, 2005 (ECF Nos. 7, 10, 11). As Browning's resentencing was then pending, on February 9, 2007, the court entered an order directing that this action would proceed with regard to guilt phase issues only (ECF No. 25). Browning amended his habeas petition on August 26, 2008 (ECF No. 48), and again on November 5, 2008 (ECF No. 54). On July 7, 2009, after Browning's re-imposed death sentence was affirmed on appeal, the court granted Browning leave to file a third amended petition, containing all known claims for relief, including any related to the newly-imposed death sentence (ECF No. 78). Browning filed his third amended petition on October 19, 2009 (ECF No. 83).

On February 10, 2010, the FPD filed a motion to withdraw from representation of Browning (ECF No. 90). That motion was granted, and the FPD withdrew on March 22, 2010 (ECF No. 96). On April 7,

2011, the court appointed new counsel for Browning (ECF Nos. 102, 103, 104). On October 14, 2011, Browning filed a fourth amended petition (ECF No. 111), and on November 28, 2011, Browning filed a fifth amended petition (ECF No. 115).

On March 7, 2012, respondents filed an answer to the fifth amended petition (ECF No. 122). On August 24, 2012, Browning filed a reply (ECF No. 131). On November 26, 2012, respondents filed a response to the reply (ECF No. 150).

When Browning filed his reply, on August 24, 2012, he also filed four motions: a motion for summary judgment (ECF No. 132), a motion to expand the record (ECF No. 133), a motion for leave to conduct discovery (ECF No. 134), and a motion for evidentiary hearing (ECF No. 135). The court denied each of those motions on January 24, 2013 (ECF No. 159). On December 31, 2012, in the course of the briefing of those motions, Browning filed another motion, a motion to strike, or, alternatively, for evidentiary hearing (ECF No. 156). The court also denied that motion on January 24, 2013 (ECF No. 159). In the January 24, 2013, order, the court stated: "The court will, however, consider Browning's motion to strike or supplement evidentiary hearing request, as well as respondents' response to that motion, in its consideration of the merits of Browning's claims." Order entered January 24, 2013, p. 11.

On January 30, 2013, Browning filed a motion requesting oral argument on the claims in his fifth amended petition (ECF No. 160). On April 5, 2013, the court entered an order (ECF No 162) denying the motion for oral argument. The court stated, regarding

oral argument: "If, after the matter of Browning's unexhausted claims is resolved (see discussion below), and upon closer consideration of the briefing, the court determines that oral argument will be helpful, the court will notify the parties of such and will schedule oral argument." Order entered April 5, 2013 (ECF No. 162), p. 5.

In the April 5, 2013, order, the court also ruled on the question of the exhaustion of state remedies with respect to the claims in the fifth amended petition, as that issue was raised by respondents in their answer. *See id*. at 6. The court found that several claims in Browning's fifth amended petition are unexhausted in state court, and, with respect to those, the court directed Browning to make an election: Browning was to either file a notice of abandonment of the unexhausted claims, indicating his election to abandon the unexhausted claims and proceed with the litigation of his remaining exhausted claims, or, alternatively, file a motion for stay, requesting a stay of these proceedings to allow him to return to state court to exhaust the unexhausted claims. *See id*. at 31-33. The court ordered that, if petitioner did not, within the time allowed, file a notice of abandonment of all his unexhausted claims, or a motion for a stay to allow exhaustion of his unexhausted claims in state court, Browning's entire fifth amended habeas petition would be dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982). *See id*.

On May 3, 2013, Browning filed a motion for reconsideration of the court's April 5, 2013, order (ECF No. 163). On September 3, 2013, the court granted that motion in part, and denied it in part, finding one

further claim in the fifth amended petition to be exhausted. *See* Order entered September 3, 2013 (ECF No. 172).

On July 19, 2013, Browning filed a "Motion to Correct Citations to Docket Number 131 (Petitioner's Reply to Respondent's Answer)" (ECF No. 168). On August 2, 2013, respondents filed a Notice of Nonopposition (ECF No. 170) regarding that motion. The court granted that motion, in the September 3, 2013, order, ordering that Browning's corrections to the reply described in the motion shall be considered made. *See* Order entered September 3, 2013 (ECF No. 172), p. 9.

Also on July 19, 2013, Browning filed a "Motion to Supplement Citations to Docket Number 131 (Petitioner's Reply to Respondent's Answer)" (ECF No. 169). On August 2, 2013, respondents filed a Notice of Nonopposition (ECF No. 171) regarding that motion. In the September 3, 2013, order, the court granted that motion as well, ordering that the supplemental citations described in the motion shall be considered included in the reply. *See* Order entered September 3, 2013 (ECF No. 172), p. 9.

On October 11, 2013, Browning filed a document entitled "Petitioner's Objection to Stay and Abeyance and Alternative Notice of Abandonment of Claims Deemed Unexhausted, per Court Orders (dkt. 162, 172), Reserving Objections" (ECF No. 173) (hereafter "Notice of Abandonment of Claims"). In that document, Browning declines to make a motion for a stay of this action to allow him to further exhaust claims in state court. *See* Notice of Abandonment of Claims, pp. 2-4 (stating, in the heading of part A of that document,

that Browning "does not request, and objects to, a stay and abeyance"). Browning goes on to state:

> Should the Court overrule his objection and adhere to its previous rulings regarding exhaustion, Petitioner, through counsel of record, hereby gives notice that he abandons the claims this Court has found to be unexhausted, to the extent and only to the extent that such abandonment is necessary to permit the Court to consider and rule on his remaining constitutional claims under *Rose v. Lundy*, 455 U.S. 509 (1982). In doing this, Petitioner does not intend to waive any of his objections to or arguments against the Court's rulings regarding exhaustion, and he specifically and respectfully reserves the right to appeal from the Court's determination that his state remedies on those claims have not been exhausted, on the grounds set forth above and all of the grounds previously submitted.

Id. at 4. The court notes Browning's objections, and accepts his abandonment of his unexhausted claims.

Thus, remaining for resolution on their merits are: the claims in Claim 1 of Browning's fifth amended petition, at paragraphs 5.1-5.6, 5.7-5.7.3, 5.8-5.8.2, 5.9-5.9.7, 5.10-5.10.4, 5.11-5.11.3 (in part), 5.12-5.12.4 (in part), 5.13-5.13.4, 5.14-5.14.5 (in part), 5.15, 5.16-5.16.4 (in part), and 5.19; Claim 2; Claim 3; the claims in Claim 4 at paragraphs 5.43-5.43.3, 5.44-5.44.2 (in part), 5.45, 5.46-5.49 (in part), 5.50-5.51 (in part), and 5.56; the claims in Claim 5 at paragraphs 5.59, 5.60, 5.61, 5.62, 5.63, 5.64, and 5.65; the claims in Claim 6 at paragraphs 5.68-5.68.2, 5.69-5.69.2, 5.70-5.70.2, 5.71,

5.72-5.72.3, 5.73-5.73.7, 5.74, 5.75, 5.76-5.76.6, 5.77-5.77.3, 5.79, 5.80 (in part), 5.81, and 5.83; Claim 7; Claim 10; and Claim 11. *See* Order entered April 5, 2013 (ECF No. 162); Order entered September 3, 2013 (ECF No. 172); Notice of Abandonment of Claims filed October 11, 2013 (ECF No. 173).[3]

Standard of Review of the Merits of Browning's Remaining Claims

Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. *See Lindh v. Murphy,* 521 U.S. 320, 336 (1997); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir.2000), overruled on other grounds by *Lockyer v. Andrade*, 538 U.S. 63 (2003).

28 U.S.C. § 2254(d) sets forth the primary standard of review under AEDPA:

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[3] On October 15, 2013, the court received from Browning, acting pro se, a letter (ECF No. 174), and on January 23, 2014, Browning filed pro se motions (ECF Nos. 175, 176), asserting that his counsel, acting against his wishes, left some eighteen claims out of the fifth amended petition, and requesting that the court fashion a procedure for briefing and consideration of those additional claims. Under Local Rule 1A 10-6, "[a] party who has appeared by attorney cannot while so represented appear or act in the case." Moreover, the court finds no basis in Browning's pro se filings to question the performance of his counsel in not including those eighteen additional claims in the fifth amended petition. The court knows of no authority extending to a habeas petitioner the right to control the choice of claims to be asserted by counsel on his behalf. The court will deny Browning's pro se motions.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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

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. at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

The Supreme Court has further instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has also emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer*, 538 U.S. at 75; *see also Cullen v. Pinholster*, 131 S.Ct.1388, 1398 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

The state court's "last reasoned decision" is the ruling subject to section 2254(d) review. *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). If the last reasoned state-court decision adopts or substantially incorporates the reasoning from a previous state-court decision, a federal habeas court may consider both decisions to ascertain the state court's reasoning. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir.2007) (en banc).

If the state supreme court denies a claim but provides no explanation at all for its ruling, the federal court still affords the ruling the deference mandated by section 2254(d); in such a case, the petitioner is entitled to federal habeas corpus relief only if "there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S.Ct. at 784.

The analysis under section 2254(d) looks to the law that was clearly established by United States Supreme Court precedent at the time of the state court's decision. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

The AEDPA standard does not apply where the state supreme court rejected a federal claim on procedural grounds and did not reach its merits. *Harrington*, 131 S.Ct. at 784-85. In that case, the federal habeas court reviews the claim de novo, rather than under AEDPA's deferential standard. *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir.2005) (applying de novo standard of review to a claim in a habeas petition that was not adjudicated on the merits by the state court); *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir.2004) (same).

Analysis

Trial Counsel's Alleged Inadequate Investigation, Generally

In Claim 1 of his fifth amended petition, at paragraphs 5.1 to 5.6, Browning makes allegations concerning what he considers to have been his trial counsel's generally inadequate pretrial investigation. Fifth Amended Petition (ECF No. 115), pp. 7-9. Those allegations, standing alone, do not state a viable claim for habeas corpus relief.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming ineffective assistance of counsel must demonstrate (1) that his attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688; *see also id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Without tethering general claims regarding the alleged minimal investigation done by trial counsel to particular effects of the insufficient investigation, Browning cannot establish ineffective assistance of counsel, in violation of his constitutional rights, under *Strickland.* Therefore, the allegations in paragraphs 5.1 to 5.6 of Browning's fifth amended petition do not, in themselves, set forth a viable habeas claim. Those allegations can only be read as introduction to, and in conjunction with, Browning's specific claims regarding the investigation done by his trial counsel, which are discussed below.

The Bloody Shoe Prints

Browning asserts claims concerning bloody shoe prints found at the scene of the murder.

In Claim 1, at paragraphs 5.7 to 5.7.3, Browning claims that, had his trial counsel conducted a sufficient

investigation, he would have learned, and the jury would have heard:

> (a) that Officer Branon was the first officer to arrive at the scene, and when he arrived the bloody shoe prints were already there; (b) that the paramedics arrived after Officer Branon so they could not have left the prints; (c) that Officer Branon told Mr. Horn that he saw the bloody shoeprints there before anyone arrived – including Mr. Horn and the paramedics; and (d) that the bloody prints were too big to have been left by either Ms. Coe or Mrs. Elsen, who had been in the jewelry store before Officer Branon's arrival.

Fifth Amended Petition, p. 10, ¶ 5.7.2.

Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 43 (ECF No. 59-174, p. 29). The Nevada Supreme Court considered Browning's claim of ineffective assistance of counsel, regarding his counsel's investigation of the bloody shoe prints, and ruled as follows:

> Browning also contends that his trial counsel was ineffective in failing to learn that bloody shoeprints near Elsen were already present when Officer Branon arrived at the crime scene. Because the prints did not match Browning's shoes and could not have been left by paramedics, who arrived after Officer Branon, Browning argues that this information indicated that another person committed the murder. We conclude that this information was not material

> and that trial counsel acted reasonably. Counsel explained at the evidentiary hearing that once he determined that the shoeprints did not match Browning's shoes, he chose not to investigate the prints further. He feared that investigation might establish that the prints had been left by police or paramedics, rather than some unidentified person. As long as the source of the prints was unknown, counsel could argue to the jury that the actual murderer had left them. Although it is now evident that the prints were present before police and paramedics arrived, counsel's basic reasoning remains sound because the bloody shoeprints were likely left by Mrs. Elsen and/or Coe, who were with Elsen before the first officer arrived. Counsel made a reasonable, tactical decision to leave the source of the prints uncertain.

Browning v. State, 120 Nev. 347, 356, 91 P.3d 39, 46 (2004). This court recognizes that there is evidence suggesting that the bloody shoe prints likely were not left by Mrs. Elsen or Mrs. Coe, but finds, nonetheless, that the Nevada Supreme Court's conclusion, regarding trial counsel's strategic decision to leave the source of the prints uncertain, was reasonable. *Strickland* requires courts to indulge a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, as it is all too easy to conclude in hindsight that a particular act or omission was unreasonable. *See Strickland*, 466 U.S. at 689. The Nevada Supreme Court's ruling on this claim was a reasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts in light of the evidence presented.

In Claim 4, at paragraphs 5.43 to 5.43.3, Browning claims, under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), that the prosecution withheld exculpatory information, and presented testimony that was misleading or false, when it presented the trial testimony of David Horn, a Las Vegas Metropolitan Police Department (LVMPD) identification specialist, whose testimony suggested, in essence, that the bloody shoe prints were likely left by paramedics or off duty detectives. *See* Fifth Amended Petition, pp. 39-40, ¶ 5.43-5.43.3. Browning contends that "[t]he prosecutor and Officer Horn knew or reasonably should have known that bloody prints could not have been left by the paramedics or anyone working the crime scene since Officer Branon was the first officer to arrive at the scene and he noticed the bloody prints before any back-up arrived." *Id*. at 40, ¶ 5.43.1.

Browning raised these claims on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 30 (ECF No. 59-174, p. 16. The Nevada Supreme Court ruled as follows:

> ... Browning contends that the State withheld the fact ... that bloody shoeprints near the victim were already present when the first police officer arrived at the crime scene. We have already concluded that this information was not material in rejecting Browning's contention that his trial counsel was ineffective. We further conclude that under *Brady* the State did not withhold this information because it was reasonably available to the defense, as Browning acknowledges by claiming that his counsel

> should have interviewed the officer and discovered it. [Footnote: *See Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).]

Browning, 120 Nev. at 370 91 P.3d at 55. The court finds this ruling by the Nevada Supreme Court to be reasonable. Browning has not shown that any evidence regarding Officer Branon's observations at the scene of the murder was withheld from the defense. The testimony of Officer Branon on which Browning relies in his attempt to show a *Brady* violation – that he was the first at the scene, and when he arrived the bloody shoe prints were already there – was not given until the evidentiary hearing in 1999, fourteen years after trial. *See* Testimony of Gregory Branon at Evidentiary Hearing, Exhibit 182, pp. 153-82 (ECF No. 59-145, p. 36 - ECF No. 59-146, p. 24). And, despite the importance of such information to the investigation of Hugo Elsen's murder, that information does not appear in Officer Branon's three-page police report. *See* Officer Branon's November 8, 1985, Police Report, Exhibit 202 in support of Browning's First Amended Petition (ECF No. 37-18, pp. 91-93). Moreover, there is no credible evidence that Officer Branon told anyone this information before the 1999 evidentiary hearing.

Browning claims that there is evidence that Officer Branon told Officer Horn, at the scene of the murder, that when he arrived the bloody footprints were already there; in making that argument, Browning relies on the following testimony of Officer Branon at the 1999 evidentiary hearing held in Browning's state habeas action:

> Q. Did you tell anyone about the bloody footprints upon entering the store?

> A. I would have mentioned it to Criminalistic's Specialist Horn when he got there.

Testimony of Gregory Branon at Evidentiary Hearing, Exhibit 182, p. 171. This court does not find that testimony to be credible. Officer Branon did not testify that he actually told Officer Horn; he testified -- some 15 years after the event -- that he "would have."

Furthermore, Officer Horn testified at trial as follows:

> Q. Now, you mentioned the bloodstain. ... Can you tell whether or not you discovered a footprint in that particular bloodstain?
>
> * * *
>
> A. There was a tennis shoe design in the bloodstain and it led away from the bloodstained area towards the east, front door.....
>
> * * *
>
> Q. ... [A]re you familiar in this case with a man by the name of Paul Lewis Browning?
>
> A. Yes, I am.
>
> Q. Did you see him later that evening?
>
> A. Yes, I did.
>
> Q. And what was the purpose of your seeing Mr. Browning?
>
> A. The purpose was to check the footwear that he was wearing to see if it might match what I found in the store.

Q. Did it match?

A. No, it did not.

* * *

Q. (By Mr. Seaton [prosecutor]) What investigation did you do?

A. None.

Q. Were you given any information that caused you not to do any investigation?

A. Yes, I was.

* * *

Q. (By Mr. Seaton) How do you determine whether or not you should do further investigation in something like this footprint?

* * *

A. If it was – if I deemed it critical or someone from the detective side of the police department thought it critical, the personnel that had responded to the crime scene at 521 Las Vegas Boulevard South would have been contacted either through the Mercy Ambulance attendant or if it was the fire department that responded we could have obtained those names of the people that had gone to that address, contacted them, even brought them back to the scene if needed to compare to or see what kind of footwear that they were wearing at the time they initially arrived to the address at the Hugo Elsen Jewelry Store.

Q. Have you been to many scenes where paramedics have been?

A. Numerous.

Q. Do they wear tennis shoes?

A. They sometimes do. More often than not they do because a lot of times they work with their feet a lot and anything that's more comfortable for them that's generally what they will wear.

Q. Do detectives come to the scene who were off duty?

A. The only off-duty people that would come to such a crime scene would be your homicide detail. Everyone else from general detail, patrol, the crime lab people would be on duty.

Q. People like Detective Leonard?

A. Right.

Q. The man in charge of this case if he were off duty?

A. He would show up, yes.

Q. Do they come in tennis shoes ever?

A. At times I have seen them wear tennis shoes.

Q. And did [you] ever think that it was critical to go look at all of the shoes of all of the people who had been in that building on that particular night?

A. No, I did not.

Trial Testimony of David Randall Horn, Exhibit 46, pp. 209-13 (ECF No. 59-29, pp. 14-18). It appears from Officer Horn's testimony that his decision not to further investigate the shoe prints was based on what he was told by other officers at the scene. In light of the trial testimony of Officer Horn, the court finds incredible Officer Branon's testimony, some 15 years after the event, that he "would have" told Officer Horn that the bloody shoe prints were present when he first arrived at the scene before anyone else.

Moreover, it is not clear from the evidence that Officer Branon was in fact, by himself, the first officer to arrive at the murder scene. Browning's claims regarding the bloody shoe prints are premised on his assertion that "... Officer Branon was the first officer to arrive at the scene and he noticed the bloody prints before any back-up arrived." Fifth Amended Petition, p. 40. At trial, however, Officer Branon testified as follows:

> Q. Officer Branon, you were one of the first two officers to arrive at the scene. Isn't that true?
>
> A. Yes, sir.
>
> Q. And you were there with Officer Robertson?
>
> A. Yes, sir.

Trial Testimony of Gregory Branon, Exhibit 49, p. 537 (ECF No. 59-41, p. 19). And, in his police report, written on the day of the murder, Officer Branon wrote:

> Upon my arrival at Hugo's Jewelers, a short time thereafter, I made my way to the front of the jewelry store, at which time I was able to

> look within and observe an elderly white female adult, later identified as Josey Elsen, the wife of the owner, Hugo Elsen, walking back and forth within the business.
>
> It was at approximately this time that Officer R. Roberston and Officer D. Radcliffe responded to my location to assist me. It was at this time that I gently knocked upon the glass door at the front of the business, which is located on the eastside of the building, which attracted the attention of Mrs. Elsen, who responded to the door, opened it and explained her husband had been stabbed.
>
> At this time both I and Officer Robertson entered the store, making a quick check on the interior, then contacting the victim, one Hugo Elsen, who was lying in a conscious state on the floor on his back at the northeast corner of the store.

Exhibit 202 in support of Browning's First Amended Petition, p. 1 (ECF No. 37-18, p. 91).

At trial, the prosecution presented the testimony of David Radcliffe, one of the other LVMPD patrol officers who responded to the scene of the murder. *See* Trial Testimony of David Radcliffe, Exhibit 48, pp. 340-63 (ECF No. 59-35, pp. 4-27). Officer Radcliffe testified as follows regarding his arrival at the scene:

> Q. .... Did you arrive with the other initial responding officers?
>
> A. Officer Robertson and Officer Branon. They were all in separate units, but they arrived probably ten or fifteen seconds prior to me.

Trial Testimony of David Radcliffe, Exhibit 48, p. 361. Officer Radcliffe also testified as follows:

> Q. When you arrived there did you drive up to the front of the business?
>
> A. There were two other units in front. I parked in the two-way turn lane just south of the business.
>
> Q. Did you meet with other police officers there?
>
> A. Yes, I did.
>
> Q. Who were they, specifically?
>
> A. Officer Branon and Officer Robertson.
>
> Q. Did the three of you go into the business at 520 Las Vegas Boulevard South?
>
> A. Yes, we did.

Id. at 3.

In sum, Officer Branon's testimony at the 1999 evidentiary hearing is not such as to compel a finding that Officer Horn's trial testimony was false or misleading. And, there is no showing by Browning that the prosecution failed to disclose to the defense any material exculpatory information in this regard. This court finds reasonable the Nevada Supreme Court's ruling that Browning did not show that the prosecution wrongfully failed to disclose information regarding Officer Branon's observations or that such information was material, and the court finds that Browning has not shown Officer Horn's testimony to be misleading or false.

The Jacket

Browning makes claims regarding a jacket that was found in the room where he was arrested and that was shown to have blood on it, with the same blood type (type B) as the victim, Hugo Elsen.

In Claim 1, at paragraphs 5.8 through 5.8.2, Browning claims that, "[h]ad trial counsel conducted pre-trial investigation into this claim, such as interviewing the state's criminologist or conducting an independent analysis of the blood on the jacket, using tests that were readily available at the time, the jury would have learned that the premise of [the] prosecutor's argument was wrong since the blood on the jacket did not belong to the victim." Fifth Amended Petition, p. 11, ¶ 5.8.2.

Browning raised this claim in a footnote in his opening brief on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 23, n.11 (ECF No. 59-174, p. 9). Before the state district court, however, Browning made no evidentiary showing that there was available, at the time of trial, a more advanced method of blood analysis that could have shown that the blood on the jacket was not Mr. Elsen's. The state district court, therefore, ruled as follows:

> Defendant claims that Mr. Pike [Browning's trial counsel] was ineffective for failing to conduct independent testing on the jacket. Defendant then argues that Mr. Pike should have done RFLP DNA testing and that would have determined that the blood was not Hugo Elsen's. This is a recurring theme throughout Defendant's argument. However, there is no

> evidence in the record that RFLP DNA testing was available in 1986. Nor is there evidence that there was a sufficient amount of blood on the jacket in order to test using RFLP. Moreover, it should be noted that Defendant never conducted an RFLP test. In the stipulation between the parties filed January 10, 2001, the test used on the three strands of fiber was AmpF/STR Profiler Plus PCR Amplification Kit. Unless Defendant could prove that test was available in 1986, which he has not, counsel cannot be faulted for not having used such a test.

Findings of Fact, Conclusions of Law and Order, Exhibit 230, p. 5 (ECR No. 59-171, p. 7). On the appeal from the denial of his state habeas petition, Browning raised the issue in a footnote in a section of his opening brief dealing with alleged prosecutorial misconduct. *See* Appellant's Opening Brief, Exhibit 232, p. 23. In his reply brief on that appeal, Browning argued that "[w]hile this DNA testing was not available at the time, there were other tests in common use that were much more discriminating than the simple ABO typing...." Appellant's Reply Brief, Exhibit 251, p. 16. In a footnote to that assertion, Browning cited to caselaw in which there were references to blood enzyme testing evidence. *See id*., p. 16 n.3. However, it remained that Browning had not made any evidentiary showing that any more sophisticated blood testing was available to defense counsel, or that blood enzyme testing, or any other blood testing available at the time of trial, could have shown that the blood on the jacket was not Mr. Elsen's. Absent such an evidentiary showing, Browning's claim was plainly without merit, and the Nevada Supreme Court so held:

> Finally, Browning claims in a footnote that trial counsel was ineffective for failing to perform more precise testing of the State's blood evidence. He has not provided any cogent argument, legal analysis, or supporting factual allegations; thus, this claim warrants no consideration.

Browning v. State, 120 Nev. 347, 361, 91 P.3d 39, 50 (2004). In light of the evidence -- or, rather, the lack of it -- regarding this issue, the ruling by the Nevada Supreme Court was reasonable. Browning did not show that his trial counsel had available any method of blood testing that could have shown that the blood on the jacket was not Mr. Elsen's.

In Claim 4, at paragraph 5.45, Browning makes a *Napue* claim involving the prosecution's evidence regarding the jacket:

> At trial, the prosecution elicited testimony from Ms. Adkins, an identification specialist with the Las Vegas Police, that upon entering the Wolfes' apartment she observed a tan jacket on top of the bed, near the location where Mr. Browning was alleged to have been sitting. The jacket was alleged to have belonged to Mr. Browning and alleged to have the victim's blood on it. None of this was true. The testimony was false and the prosecutor did nothing to correct it. According to Ms. Adkins own Evidence Impound Report, the tan jacket was not recovered on the bed next to Mr. Browning, but rather on the floor of the Wolfe's closet.

Fifth Amended Petition, p. 42, ¶ 5.45 (citations omitted).

Browning raised this claim before the Nevada Supreme Court on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 21-24 (ECF No. 59-174, pp. 7-8). The Nevada Supreme Court ruled on this claim as follows:

> Browning claims that the prosecutor presented false evidence regarding blood found on Browning's coat, which was type B blood like the victim's. The prosecutor argued to jurors that the blood on the coat belonged to the victim, though he also conceded that other people have type B blood. DNA testing after the trial revealed that the blood was not the victim's. Because this is an independent claim of prosecutorial misconduct, Browning must demonstrate good cause for failing to raise it earlier and actual prejudice. Browning sought DNA testing of the bloodstain in November 1999. He does not attempt to establish good cause and explain why he did not raise the claim earlier. But even if Browning could show good cause, he cannot demonstrate prejudice. Although the prosecutor was wrong that the blood belonged to the victim, the evidence he relied on was not false: the blood on the coat was the same type as the victim's. Therefore, no prosecutorial misconduct occurred.

Browning, 120 Nev. at 368, 91 P.3d at 54 (footnote omitted). This ruling was reasonable. Browning made no showing that the evidence presented by the prosecution regarding the jacket was false.

Browning claims in Claim 6, at paragraph 5.71, that his trial counsel was ineffective for failing to object to the following characterization of the jacket by the prosecutor in his closing argument:

> The jacket that had Mr. Hugo Elsen's blood on it that Paul Browning was wearing when he killed him. This proves his guilt probably as much as anything, maybe as much as the identification by Coe and Woods and poor Mrs. Elsen.

Fifth Amended Petition, pp. 61-62; *see also* Trial Transcript, Exhibit 51, p. 655 (ECF No. 59-47, p. 12). Browning raised this claim, in a footnote in his opening brief on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 23 n. 11 (ECF No. 59-174, p. 9). As is discussed above, however, the Nevada Supreme Court held the argument by the prosecutor, that the blood on the jacket was the victim's, to be permissible, based on the evidence admitted at trial. In view of that ruling by the Nevada Supreme Court, an objection by Browning's counsel would have been futile. The Nevada Supreme Court's ruling, that counsel was not ineffective for failing to make such an objection, was not objectively unreasonable.

Browning also claims, in Claim 6, at paragraphs 5.77 through 5.77.3, that his trial counsel was ineffective in that he "allowed the prosecution to present a photograph of Mr. Browning wearing the jacket that Mr. Pike had Mr. Browning try on before the jury to demonstrate that it did not belong to him." Fifth Amended Petition, p. 69, ¶ 5.77.

Browning raised a similar claim on the appeal in his state habeas action (*see* Appellant's Opening Brief, Exhibit 232, pp. 49-50 (ECF No. 59-175, pp. 2-3), and the Nevada Supreme Court ruled as follows:

> ... Browning claims that counsel should have objected to admission of a mug shot, which allowed the jury to infer that Browning had been involved in prior criminal activity. We conclude that the photo had no appreciable prejudicial effect since jurors had no reason to assume that it had been taken in any other case but the one for which Browning was being tried.

Browning, 120 Nev. at 358, 91 P.3d at 47. This court agrees with the ruling of the Nevada Supreme Court, and finds that court's ruling was not objectively unreasonable. Even assuming that an objection might possibly have been sustained, and that Browning's counsel should reasonably have made such an objection, there is no showing of any reasonable probability that, had such an objection been made, the outcome of the trial would have been different.

The Wolfes' Credibility

Next, Browning makes claims concerning the credibility of Randall and Vanessa Wolfe, witnesses presented by the prosecution.

In Claim 1, at paragraphs 5.9 through 5.9.7, 5.12 through 5.12.4, and 5.16 through 5.16.4, Browning claims that his counsel was ineffective for failing to better investigate issues relating to the credibility of the Wolfes, and better impeach the Wolfes' testimony. Fifth Amended Petition, pp. 11-13, 16-18. Browning asserted this claim on the appeal in his state habeas

action. *See* Appellant's Opening Brief, Exhibit 232, pp. 42-43, 47-48 (ECF No. 59-174, pp. 28-29, 33-34). The Nevada Supreme Court ruled on this claim as follows:

> ... Browning claims that counsel should have interviewed Randy and Vanessa Wolfe, the State's key witnesses. Counsel testified that to avoid becoming a witness himself, he had a policy of not personally interviewing witnesses. Instead, he had his investigator conduct all interviews. This is a reasonable tactic. The investigator gathered enough information to permit trial counsel to adequately cross-examine the Wolfes on their version of events, their drug usage, their informer status, their lying, and their convictions and arrests. Therefore, Browning has failed to show that counsel was ineffective.

Browning, 120 Nev. at 356, 91 P.3d at 44. This court concurs with the ruling of the Nevada Supreme Court that Browning's counsel was able to adequately cross-examine the Wolfes.

Browning's counsel's cross-examination of Randall Wolfe was effective, in that counsel elicited evidence that Randall Wolfe used heroin and other drugs, that he committed thefts to support his drug use, that he used several aliases, that he lived off the proceeds of Vanessa's prostitution, and that he had been convicted of three felonies, including sale of a controlled substance, escape from prison, and attempted possession of stolen property. Trial Testimony of Randall Wolfe, Exhibit 48, pp. 390-95, 399-403, 406-08, 411 (ECF Nos. 59-36 and 59-37). Counsel also elicited

testimony from Randall Wolfe showing that he received special treatment in a pending case in exchange for his testimony in Browning's case. *Id*. at 396-97, 403-08. Counsel also showed that Randall Wolfe perjured himself at Browning's preliminary hearing, but likely would not be charged. *Id*. at 397-99. This court concludes that Browning has not shown that any further investigation of Randall Wolfe would have resulted in such a better cross-examination that there would have been a reasonable probability of a better result for Browning at trial. *See Strickland*, 466 U.S. at 688, 694.

Similarly, in this court's view, Browning's counsel's cross-examination of Vanessa Wolfe was effective; counsel elicited testimony showing that she used heroin and cocaine, that she had "run con games" in California, and that she had learned that Randall had kept jewelry from the robbery of the Elsens' jewelry store. Trial Testimony of Vanessa Wolfe, Exhibit 48, pp. 442-52 (ECF No. 59-38, pp. 8-18). The court concludes that Browning has not shown that any further investigation of Vanessa Wolfe would have resulted in such a better cross-examination that there would have been a reasonable probability of a better result for Browning at trial.

In Claim 4, at paragraphs 5.46 to 5.51, Browning claims, under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution withheld from the defense information related to the credibility of Randall and Vanessa Wolfe. Fifth Amended Petition, pp. 42-47. Browning raised these claims on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 24-29 (ECF No. 59-174, pp. 10-15).

With respect to Vanessa Wolfe, the Nevada Supreme Court denied this claim without any discussion. Browning did not make a showing in state court that any material information regarding Vanessa Wolfe's credibility was withheld from the defense, and this court, therefore, finds reasonable the state court's summary rejection of that *Brady* claim.

With respect to Randall Wolfe, the Nevada Supreme Court ruled as follows on this *Brady* claim:

> First, the prosecutor withheld information regarding benefits given to an important witness for the State, Randy Wolfe. At trial, Wolfe denied receiving or expecting any benefits for his testimony. However, at that time Wolfe was the defendant in a separate criminal prosecution, and the prosecutor admitted at the post-conviction evidentiary hearing that after Browning's trial he told the district judge assigned to Wolfe's case that Wolfe had helped in prosecuting Browning; he also admitted that he later helped Wolfe acquire a job. Though the prosecutor maintained that he acted unilaterally and never made any deal with Wolfe, this information still should have been disclosed to the defense. Under *Brady*, even if the State and a witness have not made an explicit agreement, the State is required to disclose to the defense any evidence implying an agreement or an understanding. [Footnote: *Jimenez v. State*, 112 Nev. 610, 622, 918 P.2d 687, 694-95 (1996).] The next question is whether there is a reasonable probability of a different result if this information had been disclosed. We conclude the

> answer is no. Wolfe's credibility was extensively challenged at trial. The jury was made aware that he had initially kept some of the stolen jewelry in this case for himself and lied under oath about doing so. On cross-examination, defense counsel also established that Wolfe had a history of heroin and other illegal drug use and had used heroin just four days before testifying, had stolen property and pimped his wife to support his drug use, had three prior felony convictions, and still faced sentencing for one of those convictions. Thus, though the jurors were not told that Wolfe would receive benefits for his testimony, he was stiffly impeached on other grounds. Moreover, strong evidence corroborated his testimony, most notably the discovery of Browning with the stolen jewelry right after the murder. So considering this issue alone, there is not a reasonable probability of a different result if the information in question had been disclosed.

Browning, 120 Nev. at 369-70, 91 P.3d at 54-55. The Nevada Supreme Court, therefore, held that the prosecutor failed to disclose to the defense his practice -- evidently unknown to Randall Wolfe -- of assisting witnesses for the State who face sentencing in their own cases, by informing the sentencing court of their cooperation; however, the Nevada Supreme Court held that Browning was not prejudiced. Despite the non-disclosure identified by the Nevada Supreme Court, Browning's counsel established on cross-examination of Randall Wolfe: that Wolfe had been permitted to plead guilty to a lesser charge, when he originally was eligible for "habitual criminal" treatment; that Wolfe's

sentencing was still pending; that, despite a history of failing to appear in court as ordered, Wolfe was released on his own recognizance; and that, despite confessing to felony possession of stolen property and perjury, there appeared to be no intent to charge Wolfe with those offenses. *See* Trial Testimony of Randall Wolfe, Exhibit 48, pp. 396-99, 403-08 (ECF No. 59-36, pp. 29-32, and ECF No. 59-37 pp. 5-10). In light of counsel's cross-examination of Randall Wolfe, it was not objectively unreasonable for the Nevada Supreme Court to determine that there was no reasonable probability that the outcome of the trial would have been affected by the additional revelation that the prosecutor, unbeknownst to Wolfe, intended to put in a good word for Wolfe at the time of his sentencing because of his testimony at Browning's trial.

The Identification of Browning by Josy Elsen

Josy Elsen was the wife of the murder victim, Hugo Elsen. At trial, Josy Elsen identified Browning as the person she saw stab her husband. Trial Testimony of Josy Elsen, Exhibit 46, pp. 263-67 (ECF No. 59-31, pp. 10-14). Browning makes claims in his fifth amended habeas petition regarding Josy Elsen's identification of him as the murderer.

In Claim 1, at paragraphs 5.10 through 5.10.4, Browning claims that his counsel was ineffective for failing to interview Josy Elsen or obtain a crime scene sketch of the jewelry store, to learn that, given the angle of her view and the layout of the store, Josy Elsen could not identify her husband's murderer. Fifth Amended Petition, pp. 13-15. Browning asserted this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 43, 45-46

(ECF No. 59-174, pp. 29, 31-33). The Nevada Supreme Court ruled as follows:

> Browning complains that his counsel also failed to interview Mrs. Elsen, the victim's wife. According to Browning, Mrs. Elsen would likely have admitted that she could not identify her husband's assailant, enabling counsel to demonstrate that her in-court identification was unreliable. This claim lacks merit. Mrs. Elsen was asked on one occasion to identify Browning in a photographic lineup shortly after the crimes occurred. She was unable to do so; however, at trial she identified Browning as her husband's attacker. She qualified this identification by stressing that she only saw the perpetrator from the side. She did state that the attacker was a black man wearing a blue cap. Although counsel did not personally interview Mrs. Elsen, he adequately cross-examined her regarding the identification. After she made her in-court identification, counsel specifically asked the court to note for the record that Browning was the only black man in the room and that he was seated at the defense table. In addition, counsel pointed out during closing argument that although Mrs. Elsen could not identify Browning at the photographic lineup a month after the crimes, one year later she somehow identified him. Finally, the result if counsel had interviewed Mrs. Elsen is completely speculative, and this speculation does not demonstrate any prejudice.

Browning, 120 Nev. at 356-57, 91 P.3d at 46-47 (footnote omitted). In this court's view, considering the hesitant nature of Josy Elsen's identification of Browning at trial, her testimony about her limited view of the murderer, and Browning's counsel's arguments regarding her identification, the jury was able to fairly weigh the value of Josy Elsen's identification of Browning as the murderer. Furthermore, in addition to hearing Josy Elsen's testimony about her limited view of the murderer, Browning's trial counsel testified at the evidentiary hearing in Browning's state habeas proceeding, that he personally visited the jewelry store to observe the scene of the crime. Testimony of Randall Pike at Evidentiary Hearing, Exhibit 181, pp. 259-60 (ECF No. 59-141, pp. 19-20). This court, therefore, finds the state supreme court's ruling on this claim, rejecting the claim of ineffective assistance of counsel, to be objectively reasonable.

In Claim 6, at paragraphs 5.73 through 5.73.7, Browning claims that his counsel was ineffective for failing to move to exclude the testimony of Josy Elsen identifying Browning as the murderer. Fifth Amended Petition, pp. 63-65. Browning asserted this claim in his state habeas action. At the evidentiary hearing in that action, Browning's trial counsel testified as follows:

> Based on my experience with the district courts, both as a prosecutor and defense attorney, the judge would have allowed the identification to have gone forward and would have directed me to just attack credibility of it.

Testimony of Randall Pike at Evidentiary Hearing, Exhibit 181, p. 258 (ECF No. 59-141, p. 18). After the state district court denied the claim, Browning raised

the claim on appeal. *See* Appellant's Opening Brief, Exhibit 232, pp. 50-53 (ECF No. 59-175, pp. 3-6). The Nevada Supreme Court ruled as follows:

> Browning also claims that trial counsel was ineffective for failing to move to exclude Mrs. Elsen's in-court identification of Browning. On direct appeal, this court ruled that although Mrs. Elsen failed to identify Browning before trial, the in-court identification was admissible. [Footnote: *See Browning*, 104 Nev. at 274, 757 P.2d at 354.] Therefore, Browning cannot demonstrate prejudice because the underlying claim has already been considered and rejected by this court.

Browning, 120 Nev. at 357, 91 P.3d at 47. Browning's counsel made a reasonable tactical decision not to make what he expected would be a futile motion to exclude Josy Elsen's identification, and, at any rate, given the Nevada Supreme Court's rulings on the question of the admissibility of the identification (*see Browning*, 104 Nev. at 274, 757 P.2d at 354; *Browning*, 120 Nev. at 357, 91 P.3d at 47), it is plain that a motion to exclude the identification would have failed. *See also* Trial Transcript, Exhibit 46, pp. 301-02 (ECF No. 59-32, pp. 18-19) (denial of motion for mistrial based on Josy Elsen's identification of Browning as the murderer). The Nevada Supreme Court's ruling on this claim was not objectively unreasonable.

In Claim 7, citing *Stovall v. Denno*, 388 U.S. 293 (1967), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), Browning claims that Josy Elsen's in-court identification of Browning as the murderer was unconstitutionally unreliable. Browning raised such a

claim on his direct appeal, and the Nevada Supreme Court denied the claim. *See* Appellant's Opening Brief, Exhibit 84, pp. 28, 30-31 (ECF No. 59-60, pp. 16, 18-19); Appellant's Supplemental Opening Brief, Exhibit 87, pp. 15-18 (ECF No. 59-61, pp. 24-27).

Browning argues that Josy Elsen's identification lacked an "independent source," which is required under *Stovall* and *Manson*. *See* Reply (ECF No. 131), p. 151. That argument is without merit, however; it is beyond dispute that Josy Elsen witnessed a man stabbing her husband. There was an independent source for her in-court identification of Browning.

More fundamentally, however, *Stovall* and *Manson* do not apply to Josy Elsen's in-court identification of Browning in this case because "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire,* ___ U.S. ___, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). In *Perry*, the Court explained that the dangers of identification testimony are ordinarily to be combated by the safeguards inherent in the criminal justice system, including the rights of counsel, compulsory process, and confrontation, and that the reliability of identifications is generally to be determined by the finder of fact. As the Supreme Court observed in *Perry*, all in-court identifications "involve some element of suggestion." *Perry*, 132 S.Ct. at 727.

In a recent Ninth Circuit Court of Appeals decision, that court explained the limited nature of the

substantive due process right established in *Stovall* and *Manson*:

> In only one line of cases has the Supreme Court held that the mere admission of evidence amounts to a denial of due process, and that's where police manipulate an eyewitness to identify the defendant as the culprit. The Court announced this rule in *Stovall v. Denno*, 388 U.S. 293, 301-02, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and has been backpedaling ever since. *See*, *e.g.*, *Manson v. Brathwaite*, 432 U.S. 98, 117, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 201, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Coleman v. Alabama*, 399 U.S. 1, 5, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Simmons v. United States*, 390 U.S. 377, 386, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). *But see Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).
>
> The latest case in the *Stovall* line ... is particularly instructive. In *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 725, 181 L.Ed.2d 694 (2012), the eyewitness identified the suspect in a suggestive setting, but this happened by accident, rather than as a result of police manipulation. By a decisive margin, the Supreme Court declined to find a due process violation. *Id*. at 730. Justice Ginsburg starts her analysis with words that our colleagues in the other circuits should read twice:
>
> > The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability,

> not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.

Id. at 723.

The Court goes on to reject Perry's argument that "trial judges [must] prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances." *Id*. at 725. Instead, exclusion of the evidence is appropriate only "to deter law enforcement use of improper lineups, showups, and photo arrays." *Id*. at 726. In another passage our colleagues might pin to their robes, the Court held:

> We have concluded in other contexts ... that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair.... We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Id. at 728 (citing [*Kansas v. Ventris*, 556 U.S. 586, 129 S.Ct. 1841, 1847 n. *, 173 L.Ed.2d 801 (2009)], and [*Dowling v. United States*, 493 U.S. 342, 353, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)].

The way to deal with unreliable evidence, the Supreme Court tells us, is via the adversary

> system, which includes the ability to confront witnesses, the assistance of counsel, jury instructions, the burden of proof and the right to introduce contrary evidence. *Id*. at 728-29. Justice Thomas concurs, noting that the *Stovall* line of cases is grounded in substantive due process, which he finds inconsistent with the strictly procedural nature of the Due Process Clause. *See id*. at 730 (Thomas, J., concurring).
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> * * *
>
> Criminal trials reflect the pinnacle of procedural formality because the consequences of an erroneous conviction --loss of liberty or life -- are the most serious. The Court has been willing to protect these values by adopting quasi-substantive rules such as those announced in *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), *Brown v. Mississippi*, 297 U.S. 278, 285-86, 56 S.Ct. 461, 80 L.Ed. 682 (1936), and *Stovall*. All of those rules were designed to counter a particular evil: misconduct by police and prosecutors. But the Court has steadfastly refused, even in criminal cases, to find a due process violation based on the mere unreliability of evidence.

Angov v. Holder, 736 F.3d 1263, 1271-72 (9th Cir.2013).

There has been no showing that the in-court identification of Browning by Josy Elsen at trial was the result of any unnecessarily suggestive procedure or

circumstances arranged by law enforcement. The Nevada Supreme Court's denial of relief on this claim was not objectively unreasonable.

The Identification of Browning by Debra Coe

Debra Coe worked at a business next door to the Elsens' jewelry store; she identified Browning as the man she saw run by that business shortly after Hugo Elsen's murder. Trial Testimony of Debra Coe, Exhibit 46, pp. 303-17 (ECF No. 59-32, pp. 20-27, and ECF No. 59-33, pp. 2-8). Browning makes claims in his fifth amended habeas petition regarding Debra Coe's identification.

In Claim 1, at paragraphs 5.11 through 5.11.3, and 5.14.3 and 5.14.4, Browning claims that his trial counsel was ineffective for not sufficiently investigating the circumstances of Coe's observations, resulting in an inadequate cross-examination, and in Claim 6, at paragraphs 5.75, and 5.76 through 5.76.6, Browning claims that his trial counsel was ineffective for not adequately cross-examining Coe. Fifth Amended Petition, pp. 15-16, 67-69; *see also* Reply, p. 34.[4] Browning raised these claims on the appeal in his state habeas action. Opening Brief, Exhibit 232, pp. 48-49 (ECF No. 59-174, p. 34, and ECF No. 59-175, p. 2). The Nevada Supreme Court considered the adequacy of counsel's cross-examination of Coe, and ruled as follows:

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[4] Browning has abandoned the claim, in Claim 1, at paragraphs 5.11 through 5.11.3, that his counsel was ineffective for not interviewing Coe before trial. *See* Reply, p. 34, lines 8-10.

> ... Browning asserts that counsel failed to properly cross-examine and impeach witness Debra Coe. Shortly after the crimes, the police brought Browning to Coe to determine if he was the man she had seen jogging by her window away from the crime scene. She said that Browning looked like the man but that she was not positive. At trial she stated that she was sure that the man was Browning. She also initially told police that all blacks look the same; however, at trial she stated that she was joking and did not think that all blacks looked the same. Browning claims that counsel inadequately cross-examined Coe by failing to ask her if the man she saw had any blood on him or was carrying any jewelry cases and why she thought that all blacks look alike. This claim lacks merit. Counsel unsuccessfully sought to suppress Coe's identification of Browning at trial. During cross-examination of Coe, counsel asked her many questions regarding her identification of Browning and whether she believed that all blacks looked alike. Browning has not demonstrated that counsel's cross-examination of Coe was deficient or that there is a reasonable probability of a different result if counsel had asked if the man she saw was bloody or was carrying jewelry cases.

Browning, 120 Nev. at 357-58, 91 P.3d at 47. Given the weight of the evidence against Browning, and considering the cross-examination of Coe that counsel conducted, the court finds that the Nevada Supreme Court's ruling -- that the alleged shortcomings of

counsel's cross-examination of Coe were not prejudicial to Browning -- was not objectively unreasonable.

In Claim 6, at paragraph 5.74, Browning claims that his trial counsel "did not use available evidence to properly move to exclude Ms. Debra Coe's identification outside the presence of the jury." Fifth Amended Petition, p. 65. Citing *Stovall*, Browning argues that the out-of-court showup identification by Coe, shortly after Browning's arrest, was unnecessary and unduly suggestive, that it tainted her in-court identification, and that counsel did not effectively convey to the trail court the prejudicial circumstances demonstrating the unreliability of the identification. Fifth Amended Petition, pp. 65-66; Reply, pp. 126-29. Counsel did seek to exclude Coe's identification of Browning, but the trial court denied that motion. *See* Motion to Suppress Identification, Exhibit 40; Trial Transcript, Exhibit 46, pp. 300-01 (ECF No. 59-32, pp. 17-18). In denying the motion, the trial court noted that Browning was actually the second individual brought before Coe; Coe told the police that the first individual brought before her was not the person she saw run by the business where she worked. *See* Trial Transcript, Exhibit 46, p. 301. Browning made this claim on the appeal in his state habeas action. *See* Appellant's Reply Brief, Exhibit 251, pp. 10-11 (ECF No. 59-180, pp. 19-20). The Nevada Supreme Court denied the claim, noting that "[c]ounsel unsuccessfully sought to suppress Coe's identification of Browning at trial." *Browning,* 120 Nev. at 357, 91 P.3d at 47. The Nevada Supreme Court's denial of this claim was not objectively unreasonable. Trial counsel moved to exclude Coe's identification under *Stovall*, and the trial court denied the motion. Browning does not specify anything further that his

counsel could have done that would have rendered that motion successful.

Hugo Elsen's Dying Declaration Regarding the Murderer's Hair

Officer Branon spoke with Hugo Elsen before he died after the stabbing, and Hugo Elsen gave Branon a description of the person who stabbed him. *See* Testimony of Gregory Branon at Evidentiary Hearing, Exhibit 182, pp. 158-69 (ECF No. 59-145, p. 41 - ECF No. 59-146, p. 11). Browning makes claims related to the information that Hugo Elsen gave to Officer Branon.

In Claim 1, at paragraphs 5.13 through 5.13.4, Browning claims that his trial counsel was ineffective for not interviewing Officer Branon to learn that Branon received from Hugo Elsen the description of the murderer's hair, and that description did not match Browning's hair. Fifth Amended Petition, pp. 18-19. Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 43-45 (ECF No. 59-174, pp. 29-31). The Nevada Supreme Court ruled on this claim as follows:

> ... Browning claims that trial counsel failed to interview several key witnesses, including Officer Gregory Branon, the first officer on the crime scene. Officer Branon testified at trial that he received from the dying Elsen a description of the killer as a "black male adult in his late twenties, wearing a blue baseball cap, ... and hair described as a shoulder length jeri-type curl." But Browning's hair was not a jeri-curl when he was arrested a short time later. In

closing argument, the prosecutor argued that it was understandable if a white person, such as the victim, incorrectly used the term "jeri-curl" to describe Browning's hair. However, at the evidentiary hearing, Officer Branon, who is black, testified that the term "jeri-curl" was his own, based on Elsen's description of the perpetrator's hair as loosely curled and wet. Browning argues that his trial counsel was ineffective in not discovering this information, which would have refuted the prosecutor's closing argument and shown that the victim's description of the perpetrator's hair did not match Browning's.

We conclude that trial counsel was deficient here but that this deficiency alone was not prejudicial. The issue of Browning's hairstyle was extensively explored at trial. Elsen was the only person who described the hair protruding from Browning's hat as loosely curled and wet. Mrs. Elsen stated that it simply "puffed out in the back" of his cap. Coe testified that Browning's hair stuck out about an inch below his cap. The showup identification was the first time that witnesses viewed him without his hat. Coe testified that at the showup she could tell that Browning had just taken a cap off because his hair was matted down. Given this evidence and the overall strong evidence of Browning's guilt, we conclude that there is no reasonable probability of a different result if counsel had discovered and presented the evidence that "jeri-curl" was the officer's term, not the victim's.

Browning, 120 Nev. at 355-56, 91 P.3d at 46. This ruling by the Nevada Supreme Court is supported by the record, and is not objectively unreasonable. Browning's counsel called Officer Branon to testify, and he testified that the description of the murderer that he received included "a shoulder length Jeri-type curl." Trial Testimony of Gregory Branon, Exhibit 49, pp. 537-38 (ECF No. 59-41, pp. 19-20). Branon described a jeri-curl as "chemically treated so that it is like a loose curl," and having "a wet, shiny look." *Id.* at 538. Browning's counsel called a hairstylist to testify regarding what is meant by "jeri-curl," and he attempted to show that a "jeri-curl" is something different from how Browning's hair looked at the time. *See* Trial Testimony of Annie Ruth Yates, Exhibit 49, pp. 540-42 (ECF No. 59-41, pp. 22-24). This court agrees with the Nevada Supreme Court that trial counsel performed deficiently in not discovering, and in not showing the jury, that Officer Branon remembered receiving from Hugo Elsen the description of the murderer's hair -- wet, shoulder length, and loosely curled, or what Branon termed a "jeri-curl" (*see* Testimony of Gregory Branon at Evidentiary Hearing, Exhibit 182, pp. 159-61 (ECF No. 59-145, p. 42 - ECF No. 59-146, p. 3)) -- however, given the other evidence at trial regarding the murderer's hairstyle and the meaning of "jeri-curl," including the descriptions provided by Josy Elsen, Debra Coe, and Charles Wood, and the testimony of the hairstylist, and given the other evidence of Browning's guilt, this court finds reasonable the Nevada Supreme Court's determination that there is no reasonable probability that, but for this deficient performance by counsel, the result of the trial would have been different.

In Claim 4, at paragraphs 5.44 through 5.44.2, Browning claims that the prosecution committed a *Brady* violation by not disclosing to the defense that it was Hugo Elsen who gave Officer Branon the description of the murderer's hair, that the description was that the murderer's hair was wet, shoulder length and loosely curled, that Officer Branon's questioning of Hugo Elsen about the murderer's hair was meticulous, and that Hugo Elsen did not appear confused when providing the description. Fifth Amended Petition, pp. 41-42. Browning raised this *Brady* claim before the Nevada Supreme Court, but only in one sentence in a footnote in a section of his opening brief dealing with alleged ineffective assistance of counsel. *See* Appellant's Opening Brief, Exhibit 232, p. 44 n.23 (ECF No. 59-174, p. 30). The Nevada Supreme Court denied the claim, ruling that "the State did not withhold this information because it was reasonably available to the defense." *Browning*, 120 Nev. at 370, 91 P.3d at 55. The Court finds that the Nevada Supreme Court's ruling in this regard was not objectively unreasonable. Browning has made no showing that the prosecution withheld any information from the defense about Officer Branon's memory of the source of his characterization of the murderer's hairstyle.

Marsha Gaylord

At the time of Hugo Elsen's murder, Browning was romantically involved with a woman named Marsha Gaylord. Browning claims that Gaylord could have provided exculpatory testimony on his behalf if she had been available to testify at trial. Browning's trial counsel intended to call Gaylord as a witness, but she was unavailable at the time of trial, and did not testify.

See Testimony of Randall Pike at Evidentiary Hearing, Exhibit 181, pp. 236-38 (ECF No. 59-140, pp. 37-39). In his fifth amended habeas petition, Browning asserts several claims involving Gaylord.

In Claim 1, at paragraph 5.15, Browning claims that his trial counsel was ineffective for failing to ensure the presence of Gaylord at trial or preserve her testimony for trial. Fifth Amended Petition, pp. 20-21. Browning raised this claim before the Nevada Supreme Court on the appeal in his state habeas action, in a footnote in a section of his opening brief dealing with a claim that trial counsel was ineffective for failing to have Browning testify in his own defense. *See* Appellant's Opening Brief, Exhibit 232, p. 57 n.30 (ECF No. 59-175, p. 10). The Nevada Supreme Court denied the claim without any discussion. This court finds that the Nevada Supreme Court's denial of this claim was not objectively unreasonable. It appears from the evidence in the record that the reason Gaylord was unavailable to testify at trial was that she unexpectedly left Las Vegas on March 20 or 21, 1986, and did not thereafter stay in touch with Browning and his counsel. *See* March 21, 1986, Letter from Marsha Gaylord, Exhibit 194 in Support of Second Amended Petition (ECF No. 57-2, p. 33). There was no showing by Browning in state court that Gaylord's unavailability was the result of any deficient performance by Browning's counsel.

In Claim 2, Browning makes the following claim:

> The prosecution improperly sought, and the trial court improperly granted, a continuance which caused the loss of Mr. Browning's primary defense witness, Ms. Marsha Gaylord. The

> continuance was granted in violation of the procedures and intended protections dictated by the holdings in *Hill v. Sheriff*, 85 Nev. 234, 452 P.2d 918 (Nev. 1969), *Bustos v. Sheriff*, 87 Nev. 622, 491 P.2d 1279 (Nev. 1971), and the Eighth Judicial District Court Rule 14 (E.D.C.R. 14). This violation of Mr. Browning's state guaranteed rights denied him due process and equal protection in violation of his rights under the Sixth and Fourteenth Amendment.

Fifth Amended Petition, p. 24. Browning claims that the prosecution requested and received a continuance of the trial date, on grounds that they had made a calendaring error and that two witnesses, Randall and Vanessa Wolfe, might be unavailable on the trial date as set, but did not provide an affidavit, or sworn testimony, regarding the need for the continuance, as was allegedly required under *Hill v. Sheriff*, 85 Nev. 234, 452 P.2d 918 (1969); *Bustos v. Sheriff*, 87 Nev. 622, 491 P.2d 1279 (1971); and Eighth Judicial District Court Rule 14. *Id*. at 24-31. Browning claims that the failure of the trial court to enforce the requirement of *Hill*, *Bustos*, and Eighth Judicial District Court Rule 14, violated his federal constitutional rights to due process of law and equal protection of the laws. *Id*. Browning raised this claim -- albiet obliquely -- in the Nevada Supreme Court on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 70-78 (ECF No. 59-175, pp. 23-31). The Nevada Supreme Court denied the claim without any discussion. *See Browning,* 120 Nev. at 371-72, 91 P.3d at 56. This court finds the claim to be meritless. Browning cites no authority finding a liberty interest, giving rise to a federal constitutional due process or

equal protection right, arising from any procedural rules like the alleged requirement of *Hill*, *Bustos*, and Eighth Judicial District Court Rule 14. Furthermore, a reading of *Hill* and *Bustos*, and the other Nevada cases cited by Browning in support of the state-law requirement on which his claim is grounded, reveals that none of those cases involve the continuance of the felony trial of an adult. *Hill*, *Bustos*, *Clark v. Sheriff*, 94 Nev. 364, 580 P.2d 472 (1978), *Reason v. Sheriff*, 94 Nev. 300, 579 P.2d 781 (1978), *Streitenberger v. Sheriff*, 93 Nev. 689, 572 P.2d 931 (1977), *Salas v. Sheriff*, 91 Nev. 802, 543 P.2d 1343 (1975), *McNair v. Sheriff*, 89 Nev. 434, 514 P.2d 1175 (1973), *Broadhead v. Sheriff*, 87 Nev. 219, 484 P.2d 1092 (1971), and *Maes v. Sheriff*, 86 Nev. 317, 468 P.2d 332 (1970), involved continuances of preliminary hearings; *Scott E. v. State*, 113 Nev. 234, 931 P.2d 1370 (1997), involved the continuance of a juvenile proceeding. As for Eighth Judicial District Court Rule 14, Browning has not provided the text of any such Eighth Judicial District Court Rule as it appeared in 1986, and this court has been unable to determine that any such rule existed. Moreover, five days after the continuance was granted, and well before the new trial date, with their response to Browning's motion to dismiss on the ground of the alleged improper continuance, the prosecution did submit affidavits explaining the need for the continuance, including information regarding the question of the availability of the Wolfes on the vacated trial date. *See* Affidavits of Bill A. Berrett, Dan M. Seaton, and Bob Leonard, Exhibit 15 (ECF No. 59-13, pp. 7-12). Therefore, in this court's view, Browning has not established that he had a liberty interest, giving rise to federal constitutional rights, with respect to the procedure for the continuance of his trial, and, even if

he could establish the existence such a liberty interest, Browning has not shown that it was violated.

In Claim 3, Browning claims a violation of his rights under the Sixth Amendment, as follows:

> The prosecution, in bad faith, improperly sought a continuance of Mr. Browning's trial by a ruse. The trial court improperly granted the prosecution's request, over defense objection. A key defense witness was available and willing to testify at the trial; however, because of the improper continuance the witness became unavailable, denying Mr. Browning his right to compel witnesses and present evidence at trial, guaranteed by the Sixth and Fourteenth Amendments.

Fifth Amended Petition, p. 32. The court construes this as a claim of violation of Browning's Sixth Amendment right to a speedy trial. *See* Order entered April 5, 2013 (ECF No. 162), p. 13; *see also* Reply, p. 65. Browning raised this claim on his direct appeal. *See* Appellant's Opening Brief, Exhibit 84, pp. 8-14 (ECF No. 59-59, p. 15 - ECF No. 59-60, p. 2); Appellant's Supplemental Opening Brief, Exhibit 87, pp. 1-10 (ECF No. 59-61, pp. 10-20). The Nevada Supreme Court ruled as follows:

> On appeal, Browning contends that by delaying his trial twenty-eight days, the district court violated his constitutional right to a speedy trial. We disagree.
>
> Although Browning promptly invoked his right to a speedy trial, under the circumstances of this case, the mere twenty-eight day delay is

> insufficient to justify dismissal of the charges against him. Due to the severity of the crimes charged, we will tolerate a longer delay than we might for a crime of less egregious proportions. *See Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In addition, the reasons underlying the delay do not justify Browning's release; namely, the deputy district attorney's honest, but negligent, mistake in transcribing the appropriate trial date and the professed inability to locate key prosecution witnesses prior to trial do not reveal an improper motive by the state in requesting the delay. Thus, this is not a case involving a deliberate attempt to delay trial in order to hamper the defense, and therefore we need not be so concerned with policing the state's activity. *See Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. Moreover, Browning has not reasonably identified how the twenty-eight day delay has prejudiced his defense. In light of the overwhelming evidence of guilt presented against him at trial, it is clear that any alleged prejudice would not rise to the level justifying dismissal of the charged crimes.

Browning, 104 Nev. at 271, 757 P.2d at 352. This court affords this ruling by the Nevada Supreme Court the deference mandated by 28 U.S.C. § 2254(d), and finds it to be reasonable. Browning concedes that the Nevada Supreme Court applied the correct United States Supreme Court precedent, *Barker v. Wingo,* 407 U.S. 514 (1972), but argues that the court unreasonably applied *Barker*. *See* Reply, pp. 65-68. In *Barker*, the Court explained that in addressing a claimed violation

of the Sixth Amendment right to a speedy trial, courts are to apply a balancing test, and the Court identified four factors to be considered: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. The Barker Court explained further:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533.

Asserting that "there is no 'severity of the crime' prong in the *Barker* test," Browning argues that the Nevada Supreme Court erroneously considered the severity of the crime in this case. *See* Reply, p. 66. That argument is meritless. While it is true that there is no separate "severity of the crime prong" in the *Barker* test, the Court in *Barker* made clear that the severity of the crime is to be taken into consideration with respect to the length of the delay. *See Barker*, 407 U.S. at 531 ("[B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."); *see also United States v. Tanh*

Huu Lam, 251 F.3d 852, 856-57 (9th Cir.2001). In this case, the delay -- 28 days -- was relatively short considering the severity of the crime -- capital first-degree murder.

Browning also takes issue with the Nevada Supreme Court's findings regarding the reason for the delay:

> In addition, the reasons underlying the delay do not justify Browning's release; namely, the deputy district attorney's honest, but negligent, mistake in transcribing the appropriate trial date and the professed inability to locate key prosecution witnesses prior to trial do not reveal an improper motive by the state in requesting the delay. Thus, this is not a case involving a deliberate attempt to delay trial in order to hamper the defense, and therefore we need not be so concerned with policing the state's activity.

Browning, 104 Nev. at 271, 757 P.2d at 352. Browning has not, however, shown those findings to be unreasonable in light of the evidence. *See*, *e.g.*, Affidavits of Bill A. Berrett, Dan M. Seaton, and Bob Leonard, Exhibit 15 (ECF No. 59-13, pp. 7-12).

Finally, Browning argues that the Nevada Supreme Court, in ruling that "Browning has not reasonably identified how the twenty-eight day delay has prejudiced his defense," did not give adequate weight to the prejudice that he claims as a result of the delay. Browning claims that he lost Marsha Gaylord as a witness as a result of the delay, and she would have provided exonerating testimony if she had been available. *See* Reply, pp. 67-68. However, while the

claimed prejudice to the defense is a factor to be considered, it is not controlling. *See Barker*, 407 U.S. at 533. And, moreover, while Browning and his trial counsel have stated what they claim Gaylord's testimony would be, Gaylord did not, in any post-trial proceeding, testify, or otherwise provide any indication how she would testify.

In sum, this Court finds that the Nevada Supreme Court's application of the *Barker* test, and its denial of the claim Browning asserts in Claim 3, was not objectively unreasonable.

In Claim 6, at paragraphs 5.72 through 5.72.3, Browning claims that his trial counsel was ineffective for failing to object, or request a curative jury instruction, with respect to statements in the prosecutor's rebuttal closing argument regarding the defense's failure to put Marsha Gaylord on the stand to testify. Fifth Amended Petition, pp. 62-63; *see also* Order entered April 5, 2013 (ECF No. 162) (regarding the court's construction of this claim); Reply, p. 118. Specifically, Browning claims that his counsel should have objected, or requested a curative jury instruction, regarding the following argument, made by the prosecutor in his rebuttal closing argument:

> And I think it just points out a typical weakness of the defense's position in a very weak case, and this is that is Marcia in jail, Mr. Pike wants to know, and why didn't I bring in jail records. I don't have to bring in jail records. I had testimony that she was in jail.
>
> Randy Wolfe said that Marcia Gaylord was in jail. Randy Pike subpoenaed a police officer. He

> has the capability.... He has the capability of subpoenaing anyone he wants to. He could bring in those jail records. He could bring in Marcia Gaylord. Sure not my witness. Sure wasn't here to testify in this particular trial.

Trial Transcript, Exhibit 51, pp. 648-49 (ECF No. 59-47, pp. 5-6). Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 56 (ECF No. 59-175, p. 9). The Nevada Supreme Court ruled as follows:

> Browning contends that counsel should have objected to the prosecutor's comments on the defense's failure to call Browning's girlfriend Gaylord as a witness. (He also claims that trial counsel should have requested a missing witness jury instruction, but provides no authority.) During closing argument, trial counsel stated, "I recall no testimony by a custodian of records or anyone from the Clark County Detention Center that Marcia Gaylord was in custody." The prosecutor responded in rebuttal that Randy Wolfe had testified that Gaylord was in jail and that defense counsel "has the capability of subpoenaing anyone he wants to. He could bring in those jail records. He could bring in Marcia Gaylord. Sure not my witness. Sure wasn't here to testify in this particular trial." This response went too far because the defense had tried to subpoena Gaylord, but after a continuance of the trial due to the prosecutor's calendaring mistake, the defense could not locate Gaylord. Here, the prosecutor should have responded by simply stating that he did not need to produce

> the jail records because a witness had testified that Gaylord was in jail. It was improper for him to point out that the defense had not called Gaylord. Generally, a prosecutor's comment on the defense's failure to call a witness impermissibly shifts the burden of proof to the defense. [Footnote: *See Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996).] However, as discussed above, the issue of exactly when Gaylord was released from jail was not significant, and we conclude that counsel's failure to object to the prosecutor's comment was not prejudicial.

Browning, 120 Nev. at 359-60, 91 P.3d at 48-49. This court agrees with the state supreme court that the question of exactly when Gaylord was released from jail was not of major significance in the trial, and it was regarding that factual question that this argument was made. The court finds that the Nevada Supreme Court's ruling -- that Browning was not prejudiced as required under *Strickland* -- was not objectively unreasonable.

In Claim 5, at paragraph 5.62, Browning makes the related substantive claim: that the prosecutor committed misconduct, and shifted the burden of proof to the defense, when he commented upon the defense's failure to put Gaylord on the stand at trial. Fifth Amended Petition, p. 54. Browning raised this claim on the appeal in his state habeas proceeding. *See* Appellant's Opening Brief, Exhibit 232, pp. 15, 33-34 (ECF No. 59-173, p. 32, and ECF No. 59-174, pp. 19-20). The Nevada Supreme Court found the claim to be procedurally barred. *See Browning,* 120 Nev. at 368, 91

P.3d at 54 ("Browning claims the prosecutor committed misconduct in several ways. Browning does not demonstrate good cause for failing to raise these issues on direct appeal or actual prejudice.").

In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails to comply with the state's procedural requirements in presenting his claims is barred from obtaining a writ of habeas corpus in federal court by the adequate and independent state ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance."). Where such a procedural default constitutes an adequate and independent state ground for denial of habeas corpus, the default may be excused only if "a constitutional violation has probably resulted in the conviction of one who is actually innocent," or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To demonstrate cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial

disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170 (1982).

With respect to this claim, Browning asserts, as cause for his procedural default, ineffective assistance of his appellate counsel, for not raising the claim on direct appeal. *See* Reply, pp. 104-05. However, even if Browning could show cause for this procedural default, there is no showing of prejudice. The prosecution's offending comments regarding the failure of the defense to put Gaylord on the stand were made in the context of argument regarding whether or not Gaylord was in jail on the day of Hugo Elsen's murder. Again, this court agrees with the state supreme court that the question of exactly when Gaylord was or was not in jail was not of any great significance in the trial. The court, therefore, finds this claim, at ¶5.62 of Browning's fifth amended petition, to be barred by the procedural default doctrine. The court finds that there is no showing of any possibility that the constitutional violation alleged in this claim "resulted in the conviction of one who is actually innocent" (*see Murray*, 477 U.S. at 496), and the court determines that an evidentiary hearing is not warranted with respect to the procedural default of this claim. *See* Petitioner's Motion for Evidentiary Hearing (ECF No. 135).

In Claim 6, at paragraph 5.83, Browning claims that his trial counsel was ineffective for failing to object to comments made by the prosecutor, unsupported by evidence, that Gaylord was a prostitute, that Browning needed money to get her out of jail so she could make money, and that this was a motive for the robbery and

murder of Hugo Elsen. Fifth Amended Petition, p. 73. Browning asserted this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 56 (ECF No. 59-175, p. 9). The Nevada Supreme Court ruled as follows:

> ... Browning claims that trial counsel should have objected during closing argument when the prosecutor referred to Browning's involvement with drug use and said that his "girlfriend prostituted for him." Randy Wolfe had testified that Browning asked Wolfe to "cop" him some heroin. Wolfe also commented on Gaylord's involvement in prostitution; however, trial counsel objected, and the district court struck the statement. Therefore, although the prosecutor's comment on Browning's drug use was based on a fact in evidence, there was no evidence that Browning was involved in the crime of pimping or pandering prostitution. Such an improper reference to criminal history may violate due process, and counsel should have objected. [Footnote: *See Manning v. Warden*, 99 Nev. 82, 86-87, 659 P.2d 847, 850 (1983).] Nevertheless, we conclude that given the extensive evidence of Browning's guilt, this reference alone was not prejudicial.

Browning, 120 Nev. at 358, 91 P.3d at 47-48. The statements regarding Gaylord being a prostitute were made by the prosecution to show that Browning needed money to get her out of jail, so that she could make money, but this court finds Browning's specific reason for needing money to have been of little importance. The court finds that the state supreme court's ruling --

that there is no reasonable probability that, but for counsel's failure to object to the prosecution's comments about Gaylord being a prostitute, the result of the trial would have been different -- was not objectively unreasonable.

In Claim 5, at paragraph 5.65, Browning makes the related substantive claim: that the prosecution committed misconduct by making comments, unsupported by evidence, that Gaylord was a prostitute. Fifth Amended Petition, p. 56. Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 35-38 (ECF No. 59-174, pp. 21-24). The claim, however, is barred by the doctrine of procedural default. Browning argues that this claim was raised and decided on his direct appeal, but the court finds that was not the case; the claim raised there was not the same. *See* Reply, p. 108; *see also* Appellant's Opening Brief, Exhibit 84, pp. 19-20 (ECF 59-60, pp. 7-8). On the appeal in the Browning's state habeas action, where Browning did raise this claim, the Nevada Supreme Court held the claim to be procedurally barred. *See Browning,* 120 Nev. at 368, 91 P.3d at 54. This claim, at paragraph 5.65 of Browning's fifth amended petition, is barred by the procedural default doctrine. The court finds that there is no showing of any possibility that the constitutional violation alleged in this claim "resulted in the conviction of one who is actually innocent" (*see Murray*, 477 U.S. at 496), and the court determines that an evidentiary hearing is not warranted with respect to the procedural default of this claim. *See* Petitioner's Motion for Evidentiary Hearing (ECF No. 135).

Thomas Stamps

In Claim 1, at paragraphs 5.16 through 5.16.4, Browning claims that his trial counsel was ineffective for failing to secure the presence of Thomas Stamps at trial to testify for the defense. Fifth Amended Petition, p. 21. Browning alleges that Stamps "went with Randall Wolfe and Mike Hines to a gold exchange shortly after Mr. Elsen's murder, where Randall Wolfe used someone else's identification to sell the jewelry." *Id*. Browning raised this claim in his state habeas action. In that case, the state district court ruled as follows:

> Defendant asserts that Mr. Pike failed to ensure the presence of several key defense witnesses. There was no evidence adduced at the evidentiary hearing or in the record to determine what the testimony of any of these witnesses would have been. Therefore, Defendant has not, as a matter of law, shouldered his burden to put forth evidence to support his allegations. Therefore, his allegation is bare and naked, unsupported by anything in the record. As such, this Court must deny relief.

Findings of Fact, Conclusions of Law and Order, Exhibit 230, p. 5 (ECR No. 59-171, p. 7). Browning then raised this claim on the appeal in that action. *See* Appellant's Opening Brief, Exhibit 232, pp. 42-43 n.22, and pp. 47-48 (ECF No. 59-174, pp. 28-29, 33-34). The Nevada Supreme Court denied the claim without any discussion. The court finds the Nevada Supreme Court's rejection of this claim to be reasonable; Browning did not offer any evidence in state court to show how Stamps would have testified. Any attempt by

Browning now, in federal court, to offer such evidence, is foreclosed by *Cullen v. Pinholster*, ___U.S.___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (federal habeas review limited to record before the state court that adjudicated the claim on the merits).

The Escape

At trial, there was evidence that, after he was arrested and taken to an interrogation room at a police station, Browning picked a lock on his handcuffs and escaped from custody. *See* Testimony of David Radcliffe, Exhibit 48, pp. 350-57 (ECF No. 59-35, pp. 14-21); Testimony of Michael K. Bunker, Exhibit 49, pp. 568-71 (ECF No 59-42, pp. 24-27). The prosecution argued that Browning's escape showed consciousness of guilt. Trial Transcript, Exhibit 51, p. 631 (ECF No. 59-46, p. 10).

In Claim 1, at paragraph 5.19, Browning claims that his trial counsel was ineffective for not investigating the facts of the escape, and learning "that when Mr. Browning was taken to the police station, he was placed shirtless in a room where he was handcuffed to a metal pole, under an air-conditioned vent, and left for several hours." Fifth Amended Petition, p. 23. Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 59-60 (ECF No. 59-175, pp. 12-13). the Nevada Supreme Court ruled as follows:

> Browning contends that trial counsel should have presented a defense of duress to the charge of escape. He claims that he was under duress immediately after he was arrested because of a police officer's threatening comments and cold

> conditions in the interrogation room. Apparently, Browning was shirtless and handcuffed to a pole below an air conditioning vent, and an officer allegedly told him that "when you are busted for murder in Nevada the case is closed." Browning picked the lock on his handcuffs, left the third-floor room, and proceeded downstairs to the door leading outside, where he was caught. Under NRS 194.010(7), duress requires a reasonable belief that one's life would be endangered or that one would suffer great bodily harm. The air conditioning and the officer's alleged comment do not constitute cause for such a belief. Moreover, this court has held that duress is not applicable to an escape charge; rather the proper defense is one of necessity, which requires the following five conditions: the prisoner is faced with a specific, imminent threat of death, forcible sexual attack, or substantial bodily injury; there is no time to complain to authorities, or there is a history that such complaints are futile; there is no time or opportunity to resort to the courts; no force or violence is used toward prison personnel or innocent persons during the escape; and the prisoner immediately reports to the proper authorities after obtaining a position of safety. [Footnote: *Jorgensen v. State*, 100 Nev. 541, 543-44, 688 P.2d 308, 309-10 (1984).] The facts here also do not support a necessity defense, and counsel reasonably presented neither defense.

Browning, 120 Nev. at 361, 91 P.3d at 49-50. This court agrees with the Nevada Supreme Court that there is no

reasonable probability that, but for counsel's failure to investigate the circumstances of Browning's escape, the result of the trial would have been different. As the Nevada Supreme Court explained, applying state law, the facts did not support either a necessity or duress defense to the escape charge. Moreover, in this court's view, establishing before the jury that, where he was handcuffed in the interrogation room, Browning was without a shirt and under an air conditioning vent, would have done nothing to ameliorate the consciousness of guilt arguably exhibited by Browning's escape. In short, this court finds this claim to be without merit. The Nevada Supreme Court's ruling on the claim was not objectively unreasonable.

The Photograph of Browning from the Photographic Line-Up -- Prior Criminal Activity

Browning claims that the prosecution committed misconduct with respect to the prosecutor's argument concerning a photograph of Browning that had been part of a photographic line-up and that was admitted into evidence at trial. *See* Fifth Amended Petition, pp. 54-55. According to Browning, "[t]he prosecution used the out-dated photograph to argue that Mr. Browning had engaged in prior criminal activity," and "[t]his argument was improper since it permitted the jury to consider prior criminal activity as propensity to convict Mr. Browning." *Id*.

In Claim 6, at paragraph 5.79, Browning claims that his trial counsel was ineffective for not objecting to the argument of the prosecutor regarding the photograph, and for not seeking a curative jury instruction. Fifth Amended Petition, p. 71. Browning raised a similar claim on the appeal in his state-court

habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 49-50 (ECF No. 59-175, pp. 2-3). The Nevada Supreme Court ruled as follows:

> ... Browning claims that counsel should have objected to admission of a mug shot, which allowed the jury to infer that Browning had been involved in prior criminal activity. We conclude that the photo had no appreciable prejudicial effect since jurors had no reason to assume that it had been taken in any other case but the one for which Browning was being tried.

Browning, 120 Nev. at 358, 91 P.3d at 47. This court agrees that, in light of the nature of this photograph, and in light of the evidence at trial, the jury was unlikely to draw from the photograph any inference that Browning had been involved in prior criminal activity, such as would significantly affect their view of the case. The court finds that there is no reasonable probability that, but for counsel's failure to object to the prosecution's argument regarding the photograph, or his failure to request a curative jury instruction, the result of the trial would have been different. The Nevada Supreme Court's denial of this claim was not objectively unreasonable.

In Claim 5, at paragraph 5.63, Browning makes the substantive claim that the prosecutor committed misconduct with respect to his argument concerning the photograph. Fifth Amended Petition, pp. 54-55. Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 37 (ECF No. 59-174, p. 23). The Nevada Supreme Court held the claim to be procedurally barred. *See Browning,* 120 Nev. at 368, 91 P.3d at 54.

This claim, at paragraph 5.63 of Browning's fifth amended petition, is therefore barred by the procedural default doctrine. The court finds that there is no showing of any possibility that the constitutional violation alleged in this claim "resulted in the conviction of one who is actually innocent" (*see Murray*, 477 U.S. at 496), and the court determines that an evidentiary hearing is not warranted with respect to the procedural default of this claim. *See* Petitioner's Motion for Evidentiary Hearing (ECF No. 135).

Browning's Heroin Use

There was evidence presented at trial indicating that Browning used heroin, and the prosecutor made comments in his closing arguments regarding Browning's heroin use.

In Claim 4, at paragraph 5.56, Browning makes claims under *Brady* and *Napue*, as follows:

> The prosecutor knew that upon being arrested, an officer with the Las Vegas Police Department obtained Mr. Browning's urine in order to analyze it for narcotics. The prosecutor further knew that the urine was submitted to Las Vegas Police Department Crime Lab for analysis, and that the results conclusively established that the had no heroin in his system. [Exh. 180] Arguing that Mr. Browning was a heroin addict who committed murder to feed his addiction was unsupported by the evidence and contrary to the facts known to the prosecutor. Had the prosecutor not been permitted to make assertions he knew to be false, the jury would have likely acquitted Mr. Browning.

Fifth Amended Petition, p. 50.

To the extent this claim is framed as a *Brady* claim it fails because Browning makes no allegation -- and made no showing in state court -- that the prosecution withheld any information from the defense with respect to the question of Browning's heroin use.

To the extent that this claim is framed as a *Napue* claim, the claim is barred by the doctrine of procedural default. Browning raised this claim on the appeal in his state habeas action (*see* Appellant's Opening Brief, Exhibit 232, pp. 35-38 (ECF No. 59-174, pp. 21-24), but the Nevada Supreme Court held the claim to be procedurally barred. *See Browning,* 120 Nev. at 368, 91 P.3d at 54. The court finds that there is no showing of any possibility that the constitutional violation alleged in this claim "resulted in the conviction of one who is actually innocent" (*see Murray*, 477 U.S. at 496), and the court determines that an evidentiary hearing is not warranted with respect to the procedural default of this claim. *See* Petitioner's Motion for Evidentiary Hearing (ECF No. 135).

In Claim 6, at paragraph 5.70, Browning claims that his trial counsel was ineffective for failing to object "when the prosecutor repeatedly told the jury that Mr. Browning was a heroin addict, that he needed 'drugs that his body craved,' had been doing drugs that day of the incident, and that he committed the homicide because of, and for, heroin." Fifth Amended Petition, p. 60. Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 56 (ECF No. 59-175, p. 9). The Nevada Supreme Court ruled that, because "Randy Wolfe had testified that Browning asked Wolfe to 'cop' him some

heroin," "the prosecutor's comment on Browning's drug use was based on a fact in evidence," and was therefore proper, and counsel was not ineffective for not objecting. *Browning,* 120 Nev. at 358, 91 P.3d at 47. That ruling by the Nevada Supreme Court is not objectively unreasonable.

Alleged Improper Arguments by the Prosecutor

In Claim 5, at paragraph 5.61, Browning makes the following claim:

> During its closing argument, the prosecutor made an analogy between Mr. Browning and the Ray Bradbury novel "Something Wicked This Way Comes." He then went on to describe the crime by referring to the "Friday the 13th" horror movies: "And there was probably wild stabbing going on, a hacking, a Friday the 13th kind of scenario." TT 12/12/86, pg. 616. The prosecutor's personal attacks were compounded by the repeated and unfounded assertions that Mr. Browning was a heroin addict who liked killing, and "shot the life of Hugo Elsen right up his arm." TT 12/12/86, pg. 603. These arguments were improper, prejudicial and misconduct.

Fifth Amended Petition, pp. 53-54. Browing made these arguments on his direct appeal. *See* Appellant's Opening Brief, Exhibit 84, pp. 18, 20-23 (ECF No. 59-60, pp. 6, 8-11. The Nevada Supreme Court denied relief, and commented on one of the challenged arguments as follows:

> During closing argument the state recounted the stabbing episode according to its view of the evidence. The prosecutor became overly-

> animated, saying, "And there was probably wild stabbing going on, a hacking, a Friday-the-13th kind of scenario." Reference to the horror flick "Friday-the-13th" served no purpose other than to divert the jury's attention from its sworn task. However, in light of the overwhelming evidence presented at the guilt phase of the trial, we cannot find the quantum of prejudice required to reverse.

Browning, 104 Nev. at 272, 757 P.2d at 353.

It is clearly established federal law within the meaning of § 2254(d)(1) that a prosecutor's improper remarks violate the Constitution only if they so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Parker v. Matthews*, ___ U.S. ___, 132 S.Ct. 2148, 2153, 183 L.Ed.2d 32 (2012) (per curiam); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir.2007). The ultimate question is whether the alleged misconduct rendered the petitioner's trial fundamentally unfair. *Darden,* 477 U.S. at 183. In determining whether a prosecutor's argument rendered a trial fundamentally unfair, a court must judge the remarks in the context of the entire proceeding to determine whether the argument influenced the jury's decision. *Boyde v. California*, 494 U.S. 370, 385 (1990); *Darden*, 477 U.S. at 179-82. In considering the effect of improper prosecutorial argument, the court considers whether the trial court instructed the jury that its decision is to be based solely upon the evidence, whether the trial court instructed that counsel's remarks are not evidence, whether the defense objected, whether the comments were "invited" by the

defense, and whether there was overwhelming evidence of guilt. *See Darden*, 477 U.S. at 182. The *Darden* standard is general, leaving courts leeway in reaching outcomes in case-by-case determinations. *Parker*, 132 S.Ct. at 2155 (*quoting Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In a federal habeas corpus action, to grant habeas relief, the court must conclude that the state court's rejection of the prosecutorial misconduct claim was objectively unreasonable, that is, that it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker*, 132 S.Ct. at 2155 (*quoting Harrington v. Richter*, 131 S.Ct. at 767-87).

Applying these standards, the court finds that the ruling by the Nevada Supreme Court, and its denial of relief on the claims asserted by Browning in paragraph 5.61 of his fifth amended petition, was not objectively unreasonable.

In Claim 5, at paragraph 5.64, Browning claims:

> The prosecutor also told the jury:
>
> There is only one person responsible for that. And it is your duty to go out, decide that and come back in here and tell him just exactly that, that he's the one that has to pay for these crimes. Thank you very much.
>
> TT 12/12/86, pg. 631. And the prosecutor argued: "Think here we are in this nice courtroom; it is quiet in here. It is safe in here. Everyone is under control. Everyone behaves, does whatever the Judge tells them to do. We are not at 520 Las Vegas Boulevard South on November the

> 8th, 1985." TT 12/12/86, p. 614-615. He continued:
>
> > ... and she sees the man leaning over her husband with a knife in his hand who takes his life away from her. He ruined her life. And she came in here and you saw her demeanor on the stand. That's part of your role is to watch these people who testify up here... Will she ever forget the face of the man who took her husband away from her? I think not.
> >
> > * * *
> >
> > That's why Mrs. Elsen's recognition is so valuable in this case. She has a reason to never ever to forget the face of that man.
>
> TT 12/12/86, p. 623, 654. These arguments are improper because they tell the jury it's their "duty" to convict, requests the jury to put themselves in the place of the victim, and invokes passion from the jury by way of victim impact evidence.

Fifth Amended Petition, p. 55.

To the extent that, in this claim, Browning claims that the prosecution committed misconduct by requesting the jury to put themselves in the place of the victim, this claim was raised by Browning on his direct appeal. *See* Appellant's Opening Brief, Exhibit 84, p. 22 (ECF No. 59-60, p. 10). The Nevada Supreme Court denied that claim on the direct appeal without comment. This court finds that the state supreme court's denial of the claim was not objectively

unreasonable -- in light of the evidence at trial, this argument by the prosecution did not render Browning's trial fundamentally unfair.

To the extent that, in this claim, Browning claims that the prosecution improperly told the jurors that it was their duty to convict, Browning raised that claim before the Nevada Supreme Court on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, pp. 34-35 (ECF No. 59-173, 59-174, 59-175). The Nevada Supreme Court held the claim to be procedurally barred. *See Browning,* 120 Nev. at 368, 91 P.3d at 54. That part of the claim, then, is barred by the doctrine of procedural default. The court finds that there is no showing of any possibility that the constitutional violation alleged in this part of the claim "resulted in the conviction of one who is actually innocent" (*see Murray*, 477 U.S. at 496), and the court determines that an evidentiary hearing is not warranted with respect to the procedural default of this part of the claim. *See* Petitioner's Motion for Evidentiary Hearing (ECF No. 135).

In Ground 6, at paragraph 5.80, Browning claims that his trial counsel was ineffective for failing to object, or request a curative jury instruction, with regard to the prosecutor's arguments to the effect that it was the jury's duty to convict Browning. Fifth Amended Petition, p. 71. Browning raised this claim -- in one sentence in his opening brief -- on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 55 (ECF No. 59-175, p. 8). The Nevada Supreme Court denied the claim without discussion. This court finds that there is no reasonable probability that, but for counsel's failure to object to the

prosecution's comments, or request a curative jury instruction, the result of the trial would have been different. The Nevada Supreme Court's denial of this claim was not objectively unreasonable.

The Photograph of Hugo Elsen with a Child

In Ground 6, at paragraph 5.81, Browning makes the following claim:

> Mr. Pike permitted the prosecutor to introduce and the jury to consider improper victim impact evidence during the guilt phase when a photograph of the victim with a young child sitting on his lap was admitted and the prosecutor argued that Mr. Browning ruined the life of "poor Mrs. Elsen." TT 12/09/86, pgs. 258; TT 12/12/86, pgs. 623, 654. A lawyer acting in compliance with prevailing professional norms would have objected to the introduction of the photograph since it lacked probative value (victim's identification had been stipulated to) and was inflammatory and prejudicial. Effective counsel would have objected or requested a curative instruction to the prosecutor's argument. As a result, the jury was permitted to consider prejudicial information in determining whether the prosecution proved its case beyond a reasonable doubt.

Fifth Amended Petition, p. 72. Browning raised this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 56 (ECF No. 59-175, p. 9). The Nevada Supreme Court ruled as follows:

> Browning complains that counsel failed to object during the guilt phase to the prosecutor's use of a photo of Elsen, the victim, with a small child on his lap. Browning contends that this picture amounted to victim impact evidence and was therefore improper during the guilt phase. He has provided no authority to support this contention, and we discern nothing prejudicial or inflammatory about the photo. It was reasonable for counsel not to object.

Browning, 120 Nev. at 360, 91 P.3d at 49. The ruling by the Nevada Supreme Court demonstrates that an objection by counsel to the admission of the photograph on the state-law grounds asserted in state court -- that there was "no proper reason for the admission of the photo because the defense had previously stipulated to Mr. Elsen's identity," that "[t]he photo was inflammatory and prejudicial to the defense," and that the prosecution's "use of the photo was misconduct" (*see* Appellant's Opening Brief, Exhibit 232, p. 56 (ECF No. 59-175, p. 9)) -- would have been for naught. The Nevada Supreme Court's ruling that it was reasonable for counsel not to object to the admission of the photograph was not objectively unreasonable.

The Prosecutor's Comments About the Presumption of Innocence

In his closing argument at Browning's trial, the prosecutor made the following comments:

> Now we are talking about when that wonderful constitutional element called the presumption of innocence, we are now talking about piercing that veil, dropping that facade

> because, in fact, as a person sits in a courtroom he may not be innocent. He may be guilty.
>
> He has the presumption of innocence. And, of course, it is one when his guilt is shown that the farce of that presumption is known and it's been done in this case.

Trial Transcript, Exhibit 51, p. 602 (ECF No. 59-45, p. 5).

In Claim 5, at paragraph 5.59, Browning claims that these comments by the prosecutor, in closing argument, violated his "constitutional guarantees of a fair trial and due process." Fifth Amended Petition, p. 52. Browning raised this claim on his direct appeal. *See* Appellant's Opening Brief, Exhibit 84, p. 20 (ECF No. 59-60, p. 8). The Nevada Supreme Court ruled as follows:

> We also denounce the state's reference to the "presumption of innocence" as a farce. The fundamental and elemental concept of presuming the defendant innocent until proven guilty is solidly founded in our system of justice and is never a farce. Even this outrageous but unpreserved act of misconduct, however, does not prejudice Browning to the extent justifying reversal.

Browning, 104 Nev. at 272 n.1, 757 P.2d at 353 n.1. This court agrees with the Nevada Supreme Court, with respect to this claim. The comments of the prosecutor were improper; the presumption of innocence "stands as one of the most fundamental principles of our system of criminal justice: defendants are considered innocent unless and until the

prosecution proves their guilt beyond a reasonable doubt." *American Civil Liberties Union v. U.S. Dept. of Justice*, ___ F.3d ___, 2014 WL 1851933, at *4 (D.C.Cir.2014); *see also Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). However, this court notes that the gist of the prosecutor's comments was that the prosecution had overcome the presumption of innocence by proof of Browning's guilt beyond a reasonable doubt -- a legitimate argument. In other words, it is plain that the prosecutor's point was not that the presumption of innocence is an unimportant idea to be ignored by the jury; it was that the presumption of innocence had been overcome by evidence of Browning's guilt. With this in mind, and considering the weight of the evidence against Browning, this court finds that the Nevada Supreme Court's conclusion -- that "[e]ven this outrageous but unpreserved act of misconduct, however, does not prejudice Browning to the extent justifying reversal" -- was not objectively unreasonable.

In Claim 6, at paragraphs 5.68 through 5.68.2, Browning argues that his trial counsel was ineffective for not objecting to the prosecutor's comments regarding the presumption of innocence, and for not requesting a curative jury instruction with respect to those comments. Fifth Amended Petition, pp. 57-58. Browning made this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 55 (ECF No. 59-175, p. 8). The Nevada Supreme Court ruled as follows:

> Browning complains that his counsel failed to object to the prosecutor's disparagement of the presumption of innocence. On direct appeal this court "denounce[d] the state's reference to the 'presumption of innocence' as a farce," but concluded that this act did not justify reversal. [Footnote: *Browning*, 104 Nev. at 272 n.1, 757 P.2d at 353 n.1.] We conclude that Browning was not prejudiced by counsel's failure to object.

Browning, 120 Nev. at 358, 91 P.3d at 48. Affording the Nevada Supreme Court's ruling the deference required under 28 U.S.C. § 2254(d), this court does not find objectively unreasonable the ruling that there is no reasonable probability that, but for counsel's failure to object to the prosecution's comments about the presumption of innocence, or his failure to request a curative jury instruction, the result of the trial would have been different.

The Prosecutor's Comments Regarding the Reasonable Doubt Standard

In his rebuttal closing argument, the prosecutor made the following comments regarding the reasonable doubt standard:

> That makes me think of something. There is not a criminal trial in which all the questions will be answered. Not one of you will walk out of here knowing the answer to everything. It never happens. It is an impossibility. You can't think of a situation in your life that's had any even minor degree or complications which you have resolved all of the questions. You just can't do it.

> So, don't anticipate answering all the question in this case as a prerequisite to coming back with a guilty verdict. It has nothing to do whatsoever with reasonable doubt.

Trial Transcript, Exhibit 51, p. 651 (ECF No. 59-47, p. 8).

In Claim 5, at paragraph 5.60, Browning claims:

> This argument was improper because discussing the reasonable doubt standard in the context of everyday decision making minimizes the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden.

Fifth Amended Petition, p. 53. Browning made this claim on the appeal in his state habeas action, albeit in a part of his brief dealing with alleged ineffective assistance of appellate counsel. *See* Appellant's Opening Brief, Exhibit 232, p. 62 (ECF No. 59-175, p. 15). The Nevada Supreme Court, however, found the claim to be procedurally barred. *Browning,* 120 Nev. at 368, 91 P.3d at 54.

Browning argues that this claim is not barred by the doctrine of procedural default, asserting that the claim was denied on its merits by the Nevada Supreme Court. *See* Reply, p. 100. However, in the part of the Nevada Supreme Court's decision on which Browning relies for this argument, the Nevada Supreme Court ruled on Browning's claim of ineffective assistance of appellate counsel, not on the claim of prosecutorial misconduct. *See Browning,* 120 Nev. at 365-66, 91 P.3d at 52.

Alternatively, Browning asserts ineffective assistance of his appellate counsel, for not raising the claim on direct appeal, as cause for his procedural default. *See* Reply, p. 100 n.39. However, even if Browning could show cause for this procedural default, there is no showing of prejudice. Appellate counsel's failure to raise this claim on Browning's direct appeal was of no moment, as the argument was acceptable. *See Browning,* 120 Nev. at 365-66, 91 P.3d at 52. This claim is barred by the procedural default doctrine. Furthermore, the court finds that there is no showing of any possibility that the constitutional violation alleged in this claim "resulted in the conviction of one who is actually innocent" (*see Murray*, 477 U.S. at 496), and the court determines that an evidentiary hearing is not warranted with respect to the procedural default of this claim. *See* Petitioner's Motion for Evidentiary Hearing (ECF No. 135).

The Jury Instruction Regarding Reasonable Doubt

At Browning's trial, the court gave the following jury instruction:

> The defendant is presumed to be innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors,

> after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty.

Jury Instructions, Exhibit 52, Instruction No. 22 (ECF No. 59-48, p. 24).

In Claim 6, at paragraph 5.69 through 5.69.2, Browning claims that his trial counsel was ineffective for failing to object to this jury instruction. Fifth Amended Petition, pp. 59-60. Browning made this claim on the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 232, p. 55 (ECF No. 59-175, p. 8). The Nevada Supreme Court ruled as follows:

> Browning also claims that counsel should have objected to the jury instruction on reasonable doubt as constitutionally inadequate. He cites *Cage v. Louisiana* [Footnote: 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)] and *Bollinger v. State* [Footnote: 111 Nev. 1110, 1115, 901 P.2d 671, 674 (1995)] but ignores *Lord v. State* [Footnote: 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991)], where this court determined that the Nevada reasonable doubt instruction at issue and the instruction given in *Cage* were distinguishable and that the Nevada instruction

> was constitutional. Thus, counsel was not ineffective.

Browning, 120 Nev. at 359, 91 P.3d at 48. This claim is meritless. The reasonable doubt instruction given at Browning's trial was constitutional. *Ramirez v. Hatcher*, 136 F.3d 1209, 1214-15 (9th Cir.1998) (upholding the same jury instruction as constitutional); *see also Nevius v. McDaniel*, 218 F.3d 940, 944-45 (9th Cir.2000). Counsel was not ineffective for failing to object to the jury instruction. The Nevada Supreme Court's ruling on this claim was not objectively unreasonable.

Cumulative Error - Guilt Phase of Trial

In Claim 11, Browning claims that "[t]he cumulative effect of the errors demonstrated in [his fifth amended petition] deprived Mr. Browning of fundamentally fair proceedings and resulted in a constitutionally unreliable guilt determination." Fifth Amended Petition, p. 104.

The following are the claims resolved in this order, either primarily or in the alternative, on a finding that Browning was not prejudiced:

- the claims in Claim 1, at paragraphs 5.9 through 5.9.7, 5.12 through 5.12.4, and 5.16 through 5.16.4, that trial counsel was ineffective for failing to better investigate the credibility of the Wolfes, and better impeach the Wolfes' testimony;
- the claim in Claim 1, at paragraphs 5.10 through 5.10.4, that trial counsel was ineffective for failing to interview Josy Elsen, or obtain a crime scene sketch of the jewelry store, to learn that, given the

angle of her view and the layout of the store, she could not identify her husband's murderer;

- the claims in Claim 1, at paragraphs 5.11 through 5.11.3, and 5.14.3 and 5.14.4, that trial counsel was ineffective for not sufficiently investigating the circumstances of Debra Coe's observations;
- the claim in Claim 1, at paragraphs 5.13 through 5.13.4, that trial counsel was ineffective for not interviewing Officer Branon to learn that Branon received from Hugo Elsen the description of the murderer's hair, and that the description did not match Browning's hair;
- the claim in Claim 1, at paragraphs 5.16 through 5.16.4, that trial counsel was ineffective for failing to secure the presence of Thomas Stamps to testify at trial for the defense;
- the claim in Claim 1, at paragraph 5.19, that trial counsel was ineffective for not investigating the facts regarding Browning's escape;
- the claim in Claim 4, at paragraphs 5.46 through 5.49, under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution withheld from the defense information related to the credibility of Randall Wolfe;
- the claim in Claim 5, at paragraph 5.59, that the prosecutor made improper comments regarding the presumption of innocence;
- the claim in Claim 5, at paragraph 5.61, that the prosecutor made improper arguments referring to the Ray Bradbury novel "Something Wicked This

Way Comes," referring to the "Friday the 13th" horror movies, asserting that Browning was a heroin addict who liked killing, and stating that Browning "shot the life of Hugo Elsen right up his arm;"

- the claim in Claim 5, at paragraph 5.64, that the prosecutor made improper arguments asking the jurors to put themselves in the shoes of the victim;
- the claim in Claim 6, at paragraphs 5.68 through 5.68.2, that trial counsel was ineffective for failing to object, or request a curative jury instruction, with respect to the prosecutor's comments regarding the presumption of innocence;
- the claim in Claim 6, at paragraphs 5.72 through 5.72.3, that trial counsel was ineffective for failing to object, or request a curative jury instruction, with respect to statements in the prosecutor's rebuttal closing argument regarding the defense's failure to put Marsha Gaylord on the stand to testify;
- the claim in Claim 6, at paragraphs 5.73 through 5.73.7, that trial counsel was ineffective for failing to move to exclude the testimony of Josy Elsen identifying Browning as the murderer of her husband;
- the claim in Claim 6, at paragraphs 5.75 through 5.76.6, that trial counsel was ineffective for not adequately cross-examining Debra Coe;
- the claim in Claim 6, at paragraphs 5.77 through 5.77.3, that trial counsel was ineffective in that he "allowed the prosecution to present a photograph of Mr. Browning wearing the jacket that Mr. Pike had

Mr. Browning try on before the jury to demonstrate that it did not belong to him;"

- the claim in Claim 6, at paragraph 5.79, that trial counsel was ineffective for not objecting to the argument of the prosecutor regarding a photograph of Browning that allowed the jury to infer that Browning had been involved in prior criminal activity, and for not seeking a curative jury instruction;

- the claim in Ground 6, at paragraph 5.80, that trial counsel was ineffective for failing to object, or request a curative jury instruction, with regard to the prosecutor's arguments to the effect that it was the jury's duty to convict Browning; and

- the claim in Claim 6, at paragraph 5.83, that trial counsel was ineffective for failing to object to comments made by the prosecutor that Gaylord was a prostitute, that Browning needed money to get her out of jail so she could make money, and that this was a motive for the robbery and murder of Hugo Elsen.

The court has considered these claims cumulatively. For the most part, the court finds that the errors shown, or assumed for purposes of analysis, are de minimis, and plainly without any effect on the outcome of Browning's trial. And, the court finds that these alleged errors, whether actual or assumed, when taken cumulatively, did not cause the sort of prejudice to Browning necessary to warrant habeas corpus relief.

Claim 10 - The Penalty Phase Retrial

In Claim 10 of his fifth amended petition, Browning claims that his constitutional rights were violated, at his resentencing, because "the prosecution, with the blessing of Judge Pavlikowski, knowingly introduced concededly false evidence to the second penalty jury, and the trial court prohibited the defense from challenging these falsehoods in any way." Fifth Amended Petition, p. 91; *see also id*. at 91-103. Specifically, Browning claims that, at the resentencing, the prosecution offered, and the court admitted, false evidence regarding the bloody shoe prints at the scene of the murder (*id*. at ¶¶5.112-5.113.2), the tan jacket (*id*. at ¶5.114), benefits received by Randall Wolfe in exchange for his testimony (*id*. at ¶¶5.115-5.117), benefits received by Vanessa Wolfe in exchange for her testimony (*id*. at ¶¶5.118-5.119), Josy Elsen's identification of Browning (*id*. at ¶¶5.120-5.121), Hugo Elsen's dying declaration regarding the appearance of the murderer (*id*. at ¶¶5.122-5.123), Browning's fingerprints on glass at the scene of the murder (*id*. at ¶5.124), and a Casio watch found at the Wolfes' apartment (*id*. at ¶¶5.125-5.126).

Browning presented this claim to the Nevada Supreme Court on the appeal from the resentencing. *See* Appellant's Opening Brief, Exhibit 378, pp. 14-40 (ECF No. 119-1, pp. 25-51). With respect to this claim, the Nevada Supreme Court denied the claim, ruling as follows:

> Browning argues that the district court erred in precluding him from presenting evidence developed during post-conviction proceedings

indicating that a host of evidence adduced at the original trial was false or misleading.

Evidence related to Randall and Vanessa Wolfe

* * *

Browning ... complains that Randall testified untruthfully at the first trial that he had not received any benefit from the State in exchange for his testimony. Browning directs our attention to the prosecutor's testimony at the post-conviction evidentiary hearing that at the time of Browning's trial, Randall was a defendant in a separate criminal prosecution and that after Browning's trial the prosecutor informed the judge assigned to Randall's prosecution that Randall had assisted in Browning's prosecution. [Footnote: The prosecutor testified that Randall was never charged with theft, receiving stolen property, or perjury stemming from his retention of several pieces of jewelry stolen from Elsen's store. However, nothing in the record on appeal suggests that the State's failure to prosecute Randall in this regard was the result of any deal to secure his testimony at Browning's original trial.] The prosecutor further stated that after Browning's trial, he assisted Randall in securing a job. The prosecutor testified that he promised no benefits to Randall or Vanessa Wolfe before they testified at Browning's original trial. We concluded in Browning's appeal from the post-conviction habeas proceedings that this information should have been disclosed to the defense pursuant to *Brady v. Maryland* but that there was not a reasonable probability that the

result of Browning's trial would have been different. We conclude that any assistance the prosecutor provided to Randall, which the evidence shows occurred after Browning's original trial, was not of such import that its absence from the jury's consideration rendered Browning's penalty hearing unfair. Therefore, we conclude that relief is not warranted in this regard.

Browning also argues that the district court erred by not allowing him to introduce evidence in the second penalty hearing that Vanessa had received benefits for her testimony. However, nothing in Browning's submissions to this court adequately substantiates this claim.

* * *

Browning next argues that a police detective's testimony during the second penalty hearing that the only aid he provided the Wolfes was assistance in entering a rehabilitation program was misleading in light of overwhelming evidence showing that the Wolfes received extensive benefits for their testimony. Vanessa corroborated the detective's testimony to the extent that she acknowledged that although the detective assisted her and Randall in enrolling in a rehabilitation program, she received no assistance in paying for the program. We conclude, however, that this assistance was not so significant that had it been presented to the jury, the result of the penalty hearing would have been different.

Even assuming that the district court erred in refusing to allow Browning to introduce the evidence explained above, we conclude that he has not demonstrated prejudice. To the extent Browning argues that the evidence outlined above suggested that he was not the individual who stabbed Elsen, relief is not warranted because he had already been found guilty and such evidence was not relevant to the sentencing decision.

The focus of a capital penalty hearing is not the defendant's guilt, but rather his character, record, and the circumstances of the offense. [Footnote: *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998); *Jones v. State*, 101 Nev. 573, 578, 707 P.2d 1128, 1132 (1985).] Such considerations are relevant to the jury charged with imposing a penalty for a capital crime. [Footnote: *Jones*, 101 Nev. at 578, 707 P.2d at 1132.] This principle was affirmed in *Oregon v. Guzek* [Footnote: 546 U.S. 517, 523, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006)]. In *Guzek*, the United States Supreme Court held that a capital murder defendant had no constitutional right to present additional alibi evidence at resentencing that was inconsistent with his prior conviction and shed no light on the manner in which he committed the crime for which he was convicted. [Footnote: *Id*. at 523, 126 S.Ct. 1226.] Although we have not yet addressed *Guzek*, in *Homick v. State*, we held that "there is no constitutional mandate for a jury instruction in a capital case making residual doubt a mitigating circumstance."

[Footnote: 108 Nev. 127, 141, 825 P.2d 600, 609 (1992); *see Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (reasoning that lingering doubts over a defendant's guilt do not constitute an aspect of the defendant's character, record, or a circumstance of the offense); *Middleton v. State*, 114 Nev. 1089, 1114, 968 P.2d 296, 313 (1998) (stating that "a capital defendant has no constitutional right to a jury instruction making residual doubt a mitigating circumstance").] More recently, in *McKenna v. State*, we rejected an argument that the defendant was entitled to a residual doubt instruction at his second penalty hearing because the second jury had not determined his guilt. [Footnote: 114 Nev. at 1059, 968 P.2d at 749.] We reasoned that although "the penalty phase jury was composed of entirely different jurors than the guilt phase jury, a lingering doubt over [the defendant's] guilt is still not an aspect of his character, record, or a circumstance of the offense." [Footnote: *Id*.]

Although *Homick* and *McKenna* concern residual doubt instructions, they are instructive respecting Browning's apparent desire to challenge his guilt at the second penalty hearing. *Homick* and *McKenna* echo the general tenet that the focus of a penalty hearing is the defendant's character and record and the circumstances of the offense, not the defendant's guilt or innocence, as that matter has been decided. We conclude that *Guzek* applies in this instance and precluded Browning from

presenting evidence contradictory to the trial jury's finding that he stabbed Elsen. Accordingly, to the extent that Browning argues that the evidence described above cast doubt on his guilt, we conclude that it was irrelevant in the penalty hearing.

To the extent Browning argues that the evidence outlined above was relevant mitigating evidence, we conclude that he has not demonstrated prejudice even if the district court erred in this regard. The Wolfes' credibility was extensively challenged at trial. Throughout the second penalty hearing, Browning suggested that the Wolfes were involved in the crimes, as evidenced by the fact that Randall had pocketed several pieces of jewelry stolen from Elsen's store. Browning further argued that it was grossly unfair that the Wolfes had not been charged with any offense stemming from Elsen's murder. Additionally, the Wolfes' drug abuse and prior criminal activities were explored at the original trial, and the jury at the second penalty hearing was privy to this information. We conclude that the evidence Browning now contends should have been presented at the second penalty hearing is not of such significance that it rendered his penalty hearing unfair.

> *Other evidence alleged to have been false and misleading*
>
> Browning argues that the district court erred in allowing the State to introduce false and misleading evidence concerning: (1) Elsen's description of the individual who stabbed him, (2) Josy Elsen's identification of Browning as the person who stabbed her husband, (3) bloodstains found on a tan leather jacket belonging to Browning, (4) Browning's fingerprints found at the crime scene, (5) the recovery of a watch found in the motel room where Browning was arrested, and (6) bloody shoeprints found at the crime scene. Browning argues that he suffered prejudice from the State's repeated use of this allegedly false and misleading evidence because it was relevant to the aggravating circumstances alleged by the State and the mitigating evidence he intended to present. However, Browning fails to adequately explain its relevance to his case in mitigation. Rather, Browning appears to argue that if he had been allowed to challenge the reliability of this evidence during the second penalty hearing, it would have cast doubt on his conviction. However, as explained above, pursuant to *Guzek*, Browning was not entitled to challenge his conviction in this manner in the second penalty hearing.

Browning v. Nevada, 124 Nev. 517, 526-28, 188 P.3d 60 (2008) (select footnotes omitted).

With respect to the Nevada Supreme Court's application of federal law in denying his claim,

Browning attempts in his reply to distinguish *Guzek*. *See* Reply, p. 169. Browning argues:

> The Nevada Supreme Court's reliance on *Guzek* is misplaced and erroneous. In *Guzek*, the issue was whether Guzek should be allowed to introduce new alibi evidence at his subsequent sentencing trial which proved that he did not commit the murder in issue. Because the new evidence did not shed light on the manner in which the crime was committed and because Guzek could not show the evidence was unavailable to him at the time of the original trial, the United States Supreme Court rejected Guzek's argument. 546 U.S. at 523-524.
>
> The *Guzek* decision was not faced with the issue at hand, namely the presentation of evidence that was demonstrated to be false and misleading during the post-conviction proceeding. As such, the *Guzek*, opinion should not be construed to permit false and misleading evidence or to overrule other authority. *See*, *e.g.*, *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984); *Townsend v. Burke*, 344 U.S. 736 (1948).

Id.

This court disagrees that the Nevada Supreme Court's reliance on *Guzek* was "misplaced and erroneous." Rather, this court finds that case to be apt guidance from the United States Supreme Court. As in this case, in *Guzek*, Guzek sought to present evidence at the resentencing to undermine the determination of

his guilt, and the Supreme Court ruled that federal law did not extend to Guzek any right to do so. In its thorough analysis, the Nevada Supreme Court reasonably ruled that, under *Guzek*, Browning was not entitled to attempt to prove that evidence underpinning his conviction was false or misleading. The Nevada Supreme Court's ruling, in that respect, was not contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d).

Browning does not make any showing that the Nevada Supreme Court's resolution of this claim was contrary to, or a misapplication of, Supreme Court precedent. This court does not find *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984); or *Townsend v. Burke*, 344 U.S. 736 (1948) -- none of which involved an attempted attack on evidence underpinning a determination of guilt in a resentencing -- to have been misapplied by the Nevada Supreme Court.

With respect to the other part of the Nevada Supreme Court's ruling -- that, to the minor extent any of the evidence proffered by Browning would have had any bearing on aggravation or mitigation, the effect of the evidence on the issues of aggravation and mitigation would have been slight, and Browning was not prejudiced -- was not objectively unreasonable.

The court, therefore, denies Browning habeas corpus relief with respect to Claim 10.

Certificate of Appealability

This is a final order adverse to Browning. Therefore, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts mandates that this court must issue or deny a certificate of appealability. *See* 28 U.S.C. § 2253(c); Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts; Fed. R. App. P. 22(b).

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

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

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

The court finds that, applying these standards, a certificate of appealability is warranted with respect to the following of Browning's claims in his fifth amended habeas petition:

- the claim in Claim 1, at paragraphs 5.7 to 5.7.3, that trial counsel was ineffective for conducting an insufficient investigation regarding the bloody shoe prints;

- the claims in Claim 1, at paragraphs 5.9 through 5.9.7, 5.12 through 5.12.4, and 5.16 through 5.16.4, that trial counsel was ineffective for failing to better investigate the credibility of the Wolfes, and better impeach the Wolfes' testimony;

- the claim in Claim 1, at paragraphs 5.13 through 5.13.4, that trial counsel was ineffective for not interviewing Officer Branon to learn that Branon received from Hugo Elsen the description of the murderer's hair, and that the description did not match Browning's hair;

- the claims in Claim 4, at paragraphs 5.43 to 5.43.3, under *Brady* and *Napue*, that the prosecution withheld exculpatory information, and presented testimony that was misleading or false, when it presented the trial testimony of David Horn, whose testimony suggested, in essence, that the bloody shoe prints were likely left by paramedics or off duty detectives; and

- the claim in Claim 4, at paragraphs 5.46 through 5.49, under *Brady*, that the prosecution withheld

from the defense information related to the credibility of Randall Wolfe.

The court declines to issue a certificate of appealability with respect to Browning's other claims.

IT IS THEREFORE ORDERED that the motions in petitioner's "Ex Parte Motion for Court to Take Judicial Notice of Sworn Facts and Requests for Relief in Petitioner's October 9, 2013 Letter (Dkt. #174); Request for Court to Address the Conflict of Interest Issue Involving the Unauthorized Abandonment of Eighteen Fully Exhausted Substantial Constitutional Claims at Dkt. #174, Pgs. 5-13" (ECF Nos. 175, 176) are **DENIED**.

IT IS FURTHER ORDERED that petitioner's fifth amended petition for writ of habeas corpus (ECF No. 115) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to the following claims in his fifth amended petition for writ of habeas corpus:

- the claim in Claim 1, at paragraphs 5.7 to 5.7.3, that trial counsel was ineffective for conducting an insufficient investigation regarding the bloody shoe prints;

- the claims in Claim 1, at paragraphs 5.9 through 5.9.7, 5.12 through 5.12.4, and 5.16 through 5.16.4, that trial counsel was ineffective for failing to better investigate the credibility of the Wolfes, and better impeach the Wolfes' testimony;

- the claim in Claim 1, at paragraphs 5.13 through 5.13.4, that trial counsel was ineffective for not interviewing Officer Branon to learn that Branon received from Hugo Elsen the description of the murderer's hair, and that the description did not match Browning's hair;

- the claims in Claim 4, at paragraphs 5.43 to 5.43.3, under *Brady* and *Napue*, that the prosecution withheld exculpatory information, and presented testimony that was misleading or false, when it presented the trial testimony of David Horn, whose testimony suggested, in essence, that the bloody shoe prints were likely left by paramedics or off duty detectives; and

- the claim in Claim 4, at paragraphs 5.46 through 5.49, under *Brady*, that the prosecution withheld from the defense information related to the credibility of Randall Wolfe.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated this 1st day of August, 2014.

/s/
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
******* DISTRICT OF NEVADA**

CASE NUMBER: 3:05-cv-00087-RCJ-WGC

[Filed August 1, 2014]

PAUL L. BROWNING,	)
Petitioner,	)
	)
V.	)
	)
RENEE BAKER, *et al.*,	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioner's fifth amended petition for a writ of habeas corpus (ECF No. 115) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to the claims as outlined in the Court's order entered on August 1, 2014 (ECF No. 177, p. 61).

August 1, 2014

LANCE S. WILSON
Clerk

/s/ J. Cotter
Deputy Clerk