No. _____

October Term, 2024

In the
Supreme Court of the United States

Donald Sherman,

Petitioner,

v.

William Gittere, Warden, *et al*.,

Respondents.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

Petitioner's Application to Extend Time to File Petition for Writ of Certiorari

CAPITAL CASE

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CAPITAL CASE

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner Donald Sherman respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for sixty (60) days, to and including January 3, 2024. The published order of the Ninth Circuit Court of Appeals affirming the denial of habeas relief in Case No. 16-99000 was issued on February 9, 2024, and is attached as Appendix A. The unpublished order of the Ninth Circuit denying the motion to expand the certificate of appealability in Case No. 16-99000 was issued on February 9, 2024, and is attached as Appendix B. An

amended memorandum from the Ninth Circuit in Case No. 16-99000 was issued on August 5, 2024, and is attached as Appendix D. An order denying rehearing in Case No. 16-99000 was issued on August 5, 2024, and is attached as Appendix C.

Petitioner's due date for filing a Petition for Writ of Certiorari is currently November 4, 2024. Petitioner is filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1257(a).

BACKGROUND

Mr. Sherman was convicted of burglary, robbery, and first-degree murder and sentenced to death in the Eighth Judicial District Court in 1997. *Sherman v. State*, 965 P.2d 903 (Nev. 1998). After unsuccessfully seeking state postconviction relief, Mr. Sherman filed a federal petition for writ of habeas corpus. The federal district court denied the petition but granted a COA on one claim. Mr. Sherman sought to expand the certificate of appealability before the district court and the Ninth Circuit. A panel of the Ninth Circuit affirmed the denial of relief on the certified issue and denied a COA as to the additional issues raised by Mr. Sherman.

REASONS FOR GRANTING THE EXTENSION

The time for filing a Petition for Writ of Certiorari should be extended for sixty days for the following reasons:

1. Mr. Sherman seeks this Court's review from the denial of his timely first federal habeas corpus petition in a capital case. His case presents several constitutional issues that infect his conviction and death sentence, both as to the issue denied by the panel of the Ninth Circuit and with respect to the court's denial of Mr. Sherman's motion to expand the COA.

2. At the present time I have identified the constitutional issue that I intend to present to the Court and have conducted substantial legal research to demonstrate a split among the federal circuit courts of appeal, which warrants plenary review from the Court under Sup. Ct. R. 10(a). I am seeking additional time so I can complete the petition while also meeting my other filing deadlines in capital habeas matters.

3. In addition to the work I have completed in Mr. Sherman's case I have had to give time and attention to other time sensitive deadlines in other capital cases that could not be further extended. In particular, I have had to devote attention to filing deadlines in a capital case where the client faces the prospect of an order and warrant of execution. *See State v. Ybarra*, Case No. CR-0001511. That case has necessitated filings in several courts, including in the state criminal case, a state habeas petition, *see* Case No. HC2410004, and a petition for sanity investigation, Case No. A-24-903549-P, which were filed on October 10, 2024. I also filed a reply to the State's response and opposition to a petition for postconviction relief in *State v. Pandeli*, Case No. CR 1993-008116, on October 11, 2024, as well as a motion for discovery and an evidentiary hearing on October 17, 2024.

4. In addition, as the Chief of the Capital Habeas Unit I have had to devote substantial time and attention to administrative matters in the office, including administrative travel during the week of September 10, 2024.

5. This Court has consistently recognized that capital cases require a heightened level of scrutiny: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in

favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45–46 (1957) (on rehearing) (Frankfurter, J., concurring); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). For this reason, Mr. Sherman should be afforded a meaningful opportunity to seek this Court's review from the denial of his first federal habeas corpus petition by the lower courts.

6. On October 22, 2024, I contacted counsel for the State, Chief Deputy Attorney General Heather Procter, regarding this request and I am authorized to represent that the State does not oppose it.

7. This application for an extension of time is not sought for the purposes of delay or for any other improper purpose, but only to ensure that Mr. Sherman receives competent representation in this matter.

Dated this 23rd day of October, 2024.

Respectfully submitted,

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APPENDICES

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD SHERMAN, *Petitioner-Appellant*, v. WILLIAM GITTERE, Warden; AARON DARNELL FORD, Attorney General of Nevada, *Respondents-Appellees*.	No. 16-99000 D.C. No. 2:02-cv-01349-LRH-VCF OPINION

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted September 20, 2023
San Francisco, California

Filed February 9, 2024

Before: Ronald M. Gould, Bridget S. Bade, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Bumatay

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Donald Sherman's 28 U.S.C. § 2254 habeas corpus petition challenging his Nevada conviction and death sentence for robbery, burglary, and the first-degree murder of Dr. Lester Bauer.

The district court granted a certificate of appealability on Sherman's claim that the trial court violated Sherman's constitutional right to present a defense by excluding certain impeaching evidence about Dr. Bauer's daughter, whom Sherman had dated.

Sherman argued that de novo review, rather than the Antiterrorism and Effective Death Penalty Act's deferential standard, applies to his right-to-present-a-complete-defense claim. The panel wrote that Sherman waived this issue by not presenting it to the district court and that AEDPA review applies in any event because Sherman did not rebut the presumption that the Nevada Supreme Court adjudicated his federal constitutional claim on the merits.

On the merits, the panel held that Sherman did not show that the Nevada Supreme Court's denial of his right-to-present-a-complete-defense claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or was based on an unreasonable

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

determination of the facts. The panel wrote the Nevada Supreme Court's rulings on the exclusion of the evidence under Nev. Rev. Stat. § 50.085(3) (generally prohibiting the use of extrinsic evidence to prove specific instances of conduct to undermine a witness's credibility) and Nev Rev. Stat. § 48.035(1) (permitting the exclusion of evidence if its probative value is substantially outweighed by the danger of issue confusion or misleading the jury) were not contrary to, or an unreasonable application of, clearly established federal law. The panel concluded that the Nevada Supreme Court's alternative conclusion that any error was harmless was not unreasonable.

In a concurrently filed memorandum disposition, the panel declined to expand the certificate of appealability to include other claims.

COUNSEL

David Anthony (argued), Assistant Federal Public Defender; Rene L. Valladares, Federal Public Defender; Las Vegas Federal Public Defender's Office, Las Vegas, Nevada; for Petitioner-Appellant.

Heather D. Procter (argued), Deputy Attorney General; Aaron D. Ford, Nevada Attorney General; Nevada Attorney General's Office, Carson City, Nevada; Erica Berrett, Senior Deputy Attorney General; Nevada Attorney General's Office, Las Vegas, Nevada; for Respondents-Appellees.

OPINION

BUMATAY, Circuit Judge:

On June 1, 1994, Dr. Lester Bauer was found bludgeoned to death in his home in Las Vegas, Nevada. The next day, Donald Sherman, who had dated Dr. Bauer's daughter, was arrested for his murder. In February 1997, a Nevada jury found Sherman guilty of robbery, burglary, and first-degree murder. The jury determined that the aggravating circumstances outweighed the mitigating circumstances and imposed the death penalty. The Nevada Supreme Court affirmed Sherman's convictions and sentence on direct appeal.

Following unsuccessful postconviction petitions in state court, Sherman raised several claims in a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. The federal district court later denied the petition but granted a certificate of appealability on a single claim—whether the trial court violated Sherman's constitutional right to present a complete defense by excluding certain impeaching evidence about Dr. Bauer's daughter. Sherman now appeals this ruling.

Because the Nevada court's resolution of this right-to-a-complete-defense claim was not "contrary to, or . . . an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts," we affirm. *See* 28 U.S.C. § 2254(d)(1)–(2). Sherman also seeks to expand the certificate of appealability to include seven other claims. In a concurrently filed memorandum, we deny the certificate for each of the uncertified claims.

I.

Sherman began dating Dianne Bauer in 1992, moving into her Longview, Washington house soon after. Dianne would regularly visit her father, Dr. Bauer, in Las Vegas while she and Sherman dated. The following year, Dianne and Sherman relocated to Alaska but then broke up. According to Dianne, in April 1994, while she was driving on a highway, she saw Sherman in another car—Sherman then pointed his hand, shaped as a gun, at her.

On May 1, 1994, Dianne's friend, Erin Murphy, informed her that Sherman was going to Las Vegas and that she feared he would harm Dr. Bauer. Murphy told Dianne that she should tell her father and the Las Vegas Police Department. Dianne says that she informed her brother, the Longview Police Department, and the FBI about the danger Sherman posed to her father.

On June 1, 1994, after receiving a call from a concerned neighbor, a Las Vegas police officer went to check on Dr. Bauer at his home. The officer noticed that one of the front windows was ajar and the screen was placed backward. She entered through the window and found Dr. Bauer dead, lying in a bed covered in blood. Blood was splattered across the headboard and bedroom walls, and soaked the blankets on the bed. The officer observed that a blood-spattered telephone receiver had been removed from the bedroom and placed in the hallway.

The autopsy report showed that Dr. Bauer was struck in the head with a hammer five to seven times. Although the strikes were hard enough to fracture his skull and damage his brain, Dr. Bauer did not die instantly. The medical examiner concluded that Dr. Bauer likely died between the night of May 29 and the early hours of May 30.

Meanwhile, Sherman stayed at a local Las Vegas hotel from May 28 to May 31, 1994, which coincided with the murder. On May 30, Sherman called Swinging Susie's, an escort service, and asked for an escort to meet him at his hotel room. An escort, "Paige," met with Sherman, who introduced himself as "Dr. Bauer." Sherman paid for Paige's services with Dr. Bauer's credit card and signed the receipt as "Dr. Lester Bauer." Paige returned to Sherman's hotel the next morning, May 31.

Later on May 31, Sherman checked into a hotel in Santa Barbara, California. Again, he introduced himself as "Lester Bauer," paid with Dr. Bauer's credit card, and signed the receipt as "Dr. Lester Bauer."

On June 2, Santa Barbara law enforcement arrested Sherman while he slept in Dr. Bauer's stolen car. Inside Sherman's wallet the officers found Dr. Bauer's credit cards and restaurant and jewelry-store receipts signed by "Lester Bauer."

Sherman was charged with robbery, burglary, and first-degree murder. During the guilt phase of his trial, the jury found Sherman guilty on all counts. At the penalty phase, the jury found four aggravating circumstances: (1) Sherman had been convicted of another murder;[1] (2) Sherman was under a sentence of imprisonment when he committed the murder; (3) the murder was committed during a burglary; and (4) the murder was committed during a robbery. The jury also found three mitigating circumstances: (1) the murder was committed when Sherman was under the

[1] In 1981, as a juvenile, Sherman was arrested for murdering 62-year-old Harold Marley in his Idaho grocery store. Sherman pleaded guilty and received a life sentence with the possibility of parole. He was paroled in 1992.

influence of an extreme mental or emotional disturbance; (2) Sherman acted under duress or domination of another person; and (3) "other mitigating circumstances." The jury determined that the aggravating circumstances outweighed the mitigating circumstances and returned a death sentence.

On direct appeal, the Nevada Supreme Court affirmed Sherman's convictions and sentence. The United States Supreme Court declined Sherman's petition for writ of certiorari. *Sherman v. Nevada*, 526 U.S. 1122 (1999). Next, Sherman filed a state habeas petition, which the Nevada trial court denied, and the Nevada Supreme Court affirmed the denial.

Sherman then filed a federal habeas petition under 28 U.S.C. § 2254 in 2002 and a first amended petition in 2005. This petition was held in abeyance while Sherman returned to state court to exhaust his claims. Sherman filed a second state habeas petition, which the Nevada trial court denied as procedurally barred. The Nevada Supreme Court then affirmed and denied a petition for rehearing.

The federal habeas proceedings were then reopened, and Sherman filed his second amended petition. The State of Nevada moved to dismiss the petition. The federal district court dismissed several claims as procedurally defaulted and denied the remaining claims on the merits. The district court later denied Sherman's motion for reconsideration. This appeal follows.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a) and review the district court's denial of the petition de novo. *See Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019).

II.

In his certified claim, Sherman alleges that the state trial court violated his constitutional right to present a complete defense by excluding certain testimony impeaching Dianne Bauer, which he asserts prevented him from presenting his theory of defense. *See California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that the defendant's "opportunity [to be heard] would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on . . . the defendant's claim of innocence").

At the close of its case-in-chief, the State orally moved in limine to bar Sherman from eliciting testimony from other witnesses that (1) Dianne had told people that her father molested her when she was a child and (2) contradicted Dianne's testimony that Sherman threatened her on a highway in Alaska. The prosecutor argued that these topics were collateral matters that could not be impeached with extrinsic evidence under Nevada Revised Statute ("Nev. Rev. Stat.") § 50.085(3). Sherman opposed the motion. According to Sherman, this evidence would counter the State's narrative that Sherman killed Dr. Bauer to hurt Dianne after she broke up with him. Instead, Sherman believes this evidence would show that Dianne was not a loving or caring daughter and that she manipulated Sherman into confronting Dr. Bauer.

The trial court ruled that this evidence went to collateral matters and granted the State's motion under Nev. Rev. Stat.

§ 50.085(3).[2] On direct appeal, the Nevada Supreme Court affirmed. On federal habeas review, the district court ruled that the Nevada Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law. The district court also concluded that, even if the evidentiary ruling was a constitutional violation, it was harmless error under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The district court then granted a certificate of appealability on Sherman's claim that the state court's evidentiary ruling violated his constitutional right to present a complete defense.

A.

Before turning to the merits of this claim, we address the proper standard of review. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "sharply limits" our review of any claim adjudicated on the merits in state court. *Johnson v. Williams*, 568 U.S. 289, 298 (2013). We may not grant a petition on an adjudicated claim unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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). But for any claim not adjudicated on the merits by the state court, our review is de novo. *See Patsalis v. Shinn*, 47 F.4th 1092, 1097–98 (9th Cir. 2022).

[2] Under the Nevada law, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence." Nev. Rev. Stat. § 50.085(3).

For the first time on appeal, Sherman argues that de novo review, not AEDPA's deferential standard, applies to his right-to-present-a-complete-defense claim because the Nevada Supreme Court failed to adjudicate it on the merits. Sherman contends that Nevada's highest court "overlooked" his federal constitutional claim and denied the claim solely on state-law grounds. To begin, Sherman waived this issue by not presenting it to the district court. *See Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006). In any event, we apply AEDPA deference here.

As we recently stated, "[w]hen a petitioner presents a federal claim 'to a state court and the state court has denied relief,' we presume that 'the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" *Patsalis*, 47 F.4th at 1098 (quoting *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). We apply this presumption "even when the state court resolves the federal claim in a different manner or context than advanced by the petitioner so long as the state court 'heard and *evaluated* the evidence and the parties' substantive arguments.'" *Id.* (quoting *Johnson*, 568 U.S. at 302 (emphasis in original)).

We adhere to this "strong" presumption because "it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference." *Johnson*, 568 U.S. at 298. And so federal habeas law "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Id.* (quoting *Richter*, 562 U.S. at 100). Thus, the presumption applies "[w]hen a state court rejects a federal claim without expressly addressing that claim." *Id.* at 301.

But this presumption can be "rebutted" in "limited" or "unusual circumstances." *Id.* at 301–02. Thus, for example, the presumption doesn't hold if the federal claim was "rejected as a result of sheer inadvertence." *Id.* at 302–03. Even so, to show this, "the evidence" must "very clearly" lead to "the conclusion that a federal claim was inadvertently overlooked in state court." *Id.* at 303.

Here, Sherman has not rebutted the presumption that the Nevada Supreme Court adjudicated his federal claim on the merits. Instead, we conclude that the state court "heard and *evaluated* the evidence and the parties' substantive arguments" regarding Sherman's federal right-to-a-complete-defense claim. *Patsalis*, 47 F.4th at 1098 (quoting *Johnson*, 568 U.S. at 302 (emphasis in original)). While Sherman's briefing was "somewhat confusing," *Sherman v. State*, 114 Nev. 998, 1007 (1998), Sherman presented his federal claim to the Nevada Supreme Court in a section of his appellate opening brief entitled "the [trial] court erred in denying Sherman the ability to impeach Dianne Bauer and to establish a defense to the charge of first degree murder." Sherman then discussed the evidentiary and constitutional issues together—with most of the section focused on the evidentiary error. Only in one line of the final paragraph of the section did Sherman contend the evidentiary "ruling deprived Sherman of an effective defense under the Sixth Amendment and violated his right to a fundamentally fair trial and due process of law." Indeed, Sherman's briefing failed to cite a single federal case discussing the constitutional right to present a complete defense.

Despite this lack of clarity, the Nevada Supreme Court's decision reflects its understanding that the substance of Sherman's evidentiary claim presented a constitutional challenge. It expressly noted Sherman's argument that the

excluded evidence was not "simply attacking Dianne's credibility as a witness," but in fact "tended to support his theory of the case." *Sherman*, 114 Nev. at 1007. The Nevada court recognized that Sherman sought to develop a defense to first-degree murder with the excluded evidence. *Id*. The court recognized Sherman's argument that, had he been permitted to introduce the excluded testimony, he could have shown that "Dianne . . . had somehow provided the impetus for him to make the trip to Las Vegas by playing upon his feelings about child abuse" and that Sherman only entered Dr. Bauer's house to talk to him about his "relationship with Dianne" and "only after he was inside the house did he lose his temper." *Id.* The court noted Sherman's argument that the excluded evidence could have been used to "show[] a lesser degree of culpability on his part." *Id.* at 1006.

The Nevada high court thus understood that Sherman's claim implicated his constitutional rights. While the court didn't expressly purport to decide a federal constitutional question, its discussion of Sherman's defense theory shows that it "understood itself to be deciding a question with federal constitutional dimensions." *See Johnson*, 568 U.S. at 305. By acknowledging that the excluded evidence touched on more than just Dianne's credibility, the court recognized that the evidentiary ruling also pertained to Sherman's constitutional right to present a defense.

And the Nevada Supreme Court's evaluation of the claim shows no basis to rebut the presumption of a merits adjudication. While the state court expressly analyzed the claim under both Nev. Rev. Stat. §§ 50.085(3) and

48.035(1),[3] the court's analysis also suggests acknowledgment of the claim's federal dimensions. *Sherman*, 114 Nev. at 1006–7. Take the court's citation to *Rembert v. State*, 104 Nev. 680, 683 (1988). *Id.* at 1006. *Rembert* considered whether admitting extrinsic evidence contrary to Nev. Rev. Stat. § 50.085(3) resulted in the denial of a "fair trial" and cited *Chapman v. California*, 386 U.S. 18, 24 (1967)—the seminal case on the federal *constitutional* harmless-error standard. *See Rembert*, 104 Nev. at 683–84. Thus, this case is like *Johnson*, in which the Supreme Court observed that it was "[m]ost important" that the Supreme Court of California discussed a state-court opinion which cited several federal cases discussing the constitutional issue. *See Johnson*, 568 U.S. at 304 (citing *People v. Cleveland*, 25 Cal. 4th 466 (2001)).[4]

The Nevada Supreme Court then concluded that the trial court "implicitly found that the evidence was not relevant for any purpose other than impeachment or that any relevance the testimony had toward proving Sherman's theory was substantially outweighed by the risk of misleading the jury or confusing the issues." *Sherman*, 114 Nev. at 1007. After reviewing the record, the Nevada Supreme Court concluded

[3] Nev. Rev. Stat. § 48.035(1) states that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or misleading the jury."

[4] While the Nevada Supreme Court did not expressly cite this principle, under Nevada law, the application of Nev. Rev. Stat. § 48.035(1) must comport with the "due process clause[] . . . right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case." *See Vipperman v. State*, 96 Nev. 592, 596 (1980). So Nevada's standard for evaluating Nev. Rev. Stat. § 48.035(1) is "at least as protective as the federal standard" for evaluating the admissibility of evidence. *Patsalis*, 47 F.4th at 1100.

that excluding the evidence was not "manifestly wrong" and that any error was harmless. *Id.*

While the Nevada Supreme Court could have been more explicit in explaining its ruling, we do not "impose mandatory opinion-writing standards on state courts." *Johnson*, 568 U.S. at 300 (simplified). Indeed, any shortcomings in its decision likely originate from Sherman's briefing. Considering the minimal attention Sherman afforded the federal issue in his briefing, it's understandable that the Nevada court would not opine on it at length. And while Sherman complains that the Nevada court's use of the deferential "manifestly wrong" standard of review means it was ruling only on state-law grounds, Sherman himself argued for the "clearly erroneous" standard in his briefing before that court. Thus, it is "entirely plausible that the [Nevada Supreme Court] applied a deferential standard of review because [Sherman] invited the court to do so—not because it ignored his constitutional claim." *See Hinkle v. Neal*, 51 F.4th 234, 240 (7th Cir. 2022). We do not demand that state courts use magical phrases or minimum word lengths before applying the presumption of adjudication on the merits.

Even more evidence cuts against Sherman's claim that the Nevada court failed to resolve his federal claim. As we noted earlier, Sherman did not argue that the Nevada Supreme Court overlooked this federal claim until his briefing in the Ninth Circuit—despite contending in the district court that the Nevada court overlooked other claims. As the Supreme Court has observed, a petitioner "presumably knows her case better than anyone else, and the fact that she does not appear to have thought that there was an oversight" until the federal appellate process "makes such a mistake most improbable." *See Johnson*, 568 U.S. at 306.

Both *Patsalis* and *Johnson* thus show that we must treat Sherman's right-to-a-complete-defense claim as adjudicated on the merits. As in *Patsalis* and *Johnson*, Sherman "presented his state and federal constitutional . . . challenges together and discussed them interchangeably." *Patsalis*, 47 F.4th at 1100. As in *Patsalis* and *Johnson*, the Nevada Supreme Court here "recognized that [Sherman] was presenting both a state and federal constitutional challenge." *Id.*; *see Johnson*, 568 U.S. at 294. And in both *Patsalis* and *Johnson*, the federal courts concluded that the claim was adjudicated on the merits by the state court. *Johnson*, 568 U.S. at 306; *Patsalis*, 47 F.4th at 1100. Given the similarities here, we likewise hold that the Nevada Supreme Court adjudicated Sherman's constitutional claim for violating his right to present a complete defense on the merits.

In sum, "[t]here is no reason to think that the [Nevada] court overlooked or failed to resolve [Sherman's] claim" regarding his right to present a complete defense. *See Patsalis*, 47 F.4th at 1100. We thus review the claim under AEDPA deference.

B.

Turning to the merits, Sherman has not shown that the Nevada Supreme Court's denial of Sherman's right-to-present-a-complete-defense claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "based on an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(1)–(2), and so the district court was right to deny the claim.

Sherman argues that the trial court violated his constitutional right to present a complete defense when it

precluded him from presenting evidence to rebut the State's theory that Sherman killed Dr. Bauer to hurt Dianne. He contends that the excluded evidence would have shown that he was not angry with Dianne over their failed relationship. Sherman also asserts that the excluded evidence shows that Dianne manipulated him into confronting Dr. Bauer by claiming that he molested her and her daughter. From this, Sherman argues that the jury could have found that he did not have the requisite intent for first-degree murder—that he did not intend to kill Dr. Bauer when he traveled to Dr. Bauer's Las Vegas home and instead Sherman lost control when confronting Dr. Bauer.

The constitutional right to "a meaningful opportunity to present a complete defense" is rooted in both the Due Process Clause and the Sixth Amendment. *Crane*, 476 U.S. at 690 (quoting *Trombetta*, 467 U.S. at 485); *see Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The [Sixth Amendment] right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.").

This right, however, is not absolute. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* (quoting *Rock v.*

Arkansas, 483 U.S. 44, 56 (1987)). Generally, the exclusion of evidence is unconstitutional when it "significantly undermine[s] fundamental elements of the defendant's defense." *Id.* at 315. But "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). "Only rarely" has the Supreme Court "held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (per curiam).

The Nevada Supreme Court affirmed the trial court's exclusion of the evidence on three grounds: (1) under Nev. Rev. Stat. § 50.085(3), (2) under Nev. Rev. Stat. § 48.035(1), and (3) under a harmless-error analysis. Reviewing each ground, we conclude that Sherman failed to satisfy AEDPA's strict requirements.

i.

Nev. Rev. Stat. § 50.085(3) generally prohibits the use of extrinsic evidence to prove specific instances of conduct to undermine a witness's credibility. The Supreme Court has expressly recognized its constitutionality and the legitimate interests it serves. *Jackson*, 569 U.S. at 509. "The purpose of that rule," the Court explained, "'is to focus the fact-finder on the most important facts and conserve judicial resources by avoiding mini-trials on collateral issues.'" *Id.* (quoting *Abbott v. State*, 122 Nev. 715, 736 (2006)). In addition, "[t]he admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial." *Id.* at 511.

As the Court observed, Nevada's rule is like the "widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness' conduct to prove the witness' character for untruthfulness." *Id.* at 510 (citing Fed. R. Evid. 608(b)).

Given all this, "[t]he constitutional propriety of [§ 50.085(3)] cannot be seriously disputed." *Id.* Indeed, the Supreme Court expressly held that none of its decisions "clearly establishes" that excluding evidence consistent with § 50.085(3)'s purposes "violates the Constitution." *Id.* at 511. Sherman has not pointed to any Supreme Court decision holding otherwise.

And nothing in the record shows that the trial court's evidentiary ruling deviated from § 50.085(3)'s legitimate purposes. As the Nevada Supreme Court found, it was not manifestly wrong to exclude collateral allegations of misconduct of a witness who was not on trial. While the excluded evidence may have somewhat undermined the State's theory that Sherman killed Dr. Bauer to get back at Dianne, it does not negate Sherman's culpability for first-degree murder and may have confused the jury with a mini-trial on the collateral issue of Dianne's alleged misconduct.

Thus, the Nevada Supreme Court's ruling on the exclusion of the extrinsic evidence here was not contrary to, or an unreasonable application of, clearly established federal law.

ii.

Nev. Rev. Stat. § 48.035(1) permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of . . . confusion of the issues or of misleading the jury." The Supreme Court has repeatedly affirmed state

rules giving trial courts discretion to exclude evidence that is more prejudicial than probative or confuses the issues. *See, e.g., Crane*, 476 U.S. at 689–90 ("[T]he Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

We have previously observed that the Supreme Court has not "squarely addressed" whether an "evidentiary rule requiring a trial court to balance factors and exercise its discretion" to exclude evidence, like § 48.035(1), itself violates a defendant's "right to present a complete defense." *Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009). And Sherman provides no Supreme Court case showing otherwise. Instead, Sherman relies on general propositions of law found in *Chambers*, 410 U.S. at 294; *Ake v. Oklahoma*, 470 U.S. 68, 83–84 (1985); *Crane*, 476 U.S. at 690–91; and *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986).

But all these cases pre-date *Moses* and thus none clearly establish that an evidentiary rule requiring a trial court to balance factors and exercise its discretion, like § 48.035(1), deprived a defendant of his right to present a complete defense. *See Chambers*, 410 U.S. at 294 (concerning Mississippi's rules against hearsay and impeachment of a party's own witness); *Ake*, 470 U.S. at 76–77, 86–87 (finding a Due Process Clause right to access to a competent psychiatrist if the defendant cannot afford one and his mental state is likely to be a significant issue at trial); *Crane*, 476 U.S. at 690 (holding that the government may not "exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's

claim of innocence"); and *Skipper*, 476 U.S. at 3 (evaluating whether testimony from an incarcerated defendant's jailers and a visitor about his "adjustment" to jail met the threshold test for relevance under South Carolina law).

Again, nothing in the record shows that the trial court's ruling fell outside § 48.035(1)'s appropriate scope—as the Nevada Supreme Court concluded. The excluded evidence was, at best, of limited exculpatory value and risked confusing the jury because it related to misconduct of a person not charged in the crime. Because Sherman cites no Supreme Court cases that "squarely address the issue in the case or establish a legal principle that clearly extends to [this] context," *Moses*, 555 F.3d at 754 (simplified), the Nevada Supreme Court's § 48.035(1) ruling is not contrary to or an unreasonable application of clearly established federal law.

iii.

The Nevada Supreme Court alternatively concluded that any error was harmless. *Sherman*, 114 Nev. at 1007–08. A federal constitutional error can be harmless only if a court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. While the Nevada Supreme Court did not cite *Chapman* in its opinion, it cited *Rembert*, which in turn cited *Chapman*'s harmless-error standard. *See Sherman*, 114 Nev. at 1006; *Rembert*, 104 Nev. at 683. We thus presume that the Nevada court applied the *Chapman* standard and review its application of that standard under AEDPA deference. *See Brown v. Davenport*, 596 U.S. 118, 127, 135 (2022) (explaining that a "harmless-error determination qualifies as an adjudication on the merits under AEDPA" and requires a petitioner to prove that the state court's decision was "unreasonable").

Sherman has not shown that the Nevada Supreme Court's application of the harmless error standard was "unreasonable."

Overwhelming evidence supports Sherman's conviction for murder in the first degree. *See* Nev. Rev. Stat. §§ 200.010, 200.030. None of the excluded evidence contradicts or minimizes the evidence that Sherman broke into Dr. Bauer's house in the middle of the night, struck him several times with a hammer, moved the telephone receiver away from Dr. Bauer, and stole items from Dr. Bauer's house. And a review of the transcripts from the guilt and penalty phases shows that Sherman presented evidence that Dianne told people, including Sherman, that she hated her father, that Dr. Bauer sexually abused her, and that she wanted to see him dead.

In addition, as the Nevada Supreme Court found, Sherman got much of his story out in closing. *Sherman*, 114 Nev. at 1007. While Sherman suggests that this factual finding was unreasonable, at closing, Sherman clearly offered his defense theory that Dianne manipulated and controlled him knowing that he was emotionally unbalanced. According to Sherman's counsel, Dianne purposefully exploited Sherman's sensitivities about child abuse and molestation by telling him that Dr. Bauer had molested her and her daughter. Sherman's counsel also argued that Dianne was desperate for Dr. Bauer's money. Sherman's counsel then contended that Dianne's manipulations drove Sherman to "confront Dr. Bauer over molesting Dianne's child and he lost it." All of this would contradict the State's putative motive of revenge and support a lower culpability than first-degree murder. Even so, the jury found Sherman guilty of first-degree murder.

And Sherman presented several witnesses who testified about Dianne's relationship with Sherman and her father during the penalty phase. Sherman's counsel argued in the penalty phase that Sherman was susceptible to Dianne's manipulation and that Sherman believed that Dr. Bauer had sexually abused her. He also blamed Sherman's increasing drug use and fragile emotional state. Sherman's counsel explained that Sherman killed Dr. Bauer in a rage due to his instabilities and Dianne's manipulation. As a result, the jury found, as mitigating factors, that the murder was committed when Sherman was under duress or domination of another person and under an extreme mental or emotional disturbance.

To the Nevada state court, all this demonstrated that the jury considered the excluded evidence about Dianne but that it was not compelling enough to reduce his sentence from death. *Id.* at 1007–08. The state court thus concluded that "even had the evidence at issue been presented at trial, the jury would not have found that Sherman was either innocent or guilty of a lesser included offense." *Id*. at 1008.

Finally, Sherman contends that the trial court's ruling also precluded a former psychologist, Dr. Stephen Pittel, from testifying on his behalf during the guilt phase. But the trial court's ruling did not bar Dr. Pittel's testimony and it is unclear why the expert witness declined to take the stand during the guilt phase. *See* Fed. R. Evid. 703 (the facts or data that an expert relies on to form the basis of an opinion "need not be admissible for the opinion to be admitted"). Sherman contends that the excluded testimony provided factual corroboration and foundation for Dr. Pittel's opinions, but he does not provide an argument or evidence on why Pittel did not testify at the penalty phase.

Thus, Sherman has not shown that the Nevada Supreme Court's harmless error determination was unreasonable.

III.

Because the Nevada Supreme Court's denial of Sherman's right-to-present-a-complete-defense claim was not erroneous under AEDPA's deferential standard of review, we affirm.

APPENDIX B

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD SHERMAN, Petitioner-Appellant, v. WILLIAM GITTERE, Warden; AARON DARNELL FORD, Attorney General of Nevada, Respondents-Appellees.	No. 16-99000 D.C. No. 2:02-cv-01349-LRH-VCF MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted September 20, 2023
San Francisco, California

Before: GOULD, BADE, and BUMATAY, Circuit Judges.

After a jury trial in Nevada state court, Donald Sherman was convicted of robbery, burglary, and first-degree murder. After unsuccessful state postconviction proceedings, Sherman filed a federal habeas petition subject to the Antiterrorism and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Effective Death Penalty Act ("AEDPA"). The district court denied the petition and granted a certificate of appealability ("COA") on one claim. We addressed Sherman's certified claim in a concurrently published opinion. In this memorandum disposition, we consider his request to expand the COA to include seven additional claims.

Under AEDPA, a petitioner seeking a certificate of appealability on the denial of constitutional rights "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (brackets in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted). When a petitioner seeks a COA on the denial of a claim on procedural grounds, the court must determine whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 1026 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We decline to expand the COA.

I.

Uncertified Claim #1 – Ineffective Assistance of Counsel Claim Under Martinez

Sherman first seeks to expand the COA to include the district court's dismissal of his ineffective-assistance-of-counsel claim as procedurally defaulted. While Sherman's first post-conviction counsel raised at least three ineffective-assistance-of-trial-counsel subclaims in his first state postconviction petition, Sherman contends that several subclaims were omitted, which led to them being procedurally barred. He argues that the district court erred in rejecting his *Martinez* arguments because it failed to apply the correct standard for determining whether the claims of ineffective assistance of counsel had "some merit." *See Martinez v. Ryan*, 566 U.S. 1, 17 (2012) (explaining that failure to raise a claim of ineffective assistance of counsel in an initial-review post-conviction proceeding does not bar a federal habeas court from considering a substantial claim of ineffective assistance of trial counsel, if counsel in the initial post-conviction proceeding was ineffective). We review a district court's dismissal for procedural default de novo. *See Fields v. Calderon*, 125 F.3d 757, 759–60 (9th Cir. 1997).

A federal court is precluded from reviewing procedurally defaulted claims unless the petitioner can establish "cause" for the default and "prejudice" as a result of the federal violation. *Coleman v. Thompson*, 501 U.S. 722, 729, 745 (1991). A petitioner can establish cause and prejudice to overcome the procedural default of

an ineffective assistance of trial counsel claim if the petitioner can show that "(1) post-conviction counsel performed deficiently; (2) 'there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different'; and (3) the 'underlying ineffective-assistance-of-trial-counsel claim is a substantial one.'" *Dickinson v. Shinn*, 2 F.4th 851, 858 (9th Cir. 2021) (quoting *Ramirez v. Ryan*, 937 F.3d 1230, 1242 (9th Cir. 2019)). A claim is "substantial" if it has "some merit." *Id.* (quoting *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)). Because the district court's dismissal of Sherman's claims of ineffective assistance of counsel as procedurally barred is not debatable, we do not expand the COA to include these claims.[1]

Sherman raises multiple ineffective-assistance-of-trial-counsel subclaims: (a) trial counsel failed to effectively litigate the motion in limine excluding evidence about his ex-girlfriend, Dianne Bauer; (b) trial counsel failed to raise Dianne's history of fabricating sexual abuse allegations; (c) trial counsel failed to present

[1] The parties dispute whether the evidence submitted in support of Sherman's defaulted ineffective assistance of counsel claims in his second post-conviction proceeding is considered part of the state court record that the federal habeas court can consider. *See Shinn v. Ramirez*, 596 U.S. 366, 382 (2022) (holding "that, under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."). We need not resolve this issue because, assuming that this evidence is considered part of the state court record, Sherman fails to satisfy the *Martinez* standard for excusing the procedural default of his claims of ineffective assistance of counsel.

testimony about Sherman's relationship with Dianne and her desire for her father's death; (d) trial counsel failed to demonstrate that Dianne lied about contacting law enforcement about her father's safety; (e) trial counsel did not move for a new trial based on Dianne's false trial testimony; (f) trial counsel failed to present available mitigating evidence; (g) trial counsel failed to present appropriate expert testimony; (h) trial counsel did not effectively counter the State's presentation of Sherman's previous murder conviction; and (i) trial counsel failed to rebut the State's presentation of future dangerousness. He also claims that trial counsel's ineffectiveness should be considered cumulatively. Because "jurists of reason" would not "find it debatable whether the petition states a valid claim of the denial of a constitutional right," or "whether the district court was correct in its procedural ruling," we deny a COA on this claim. *Lambright*, 220 F.3d at 1026.[2]

Dianne Bauer: On the various subclaims of ineffectiveness in investigating, impeaching, and litigating issues related to Dianne Bauer, we find no deficient performance or prejudice. Regarding the motion in limine, the record adequately shows that trial counsel made a cogent argument against the State's motion and presented a detailed offer of proof. Even if trial counsel failed to object to the motion

[2] Sherman also claims that the district court improperly dismissed five ineffective assistance subclaims as "non-cognizable." Those subclaims involve issues related to the use of a stun belt, the venire composition, the reasonable doubt instruction, prosecutorial misconduct, and the penalty-phase instruction. We agree with the district court that these subclaims are insubstantial.

in limine on procedural grounds, the trial court could have excused any error or excluded the evidence that Sherman presented question-by-question. *See Hernandez v. State*, 124 Nev. 639, 647–50 (2008).

Regarding allegations of ineffectiveness related to Dianne's past claims of sexual abuse, her failure to contact police about the threat to Dr. Bauer, or her desire for his death, we see no prejudice. The jury heard that Dianne had manipulated Sherman based on her desire for her father's money by claiming that her father sexually abused her and her daughter. Additionally, while this evidence may explain why Sherman traveled to Las Vegas, it does not negate premeditation or otherwise show what happened when he arrived at Dr. Bauer's house in Las Vegas.

Mitigating Evidence: Sherman next argues that trial counsel did not investigate and present all reasonably available mitigating evidence regarding his family's history of poverty and physical, sexual, and substance abuse or the abuse he suffered while incarcerated for his prior murder conviction. As Sherman concedes, however, much of this evidence was cumulative of information that his trial counsel discovered about his background. As such, "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009). Instead, "there comes a point at which evidence . . . can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Id*. To the

extent that Sherman argues that counsel was ineffective for failing to present the new mitigation evidence, he does not explain why it was unreasonable for trial counsel to decide against presenting additional evidence of his dysfunctional family background, his family's violent and addictive nature, and history of sexual and physical abuse when that evidence could have undermined the defense theory that Sherman was a good child who was loved by friends and family but who was manipulated into committing the murder. *See Burger v. Kemp*, 483 U.S. 776, 789–94 (1987) (concluding that counsel's failure to discover and present evidence of petitioner's troubled and unstable childhood was not deficient in part because the evidence "suggest[ed] violent tendencies that are at odds with the defense's strategy of portraying the petitioner's actions on the night of the murder as the result of [someone else's] strong influence upon his will").

Expert Testimony: Sherman further alleges that counsel performed deficiently by selecting an unlicensed psychologist, Dr. Stephen Pittel, as an expert and by failing to provide him with all relevant mitigating evidence. In Nevada, however, an expert does not need to be licensed to qualify as an expert. *See Wright v. Las Vegas Hacienda, Inc.*, 720 P.2d 696, 697 (Nev. 1986) ("A witness need not be licensed to practice in a given field in order to be qualified to testify as an expert."). And the record does not suggest that trial counsel failed to provide Dr. Pittel with

relevant background information or that Dr. Pittel was missing critical information for his evaluation.

Prior Murder Conviction: Sherman next argues that trial counsel was ineffective for failing to present evidence minimizing his role during the 1981 murder that led to his prior murder conviction or to impeach the State's witness on the conviction. But as the district court found, "trial counsel made a substantial effort to rebut the State's evidence related to the Idaho murder." Indeed, trial counsel called Idaho prosecutor Phillip Robinson, who testified that Sherman did not premediate the killing, that his accomplice prepared and planned the robbery and murder, and that the accomplice was more criminally sophisticated than Sherman. Sherman argues that trial counsel failed to present other evidence regarding the details of the Idaho offense, victim impact testimony, or evidence to impeach the state's witness. Based on the sentencing transcript in the Idaho case, including Sherman's admission that he shot and killed the victim, and Robinson's testimony, Sherman has not demonstrated that, but for trial counsel's failure to investigate and present additional evidence related to the Idaho murder, there is reasonable probability that the outcome of the proceeding would have been different. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (taking into account that presenting certain mitigating evidence could open the door to rebuttal evidence); *see Lambright*, 220 F.3d at 1026.

Future Dangerousness: Sherman also argues that trial counsel was ineffective for failing to retain an institutionalization expert at the penalty phase to rebut the State's argument regarding his future dangerousness. The record shows that Sherman's trial counsel considered hiring an institutionalization expert but she could not recall whether she "had a strategic justification," for not pursuing such evidence. This is not enough to "overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (brackets in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Sherman relies on a declaration from Dr. Cunningham to argue that had trial counsel hired an institutionalization expert, she could have presented testimony that there was a low probability that Sheman would commit violent acts in prison. But he has not made a "substantial showing of a 'reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different.'" *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016). The jury had heard evidence of the circumstances of the crime, Sherman's prior murder conviction, and of Sherman's conduct while in jail awaiting trial—including planning to escape using violence—and Sherman has not made a substantial showing of a reasonable likelihood that Dr. Cunningham's general testimony would have overcome that evidence and led to a different outcome.

Cumulative Error: Sherman finally argues that the district court failed to consider the cumulative prejudicial effect of the procedurally defaulted ineffective assistance claims. But "[w]e reject [Sherman's] cumulative error argument, which would require us to accumulate a number of trial-level IAC claims that we have found insubstantial or unsuccessful on the merits." *See Runningeagle*, 825 F.3d at 990 n.21.

Uncertified Claim #2 – Brady/Napue Claim

Sherman next seeks to expand the COA over his claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose impeachment evidence against Dianne Bauer and jailhouse informants Michael Placencia and Christine Kalter.[3] To succeed on a *Brady* claim, a petitioner must show that the evidence: (1) is favorable to the accused; (2) was suppressed by the prosecution; and (3) was material. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Nevada Supreme Court concluded that

[3] Sherman also alleges that the State failed to disclose exculpatory and impeachment information regarding Sherman's prior conviction. This contention, however, is contained in a single reference and is unsupported by argument or citation, and we decline to address it. *See Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002) ("Issues raised in a brief but not supported by argument are deemed abandoned absent manifest injustice.").

Brady was not violated because the undisclosed evidence concerning Dianne Bauer, Placencia, and Kalter was not material.

Sherman alleges that, contrary to Dianne Bauer's testimony, the State knew that she had not notified the Longview Police Department ("LPD") or the FBI that Sherman posed a danger to her father. Sherman also alleges that the State failed to disclose certain LPD files, including (1) investigative notes indicating that officers spoke with Dianne several times but that she did not inform them that Dr. Bauer was in danger, and (2) files containing statements from other witnesses that Dianne and Sherman had planned Dr. Bauer's murder because Dianne learned that Dr. Bauer had cut her out of his will.

The Nevada Supreme Court's conclusion that such evidence was not material was not contrary to clearly established federal law. The evidence would have been subject to the trial court's motion in limine prohibiting Sherman from impeaching Dianne with extrinsic evidence, which would render the evidence inadmissible. *See* Nev. Rev. Stat. § 50.085(3). And Sherman's convictions were based largely on his confession to two separate people, the method and time of killing, his actions after the killing, and his arrest after being found in Dr. Bauer's car with Dr. Bauer's property. Dianne did not provide key evidence of Sherman's guilt. Thus, the alleged failure of the State to disclose the evidence against Dianne does not "undermine[]

confidence in the outcome of the trial." *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citation omitted) (defining materiality).

Sherman next contends that the State failed to disclose that Placencia had a 1991 felony conviction for use of a controlled substance and that Kalter had conducted controlled drug buys as a confidential informant for the Las Vegas police. Even under de novo review, we conclude that the failure to disclose Placencia's 1991 felony conviction and the failure to disclose Kalter's prior informant status was not material because Sherman has not shown "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See Bagley*, 473 U.S. at 682. The jury already knew that Placencia had a history with law enforcement—indeed, he met Sherman when they were both incarcerated. Additionally, the jury heard evidence that corroborated Placencia's statements and independently supported Sherman's role in the escape plan. Evidence of Kalter's history as a paid police informant in other unrelated investigations has general impeachment value. *See Gentry v. Sinclair*, 705 F.3d 884, 905 (9th Cir. 2013) (observing that evidence that a jailhouse witness was a paid informant has impeachment value). Sherman, however, fails to explain how, if this evidence had been disclosed, there is a reasonable probability that the outcome of the proceeding would have been different. *See Kyles*, 514 U.S. at 435. After all, the

jury had seen Sherman's several letters to Kalter which corroborated her accounting of Sherman's planned escape attempt.

Sherman alleges that the State failed to disclose that Placencia received benefits in three pending criminal cases in exchange for his cooperation, including a deal with the State to release Placencia from custody over a month early in a misdemeanor case.[4] Sherman also alleges that in exchange for Kalter's cooperation in Sherman's case, the State reduced her pending first-degree murder charge to manslaughter and did not oppose her request for release from custody after her guilty plea in that case.

The Nevada Supreme Court's determination that any favorable treatment received by Placencia or Kalter was not related to their cooperation against Sherman was not an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). And we agree with the district court, "[g]iven [the] strength of . . . corroborating evidence, Sherman's allegations about inducements or benefits allegedly received by Placencia and Kalter, even if true, would not undermine this court's confidence in the outcome of Sherman's trial." *See Strickler*, 527 U.S. at 281–82. For these same

[4] Sherman fails to support his claim that the State did not disclose that Placencia was a "career criminal informant who had a history of escape and failure to appear and often curried favor with prosecutors to avoid incarceration." He cites to more than 200 pages of state-court criminal records without identifying how the records support his assertion that Placencia was a career informant. This argument is thus forfeited. *See Humble*, 305 F.3d at 1012.

reasons, Sherman has not established that trial counsel was ineffective for failing "to investigate, uncover, and present evidence that State witnesses received undisclosed benefits." *See Strickland*, 466 U.S. at 691.

Relatedly, Sherman alleges that the State violated *Napue v. Illinois*, 360 U.S. 264 (1959), when it failed to correct the false testimonies of Dianne and Las Vegas Police Sergeant Gayland Hammack. To establish a constitutional violation under *Napue*, Sherman must demonstrate that: (1) the testimony or evidence is false or misleading; (2) the prosecution must or should have known that the testimony was false or misleading; and (3) the challenged testimony is material. *See Panah v. Chappell*, 935 F.3d 657, 664 (9th Cir. 2019).

Sherman alleges that the State violated *Napue* by failing to correct Dianne's testimony that she contacted the LPD to warn them that Dr. Bauer was in danger and Sergeant Hammack's testimony that Placencia did not receive any benefits outside of $300. The Nevada Supreme Court acknowledged Sherman's argument related to the State's failure to correct the alleged false testimony but did not specifically explain its ruling on this issue. We presume the state court decided this issue on the merits. *See Williams*, 568 U.S. at 301. And we consider "what arguments or theories . . . could have supported[] the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Richter*,

562 U.S. at 102. Fair-minded jurists could conclude that the absence of a record in the LPD files showing that Dianne informed them of a danger to Dr. Bauer did not demonstrate that Dianne's testimony was false. *See United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011) (noting that mere "evidence creating an inference of falsity" is not enough). Similarly, the record does not indicate that Placencia received any undisclosed benefits[5] and so reasonable jurists could conclude that Sergeant Hammack's testimony was not false.

Uncertified Claim #3 – Prosecutorial Misconduct Claim

Sherman seeks to expand the COA to include his claim that the prosecutor committed numerous instances of misconduct during closing arguments. He argues that the district court erred by dismissing the entire claim as unexhausted and procedurally barred. The record reflects that, although Sherman alleged several

[5] With respect to this allegation, Sherman argues for the first time in his supplemental reply brief that the issue on appeal is not the reasonableness of the state court's determination of this claim under § 2254(d), but "whether Sherman demonstrated good cause for discovery under Rule 6(a) of the Rules Governing Section 2254 Cases." Aside from a one-sentence request for this court to remand for discovery and factual development as an alternative remedy, Sherman's opening brief discusses the merits of his *Brady* and *Napue* claims. His only reference to discovery, however, is a single sentence asking the court to remand for discovery and factual development as an alternative remedy. Sherman does not request a certificate of appealability on the denial of discovery. The discovery issue is not properly raised. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.") (internal quotation marks and citation omitted).

instances of prosecutorial misconduct in the district court, he only presented one of those instances on direct appeal. Specifically, the only allegation of prosecutorial misconduct that Sherman raised that was also presented on direct appeal was that the prosecutor improperly reminded the jury that Dianne had referred to Sherman as a "creep" after that testimony had been stricken. While this claim was not procedurally defaulted and was addressed by Nevada Supreme Court, *see Sherman v. State*, 965 P.2d 903, 912 (Nev. 1998), we deny a COA on this claim because jurists of reason would not find it "debatable whether the petition states a valid claim of the denial of a constitutional right." *Lambright*, 220 F.3d at 1026. A prosecutor's improper comments during argument will violate the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). The state court reasonably concluded that the prosecutor's isolated reference to stricken testimony, which the prosecutor acknowledged was improper and asked the jury to disregard, did not "infect[] the trial with unfairness." *Id.*

Uncertified Claim #4 – Voir Dire

Sherman next seeks to expand the COA to include his claim that the trial court's improper comments during voir dire violated his due process and Eighth Amendment rights. Sherman argues that the trial court improperly stated that the Bible prescribes the death penalty as punishment, improperly rehabilitated jurors

who said that they could not consider a life sentence for capital murderers, informed potential jurors that they did not have an individual responsibility when issuing a verdict, and restricted counsel's voir dire questioning. Sherman also asserts that his trial counsel was ineffective for failing to object to the trial court's comments. The Nevada Supreme Court concluded that the judge's "reference to religious authority for capital punishment was inappropriate," but that Sherman was not prejudiced by counsel's failure to challenge the trial court's remarks.

We assume that de novo review applies to Sherman's Eighth Amendment claim. *See Ayala v. Wong*, 756 F.3d 656, 670 & n. 8 (9th Cir. 2014) (reviewing de novo a state court's conclusion of constitutional error and applying *Brecht* without addressing the state court's conclusion of harmlessness), *rev'd on other grounds sub nom. Davis v. Ayala*, 576 U.S. 257 (2015)). Sherman provides no authority to support his argument that a trial court's comments during voir dire can violate the Eighth Amendment. Sherman's reliance on *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000) to support his argument is unpersuasive. *Sandoval* concerns the comments of a prosecutor during closing argument, that "God sanctioned the death penalty for people like [the defendant]," that the jury would be "doing what God says," and that sentencing the defendant to death might save his soul. *Id.* at 775–76. We determined that these arguments violated the Eighth Amendment because they did not "carefully focus[] the jury on the specific factors it is to consider in reaching

a verdict." *Id.* at 776. We also noted that the argument that a higher power directed the imposition of a death sentence transferred the jury's sense of responsibility. *Id.* at 777. In contrast, the challenged comments at issue were made by the trial court during death qualification of the prospective jurors. The transcripts support the Nevada Supreme Court's determination that the trial court's comments about the Bible "were limited to determining whether the juror[s] could consider the death penalty as a possible form of punishment." *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (clarifying that, in a capital case, a prospective juror may be excused for cause if the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath (citation omitted)). It is unlikely that the trial court's comments were understood by the jury to be a factor for them to consider when reaching a sentencing decision. *Cf. Sandoval*, 241 F.3d at 776. In addition, any harm from the trial court's comments about the Bible would not have had a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht*, 507 U.S. at 623, when the comments were made to the prospective jurors during voir dire and, therefore, were remote in time from the trial court's instructions at the guilty and penalty phases and from the jury's deliberations, and when the potential jurors involved were not seated on the jury.

Sherman also argues that the trial court inappropriately told potential jurors that they had no individual responsibility when issuing a verdict in the penalty phase, in violation of the Supreme Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court held that a capital sentence is invalid when the sentencing jury is led to believe that the responsibility for determining the appropriateness of a death sentence does not rest with the jury. *Id.* at 323. In contrast, the trial court here stated that the jurors would make "a judgment" on the sentence and noted that the jurors would make that decision as members of the jury.

Sherman also argues that the trial court gave "improper" and "deceptive" hypotheticals to rehabilitate jurors. The challenged hypotheticals that the trial court gave during voir dire were directed at determining whether the potential jurors could give equal consideration to the three possible forms of punishment—the death penalty, life imprisonment without the possibility of parole, and life imprisonment with the possibility of parole. The trial court properly conducted an inquiry "to identify unqualified jurors." *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992). "[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Wainwright*, 469 U.S. at 424–25. "[T]his is why deference must be paid to the trial judge who sees and hears the

juror." *Id*. at 426. Sherman has not cited any authority that supports his assertion that the trial court's hypotheticals violated his due process or Eighth Amendment rights.

Regarding Sherman's assertion of ineffective-assistance-of-counsel, we see no prejudice from the trial counsel's failure to object to the trial court's comments.[6]

Uncertified Claim #5 – First-Degree Murder Statute Vagueness

Sherman requests that we extend the COA to include his claim that Nevada's "statutory scheme" for first-degree murder, including its related jury instruction, is unconstitutionally vague because the Nevada Supreme Court's interpretation of the statute erased any distinction between premeditated first-degree murder and intentional second-degree murder. Under Nevada law, first-degree murder includes murder perpetrated by "willful, deliberate and premeditated killing." Nev. Rev. Stat. § 200.030(1)(a); *Nika v. State*, 198 P.3d 839, 842, 845 (Nev. 2009). To the extent

[6] In addition to arguing that the trial court made improper comments to the prospective jurors, Sherman asserts that the trial court impeded defense counsel's ability to question them to determine whether they could consider mitigating evidence. He points to the trial court's directing defense counsel "to get to the real question" and "cut[ting] off" questioning about whether a person's background and upbringing impacted their culpability. Sherman does not support this claim with citation to any authority and has not shown that reasonable jurists would find it debatable whether the trial court denied a constitutional right. *See Jones v. Gomez*, 66 F.3d 199, 204–05 (9th Cir. 1995) (stating that conclusory allegations are insufficient to support habeas relief); *see also See Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991) (noting that trial courts have "great latitude in deciding what questions should be asked on voir dire," including restricting inquiries of counsel).

that Sherman's argument is understood as challenging the statute itself, he waived this issue by failing to properly present it in his operative petition for writ of habeas corpus filed in the district court. *See Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006); *see also Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). At the time of Sherman's 1997 trial, the jury instruction on premeditation allowed a jury to conclude that a murder was "willful, deliberate and premeditated" if it found premeditation. *Nika*, 198 P.3d 839 at 844–47 (discussing the so-called *Kazalyn* instruction). The Nevada Supreme Court reasonably determined that Sherman's challenge to the jury instruction failed.

The instruction accurately stated Nevada law at the time of Sherman's trial. *Id*. Even if we assume that the jury instruction on first-degree murder failed to differentiate between premeditation and intentional second-degree murder, it is not debatable whether the error had a substantial or injurious effect because the trial court gave additional jury instructions that differentiated between first- and second-degree murder. *See Lambright*, 220 F.3d at 1025. While first-degree murder required premeditation, second-degree murder did not. Constitutional errors do not warrant habeas relief except when they are prejudicial or structural, *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993), and Sherman cites no cases when we have found vagueness errors to be structural in the habeas context.

Uncertified Claim #6 – Sentence

Sherman seeks to expand the COA to include three alleged violations of his Eighth Amendment and Fourteenth Amendment rights to a reliable sentence. He argues that the Nevada Supreme Court failed to provide close appellate scrutiny of his death sentence, that the State introduced improper victim impact testimony, and that the prior murder statutory aggravating circumstance improperly relied on a juvenile conviction.

After the Nevada Supreme Court invalidated two of Sherman's aggravating factors, it reweighed the two remaining aggravating factors, along with the mitigation evidence presented at trial, and found that the jury still would have found Sherman eligible for the death penalty. When a death sentence is based in part on an invalid aggravating factor, an appellate court can uphold the sentence if it either reweighs the aggravators and mitigators or reviews the sentence for harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 741, 751–54 (1990). Sherman argues that the Nevada Supreme Court overlooked the cumulative effect of the errors it identified on direct appeal when reviewing the sentence for harmless error.

First, Sherman does not cite authority to support his contention that evaluating harmless error for one issue requires or permits cumulative error analysis of all errors in that evaluation. Second, Sherman does not explain how or why guilt phase errors should cumulate with penalty phase errors, and Nevada caselaw does not appear to allow cumulation of errors across different phases of trial. *See Jeremias v. State*,

412 P.3d 43, 55 (Nev. 2018) ("Although we have identified several arguable errors, they occurred at different portions of the proceedings (jury selection, the guilt phase, and the penalty phase). Jeremias offers no explanation as to whether, or how, this court should cumulate errors across different phases of a criminal trial."). Third, Sherman is incorrect that the Nevada Supreme Court was required to examine *all* available mitigating evidence, including evidence adduced post-trial, after ruling an aggravating factor invalid. As we have said, "[u]nder *Clemons*, the state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist." *Valerio v. Crawford*, 306 F.3d 742, 757 (9th Cir. 2002) (en banc).

Sherman claims that the Nevada Supreme Court violated his right to equal protection because it has previously considered new mitigating evidence not presented at trial on reweighing in other cases. Sherman cites *State v. Bennett*, 81 P.3d 1 (Nev. 2003) and *State v. Haberstroh*, 69 P.3d 676 (Nev. 2003). But those cases are not similarly situated to Sherman's case. In *Bennett,* the Nevada court found several *Brady* violations and its *Brady* analysis required consideration of the undisclosed evidence to determine whether it was material to establish prejudice under the state law cause and prejudice standards to excuse a procedural bar to review of a postconviction petition. 81 P.3d at 8. But here, the Nevada Supreme Court found no *Brady* violation; therefore, Sherman has not demonstrated that he

was similarly situated to the petitioner in *Bennett*. In *Haberstroh*, the Nevada Supreme Court simply observed that the petitioner presented new mitigation evidence related to a claim of ineffective assistance counsel in the penalty phase. *Haberstroh*, 69 P.3d at 683 n. 22. The court remanded for resentencing because it could not say the jury's consideration of an invalid aggravating factor was harmless. *Id*. at 683–84. Contrary to Sherman's claim, the court in *Haberstroh* did not expressly mandate that the reviewing state court consider new evidence in postconviction proceedings. *Id*.

Sherman also argues that the State elicited improper victim-impact evidence during the penalty phase about the victim from the 1981 Idaho murder. The State elicited testimony that the victim's family and community were "incensed" after the murder and that the victim was a "nice man." Sherman acknowledges that evidence about the victim and the impact of a defendant's actions on the family of the victim of a crime for which a defendant is on trial may be admissible during the penalty phase. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). He argues that the victim impact evidence related to the victim of a prior murder falls outside of the scope of *Payne*. Sherman does not, however, present any clearly established law prohibiting victim-impact testimony from a previous crime under the Eighth Amendment. As such, Sherman is not entitled to relief under AEDPA. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004).

Lastly, we consider Sherman's claim that the State improperly relied on his juvenile conviction in Idaho to support the prior-murder aggravating circumstance. He cites *Roper v. Simmons*, 543 U.S. 551 (2005), to support the assertion that using his juvenile conviction to expose him to death eligibility is unconstitutional. *Roper* held that the Eighth Amendment prohibits imposing the death penalty on juvenile offenders under eighteen. 543 U.S. at 568. It does not establish that a prior juvenile conviction may not form the basis for an aggravating factor in a capital case. *See Melton v. Sec'y, Fla. Dep't Corrs.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (concluding that neither *Roper* nor any other Supreme Court precedent "suggests that a prior conviction from youth may not form the basis for an aggravating factor in a capital case.") Because there is no clearly established law on this issue, under AEDPA, Sherman cannot be entitled to relief. *See Brewer*, 378 F.3d at 955. We deny Sherman's request for a COA on this claim because its merit is not debatable. *See Lambright*, 220 F.3d at 1025.

Uncertified Claim #7 – Cumulative Error

Sherman lastly argues that the cumulative impact of errors at trial, on appeal, and in postconviction proceedings violated his constitutional rights and had a substantial and injurious effect on the jury's verdict. In denying Sherman's motion for reconsideration, the district court correctly noted that the cumulative-error claim was not exhausted because he failed to fairly present it to the Nevada courts as a

separate claim. *See Wooten v. Kirkland*, 540 F.3d 1019, 1025–26 (9th Cir. 2008). A claim of cumulative error must be exhausted in state court. *Id.* Sherman does not acknowledge the district court's procedural ruling or dispute that he failed to properly present a claim of cumulative error to the state court. Additionally, he has not presented any argument to excuse the procedural bar to federal habeas review of this claim. Accordingly, we deny his request to expand the COA to include this claim because "jurists of reason" would not "find it debatable whether the district court was correct in his procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

II.

Motion for Judicial Notice

We grant Sherman's motion to take judicial notice of a copy of his trial transcript. Dkt. No. 68. The transcript was admitted as an exhibit at trial, both parties refer to it in their appellate briefs, and the State does not dispute that the document is an accurate copy of the admitted exhibit. *See Harris v. Cnty. of Orange*, 682 F.3d 1126, 1131–32 (9th Cir. 2012) ("We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts." (citations omitted)).

III.

Based on the foregoing, we deny Sherman's request to expand the COA to include the seven uncertified issues. We also grant the motion for judicial notice.

AFFIRMED.

APPENDIX C

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FILED

AUG 5 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD SHERMAN, Petitioner-Appellant, v. WILLIAM GITTERE, et al., Respondents-Appellees.	No. 16-99000 D.C. No. 2:02-cv-01349-LRH-VCF ORDER

Before: GOULD, BADE, and BUMATAY, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and rehearing en banc. *See* Fed. R. App. P. 40; Fed. R. App. P. 35. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. No. 87, is **DENIED**.

APPENDIX D

APPENDIX D

NOT FOR PUBLICATION

FILED

AUG 5 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD SHERMAN, Petitioner-Appellant, v. WILLIAM GITTERE, Warden; AARON DARNELL FORD, Attorney General of Nevada, Respondents-Appellees.	No. 16-99000 D.C. No. 2:02-cv-01349-LRH-VCF AMENDED MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted September 20, 2023
San Francisco, California

Before: GOULD, BADE, and BUMATAY, Circuit Judges.

After a jury trial in Nevada state court, Donald Sherman was convicted of robbery, burglary, and first-degree murder. After unsuccessful state postconviction proceedings, Sherman filed a federal habeas petition subject to the Antiterrorism and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Effective Death Penalty Act ("AEDPA"). The district court denied the petition and granted a certificate of appealability ("COA") on one claim. We addressed Sherman's certified claim in a concurrently published opinion. In this memorandum disposition, we consider his request to expand the COA to include seven additional claims.

Under AEDPA, a petitioner seeking a certificate of appealability on the denial of constitutional rights "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (brackets in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted). When a petitioner seeks a COA on the denial of a claim on procedural grounds, the court must determine whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 1026 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We decline to expand the COA.

I.

Uncertified Claim #1 – Ineffective Assistance of Counsel Claim Under Martinez

Sherman first seeks to expand the COA to include the district court's dismissal of his ineffective-assistance-of-counsel claim as procedurally defaulted. While Sherman's first post-conviction counsel raised at least three ineffective-assistance-of-trial-counsel subclaims in his first state postconviction petition, Sherman contends that several subclaims were omitted, which led to them being procedurally barred. He argues that the district court erred in rejecting his *Martinez* arguments because it failed to apply the correct standard for determining whether the claims of ineffective assistance of counsel had "some merit." *See Martinez v. Ryan*, 566 U.S. 1, 17 (2012) (explaining that failure to raise a claim of ineffective assistance of counsel in an initial-review post-conviction proceeding does not bar a federal habeas court from considering a substantial claim of ineffective assistance of trial counsel, if counsel in the initial post-conviction proceeding was ineffective). We review a district court's dismissal for procedural default de novo. *See Fields v. Calderon*, 125 F.3d 757, 759–60 (9th Cir. 1997).

A federal court is precluded from reviewing procedurally defaulted claims unless the petitioner can establish "cause" for the default and "prejudice" as a result of the federal violation. *Coleman v. Thompson*, 501 U.S. 722, 729, 745 (1991). A

petitioner can establish cause and prejudice to overcome the procedural default of an ineffective assistance of trial counsel claim if the petitioner can show that "(1) post-conviction counsel performed deficiently; (2) 'there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different'; and (3) the 'underlying ineffective-assistance-of-trial-counsel claim is a substantial one.'" *Dickinson v. Shinn*, 2 F.4th 851, 858 (9th Cir. 2021) (quoting *Ramirez v. Ryan*, 937 F.3d 1230, 1242 (9th Cir. 2019)). A claim is "substantial" if it has "some merit." *Id.* (quoting *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)). Because the district court's dismissal of Sherman's claims of ineffective assistance of counsel as procedurally barred is not debatable, we do not expand the COA to include these claims.[1]

Sherman raises multiple ineffective-assistance-of-trial-counsel subclaims: (a) trial counsel failed to effectively litigate the motion in limine excluding evidence about his ex-girlfriend, Dianne Bauer; (b) trial counsel failed to raise Dianne's

[1] The parties dispute whether the evidence submitted in support of Sherman's defaulted ineffective assistance of counsel claims in his second post-conviction proceeding is considered part of the state court record that the federal habeas court can consider. *See Shinn v. Ramirez*, 596 U.S. 366, 382 (2022) (holding "that, under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."). We need not resolve this issue because, assuming that this evidence is considered part of the state court record, Sherman fails to satisfy the *Martinez* standard for excusing the procedural default of his claims of ineffective assistance of counsel.

history of fabricating sexual abuse allegations; (c) trial counsel failed to present testimony about Sherman's relationship with Dianne and her desire for her father's death; (d) trial counsel failed to demonstrate that Dianne lied about contacting law enforcement about her father's safety; (e) trial counsel did not move for a new trial based on Dianne's false trial testimony; (f) trial counsel failed to present available mitigating evidence; (g) trial counsel failed to present appropriate expert testimony; (h) trial counsel did not effectively counter the State's presentation of Sherman's previous murder conviction; and (i) trial counsel failed to rebut the State's presentation of future dangerousness. He also claims that trial counsel's ineffectiveness should be considered cumulatively. Because "jurists of reason" would not "find it debatable whether the petition states a valid claim of the denial of a constitutional right," or "whether the district court was correct in its procedural ruling," we deny a COA on this claim. *Lambright*, 220 F.3d at 1026.[2]

Dianne Bauer: On the various subclaims of ineffectiveness in investigating, impeaching, and litigating issues related to Dianne Bauer, we find no deficient performance or prejudice. Regarding the motion in limine, the record adequately shows that trial counsel made a cogent argument against the State's motion and

[2] Sherman also claims that the district court improperly dismissed five ineffective assistance subclaims as "non-cognizable." Those subclaims involve issues related to the use of a stun belt, the venire composition, the reasonable doubt instruction, prosecutorial misconduct, and the penalty-phase instruction. We agree with the district court that these subclaims are insubstantial.

presented a detailed offer of proof. Even if trial counsel failed to object to the motion in limine on procedural grounds, the trial court could have excused any error or excluded the evidence that Sherman presented question-by-question. *See Hernandez v. State*, 124 Nev. 639, 647–50 (2008).

Regarding allegations of ineffectiveness related to Dianne's past claims of sexual abuse, her failure to contact police about the threat to Dr. Bauer, or her desire for his death, we see no prejudice. The jury heard that Dianne had manipulated Sherman based on her desire for her father's money by claiming that her father sexually abused her and her daughter. Additionally, while this evidence may explain why Sherman traveled to Las Vegas, it does not negate premeditation or otherwise show what happened when he arrived at Dr. Bauer's house in Las Vegas.

Mitigating Evidence: Sherman next argues that trial counsel did not investigate and present all reasonably available mitigating evidence regarding his family's history of poverty and physical, sexual, and substance abuse or the abuse he suffered while incarcerated for his prior murder conviction. As Sherman concedes, however, much of this evidence was cumulative of information that his trial counsel discovered about his background. As such, "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009). Instead, "there comes a point at which evidence . . . can reasonably be expected to be only

cumulative, and the search for it distractive from more important duties." *Id*. To the extent that Sherman argues that counsel was ineffective for failing to present the new mitigation evidence, he does not explain why it was unreasonable for trial counsel to decide against presenting additional evidence of his dysfunctional family background, his family's violent and addictive nature, and history of sexual and physical abuse when that evidence could have undermined the defense theory that Sherman was a good child who was loved by friends and family but who was manipulated into committing the murder. *See Burger v. Kemp*, 483 U.S. 776, 789–94 (1987) (concluding that counsel's failure to discover and present evidence of petitioner's troubled and unstable childhood was not deficient in part because the evidence "suggest[ed] violent tendencies that are at odds with the defense's strategy of portraying the petitioner's actions on the night of the murder as the result of [someone else's] strong influence upon his will").

Expert Testimony: Sherman further alleges that counsel performed deficiently by selecting an unlicensed psychologist, Dr. Stephen Pittel, as an expert and by failing to provide him with all relevant mitigating evidence. In Nevada, however, an expert does not need to be licensed to qualify as an expert. *See Wright v. Las Vegas Hacienda, Inc.*, 720 P.2d 696, 697 (Nev. 1986) ("A witness need not be licensed to practice in a given field in order to be qualified to testify as an expert."). And the record does not suggest that trial counsel failed to provide Dr. Pittel with

relevant background information or that Dr. Pittel was missing critical information for his evaluation. Indeed, the one piece of information that Sherman alleges Dr. Pittel lacked in his analysis (information about Diane's allegations of sexual abuse concerning her daughters) was information that Dr. Pittel testified would not have *altered* his analysis.

Prior Murder Conviction: Sherman next argues that trial counsel was ineffective for failing to present evidence minimizing his role during the 1981 murder that led to his prior murder conviction or to impeach the State's witness on the conviction. But as the district court found, "trial counsel made a substantial effort to rebut the State's evidence related to the Idaho murder." Indeed, trial counsel called Idaho prosecutor Phillip Robinson, who testified that Sherman did not premediate the killing, that his accomplice prepared and planned the robbery and murder, and that the accomplice was more criminally sophisticated than Sherman. Sherman argues that trial counsel failed to present other evidence regarding the details of the Idaho offense, victim impact testimony, or evidence to impeach the state's witness. Based on the sentencing transcript in the Idaho case, including Sherman's admission that he shot and killed the victim, and Robinson's testimony, Sherman has not demonstrated that, but for trial counsel's failure to investigate and present additional evidence related to the Idaho murder, there is reasonable probability that the outcome of the proceeding would have been different. *See*

Cullen v. Pinholster, 563 U.S. 170, 201 (2011) (taking into account that presenting certain mitigating evidence could open the door to rebuttal evidence); *see Lambright*, 220 F.3d at 1026.

Future Dangerousness: Sherman also argues that trial counsel was ineffective for failing to retain an institutionalization expert at the penalty phase to rebut the State's argument regarding his future dangerousness. The record shows that Sherman's trial counsel considered hiring an institutionalization expert but she could not recall whether she "had a strategic justification," for not pursuing such evidence. This is not enough to "overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (brackets in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Sherman relies on a declaration from Dr. Cunningham to argue that had trial counsel hired an institutionalization expert, she could have presented testimony that there was a low probability that Sheman would commit violent acts in prison. But he has not made a "substantial showing of a 'reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different.'" *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016). The jury had heard evidence of the circumstances of the crime, Sherman's prior murder conviction, and of Sherman's conduct while in jail awaiting trial—including planning to escape using violence—and Sherman has not made a

substantial showing of a reasonable likelihood that Dr. Cunningham's general testimony would have overcome that evidence and led to a different outcome.

Cumulative Error: Sherman finally argues that the district court failed to consider the cumulative prejudicial effect of the procedurally defaulted ineffective assistance claims. But "[w]e reject [Sherman's] cumulative error argument, which would require us to accumulate a number of trial-level IAC claims that we have found insubstantial or unsuccessful on the merits." *See Runningeagle*, 825 F.3d at 990 n.21.

Uncertified Claim #2 – Brady/Napue Claim

Sherman next seeks to expand the COA over his claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose impeachment evidence against Dianne Bauer and jailhouse informants Michael Placencia and Christine Kalter.[3] To succeed on a *Brady* claim, a petitioner must show that the evidence: (1) is favorable to the accused; (2) was suppressed by the prosecution; and (3) was material. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed

[3] Sherman also alleges that the State failed to disclose exculpatory and impeachment information regarding Sherman's prior conviction. This contention, however, is contained in a single reference and is unsupported by argument or citation, and we decline to address it. *See Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002) ("Issues raised in a brief but not supported by argument are deemed abandoned absent manifest injustice.").

to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Nevada Supreme Court concluded that *Brady* was not violated because the undisclosed evidence concerning Dianne Bauer, Placencia, and Kalter was not material.

Sherman alleges that, contrary to Dianne Bauer's testimony, the State knew that she had not notified the Longview Police Department ("LPD") or the FBI that Sherman posed a danger to her father. Sherman also alleges that the State failed to disclose certain LPD files, including (1) investigative notes indicating that officers spoke with Dianne several times but that she did not inform them that Dr. Bauer was in danger, and (2) files containing statements from other witnesses that Dianne and Sherman had planned Dr. Bauer's murder because Dianne learned that Dr. Bauer had cut her out of his will.

The Nevada Supreme Court's conclusion that such evidence was not material was not contrary to clearly established federal law. The evidence would have been subject to the trial court's motion in limine prohibiting Sherman from impeaching Dianne with extrinsic evidence, which would render the evidence inadmissible. *See* Nev. Rev. Stat. § 50.085(3). And Sherman's convictions were based largely on his confession to two separate people, the method and time of killing, his actions after the killing, and his arrest after being found in Dr. Bauer's car with Dr. Bauer's property. Dianne did not provide key evidence of Sherman's guilt. Thus, the alleged

failure of the State to disclose the evidence against Dianne does not "undermine[] confidence in the outcome of the trial." *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citation omitted) (defining materiality).

Sherman next contends that the State failed to disclose that Placencia had a 1991 felony conviction for use of a controlled substance and that Kalter had conducted controlled drug buys as a confidential informant for the Las Vegas police. Even under de novo review, we conclude that the failure to disclose Placencia's 1991 felony conviction and the failure to disclose Kalter's prior informant status was not material because Sherman has not shown "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See Bagley*, 473 U.S. at 682. The jury already knew that Placencia had a history with law enforcement—indeed, he met Sherman when they were both incarcerated. Additionally, the jury heard evidence that corroborated Placencia's statements and independently supported Sherman's role in the escape plan. Evidence of Kalter's history as a paid police informant in other unrelated investigations has general impeachment value. *See Gentry v. Sinclair*, 705 F.3d 884, 905 (9th Cir. 2013) (observing that evidence that a jailhouse witness was a paid informant has impeachment value). Sherman, however, fails to explain how, if this evidence had been disclosed, there is a reasonable probability that the outcome of the proceeding would have been different. *See Kyles*, 514 U.S. at 435. After all, the

jury had seen Sherman's several letters to Kalter which corroborated her accounting of Sherman's planned escape attempt.

Sherman alleges that the State failed to disclose that Placencia received benefits in three pending criminal cases in exchange for his cooperation, including a deal with the State to release Placencia from custody over a month early in a misdemeanor case.[4] Sherman also alleges that in exchange for Kalter's cooperation in Sherman's case, the State reduced her pending first-degree murder charge to manslaughter and did not oppose her request for release from custody after her guilty plea in that case.

The Nevada Supreme Court's determination that any favorable treatment received by Placencia or Kalter was not related to their cooperation against Sherman was not an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). And we agree with the district court, "[g]iven [the] strength of . . . corroborating evidence, Sherman's allegations about inducements or benefits allegedly received by Placencia and Kalter, even if true, would not undermine this court's confidence in the outcome of Sherman's trial." *See Strickler*, 527 U.S. at 281–82. For these same

[4] Sherman fails to support his claim that the State did not disclose that Placencia was a "career criminal informant who had a history of escape and failure to appear and often curried favor with prosecutors to avoid incarceration." He cites to more than 200 pages of state-court criminal records without identifying how the records support his assertion that Placencia was a career informant. This argument is thus forfeited. *See Humble*, 305 F.3d at 1012.

reasons, Sherman has not established that trial counsel was ineffective for failing "to investigate, uncover, and present evidence that State witnesses received undisclosed benefits." *See Strickland*, 466 U.S. at 691.

Relatedly, Sherman alleges that the State violated *Napue v. Illinois*, 360 U.S. 264 (1959), when it failed to correct the false testimonies of Dianne and Las Vegas Police Sergeant Gayland Hammack. To establish a constitutional violation under *Napue*, Sherman must demonstrate that: (1) the testimony or evidence is false or misleading; (2) the prosecution must or should have known that the testimony was false or misleading; and (3) the challenged testimony is material. *See Panah v. Chappell*, 935 F.3d 657, 664 (9th Cir. 2019).

Sherman alleges that the State violated *Napue* by failing to correct Dianne's testimony that she contacted the LPD to warn them that Dr. Bauer was in danger and Sergeant Hammack's testimony that Placencia did not receive any benefits outside of $300. The Nevada Supreme Court acknowledged Sherman's argument related to the State's failure to correct the alleged false testimony but did not specifically explain its ruling on this issue. We presume the state court decided this issue on the merits. *See Williams*, 568 U.S. at 301. And we consider "what arguments or theories . . . could have supported[] the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Richter*,

562 U.S. at 102. Fair-minded jurists could conclude that the absence of a record in the LPD files showing that Dianne informed them of a danger to Dr. Bauer did not demonstrate that Dianne's testimony was false. *See United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011) (noting that mere "evidence creating an inference of falsity" is not enough). Similarly, the record does not indicate that Placencia received any undisclosed benefits[5] and so reasonable jurists could conclude that Sergeant Hammack's testimony was not false.

Uncertified Claim #3 – Prosecutorial Misconduct Claim

Sherman seeks to expand the COA to include his claim that the prosecutor committed numerous instances of misconduct during closing arguments. He argues that the district court erred by dismissing the entire claim as unexhausted and procedurally barred. The record reflects that, although Sherman alleged several

[5] With respect to this allegation, Sherman argues for the first time in his supplemental reply brief that the issue on appeal is not the reasonableness of the state court's determination of this claim under § 2254(d), but "whether Sherman demonstrated good cause for discovery under Rule 6(a) of the Rules Governing Section 2254 Cases." Aside from a one-sentence request for this court to remand for discovery and factual development as an alternative remedy, Sherman's opening brief discusses the merits of his *Brady* and *Napue* claims. His only reference to discovery, however, is a single sentence asking the court to remand for discovery and factual development as an alternative remedy. Sherman does not request a certificate of appealability on the denial of discovery. The discovery issue is not properly raised. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.") (internal quotation marks and citation omitted).

instances of prosecutorial misconduct in the district court, he presented only two of those instances on direct appeal.

First, Sherman alleged that the prosecutor improperly reminded the jury that Dianne had referred to Sherman as a "creep" after that testimony had been stricken. Second, Sherman alleged that the prosecutor committed misconduct during the penalty-phase closing argument by "telling the jury to execute him to save the lives of future victims in the prison system." While Sherman's prosecutorial-misconduct claim was not procedurally defaulted and was addressed by Nevada Supreme Court, *see Sherman v. State*, 965 P.2d 903, 912, 914–15 (Nev. 1998), we deny a COA on this claim because jurists of reason would not find it "debatable whether the petition states a valid claim of the denial of a constitutional right." *Lambright*, 220 F.3d at 1026. A prosecutor's improper comments during argument will violate the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). The state court reasonably concluded that the prosecutor's isolated reference to stricken testimony, which the prosecutor acknowledged was improper and asked the jury to disregard, did not "infect[] the trial with unfairness." *Id.* So too with the prosecutor's reference to Sherman's potential future dangerousness, *see California v. Ramos*, 463 U.S. 992, 1005–07 (1983) (recognizing that a "consideration of the defendant's future dangerousness

[is] an inquiry common throughout the criminal justice system" and as such is appropriate for the jury to consider during sentencing), especially when viewed in light of the "overwhelming evidence [that] supported the jury's finding of [the] four aggravating factors," *Sherman*, 965 P.2d at 915.

Uncertified Claim #4 – Voir Dire

Sherman next seeks to expand the COA to include his claim that the trial court's improper comments during voir dire violated his due process and Eighth Amendment rights. Sherman argues that the trial court improperly stated that the Bible prescribes the death penalty as punishment, improperly rehabilitated jurors who said that they could not consider a life sentence for capital murderers, informed potential jurors that they did not have an individual responsibility when issuing a verdict, and restricted counsel's voir dire questioning. Sherman also asserts that his trial counsel was ineffective for failing to object to the trial court's comments. The Nevada Supreme Court concluded that the judge's "reference to religious authority for capital punishment was inappropriate," but that Sherman was not prejudiced by counsel's failure to challenge the trial court's remarks.

We assume that de novo review applies to Sherman's Eighth Amendment claim. *See Ayala v. Wong*, 756 F.3d 656, 670 & n. 8 (9th Cir. 2014) (reviewing de novo a state court's conclusion of constitutional error and applying *Brecht* without addressing the state court's conclusion of harmlessness), *rev'd on other grounds sub*

nom. Davis v. Ayala, 576 U.S. 257 (2015). Sherman provides no authority to support his argument that a trial court's comments during voir dire can violate the Eighth Amendment. Sherman's reliance on *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000) to support his argument is unpersuasive. *Sandoval* concerns the comments of a prosecutor during closing argument, that "God sanctioned the death penalty for people like [the defendant]," that the jury would be "doing what God says," and that sentencing the defendant to death might save his soul. *Id.* at 775–76. We determined that these arguments violated the Eighth Amendment because they did not "carefully focus[] the jury on the specific factors it is to consider in reaching a verdict." *Id.* at 776. We also noted that the argument that a higher power directed the imposition of a death sentence transferred the jury's sense of responsibility. *Id.* at 777. In contrast, the challenged comments at issue were made by the trial court during death qualification of the prospective jurors. The transcripts support the Nevada Supreme Court's determination that the trial court's comments about the Bible "were limited to determining whether the juror[s] could consider the death penalty as a possible form of punishment." *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (clarifying that, in a capital case, a prospective juror may be excused for cause if the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath (citation omitted)). It is unlikely that the trial court's comments were understood by the jury

to be a factor for them to consider when reaching a sentencing decision. *Cf. Sandoval*, 241 F.3d at 776. In addition, any harm from the trial court's comments about the Bible would not have had a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht*, 507 U.S. at 623, when the comments were made to the prospective jurors during voir dire and, therefore, were remote in time from the trial court's instructions at the guilty and penalty phases and from the jury's deliberations, and when the potential jurors involved were not seated on the jury.

Sherman also argues that the trial court inappropriately told potential jurors that they had no individual responsibility when issuing a verdict in the penalty phase, in violation of the Supreme Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court held that a capital sentence is invalid when the sentencing jury is led to believe that the responsibility for determining the appropriateness of a death sentence does not rest with the jury. *Id.* at 323. In contrast, the trial court here stated that the jurors would make "a judgment" on the sentence and noted that the jurors would make that decision as members of the jury.

Sherman also argues that the trial court gave "improper" and "deceptive" hypotheticals to rehabilitate jurors. The challenged hypotheticals that the trial court gave during voir dire were directed at determining whether the potential jurors could give equal consideration to the three possible forms of punishment—the death penalty, life imprisonment without the possibility of parole, and life imprisonment

with the possibility of parole. The trial court properly conducted an inquiry "to identify unqualified jurors." *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992). "[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Wainwright*, 469 U.S. at 424–25. "[T]his is why deference must be paid to the trial judge who sees and hears the juror." *Id*. at 426. Sherman has not cited any authority that supports his assertion that the trial court's hypotheticals violated his due process or Eighth Amendment rights.

Regarding Sherman's assertion of ineffective-assistance-of-counsel, we see no prejudice from the trial counsel's failure to object to the trial court's comments.[6]

Uncertified Claim #5 – First-Degree Murder Statute Vagueness

[6] In addition to arguing that the trial court made improper comments to the prospective jurors, Sherman asserts that the trial court impeded defense counsel's ability to question them to determine whether they could consider mitigating evidence. He points to the trial court's directing defense counsel "to get to the real question" and "cut[ting] off" questioning about whether a person's background and upbringing impacted their culpability. Sherman does not support this claim with citation to any authority and has not shown that reasonable jurists would find it debatable whether the trial court denied a constitutional right. *See Jones v. Gomez*, 66 F.3d 199, 204–05 (9th Cir. 1995) (stating that conclusory allegations are insufficient to support habeas relief); *see also See Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991) (noting that trial courts have "great latitude in deciding what questions should be asked on voir dire," including restricting inquiries of counsel).

Sherman requests that we extend the COA to include his claim that Nevada's "statutory scheme" for first-degree murder, including its related jury instruction, is unconstitutionally vague because the Nevada Supreme Court's interpretation of the statute erased any distinction between premeditated first-degree murder and intentional second-degree murder. Under Nevada law, first-degree murder includes murder perpetrated by "willful, deliberate and premeditated killing." Nev. Rev. Stat. § 200.030(1)(a); *Nika v. State*, 198 P.3d 839, 842, 845 (Nev. 2009). To the extent that Sherman's argument is understood as challenging the statute itself, he waived this issue by failing to properly present it in his operative petition for writ of habeas corpus filed in the district court. *See Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006); *see also Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). At the time of Sherman's 1997 trial, the jury instruction on premeditation allowed a jury to conclude that a murder was "willful, deliberate and premeditated" if it found premeditation. *Nika*, 198 P.3d 839 at 844–47 (discussing the so-called *Kazalyn* instruction). The Nevada Supreme Court reasonably determined that Sherman's challenge to the jury instruction failed.

The instruction accurately stated Nevada law at the time of Sherman's trial. *Id*. Even if we assume that the jury instruction on first-degree murder failed to differentiate between premeditation and intentional second-degree murder, it is not debatable whether the error had a substantial or injurious effect because the trial

court gave additional jury instructions that differentiated between first- and second-degree murder. *See Lambright*, 220 F.3d at 1025. While first-degree murder required premeditation, second-degree murder did not. Constitutional errors do not warrant habeas relief except when they are prejudicial or structural, *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993), and Sherman cites no cases when we have found vagueness errors to be structural in the habeas context.

Uncertified Claim #6 – Sentence

Sherman seeks to expand the COA to include three alleged violations of his Eighth Amendment and Fourteenth Amendment rights to a reliable sentence. He argues that the Nevada Supreme Court failed to provide close appellate scrutiny of his death sentence, that the State introduced improper victim impact testimony, and that the prior murder statutory aggravating circumstance improperly relied on a juvenile conviction.

After the Nevada Supreme Court invalidated two of Sherman's aggravating factors, it reweighed the two remaining aggravating factors, along with the mitigation evidence presented at trial, and found that the jury still would have found Sherman eligible for the death penalty. When a death sentence is based in part on an invalid aggravating factor, an appellate court can uphold the sentence if it either reweighs the aggravators and mitigators or reviews the sentence for harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 741, 751–54 (1990). Sherman argues that

the Nevada Supreme Court overlooked the cumulative effect of the errors it identified on direct appeal when reviewing the sentence for harmless error.

First, Sherman does not cite authority to support his contention that evaluating harmless error for one issue requires or permits cumulative error analysis of all errors in that evaluation. Second, Sherman does not explain how or why guilt phase errors should cumulate with penalty phase errors, and Nevada caselaw does not appear to allow cumulation of errors across different phases of trial. *See Jeremias v. State*, 412 P.3d 43, 55 (Nev. 2018) ("Although we have identified several arguable errors, they occurred at different portions of the proceedings (jury selection, the guilt phase, and the penalty phase). Jeremias offers no explanation as to whether, or how, this court should cumulate errors across different phases of a criminal trial."). Third, Sherman is incorrect that the Nevada Supreme Court was required to examine *all* available mitigating evidence, including evidence adduced post-trial, after ruling an aggravating factor invalid. As we have said, "[u]nder *Clemons*, the state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist." *Valerio v. Crawford*, 306 F.3d 742, 757 (9th Cir. 2002) (en banc).

Sherman claims that the Nevada Supreme Court violated his right to equal protection because it has previously considered new mitigating evidence not presented at trial on reweighing in other cases. Sherman cites *State v. Bennett*, 81

P.3d 1 (Nev. 2003) and *State v. Haberstroh*, 69 P.3d 676 (Nev. 2003). But those cases are not similarly situated to Sherman's case. In *Bennett,* the Nevada court found several *Brady* violations and its *Brady* analysis required consideration of the undisclosed evidence to determine whether it was material to establish prejudice under the state law cause and prejudice standards to excuse a procedural bar to review of a postconviction petition. 81 P.3d at 8. But here, the Nevada Supreme Court found no *Brady* violation; therefore, Sherman has not demonstrated that he was similarly situated to the petitioner in *Bennett*. In *Haberstroh*, the Nevada Supreme Court simply observed that the petitioner presented new mitigation evidence related to a claim of ineffective assistance counsel in the penalty phase. *Haberstroh*, 69 P.3d at 683 n. 22. The court remanded for resentencing because it could not say the jury's consideration of an invalid aggravating factor was harmless. *Id*. at 683–84. Contrary to Sherman's claim, the court in *Haberstroh* did not expressly mandate that the reviewing state court consider new evidence in postconviction proceedings. *Id*.

Sherman also argues that the State elicited improper victim-impact evidence during the penalty phase about the victim from the 1981 Idaho murder. The State elicited testimony that the victim's family and community were "incensed" after the murder and that the victim was a "nice man." Sherman acknowledges that evidence about the victim and the impact of a defendant's actions on the family of the victim

of a crime for which a defendant is on trial may be admissible during the penalty phase. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). He argues that the victim impact evidence related to the victim of a prior murder falls outside of the scope of *Payne*. Sherman does not, however, present any clearly established law prohibiting victim-impact testimony from a previous crime under the Eighth Amendment. As such, Sherman is not entitled to relief under AEDPA. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004).

Lastly, we consider Sherman's claim that the State improperly relied on his juvenile conviction in Idaho to support the prior-murder aggravating circumstance. He cites *Roper v. Simmons*, 543 U.S. 551 (2005), to support the assertion that using his juvenile conviction to expose him to death eligibility is unconstitutional. *Roper* held that the Eighth Amendment prohibits imposing the death penalty on juvenile offenders under eighteen. 543 U.S. at 568. It does not establish that a prior juvenile conviction may not form the basis for an aggravating factor in a capital case. *See Melton v. Sec'y, Fla. Dep't Corrs.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (concluding that neither *Roper* nor any other Supreme Court precedent "suggests that a prior conviction from youth may not form the basis for an aggravating factor in a capital case.") Because there is no clearly established law on this issue, under AEDPA, Sherman cannot be entitled to relief. *See Brewer*, 378 F.3d at 955. We

deny Sherman's request for a COA on this claim because its merit is not debatable. *See Lambright*, 220 F.3d at 1025.

Uncertified Claim #7 – Cumulative Error

Sherman lastly argues that the cumulative impact of errors at trial, on appeal, and in postconviction proceedings violated his constitutional rights and had a substantial and injurious effect on the jury's verdict. In denying Sherman's motion for reconsideration, the district court correctly noted that the cumulative-error claim was not exhausted because he failed to fairly present it to the Nevada courts as a separate claim. *See Wooten v. Kirkland*, 540 F.3d 1019, 1025–26 (9th Cir. 2008). A claim of cumulative error must be exhausted in state court. *Id.* Sherman does not acknowledge the district court's procedural ruling or dispute that he failed to properly present a claim of cumulative error to the state court. Additionally, he has not presented any argument to excuse the procedural bar to federal habeas review of this claim. Accordingly, we deny his request to expand the COA to include this claim because "jurists of reason" would not "find it debatable whether the district court was correct in his procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

II.

Motion for Judicial Notice

We grant Sherman's motion to take judicial notice of a copy of his trial transcript. Dkt. No. 68. The transcript was admitted as an exhibit at trial, both parties refer to it in their appellate briefs, and the State does not dispute that the document is an accurate copy of the admitted exhibit. *See Harris v. Cnty. of Orange*, 682 F.3d 1126, 1131–32 (9th Cir. 2012) ("We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts." (citations omitted)).

III.

Based on the foregoing, we deny Sherman's request to expand the COA to include the seven uncertified issues. We also grant the motion for judicial notice.

AFFIRMED.