No. _____

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

PIERRE DONTE JOSHLIN, Petitioner,

v.

DWIGHT NEVEN, WARDEN; NEVADA ATTORNEY GENERAL, Respondents.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioner Pierre Donte Joshlin asks for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the District Court and in the United States Court of Appeals. Counsel for Joshlin was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Dated this 26th Day of November 2018.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ ***Jason F. Carr***

_____

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QUESTIONS PRESENTED

Whether the Ninth Circuit properly applied the federal habeas harmless error analysis in light of this Court's recent decision in *Davis v. Ayala*, 135 S.Ct. 2187 (2015)?

LIST OF PARTIES

There are no parties to the proceeding other than those listed in the caption.

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On August 26, 2016, a United States District Court for the District of Nevada filed a written order dismissing Petitioner Joshlin's 28 U.S.C. § 2254 petition for writ of habeas corpus. (*See* Appendix (App.) C, 30-38; *see also* App. E (underlying Nevada criminal judgment).) On August 28, 2018, The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum denying Joshlin's appeal of that decision. (*See* App. A, 1-3.)

It is the unpublished Ninth Circuit decision that is at issue in this Petition. (*See* App. A.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished memorandum and order denying Joshlin' federal post-conviction appeal on August 28, 2018. (*See* App. A, 1-3.) Joshlin mails and electronically files this petition within ninety days of the entry of that order. *See* Sup. Ct. R. 13(1). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This petition implicates Title 28 U.S.C. § 2254, which states in pertinent part:

> The Supreme Court . . . shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The standards and requirements for acquiring relief from a state court conviction in federal court is set forth in 28 U.S.C. § 2254(d):

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

STATEMENT OF THE CASE

A. Trial and Sentencing

Las Vegas Metropolitan Police Department ("Metro") officers arrested Pierre Donte Joshlin and co-defendant Jemar Matthews ("Matthews") on September 30, 2006.

Pursuant to the Justice Court's finding that sufficient evidence existed to proceed with the charges, on December 7, 2006, the Clark County District Attorney ("DA") filed charging documents alleging the following crimes as to Joshlin and Matthews:

Count 1: Conspiracy to Commit Murder.

Count 2: Murder with Use of Deadly Weapon.

Count 3: Attempt Murder with Use of a Deadly Weapon.

Count 4: Attempt Murder with Use of a Deadly Weapon.

Count 5: Attempt Murder with Use of a Deadly Weapon.

Count 6: Possession of Short Barreled Rifle: As to co-defendant Matthews only.

Count 7: Conspiracy to Commit Robbery.

Count 8: Robbery with Use of a Deadly Weapon.

Count 9: Robbery with Use of a Deadly Weapon.

Count 10: Assault with Deadly Weapon: As to co-defendant Matthews only.

Count 11: Assault with Deadly Weapon: As to co-defendant Matthews only.

(*See* Exhibit (Ex.) 12 (Amended Information).)[1]

Trial commenced on May 7, 2007, and concluded on May 11, 2007. (*See* Exs. 32, 35, 36, 41 (transcripts of jury trial); *see also* EX 92 (prosecutor's rebuttal argument).) Neither Joshlin nor Matthews testified at trial. The jury found Joshlin guilty of Counts 1, 2, 3, 4, 5, 7, 8 and 9. (*See* Ex. 39 (Verdict-Joshlin).) The jury found Matthews found guilty of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. (*See* Ex. 40 (Verdict-Matthews).)

The court sentenced both defendants that same day. The court filed written judgments of conviction on July 17, 2007. (*See* Ex. 52; App. E (written judgment of conviction).)

B. Direct Appeal on Judgment of Conviction

Joshlin filed a timely notice of appeal. (*See* Ex. 53.) The Nevada Supreme Court docketed the appeal as Case No. 49947.

The Nevada Supreme Court filed its Order of Affirmance denying Joshlin's appeal on March 11, 2010. (*See* App. D, 39-42.) That opinion contains the ruling

C. State Post-Conviction Proceedings

Following the Nevada Supreme Court's denial of Joshlin's direct appeal, Joshlin began state post-conviction proceedings. Joshlin filed his proper person Petition for Writ of Habeas Corpus (Post-Conviction) on August 30, 2008. (*See* Ex. 62.)

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[1] Exhibits refer to state court documents and filings filed in the federal district court and referenced on appeal.

The state district court conducted a hearing on May 20, 2011. (*See* Ex. 79 (transcript of evidentiary hearing).) Counsel argued and the court took the matter under submission. On June 21, 2011, the court issued its Findings of Fact, Conclusions of Law and Order. (*See* Ex. 80.) The court filed its Notice of Entry of Decision and Order on July 21, 2011. (*See* Ex. 82.)

Schwarz filed a notice of appeal from the district court's adverse rulings on July 26, 2011. (*See* Ex. 81.) Joshlin filed an opening brief with the Nevada Supreme Court in Case No. 58881. The DA responded.

The Nevada Supreme Court filed its Order of Affirmance on February 13, 2013. (*See* Ex. 87.)

State post-conviction proceedings are only tangentially related to this petition.

D. Federal Post-Conviction Proceedings

Joshlin began federal habeas proceedings. The District of Nevada the petition filed his pro se petition on June 7, 2013. (*See* federal district court clerk's record (CR) in 2:13-cv-01014-JAD-NJK, entry 1.)

A representative from the Federal Public Defender's Office entered a notice of appearance on December 26, 2013. (*See* CR 9.) On March 11, 2014, Joshlin filed the state court exhibits referred to in this pleading. (*See* CR 12-20; *see also* CR 12 (Index of Exhibits).)

On August 31, 2015, the State filed an answer to Joshlin's Second Amended Petition. (*See* CR 45; ER 1441–66.) Joshlin responded with reply and legal memorandum in support of his claims. (*See* CR 50.)

On August 25, 2016, the lower court denied Joshlin's petition on the merits. (*See* App. C, 30-38.)

E. The Ninth Circuit's Unpublished Opinion

The Ninth Circuit denied relief. Since all courts, including the Nevada Supreme Court, had found the prosecutor had committed misconduct during closing, the only issue was whether that error warranted reversal. The Ninth Circuit found that the Nevada Supreme Court did not err in its application of the habeas harmless error standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). (*See* App. A, 2.)

The Ninth Circuit recognized the Nevada Supreme Court erred by placing the burden on Joshlin to prove the error was harmful. (*See id.*; *see also* App. D, 3 ("we conclude that Joshlin failed to demonstrate prejudice sufficient to warrant reversal of his conviction").)

A different federal judge granted Joshlin's co-defendant, Matthews, relief based on the same prosecutorial misconduct. *See Matthews v. Neven*, 250 F.Supp.3d 751, 764-66 (D. Nev. 2017) (reproduced in Appendix B). The Ninth Circuit, agreeing with the *Matthews* opinion, found that the evidence against Joshlin was stronger. (*See* App. A, 2.) Although misconduct equally impacted both parties, Joshlin is not entitled to habeas relief because the error was harmless due to the weight of the evidence against Joshlin. (*See id.*)

F. Facts in Support of Ground One

The sole issue in this petition concerns application of the federal habeas harmless error standard. In order to appreciate that the prosecutor's misconduct did have an impact on the jury's verdict, it is necessary to briefly run through the facts of Joshlin's claim and trial.

In Ground One of the Second Amended Petition Joshlin pleads that the prosecutor's comments in her final rebuttal closing remarks, which invited the jury to look at the defendants to determine "how innocent do they look to you," argued that the defendant's professional trial attire was affirmative evidence of guilt and denigrated defense counsel for cross-examining a witness. This misconduct violated Petitioner Joshlin's Fifth Amendment right to due process and a fair trial as well as his Sixth Amendment right to a trial by jury. (*See* CR 41.)

The first instance of prosecutorial misconduct began in the State's rebuttal closing argument. There the prosecutor tainted the jury's deliberations with the following racially-tinged statement:

> At the beginning of the trial all you hear about is how they're presumed innocent, believe they're innocent—innocent, innocent, innocent—you haven't heard anything, you don't know anything, they're innocent. Now you know everything. How innocent do they look to you? Take a look over there. How innocent do they look?

(Ex. 92.)

Defense counsel for Matthews, Mr. Figler, objected. The trial court responded with: "Its argument." (*Id.*) Figler rejoined: "Telling them to look at them to see if they look innocent or not? I think that's improper." (*Id.*) The court states the objection is noted for the record. The State then continues: "There's nothing improper about it. Take a look at them. Stare at them." (*Id.*)

Both Joshlin and his codefendant are black. Earlier in the trial, a group of youths dressed in oversized white T-shirts and baggy shorts attended the proceedings. They were involved in a disturbance in the halls outside the courtroom. (*See* App. B, 12 (referencing co-defendant Matthew's Nevada Supreme Court Order).)

This event further exacerbates the patent racial overtures of the prosecutor's argument. It was an attempt to tap into the fears of an all-white jury and to play on minority stereotypes. The comments also denigrates lower socioeconomic classes.

The Nevada Supreme Court had little difficult finding this conduct was misconduct in both Joshlin's and Mattthews' direct appeals. *See also United States v. Schuler*, 813 F.2d 978, 980-81 (9th Cir. 1987) (reaffirming that a defendant's race, wealth, or appearance cannot be argued as evidence of guilt).

Later in the rebuttal the State continued with:

> And so what if Officer Walter and Officer Cupp and every other witness who testified wanted to come in here and make a good impression for you? So what? Does this mean they're lying? Look at these two defendants. What, you think they walk around on the Streets wearing those white shirts and ties? Come on.

The defense objects. The district court states only that the objection is "[n]oted for the record."

The prosecutor also attacked the defendants' challenge to evidence concerning gunshot residue found on a red glove recovered from the scene:

> [Prosecutor]: And then finally, they talk to you about the gunshot residue and how terrible she [the witness who testified about the gunshot residue found on the red glove] was because she's just a lab assistant. How rude and insulting is that? I'm glad she is not here to hear that. As if they haven't disparaged enough people, the police, me and [the other prosecutor], now let's go after her, she's just a lab assistant. Let me put it to you this way. If we have the wrong guys and it's not them, why do they care so much about gunshot residue being found on the gloves?
>
> [Defense Counsel]: And I'll object to that, Your Honor, as the caring about the quality of evidence. It's not appropriate.

> [The Court]: Noted for the record. It's argument.
>
> [Prosecutor]: Why are they arguing to you about how her tests were no good and she's just a lab assistant and she doesn't know what she's doing? Because you know what the implication is when they sit up here and say she's just a lab assistant and she told you about molecules and how they fall off and this and that—why are they telling you that? If we have the wrong guys, why do they care if there's gunshot residue on those gloves or not? Think about that.

The trial court did not sustain any of the defense's objections or issue curative instructions.

Joshlin submits he should have received a new trial based on this misconduct.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE NINTH CIRCUIT'S DECISION AND DECIDE WHETHER THE NEVADA SUPREME COURT FAILED TO PROPERLY APPLY THE *CHAPMAN* HARMLESS-BEYOND-A-REASONABLE-DOUBT STANDARD TO PROSECUTORIAL MISCONDUCT THAT INVITED A JURY TO CONVICT JOSHLIN BECAUSE HE IS POOR AND BLACK.

"It is a less evil that some criminals should escape than that the government should play an ignoble role."

Oliver Wendall Holmes, dissenting in *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

The government played an ignoble role in the instant matter. The prosecutor's closing argument, in particular the rebuttal, contains instances of prosecutorial misconduct.

Appellant/Petitioner Pierre Joshlin submits that the Nevada Supreme Court decision denying his direct appeal is contrary to, and an unreasonable application of, clearly established federal law; specifically, this Court's admonition that a trial burdened with constitutional error must be reversed unless the prosecution proves

the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

There is no question that the prosecutorial misconduct at issue constitutes constitutional error. Every court to examine it, from the Nevada Supreme Court to federal district courts, have agreed the prosecutor's statements cannot be countenanced. In fact, a federal district court in the Nevada granted Joshlin's codefendant a writ of habeas corpus based on the prosecutor's rebuttal argument. *See Matthews v. Neven*, 250 F.Supp.3d 751 (D. Nev. 2017).

The argument at issue in Joshlin's case is the exact same. The only difference between Joshlin and Matthew's case is that the evidence against Matthews is stronger; contrary to the Ninth Circuit's finding,. Officer Walter claimed, albeit he was effectively impeached, to have seen Matthew's in the stolen get-away car with a weapon that was the same caliber as the firearm that killed Mercy Williams.

The misconduct at issue exceeds the usual scope of improper comment as it invited the jury to convict Joshlin because of his race, appearance, and income level. The sole purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence. It is not proper to attempt to convince a jury to convict defendants based on racial stereotypes and cultural differences. It is also well-settled that a prosecutor may not seek to obtain a conviction by going beyond the evidence before the jury. *See, e.g., United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984). It is also clear that the defendant's status, appearance, and behavior off the witness stand is not evidence subject to comment. *See United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973).

Both Joshlin and his codefendant are black while the jury was all Caucasian. The racial overtures of the prosecutor's arguments are apparent. It is an attempt to tap into the fears of an all-white jury and to play on minority stereotypes. The comments also denigrates lower socioeconomic classes.

The prosecutor also impugned the defense function by stating that if Joshlin and Matthews were innocent, their defense attorneys would not fight for them or cross-examine witnesses. *Cf. United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999) (finding misconduct there the prosecution denigrated the defense as a "sham"). The prosecutor's arguments implicate several facets of prosecutorial misconduct and potential grounds for legal and constitutional error, including whether such remarks: 1) introduce character evidence solely to prove guilt; 2) violate a defendant's Fifth Amendment right not to be convicted except on the basis of evidence adduced at trial; and 3) violate a defendant's Fifth Amendment rights by indirectly commenting on a defendant's failure to testify at trial.

Unless and until the accused puts his character at issue by giving evidence of his good character or by taking the stand and raising an issue as to his credibility, the prosecutor is forbidden to introduce evidence of the bad character of the accused simply to prove that he is a bad man likely to engage in criminal conduct. Such arguments are precluded under the Fifth Amendment to the United States Constitution, as well as both federal and Nevada rules of evidence. This basic principle cannot be circumvented by allowing the prosecutor to comment on the character of the accused as evidenced by his courtroom appearance. The race of a defendant, his limited wealth, or even his simple appearance is not evidence of guilt. *See United States v. Schuler*, 813 F.2d 978, 980–81 (9th Cir. 1987).

The prosecutor's reference to the courtroom appearance of Joshlin was improper. It impugned Joshlin's Fifth and Sixth Amendment rights. Joshlin had a Fifth Amendment right not to testify and he elected to exercise that right. Joshlin had a Fifth Amendment right not to be convicted except on the basis of evidence adduced against him. Joshlin also has a Sixth Amendment right to a trial by jury. In tandem, Joshlin enjoyed the constitutional right to a jury trial where the jury is required to find him guilty beyond a reasonable doubt based solely on the evidence

the State presented at trial. The fact of his presence and his nontestimonial behavior, such as what Joshlin may wear outside the courtroom, could not be considered by the jury as evidence of his guilt.

Further, the comment was a race-based appeal to convict which is contrary to clearly established federal constitutional law. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (noting that "the Constitution prohibits racially biased prosecutorial arguments");

When, as here, the prosecutor stresses the courtroom appearance of a defendant who has not testified, and then goes on to tell the jury that it may consider that behavior as evidence of guilt, the prosecutor commits misconduct.

The Nevada Supreme Court did in fact find the prosecutor committed prosecutorial misconduct. (*See* App D, 39-40.) That court committed structural legal error in its analysis, however, in concluding that "Joshlin failed to demonstrate prejudice sufficient to warrant reversal of his convictions." (*Id.*) To the contrary, it was not Joshlin's burden to prove prejudice. *Under Chapman v. California*, 386 U.S. 18, 24 (1967), the District Attorney owned the burden of proving that this error of constitutional dimension was "harmless beyond a reasonable doubt." The DA failed to meet its burden.

A. The Ninth Circuit's Opinion Fails to Properly Apply *Davis v. Ayala*, 135 S.Ct. 2187 (2015).

Joshlin argues that the misconduct at issue was so pervasive, and pernicious given its racist hue, that it constituted a violation of his Fifth Amendment rights to due process and a fair trial. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The question then becomes whether the Nevada Supreme Court unreasonably applied *Chapman* in finding that the prosecutorial misconduct did not warrant a new trial. In other words,

was that court objectively unreasonable in finding the prejudice incurred by the violation was harmless beyond a reasonable doubt.

Davis v. Ayala, 135 S.Ct. 2187 (2015), explores how to apply § 2254(d)(1) standard in the prejudice context. The decision assumed, for the sake of argument, that the State of California violated Mr. Ayala's federal constitutional rights. But that does not necessarily mean that he is entitled to habeas relief. *See Ayala*, 135 S.Ct. at 2197. In the absence of "the rare type of error" that requires automatic reversal, *i.e.,* structural error, relief is appropriate only if the prosecution cannot demonstrate harmlessness. *See Glebe v. Frost*, 135 S.Ct. 429, 430-31 (2014) (per curiam).

This Court clarified the standards of review to apply once constitutional error is established. The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one beyond a reasonable doubt standard prescribed in *Chapman*.

In a collateral proceeding the test is different. For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Agnail v. McAninch*, 513 U.S. 432, 436 (1995) (quotation citations omitted).

There must be more than a "reasonable possibility" that the error was harmful. *See Brecht*, 507 U.S. at 637. The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman*, 525 U.S. 141,

146 (1998) (per curiam). A state court's harmlessness determination has significance under *Brecht* and is therefore entitled to deference. *See Davis v. Ayala*, 135 S.Ct. at 2198.

Fry v. Pliler, 551 U.S. 112, 120 (2007), held that the *Brecht* standard "subsumes" the requirement that § 2254(d) imposes when a federal habeas petitioner contests a state court determination that a constitutional error was harmless under *Chapman*. The Supreme Court found fault with that analysis, at least in part. "The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out." *Davis v. Ayala*, 135 S.Ct. at 2198. While a federal habeas court need not "formal[ly]" apply both *Brecht* and "AEDPA/*Chapman*," AEDPA nevertheless "sets forth a precondition to the grant of habeas relief." *Id.* (citing and quoting *Fry*, 551 U.S. at 119-120).

Section 2254(d) demands an inquiry into whether a prisoner's "claim" has been "adjudicated on the merits" in state court; if it has, "AEDPA's highly deferential standards kick in." *See id.* (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

When a *Chapman* harmless error decision is reviewed under AEDPA, "a federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable." *Fry*, 551 U.S. at 119 (emphasis in original). A state-court decision is reasonable even if "fair-minded jurists could disagree on [its] correctness." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Joshlin must therefore show that the Nevada Supreme Court's decision to reject his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 103.

"In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Davis v. Ayala*, 135 S.Ct. at 2199.

Under the *Chapman*/AEDPA, standard set forth in *Ayala*, a state court's prior harmless error determination stands unless it involved such an "unreasonable" application of Supreme Court precedent that "no fair-minded jurist" could agree with it. *See id.* at 2199 (2015). Here, however, application of the *Chapman*/AEDPA standard is complicated by the fact the Nevada Supreme Court did not directly invoke the *Chapman* standard or supply any reasoning as to why it found the prosecutorial misconduct harmless.

The district court in Matthews' case found significance in the fact the Nevada Supreme Court applied the wrong standard. *See Matthews v. Neven*, 250 F.Supp.3d 751, 764-65 (D. Nev. 2017). "Because the Nevada Supreme Court did not apply *Chapman*, its harmless error analysis was 'contrary to . . . clearly established federal law,' and is not afforded deference under 28 U.S.C. § 2254(d)." (*Id.* at 764) If the district court is correct, then *Davis v. Ayala* doesn't apply.[2] At this stage it may be instrumental to turn the focus to the analysis provided in *Parker v. Matthews*, 132 S.Ct. 2148, 2153 (2012).

Parker v. Matthews affirms that it is clearly established that a prosecutor's "misleading . . . arguments" to the jury may rise to the level of a federal constitutional violation. *See Sechrest v. Ignacio*, 549 F.3d 789, 807 (9th Cir. 2008) (citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986*)); see also Allen v. Woodford*, 395 F.3d 979, 997 (9th Cir. 2005) (citing *Darden* for the conclusion that improper prosecutorial argument may violate federal constitutional rights). *Darden* is the "clearly

[2] Note that the district court in Joshlin's case did not confront this issue finding that Joshlin is not entitled to relief "under the more favorable de novo standard." (*See* App. C, 32-33.)

established Federal law" relating to a prosecutor's improper comments for purposes of AEDPA review.

Parker, granted habeas relief on a claim that the prosecutor committed misconduct in closing argument by suggesting that the petitioner had colluded with his lawyer and a witness to manufacture an "extreme emotional disturbance" defense. Applying the AEDPA standard of review, the Court reversed the Sixth Circuit, observing that, even if the comments directed the jury's attention to inappropriate considerations, the petitioner had not shown that the comments were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 2155 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

In *Darden* the Court upheld a closing argument "considerably more inflammatory" than the one at issue in *Parker* and that "particularly because the *Darden* standard is a very general one, leaving courts more leeway in reaching outcomes in case-by-case determinations," the Sixth Circuit's grant of habeas relief was unwarranted. *See Parker*, 132 S.Ct. at 2155 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

As is typical in federal habeas litigation, complexities abound. Neither *Davis v. Ayala* nor *Parker v. Matthews* provide a clear answer as to how to resolve Joshlin's claim. *Parker* concerns whether a state court decision was unreasonable in finding that prosecutorial misconduct did not rise to the level of a constitutional violation under *Darden v. Wainwright*. The core holding of *Parker* is that it was not.

In the case at bar, although clearly raised as a due process violation, the Nevada Supreme Court did not clarify whether misconduct rose to the level of constitutional violation. (*See* App. D, at 40.) Nor does the Nevada Supreme Court designate whether it was applying the *Chapman* standard.

A recent Ninth Circuit en banc opinion provides some clarity. *See Deck v. Jenkins*, 814 F.3d 954 (9th Cir. 2016) (en banc). *Deck v. Jenkins* involves an AEDPA harmless error analysis where the California Court of Appeals found the prosecutor committed misconduct by providing incorrect closing argument related to the attempt element of the charged offense of Attempt to Commit a Lewd Act on a Minor. *See id.* at 974–76. The jury sent out a note regarding the conflict between the prosecutor's argument and the applicable jury instructions. The district court declined to answer the note because the court had elected to seat a substitute juror and have the jury begin deliberations anew. *See id.* at 976. The reconstituted jury convicted Deck without again seeking clarification.

Like the instant case, the California Court of Appeals (CCA) decision found misconduct, but did not clarify whether the misconduct amounted to a constitutional violation. The CCA agreed that the prosecutor misstated the law of attempt but held that "this lone misstatement—counteracted by the trial court's correct instructions—was harmless." *Id.* at 979.

The California court determined that the CCA implicitly found that no federal constitutional violation occurred. *See id.*

This determination was objectively unreasonable. "Because the prosecutor's misstatements were not inadvertent or isolated; because the jury was never correctly instructed that, in order to convict, it had to find Deck had moved beyond preparation and would have engaged in a lewd act with Amy the night he was arrested; and because the evidence concerning the temporal aspect of Deck's intent was not overwhelming, we conclude this stringent standard has been met." *Id.* at 980. The prosecutor's misstatements were not isolated stray words. They were the focus of the prosecutor's argument and "they were a direct response to the central theory in Deck's case." *Id.*

The prosecutor's misconduct during Joshlin's trial was of a similar powerful kind. Although not focused on a defense argument, they cut right to the heart of the defense function and invited the jury to convict Joshlin because he is a poor and young black male.

Also similar to *Deck*, the trial court did not correct the prosecutor's misstatements. *See also United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005) (improper prosecutorial statements cannot be neutralized by instructions that do not address "the specific statements of the prosecutor" (quoting *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992))).

The crux of the matter is that the federal district courts need more guidance on how to apply harmless error standard in federal habeas matters. This case provides a vehicle for this Court to provide that guidance.

CONCLUSION

All courts agree that Joshlin presents a strong prosecutorial misconduct claim. The misconduct was repeated, deliberate, and fashioned to exploit an all-white jury's fear of poor, black Americans.

Joshlin remains in custody due to confusion about how to apply this Court's recent decision in Davis v. Ayala. Joshlin respectfully requests this Court grant this petition and review the Ninth Circuit's unpublished order denying Joshlin habeas relief.

DATED this 26th Day of November 2018.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,697 words, excluding the parts of the document that are exempted by Supreme Court Rule 33(g).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 26th day of November 2018.

Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 26th day of November , 2018, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

Heidi Stern
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Pierre Joshlin
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INDEX TO APPENDIX

APP. 001

FILED

AUG 28 2018

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PIERRE DONTE' JOSHLIN, Petitioner-Appellant, v. DWIGHT NEVEN, Warden; and ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 16-16669 D.C. No. 2:13-cv-01014-JAD-NJK MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Argued and Submitted August 16, 2018
San Francisco, California

Before: SCHROEDER, SILER,** and GRABER, Circuit Judges.

Petitioner-Appellant Pierre Joshlin appeals from the district court's order denying his petition for habeas relief pursuant to 28 U.S.C. § 2254. We affirm.

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

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

In light of the prosecution's improper comments, the only material dispute in this appeal is whether the Nevada Supreme Court erred in its application of the harmless error standard. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

We have independently reviewed the record in this case. Although the state court may have failed to recognize that the burden was on the state to establish a lack of prejudice resulting from constitutional error, given the weight of the evidence presented against Joshlin, there was no "'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). The jury heard testimony describing the physical and circumstantial evidence linking Joshlin to the shooting. The police presented testimony of their pursuit of Joshlin from the stolen vehicle to the dumpster in which he was found, during which they maintained nearly constant visual surveillance. Joshlin was found in that dumpster with a Glock pistol matching ten of the bullet casings at the scene of the shooting. The gloves found with Joshlin in the dumpster contained gunshot residue.

The evidence against Joshlin was substantially stronger than that against his co-defendant, Jemar Matthews. As the court in *Matthews* recognized, "[u]nlike Joshlin, who was found in a dumpster with a handgun linked to the shooting, there

was no evidence directly linking Matthews to either the shooting or the robbery."

Matthews v. Neven, 250 F. Supp. 3d 751, 765 (D. Nev. 2017).

AFFIRMED.

APP. 004

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JEMAR D. MATTHEWS,

Petitioner,

vs.

DWIGHT NEVEN, *et al.*,

Respondents.

_____/

2:14-cv-00472-GMN-PAL

ORDER

Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Jemar D. Matthews, a Nevada prisoner. The court concludes that Matthews' trial was rendered unfair by improper comments made by the prosecutor in her rebuttal closing arguments, and that the prosecutorial misconduct was not harmless. The court grants Matthews a writ of habeas corpus.

Background

Matthews was convicted on July 17, 2007, following a jury trial in Nevada's Eighth Judicial District Court, in Clark County, of conspiracy to commit murder, murder with use of a deadly weapon, three counts of attempted murder with use of a deadly weapon, possession of a sawed off rifle, conspiracy to commit robbery, two counts of robbery with use of a deadly weapon, and two counts of assault with a deadly weapon. *See* Judgment of Conviction, Exhibit H (ECF No. 20-3)

APP. 005

(The exhibits referred to in this order were filed by respondents, and are found in the record at ECF Nos. 17, 18, 19 and 20.). He was sentenced to the following prison terms, to be served concurrently:

Count 1	conspiracy to commit murder	26 to 120 months
Count 2	murder with use of a deadly weapon	two consecutive sentences of 20 years to life
Count 3	attempted murder with use of a deadly weapon	two consecutive sentences of 48 to 240 months
Count 4	attempted murder with use of a deadly weapon	two consecutive sentences of 48 to 240 months
Count 5	attempted murder with use of a deadly weapon	two consecutive sentences of 48 to 240 months
Count 6	possession of a sawed off rifle	12 to 48 months
Count 7	conspiracy to commit robbery	12 to 72 months
Count 8	robbery with use of a deadly weapon	two consecutive sentences of 40 to 180 months
Count 9	robbery with use of a deadly weapon	two consecutive sentences of 40 to 180 months
Count 10	assault with a deadly weapon	16 to 72 months
Count 11	assault with a deadly weapon	16 to 72 months

See id.

In its order affirming the judgment of conviction, the Nevada Supreme Court described the factual background of the case as follows:

> In this case, appellant Jemar Matthews and three other young men walked up to a group of people standing outside a friend's house and opened fire, killing one victim with a shot to the head and injuring another. In attempting to flee the area, the shooters robbed a vehicle at gunpoint and a police chase ensued, resulting in Matthews' capture.

Order of Affirmance, Exhibit J, p. 1 (ECF No. 20-5, p. 2). The Nevada Supreme Court affirmed the judgment of conviction on June 30, 2009. *See id*. The court then denied Matthews' petition for rehearing and his petition for en banc reconsideration. *See* Order Denying Rehearing, Exhibit L (ECF No. 20-7); Order Denying En Banc Reconsideration, Exhibit N (ECF No. 20-9).

APP. 006

On December 14, 2010, Matthews filed a post-conviction petition for writ of habeas corpus in the state district court. *See* Petition for Writ of Habeas Corpus, Exhibit O (ECF No. 20-10); Amended Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit P (ECF No. 20-11). The state district court held an evidentiary hearing (*see* Recorder's Transcript of Proceedings, Exhibit Q (ECF No. 20-12)) and then denied the petition in a written order filed on November 13, 2012. *See* Findings of Fact, Conclusions of Law and Order, Exhibit R (ECF No. 20-13). Matthews appealed and the Nevada Supreme Court affirmed on January 16, 2014. *See* Order of Affirmance, Exhibit T (ECF No. 20-15).

This court received Matthews' federal habeas petition, initiating this action, *pro se*, on March 28, 2014 (ECF No. 6). The court granted Matthews' motion for appointment of counsel, and appointed counsel to represent him. *See* Order entered August 29, 2014 (ECF No. 5); Order entered September 10, 2014 (ECF No. 9). With counsel, Matthews filed a first amended habeas petition (ECF No. 14) on January 9, 2015. Matthews' first amended petition asserts the following claims:

1. "Mr. Matthews' rights to [a] fair and impartial trial, due process, and equal protection of the law under the Fifth, Sixth and Fourteenth Amendments to the Constitution were violated in his state court prosecution because there was not sufficient evidence on which to convict him." First Amended Petition (ECF No. 14), p. 7.

2. "Mr. Matthews' rights to a fair trial, due process and equal protection of the law were abrogated in violation of [the] Fifth, Sixth and Fourteenth Amendment guarantees by the pervasive prosecutorial misconduct evidenced during trial and at rebuttal closing." *Id*. at 21. Claim 2 includes four subclaims:

    (a) the prosecutor committed misconduct by urging the jurors to stare at Matthews and scrutinize his attire;

    (b) the prosecutor committed misconduct by questioning Matthews' opposition to a key piece of evidence, gunshot residue found on a red glove;

    (c) the prosecutor committed misconduct by "painting Mr. Matthews in the light of Mr. Joshlin's actions by referring to 'they' and 'them'" during trial and closing arguments; and

    (d) the prosecutor committed misconduct by having a witness read from a SCOPE printout containing Matthews' criminal history to establish his height, and commenting that the printout contained arrest information.

APP. 007

3. "Mr. Matthews' constitutional rights under the Sixth, Fifth and Fourteenth Amendment guarantees to a fair trial, due process and equal protection under the law were violated when an unqualified expert was allowed to testify regarding gun residue on a red glove which was unconnected to any crime and which further was unconnected to Mr. Matthews as well as being unacceptable as unproven and was hypothetical not actual evidence." *Id.* at 31 (as in original).

4. "Mr. Matthews' Fifth, Sixth and Fourteenth Amendment rights to due process and equal protection were violated when the trial court allowed the prosecutor and his witness to vouch that they, in fact, had the 'right guy.'" *Id*. at 37.

5. "The district court erred when it stated it had no discretion to allow additional peremptory challenges, and violated Mr. Matthews' Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial." *Id*. at 40.

6. "Mr. Matthews' conviction and sentence are unconstitutional, in violation of his Sixth Amendment right to effective assistance of counsel, and his Fourth and Fifth and Fourteenth Amendment right to due process, fair trial and equal protection." *Id*. at 42. Specifically, trial counsel was ineffective for not moving to sever the charges against him from the charges against his codefendant. *Id*. at 42-48.

On July 13, 2015, respondents filed a motion to dismiss, arguing that Claims 2c, 3, 4 and 5 are unexhausted in state court, and that Claims 1, 3, 4 and 5 fail to state claims cognizable in this federal habeas corpus action. *See* Motion to Dismiss (ECF No. 16), pp. 8-12. The court resolved the motion to dismiss on November 13, 2015, ruling that Claims 2c, 3 and 5 are unexhausted, and declining to reach, on the motion to dismiss, the question of the cognizability of Claims 1, 3, 4 and 5. *See* Order entered November 13, 2015 (ECF No. 24). With respect to Claims 2c, 3 and 5, the court granted Matthews an opportunity to make an election, to either abandon those claims, or, alternatively, file a motion for stay, requesting a stay of this action to allow him to return to state court to exhaust them. *See id*. at 9-10. Matthews elected to abandon the unexhausted claims. *See* Notice of Abandonment (ECF No. 25); Declaration of Jemar Matthews (ECF No. 26).

Respondents filed an answer on April 13, 2016, responding to Matthews' remaining claims (ECF No. 32). Matthews filed a reply on June 16, 2016 (ECF No. 33).

Discussion

28 U.S.C. § 2254(d)

A federal court may not grant an application for a writ of habeas corpus on behalf of a person in state custody on any claim that was adjudicated on the merits in state court unless the state court decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by United States Supreme Court precedent, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding. 28 U.S.C. § 2254(d). A state-court ruling is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). A state-court ruling is "an unreasonable application" of clearly established federal law, under section 2254(d) if it correctly identifies the governing legal rule but unreasonably applies the rule to the facts of the particular case. *See Williams v. Taylor*, 529 U.S. 362, 407-08 (2000). To obtain federal habeas relief for such an "unreasonable application," the petitioner must show that the state court's application of Supreme Court precedent was "objectively unreasonable." *Id*. at 409-10; *see also Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Or, in other words, habeas relief is warranted, under the "unreasonable application" clause of section 2254(d), only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Claim 1

In Claim 1, Matthews claims that his federal constitutional rights were violated because there was insufficient evidence to convict him. *See* First Amended Petition (ECF No. 14), pp. 7-20.

Matthews asserted this claim on his direct appeal. *See* Appellant's Opening Brief, Exhibit I, pp. 7-16 (ECF No. 20-4, pp. 13-22). The Nevada Supreme Court denied the claim on its merits without discussion. *See* Order of Affirmance, Exhibit J, p. 5, footnote 3 (ECF No. 20-5, p. 6); *see*

also Harrington, 562 U.S. at 99 (when state court summarily denies a claim without discussion, federal habeas court presumes that the claim was adjudicated on its merits); *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013) (*Harrington* presumption applies when state court's decision denying relief discusses some claims, but is silent with respect to other claims). When the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court "must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must 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 United States Supreme Court]." *Harrington*, 562 U.S. at 102.

This court finds reasonable the Nevada Supreme Court's ruling that there was sufficient evidence to support Matthews' conviction; fairminded jurists could find that ruling to be consistent with Supreme Court precedent.

A federal habeas petitioner who alleges that the evidence at trial was insufficient to support his conviction states a constitutional claim that, if proven, entitles him to federal habeas relief. *See Jackson v. Virginia*, 443 U.S. 307, 321, 324 (1979). The Supreme Court has emphasized, however, that "*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam).

A court reviewing a state court conviction does not simply determine whether the evidence established guilt beyond a reasonable doubt. *See Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1993); *see also Coleman*, 132 S. Ct. at 2065. Rather, the question is "whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Payne*, 982 F.2d at 338 (quoting *Jackson*, 443 U.S. at 319) (emphasis in original). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt is habeas relief warranted. *Jackson*, 443 U.S. at 324; *Payne*, 982 F.2d at 338. In applying this standard, a jury's credibility determinations are entitled to near-total deference. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

28 U.S.C. § 2254(d) imposes a second layer of deference: the state court's decision denying a sufficiency of the evidence claim may not be overturned on federal habeas unless the decision was "objectively unreasonable." *See Williams*, 529 U.S. at 409-10; *Parker v. Matthews*, 132 S.Ct. 2148, 2152 (2012) (quoting *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (per curiam)).

The crimes for which Matthews was convicted involved: a shooting in which nearly forty shots were fired at four people, leaving one dead and another injured; an armed robbery of an automobile a few minutes later and about a block away; a car chase, during which the driver leaned out of the stolen car brandishing a sawed-off rifle; and then a foot chase, about an hour to an hour and a half after which Matthews was found by a police officer with a police dog, in the yard of a house about a block from where the foot chase ended. The circumstantial evidence -- most importantly, the proximity in time and distance of the auto theft to the shooting; the timing and location of the apprehension of Matthews with respect to the car and foot chases; the sawed-off rifle, of the same caliber that killed the murder victim, found near where the car chase ended and the foot chases began; and a red glove, with gunshot residue on it, found about a block from where Matthews was apprehended -- pointed, albeit somewhat obliquely, to Matthews as one of the perpetrators of the murder, robbery and other crimes.

Moreover, Brian Walter and Bradley Cupp, the two police officers who pursued suspects from the scene of the auto theft, identified Matthews at trial as the driver of the stolen car. *See* Testimony of Brian Walter, Transcript of Trial, May 8, 2007, Exhibit B, pp. 242-47 (ECF No. 17-3, pp. 43-48); Testimony of Bradley Cupp, Transcript of Trial, May 9, 2007, Exhibit C, pp. 55-56 (ECF No. 18-1, pp. 56-57). Also, Walter identified Matthews as the suspect he chased on foot, stating that he got "a good look at his face," and that he recognized him, as "he appeared to be somebody that [he] had made contact with before." *See* Testimony of Brian Walter, Transcript of Trial, May 8, 2007, Exhibit B, p. 246 (ECF No. 17-3, p. 47). Walter also testified that, after Matthews was arrested, he viewed Matthews and identified him as the person he had chased. *See id*. at 260-63 (ECF No. 17-3, pp. 61-64). Defense counsel extensively -- and, in this court's view, effectively --

cross-examined Walter and Cupp (*see* discussion of Claims 2a and 2b, below), and Matthews argues that their identifications of him were not credible; however, the credibility of Walter and Cupp was for the jury to determine, and the jury apparently found their testimony believable. That determination by the jury is beyond the scope of review of this federal habeas court. *See Schlup*, 513 U.S. at 330; *Bruce*, 376 F.3d at 957-58 ("Except in the most exceptional of circumstances, *Jackson* does not permit [the Court] to revisit ... credibility determinations.").

Also, the court notes that there were obvious weaknesses in the State's case against Matthews. There was no evidence directly connecting Matthews to either the shooting or the auto theft; this distinguishes the case against Matthews from the case against his codefendant, Pierre Joshlin, who was chased on foot from where the car chase ended to where he was found hiding in a garbage dumpster with a handgun that was linked to the scene of the shooting. Furthermore, there was a lapse of an hour to an hour and a half from when Walter terminated his foot chase to when Matthews was found, about a block away, hiding in a back yard. And, perhaps most notably, none of the testifying victims identified Matthews as one of the assailants, and none gave descriptions of assailants closely matching Matthews. *See* discussion of Claims 2a and 2b, below.

However, despite the weaknesses in the State's case against Matthews, and while there was no direct evidence placing Matthews at the scene of either the shooting or the auto theft, viewing the evidence in the light most favorable to the State, the Nevada Supreme Court did not rule in an objectively unreasonable manner in concluding that the jury could reasonably have found, from the circumstantial evidence and from the testimony of Walter and Cupp, that Matthews conspired to commit, and participated in the commission of, the charged crimes. The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of, *Jackson*, or any other Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence. The court will deny Matthews habeas corpus relief with respect to Claim 1.

APP. 012

Claims 2a and 2b

In Claim 2a, Matthews claims that his federal constitutional rights were violated on account of prosecutorial misconduct, because the prosecutor urged the jurors to stare at Matthews and Joshlin, his codefendant, and scrutinize their attire, and asked, rhetorically: "How innocent do they look?" *See* First Amended Petition, pp. 21-22. In Claim 2b, Matthews claims that his federal constitutional rights were violated on account of prosecutorial misconduct, because the prosecutor argued that Matthews' and his codefendant's challenge of the evidence of gunshot residue on a red glove found about a block from where Matthews was apprehended suggested that they were guilty -- the prosecutor argued, "If we have the wrong guys and it's not them, why do they care so much about gunshot residue being found on the gloves?" *See id*. at 22.

Matthews asserted these claims on his direct appeal. *See* Appellant's Opening Brief, Exhibit I, pp. 20-24 (ECF No. 20-4, pp. 26-30). The Nevada Supreme Court denied the claims, as follows:

> Comment directing the jurors to scrutinize Matthews' attire
>
> At trial, a group of youths dressed in oversized white T-shirts and baggy shorts attended the proceedings and were involved in a disturbance in the halls outside the courtroom. Then, during closing argument, in an attempt to associate Matthews with the troublemaking youths, the prosecutor directed the jurors to stare at Matthews and his co-defendants, and take note of their attire.
>
> Asking the jury to infer a defendant's guilt based solely on his or her appearance and demeanor at trial is improper. *Cf. Nau v. Sellman*, 104 Nev. 248, 251, 757 P.2d 358, 360 (1988) (stating that an expert witness' comment that the defendant "acted like a guilty guy" during the preliminary hearing was improper); *see*, *e.g.*, *United States v. Schuler*, 813 F.2d 978, 981-82 (9th Cir. 1987) (concluding that a prosecutorial comment on a defendant's nontestifying behavior impinges on this constitutional right to a fair trial and his right not to testify); *United States v. Wright*, 489 F.2d 1181, 1185-86 (D.C. Cir. 1973) (stating that the prosecutor improperly directed the jury, in its deliberations, to consider the defendant's demeanor during trial). Here, since the prosecutor clearly urged the jury to take note of Matthews' attire and thus infer his guilt by equating him with the troublemaking youths, we conclude that he comment was improper.
>
> Comment regarding Matthews' strenuous opposition to a key piece of evidence
>
> Throughout trial, Matthews strenuously opposed evidence of gunshot residue that was found on a red glove that was linked to him and the commission of the crimes. Focusing on Matthews' opposition to that evidence during its closing argument, the prosecutor commented to the jurors that, "[i]f we have the wrong guys

> and it's not them, why do they care so much about the gunshot residue being found on the gloves?"
>
> A defendant has the right to challenge the evidence against him, *see Hernandez v. State*, [124 Nev. 978, 990-91], 194 P.3d 1235, 1243 (2008), and this court has repeatedly stated that it is improper for a prosecutor to disparage legitimate defense tactics. *See*, *e.g.*, *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004).
>
> Here, the prosecutor's statement directed the jury to infer Matthews' guilt as a result of his strenuous opposition to the red glove and the gunshot residue discovered thereon. Since the prosecutor's statement disparaged Matthews' defense and denigrated his right to challenge a key piece of evidence against him, we conclude that the comment was improper.
>
> The misconduct was harmless
>
> Although the two comments mentioned above were improper, since there was significant evidence indicating that Matthews participated in the shooting, robbery, and police chase (a pursuing officer identified Matthews as the driver in possession of the rifle, the bullet that killed the victim came from the same type of rifle in Matthews' possession, the red glove found near where the police apprehended Matthews tested positive for gunshot residue, and Matthews closely matched the description of the shooting and robbery suspects), we conclude that the prosecutor's misconduct was harmless. *See Smith v. State*, 120 Nev. 944, 947-48, 102 P.3d 569, 572 (2004). Therefore, reversal on these grounds is unwarranted.

Order of Affirmance, Exhibit J, pp. 2-4 (ECF No. 20-5, pp. 3-5) (footnote omitted).

Prosecutorial misconduct warrants federal habeas relief if the prosecutor's actions "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 and internal quotation marks omitted). A defendant's constitutional right to due process of law is violated if the prosecutor's misconduct renders a trial "fundamentally unfair." *Id*. at 181-83; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Claims of prosecutorial misconduct are reviewed "on the merits, examining the entire proceedings to determine whether the prosecutor's [actions] so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (citation and internal quotation marks omitted); *see also Greer v. Miller*, 483 U.S. 756, 765 (1987); *Turner v. Calderon*, 281 F.3d 851, 868 (9th Cir. 2002). If there is constitutional error, a harmless error analysis is applied; the error

warrants relief if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (citation and internal quotation marks omitted); *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012).

The comments of the prosecutor in her rebuttal closing arguments regarding the appearance of the defendants, and the resulting objections of defense counsel, which were overruled by the trial court, were as follows:

> [PROSECUTOR]: ... And I'm not going to talk to you about the burden of proof. You know that's something we talked about at the beginning of trial. Now it's the end of the trial. At the beginning of trial all you hear about is how they're presumed innocent, believe they're innocent, innocent, innocent, innocent, you haven't heard anything, you don't know anything, they're innocent. Now you know everything.
>
> How innocent do they look to you? Take a look over there. How innocent do they look? You heard all the evidence.
>
> [DEFENSE COUNSEL]: I'm going to object, Your Honor, to that.
>
> THE COURT: It's argument.
>
> [DEFENSE COUNSEL]: Telling them look at them to see if they look innocent or not? I think that's improper.
>
> THE COURT: Noted for the record.
>
> [PROSECUTOR]: There's nothing improper about it. Take a look at them. Stare at them....
>
> * * *
>
> And if that's not enough, well, Officer Walter is lying to you because he told you that he's wearing his uniform in court because he has to and we all know that police officers don't ever wear uniforms. How crazy is that, a police officer in a uniform? That's a ridiculous statement. Now, come on.
>
> And so what if Officer Walter and Officer Cupp and every other witness who testified wanted to come in here and make a good impression for you? So what? Does that mean they're lying? Look at these two defendants. What, you think they walk around the street wearing those white shirts and ties? Come on.
>
> [DEFENSE COUNSEL]: Object, Your Honor. Now she's disparaging the defendants and how they're dressed today.
>
> THE COURT: Noted for the record.

Transcript of Trial, May 11, 2007, Exhibit E, pp. 66, 81 (ECF No. 19-3, pp. 67, 82).

"[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds ... not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). The appearance of the defendants at trial in this case was not evidence. *See United States v. Schuler*, 813 F.2d 978, 979-82 (9th Cir. 1987) (holding that prosecutor's comments about defendant's behavior during trial were improper). The prosecutor's comments about the defendants' appearance -- that they did not "look" innocent -- were, in this court's view, plainly improper. There was nothing for the jury to see from looking at the defendants other than that they were young black men. Moreover, as the Nevada Supreme Court recognized, the prosecutor might have made the comments in an attempt to associate the defendants with youths who caused a disturbance outside the courtroom during the trial. *See* Order of Affirmance, Exhibit J, p. 2 (ECF No. 20-5, p. 3) ("in an attempt to associate Matthews with the troublemaking youths"); *see also* Transcript of Trial, May 8, 2007, Exhibit B, pp. 119-20 (ECF No. 17-2, pp. 120-21) (discussion on record, out of presence of jury, regarding the disturbance). Certainly, it was unnecessary for the prosecutor to direct the jury's attention to the appearance of the defendants in order to argue that the State had met its burden of proof.

The comments of the prosecutor regarding the defendants' challenge of the evidence concerning the gunshot residue found on the red glove were also improper. Those comments were as follows:

> [PROSECUTOR]: ... And then finally, they talk to you about the gunshot residue and how terrible she [the witness who testified about the gunshot residue found on the red glove] was because she's just a lab assistant. How rude and insulting is that? I'm glad she's not here to hear that. As if they haven't disparaged enough people, the police, me and [the other prosecutor], now let's go after her, she's just a lab assistant. Let me put it to you this way. If we have the wrong guys and it's not them, why do they care so much about gunshot residue being found on the gloves?
>
> [DEFENSE COUNSEL]: And I'll object to that, Your Honor, as to the caring and the quality of the evidence. It's not appropriate.
>
> THE COURT: Noted for the record. It's argument.

> [PROSECUTOR]: Why are they arguing to you about how her tests were no good and she's just a lab assistant and she doesn't know what she's doing? Because you know what the implication is when they sit up here and they say she's just a lab assistant and she told you about molecules and how they fall off and this and that -- why are they telling you all of that? If we have the wrong guys, why do they care if there's gunshot residue on those gloves or not? Think about that.

Transcript of Trial, May 11, 2007, Exhibit E, pp. 86-87 (ECF No. 19-3, pp. 87-88).

A criminal defendant has a right to cross-examine witnesses presented by the prosecution, and the defendant's cross-examination of a prosecution witness is not evidence of consciousness of guilt. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (Confrontation Clause of Sixth Amendment secures for the criminal defendant the right to cross-examine a witness against him); *see also* Answer (ECF No. 32), pp. 23-24 (respondents appear to concede that the argument was improper).

While this court agrees with the Nevada Supreme Court that the arguments of the prosecutor that are the subjects of Claims 2a and 2b were improper, this court disagrees that those arguments were harmless. In finding the prosecutor's improper arguments to be harmless, the Nevada Supreme Court applied a state-law harmless error test that was more deferential than the standard announced in *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring State to prove beyond a reasonable doubt that the error did not contribute to the verdict). *See* Order of Affirmance, Exhibit J, p. 4 (ECF No. 20-5, p. 5), citing *Smith v. State*, 120 Nev. 944, 947-48, 102 P.3d 569, 572 (2004). Because the Nevada Supreme Court did not apply *Chapman*, its harmless error analysis was "contrary to ... clearly established federal law," and is not afforded deference under 28 U.S.C. § 2254(d).

This court finds that the prosecutor's improper arguments rendered Matthews' trial fundamentally unfair, in that they conveyed to the jury that there were reasons beyond the evidence to find him guilty, and the court finds, further, that under the circumstances in this case, taking into account the entire trial record, the violation of Matthews' constitutional right to due process of law resulted in actual prejudice to Matthews.

Even where constitutional error is found, "in § 2254 proceedings a court must [also] assess the prejudicial impact of constitutional error" under the *Brecht* standard. *Fry v. Pliler*, 551 U.S. 112,

121-22 (2007); *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011). Habeas relief is warranted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637-38, citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (internal quotation marks omitted). In *Kotteakos*, the Supreme Court explained:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 765; *See also Merolillo*, 663 F.3d at 454. Where "the matter is so evenly balanced" that the habeas court is "in virtual equipoise as to the harmlessness of the error," and is "in grave doubt about the likely effect of an error on the jury's verdict," the court must conclude that the error was not harmless. *O'Neal v. McAninch*, 513 U.S. 432, 435, 437-38 (1995) (quoting *Kotteakos*, 328 U.S. at 765).

The offending comments of the prosecutor in this case misstated the evidence, in that the prosecutor urged the jury to consider, as indicative of guilt, the defendants' appearance and their challenge of the testimony of a prosecution expert witness, neither of which was evidence. The trial court overruled the objections to the offending comments, and did not give curative instructions. Indeed, with respect to the prosecutor's comments regarding the defendants' appearance, the prosecutor was apparently emboldened after the court overruled the objections, and reiterated: "There's nothing improper about it. Take a look at them. Stare at them...." Transcript of Trial, May 11, 2007, Exhibit E, p. 66 (ECF No. 19-3, p. 67). Furthermore, because the prosecutor made the offending comments in her rebuttal closing argument, the defense had no opportunity to respond. The prosecution's improper arguments were some of the last arguments the jury heard before deliberating.

The evidence against Matthews -- while sufficient to support his convictions, if viewed in the light most favorable to the State (*see* discussion of Claim 1, above) -- had obvious weaknesses and

was far from overwhelming. Unlike Joshlin, who was found in a dumpster with a handgun linked to the shooting, there was no evidence directly linking Matthews to either the shooting or the robbery. About an hour to an hour and a half after the foot chase ended, Matthews was found hiding in a backyard about a block from where the chase ended, and some four or five blocks from where the shooting and robbery occurred. The defense suggested, and it remains a possibility, that Matthews had reason to fear apprehension by police other than -- and less egregious than -- having participated in the shooting and robbery.

Matthews, at five feet eleven inches tall, with a corn row hair style, and wearing blue denim shorts and a long-sleeve shirt, did not closely match the descriptions of the assailants given by the victims who testified at trial. *See* Testimony of Myniece Cook, Transcript of Trial, May 8, 2007, Exhibit B, pp. 138, 147-49 (all black clothing); Testimony of Michel'le Tolefree, Transcript of Trial, May 8, 2007, Exhibit B, pp. 157-58, 161-62 (ECF No. 17-2, pp. 158-59, 162-63) (black clothing, afro hair style), pp. 165 (all black clothing), pp. 165-66 (ECF No. 17-2, pp. 166-67) (assailant five feet six inches to five feet seven inches), p. 168 (ECF No. 17-2, p. 169) (all black clothing), pp. 164-65, 170-73 (ECF No. 17-2, pp. 165-66, 171-74) (assailant wearing blue shorts identified as Joshlin); Testimony of Geishe Orduno, Transcript of Trial, May 8, 2007, Exhibit B, pp. 180-81 (ECF No. 17-2, pp. 181-82) (dark clothing); p. 184 (ECF No. 17-2, p. 185) (dark clothing), pp. 184, 189 (ECF No. 17-2, pp. 185, 190) (white shirt); p. 189 (ECF No. 17-2, p. 190) (pants, not shorts); pp. 190, 196 (ECF No. 17-2, pp. 191, 197) (assailant no taller than five feet five inches); p. 193 (ECF No. 17-2, p. 194) (other than white shirt, all dark clothing, and long pants); Testimony of Melvin Bolden, Transcript of Trial, May 8, 2007, Exhibit B, pp. 202, 205 (ECF No. 17-3, pp. 3, 6) (black T-shirts, blue jeans), pp. 206-07 (ECF No. 17-3, pp. 7-8) (short-sleeve black T-shirts), pp. 209, 214 (ECF No. 17-3, pp. 10, 15) (pants), pp. 209-11, 218 (ECF No. 17-3, pp. 10-12, 19) (assailant no taller than five feet seven inches), pp. 213-17 (ECF No. 17-3, pp. 14-18) (pants). In order to convict Matthews despite the many descriptions that did not match his appearance, the jury had to infer that the descriptions were of assailants other than Matthews, and that none of the victims saw Matthews or

recalled his appearance -- an inference generous to the prosecution. This court has grave doubt about whether the prosecutor's improper arguments, suggesting that Matthews' appearance and his challenge of prosecution evidence alone were reason to believe him guilty, had a substantial influence in leading the jury view the evidence in such a manner.

Officers Walter and Cupp identified Matthews as the driver of the stolen car, and Walter identified Matthews as the suspect he chased on foot. *See* Testimony of Brian Walter, Transcript of Trial, May 8, 2007, Exhibit B, pp. 242-47 (ECF No. 17-3, pp. 43-48); Testimony of Bradley Cupp, Transcript of Trial, May 9, 2007, Exhibit C, pp. 55-56 (ECF No. 18-1, pp. 56-57). However, Walter and Cupp were subjected to extensive, and rather effective, cross-examination. *See*, *e.g.*, Testimony of Brian Walter, Transcript of Trial, May 8, 2007, Exhibit B, pp. 269-71 (ECF No. 17-3, pp. 70-72) (Walter got only a glimpse of driver of stolen car), pp. 279-81 (ECF No. 17-3, pp. 80-82) (Walter's foot chase lasted only ten to twenty seconds); p. 282 (ECF No. 17-3, p. 83) (Walter did not say, in statement given to detective, that he got a good look at suspect); pp. 282-87 (ECF No. 17-3, pp. 83-88) (Walter did not say, in statement given to detective, or in prior testimony, that he recognized suspect from prior contact); pp. 287-88, 301 (ECF No. 17-3, pp. 88-89, 102) (during foot chase, Walter gave description of suspect over radio, and described suspect as wearing black clothing, and as five feet eight or nine inches tall, and did not mention corn row hair style or denim shorts); pp. 298-302 (ECF No. 17-3, pp. 99-100) (Walter first described suspect as having corn row hair style, and as wearing denim shorts, only after seeing Matthews subsequent to his arrest); Testimony of Bradley Cupp, Transcript of Trial, May 9, 2007, Exhibit C, p. 85 (ECF No. 18-1, p. 86) (Cupp's identification of Matthews based on instantaneous look). Here too, with respect to the testimony of Walter and Cupp, this court has grave doubt about whether the prosecutor's arguments suggesting improper reasons beyond the evidence to believe Matthews guilty, had substantial influence upon the jury's decision.

This court concludes that the improper comments of the prosecutor -- urging the jury to look at the defendants and asking whether they looked innocent, and arguing that the defense cross-

examination of a prosecution expert witness suggested the defendants' were guilty -- rendered Matthews' trial fundamentally unfair, violated his federal constitutional right to due process of law, and had a substantial and injurious influence in determining the jury's verdict. The court, therefore, will grant Matthews habeas corpus relief on Claims 2a and 2b of his amended petition for writ of habeas corpus.

Claim 2d

In Claim 2d, Matthews claims that his federal constitutional rights were violated on account of prosecutorial misconduct, because a prosecution witness read from a "SCOPE" report, which contained Matthews' criminal history, to establish his height, and commented that the report contained arrest information. *See* First Amended Petition, pp. 23-24.

The exchange that is the subject of this claim, which occurred during the testimony of Officer Walter, was as follows:

> Q. Now, there's been some talk about the height of the driver that you were chasing. Are you familiar with what's called SCOPE?
>
> A. Yes.
>
> Q. Okay. And is SCOPE something that people in the community get, for instance, when they go down and get a sheriff's card and work cards?
>
> A. Sheriff cards, work cards or arrested, for that matter.
>
> Q. Okay. And does that actually, generally, contain identifiers of that particular individual like height and weight and ethnicity?
>
> A. Yes, sir, it does.
>
> Q. Okay.
>
> [PROSECUTOR]: Okay. And I'm not going to have this marked for various reasons. We can highlight it out if you want to mark it separately.
>
> THE COURT: I don't know where you're going.
>
> [DEFENSE COUNSEL]: Judge, can I approach?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: Thank you.

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(Off-record bench conference)

BY [PROSECUTOR]:

Q. Do you happen to know what the height of Mr. Matthews was [at the] time? Do you know?

A. No.

Q. Okay. If you looked at a document and it said it was five-nine, would that be correct?

A. If that's what it had in the document, yes, sir.

Q. Generally --

[DEFENSE COUNSEL]: I do object. I don't understand that question. If you look at a document, it would tell whose height? I don't even understand the question he just asked.

[PROSECUTOR]: That is about the same type of question as if I told you he was five-eleven, would that sound about right.

[DEFENSE COUNSEL]: I don't know if that's a response to my objection.

[PROSECUTOR]: I'll withdraw.

THE COURT:` Okay. The [question's] withdrawn.

[DEFENSE COUNSEL]: I move to strike it, Your Honor.

THE COURT: The question is struck. The answer is struck.

Transcript of Trial, May 8, 2007, Exhibit B, pp. 318-20 (ECF No. 17-3, pp. 119-21).

Matthews moved for a mistrial based on this testimony, *see* Transcript of Trial, May 8, 2007, Exhibit B, pp. 357-61 (ECF No. 17-3, pp. 158-62), and the trial court ruled as follows:

THE COURT: In my research on this issue I've determined that the burden is a manifest necessity that the mistrial be granted based upon the facts.

I find that [the prosecutor] did, in fact, pull the SCOPE sheet and did refer to it, but referred to it in content-neutral terms which should be supported by the record that many people can have [SCOPE's] including individuals who have work cards.

Based upon the minimum impact of that information and the understanding that the defense does not wish to have a curative or cautionary instruction, I'm inclined t deny the motion for mistrial at this time.

Transcript of Trial, May 9, 2007, Exhibit C, pp. 2-3 (ECF No. 18-1, pp. 3-4).

Matthews asserted this claim on his direct appeal, *see* Appellant's Opening Brief, Exhibit I, pp. 17-20 (ECF No. 20-4, pp. 23-26), and the Nevada Supreme Court denied the claim without discussion. *See* Order of Affirmance, Exhibit J, p. 2, footnote 1 (ECF No. 20-5, p. 3).

The court finds this claim to be without merit. The reference to the SCOPE report was without mention of any previous arrest of Matthews. It was only a brief uninvited aside by the witness that raised the possibility that the document related to an arrest. And, even if the jury might have understood the SCOPE report to result from an arrest, there was no indication that it resulted from an arrest in a previous case, as opposed to Matthews' arrest in this case. The prosecutor's use of the SCOPE report did not render Matthews' trial unfair. *See Darden*, 477 U.S. at 181.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence. The court will deny Matthews habeas corpus relief with respect to Claim 2d.

Claim 4

In Claim 4, Matthews claims that his federal constitutional rights were violated when "the trial court allowed the prosecutor and his witness to vouch that they, in fact, had the 'right guy.'" *See* First Amended Petition, pp. 37-39.

Matthews asserted this claim on his direct appeal, *see* Appellant's Opening Brief, Exhibit I, pp. 28-29 (ECF No. 20-4, pp. 34-35), and the Nevada Supreme Court denied the claim without discussion. *See* Order of Affirmance, Exhibit J, p. 5, footnote 3 (ECF No. 20-5, p. 6) .

The testimony that is the subject of this claim was that of Officer Walter, regarding his identification of Matthews, after his arrest, as the suspect he had chased. The subject testimony was as follows:

> Q. Okay. Towards the end of your statement with homicide detectives, do you remember them asking you whether you -- how sure you were of the person that you saw or that they brought you to take a look at was the individual you were chasing?

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* * *

A. Yes.

BY [PROSECUTOR]:

Q. Okay. And what did you tell the homicide detectives?

A. 100 percent sure.

Q. Okay. Despite not telling the homicide detectives --

* * *

BY [PROSECUTOR]:

Q. I'm sorry. Through all that, I missed what your answer was.

A. Yeah, 100 percent.

Q. Okay.

A. Yes.

Q. So after all of this you feel pretty confident that the person you observed that evening in custody sometime later was the individual you had been chasing and came out of the Town Car of the driver's side?

A. Yes, 100 percent sure.

Q. All right. Did you have the right guy?

A. Yes.

Transcript of Trial, May 8, 2007, Exhibit B, pp. 322-24 (ECF No. 17-3, pp.123-25).

As the court understands Matthews' claim, it is that this testimony was either improper vouching or improper opinion evidence regarding his guilt. *See* First Amended Petition, pp. 37-39; *see also* Appellant's Opening Brief, Exhibit I, pp. 28-29 (ECF No. 20-4, pp. 34-35) (Matthews' claim as presented to the Nevada Supreme Court on his direct appeal). It was neither. Testimony by a witness regarding his or her certainty regarding an identification is proper. In fact, a witness's certainty regarding an identification is a factor to be considered in determining the admissibility of the identification testimony. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). This is so with respect to both an initial identification and a subsequent in-court identification. *See*, *e.g.*, *Neil v.*

Biggers, 409 U.S. 188, 193-201 (1972); *see also Manson*, 432 U .S. at 110 n. 10 ("[I]f the challenged identification is reliable, then testimony as to it and any identification in its wake is admissible."). Matthews' claim that such testimony was improper vouching or improper opinion testimony is meritless.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence. The court will deny Matthews habeas corpus relief with respect to Claim 4.

Claim 6

In Claim 6, Matthews claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because counsel did not move to sever his trial from the trial of his codefendant, Pierre Joshlin. *See* First Amended Petition, pp. 42-48.

Matthews asserted this claim in his state habeas petition. *See* Petition for Writ of Habeas Corpus, Exhibit O, pp. 5-9 (ECF No. 20-10, pp. 6-10); Amended Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit P, pp. 7-12 (ECF No. 20-11, pp. 8-13). The state district court held an evidentiary hearing in the state habeas action, *see* Recorder's Transcript, October 12, 2012, Exhibit Q (ECF No. 20-12), and then denied the claim, ruling as follows:

> Defendant did not establish that severance of his trial from his co-defendant was warranted.
>
> Defendant failed to establish that the evidence at trial was significantly greater against one defendant than another.
>
> Even to the extent evidence of guilt was greater against one defendant than another, Defendant's trial counsel ... testified that there existed no legal basis for severance of Defendant's trial.
>
> Any motion for severance would have been futile.
>
> Defendant received effective assistance of trial counsel.
>
> * * *

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> Since Defendant failed to illustrate any specific right that a joint trial would have compromised or any circumstances that would have prevented the jury from making a reliable judgment about guilt or innocence, there was no ground upon which a severance could have been granted. Moreover, since the post-conviction writ was the basis for severance, and this Court found that it would not have granted a motion for severance had it been brought before trial, any motion seeking severance would have been futile and cannot provide Defendant relief.

Findings of Fact, Conclusions of Law and Order, Exhibit R, pp. 3-6 (ECF No. 20-13, pp. 4-7).

Matthews appealed, and the Nevada Supreme Court ruled as follows:

> On appeal from the denial of his December 14, 2010, petition, appellant argues that the district court erred in denying his claim that trial counsel was ineffective for failing to file a motion to sever the proceedings. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). A petitioner must also demonstrate resulting prejudice by showing that the motion was meritorious, *cf. Kirksey v. State*, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996), and that there was a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88; *Lyons*, 100 Nev. at 432-33. Both deficiency and prejudice must be shown. *Strickland*, 466 U.S. at 697.
>
> Appellant argues that counsel was ineffective for failing to file a motion to sever his case from that of his codefendant because the State's case against the codefendant was significantly stronger than that against appellant. Appellant has failed to demonstrate deficiency or prejudice. This court has held that "a defendant is not entitled to a severance merely because the evidence admissible against a co-defendant is more damaging than that admissible against the moving party." *Lisle v. State*, 113 Nev. 679, 690, 941 P.2d 459, 466 (1997), *limited on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). Accordingly, a motion based solely on the disparity of evidence would have lacked merit, and appellant offers no other basis for counsel to have filed the motion. Where, as here, the motion would have been futile, counsel was not ineffective in failing to file it. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Moreover, this court held on direct appeal not only that sufficient evidence supported appellant's conviction but also that "significant evidence" did. *Matthews v. State*, Docket No. 50052 (Order of Affirmance, June 30, 2009). We therefore conclude that the district court did not err in denying the petition....

Order of Affirmance, Exhibit T, pp. 1-2 (ECF No. 20-15, pp. 2-3).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of counsel must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

Where a state court has adjudicated a claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable under 28 U.S.C. § 2254(d) is especially difficult. *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court instructed:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994-95 (9th Cir. 2010) (acknowledging double deference required for state court adjudications of *Strickland* claims).

In analyzing a claim of ineffective assistance of counsel under *Strickland*, a court may first consider either the question of deficient performance or the question of prejudice; if the petitioner fails to satisfy one prong, the court need not consider the other. *See Strickland*, 466 U.S. at 697.

Matthews claims that his trial counsel was remiss for failing to move, either before or during trial, to sever his trial from Joshlin's trial. Matthews argues that the evidence against Joshlin was stronger than the evidence against him, and also that Joshlin's counsel was ineffective, and on those

bases, a motion to sever would have been granted. *See* First Amended Petition, pp. 42-48; Reply, pp. 23-28.

The Nevada Supreme Court ruled that, under Nevada law, severance was not warranted, and that, therefore, Matthews' trial counsel was not ineffective for failing to move for severance, and Matthews was not prejudiced by any such failure. *See* Order of Affirmance, Exhibit T, pp. 1-2 (ECF No. 20-15, pp. 2-3). These rulings by the Nevada Supreme Court, based on Nevada law, are authoritative, and beyond the scope of this court's federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Bains v. Cambra*, 204 F.3d 964, 971 (9th Cir. 2000) ("[A] federal court is bound by the state court's interpretations of state law."). Federal habeas courts are only concerned with errors of state law if they rise to the level of federal constitutional violations. *See Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir. 1989). Matthews has not made any showing that his federal constitutional rights were violated by the failure to sever his trial from Joshlin's trial. Therefore, the ruling by the Nevada Supreme Court that there was no basis for a motion to sever is unassailable, and leads to the conclusions that Matthews' trial counsel was not ineffective, and that Matthews was not prejudiced by counsel's failure to move for severance.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of *Strickland*, or any other Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence. The court will deny Matthews habeas corpus relief with respect to Claim 6.

Certificate of Appealability

Respondents do not need a certificate of appealability to appeal from this order, insofar as it grants Matthews relief on Claims 2a and 2b. However, if respondents appeal the ruling on Claims 2a and 2b, Matthews would need a certificate of appealability to cross-appeal with regard to any of Claims 1, 2d, 4 and 6, as to which this court denies relief. *See Rios v. Garcia*, 390 F.3d 1082, 1087-88 (9th Cir. 2004).

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

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

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Miller-El, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

The court has considered Matthews' Claims 1, 2d, 4 and 6, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and the court determines that a certificate of appealability is unwarranted. The court will deny Matthews a certificate of appealability.

IT IS THEREFORE ORDERED that petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 14) is **GRANTED** with respect to Claims 2a and 2b. The respondents shall, within 180 days from the date of this order, release petitioner from custody on the convictions that are the subject of his Amended Petition for Writ of Habeas Corpus in this action, unless, within 60 days from the date of this order, the respondents file in this case a written notice of the State's election to retry petitioner, and initiate proceedings toward the new trial within 180 days from the date of this order.

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IT IS FURTHER ORDERED that petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 14) is **DENIED** in all other respects.

IT IS FURTHER ORDERED that petitioner is denied a certificate of appealability with respect to Claims 1, 2d, 4 and 6 of his Amended Petition for Writ of Habeas Corpus (ECF No. 14).

IT IS FURTHER ORDERED that the Clerk of the Court shall **ENTER JUDGMENT ACCORDINGLY.**

Dated this 31 day of March, 2017

UNITED STATES DISTRICT ~~JUDG~~E

APP. 030

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Pierre Donte Joshlin,

Petitioner

v.

Dwight Neven, et al.,

Respondents

2:13-cv-01014-JAD-NJK

Order Denying Petition for Writ of Habeas Corpus and Closing Case

[ECF No. 41]

Nevada state prisoner Pierre Donte Joshlin, who is represented by the Federal Public Defender's Office, brings this § 2254 petition to challenge his state court conviction for first-degree murder with use of a deadly weapon and related charges. Having reviewed respondents' answer, I find that Joshlin's claims fail on their merits, so I deny his petition and decline to issue a certificate of appealability.

Background[1]

A. Joshlin's trial

On May 11, 2007, a jury in Nevada's Eighth Judicial District Court found Joshlin guilty of conspiracy to commit murder, first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon (three counts), conspiracy to commit robbery, and robbery with use of a deadly weapon (two counts). The trial court sentenced Joshlin to various consecutive and concurrent terms ranging from 26 months to life imprisonment.

Evidence presented at trial established the following: On the night of September 30, 2006, Joshlin, his co-defendant Jemar Matthews, and two other men ambushed four people visiting outside a house and opened fire, killing one woman and injuring another. According to expert testimony, at least 40 shots were fired by the assailants, who then fled on foot until they stumbled across four

[1] Except where otherwise indicated, this procedural and factual background is derived from the exhibits provided by Joshlin at ECF Nos. 12–20 and this court's own docket.

people in a parked Lincoln Continental just a block away. One of the assailants put a gun to the driver's head and demanded that he get out of the car.

Two police officers happened upon the hijacking. Three of the assailants got into the car, sped away, and ran a stop sign; the officers gave chase. The car stopped when the driver, co-defendant Matthews, fell out of the car and fled. Officer Walter pursued Matthews and Officer Cupp pursued Joshlin. Officer Cupp noticed that Joshlin was wearing black gloves and had a Glock pistol in his hand. When Joshlin appeared to be pointing the pistol at him, Officer Cupp fired three shots at Joshlin and took cover behind a vehicle. Officer Cupp then lost sight of Joshlin.

At approximately the same time, a third officer, Officer Rios, saw Joshlin run toward an apartment complex and pry open and squeeze through the gates. Officer Rios lost sight of Joshlin as he waited for the gates to open so he could drive into the complex. Upon entering the complex, Officer Rios and another officer, Officer Calarco, found Joshlin hiding in a dumpster. When Joshlin raised his hands to surrender, Officer Calarco noticed a Glock pistol underneath Joshlin's left hand. Officer Cupp arrived as Officers Rios and Calarco were pulling Joshlin out of the dumpster. Offier Cupp recognized Joshlin as the same person he chased from the Lincoln Continental but noticed that Joshlin was no longer wearing black gloves. Black gloves and a Glock pistol were recovered from the dumpster.

A firearms expert testified that the bullet that killed one of the female victims came from the sawed-off .22 rifle that, based on testimony of eye-witnesses, was used by Matthews. This expert further testified that ten spent shell casings found at the shooting scene matched the Glock pistol found in the dumpster with Joshlin. Another expert later testified that one of the gloves found with Joshlin in the dumpster contained particles of gunshot residue.

B. Procedural history

Joshlin's judgment of conviction was entered on July 17, 2007. Joshlin appealed, and the Nevada Supreme Court affirmed on March 11, 2010. While his direct appeal was pending before the Nevada Supreme Court, Joshlin had filed a proper person state habeas petition in the state district court. The state district court appointed counsel, who filed a memorandum in support of Joshlin's petition. The state district court denied Joshlin's petition; Joshlin appealed, and the Nevada Supreme

Court affirmed.

On May 24, 2013, Joshlin dispatched his first federal habeas petition. I appointed the Federal Public Defender's office to represent Joshlin, who filed an amended petition in May 2014. Respondents moved to dismiss ground 3(c) of the petition as unexhausted. Joshlin then filed a second-amended petition omitting ground 3(c). Joshlin's remaining claims have been fully briefed, and I now decide them on their merits.

Discussion

A. Standard for habeas relief under 28 U.S.C. § 2254(d)

A federal court may not grant an application for a writ of habeas corpus on behalf of a person in state custody on any claim that was adjudicated on the merits in state court unless the state-court decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding.[2] In making this determination, federal courts look to the last reasoned state-court decision.[3] "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."[4] To the extent no reasoned opinion exists, courts must independently review the record to determine whether the state court clearly erred in its application of controlling federal law or whether the state court's decision was objectively unreasonable.[5] Because de novo review is more favorable to the petitioner, federal courts can deny § 2254 petitions by conducting de novo review rather than applying the more deferential AEDPA standard.[6]

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[2] 28 U.S.C. § 2254(d).

[3] *Smith v. Hedgpeth*, 706 F.3d 1099, 1102 (9th Cir. 2013), *cert. denied* 133 S.Ct. 1831 (2013).

[4] *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

[5] *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000); *see also Harrington v. Richter*, 562 U.S. 86, 98 (2011) (holding that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

[6] *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

APP. 033

1. Ground one—improper argument

In ground one, Joshlin claims that the prosecutor made improper comments in her rebuttal closing argument when she stated:[7]

> At the beginning of the trial all you hear about is how they're presumed innocent, believe they're innocent—innocent, innocent, innocent—you haven't heard anything, you don't know anything, they're innocent. Now you know everything. How innocent do they look to you? Take a look over there. How innocent do they look?[8]
>
> . . .
>
> And so what if Officer Walter and Officer Cupp and every other witness who testified wanted to come in here and make a good impression for you? So what? Does that mean they're lying? Look at these two defendants. What, you think they walk around on the street wearing those white shirts and ties? Come on.

Co-defendant Mathews's counsel objected to each of these comments. The trial court overruled the objections,[9] and the prosecutor again told the jury to "[t]ake a look at [the defendants]. Stare at them."[10]

"Improper argument does not, per se, violate a defendant's constitutional rights."[11] Habeas relief is available on grounds of improper argument only when the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."[12] The Nevada Supreme Court rejected this claim on direct appeal, finding that, although the prosecutor's comments inviting the jury to stare at the defendants and consider whether they looked innocent was

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[7] Ground one also includes an allegation that the prosecutor improperly referred to Joshlin's SCOPE (an online system used by law enforcement to access an individual's personal information, including criminal history). Joshlin concedes, however, that the SCOPE reference at issue actually pertained to his co-defendant Matthews. ECF No. 50 at 5.

[8] ECF No. 23-1 at 66.

[9] *Id.*

[10] *Id.*

[11] *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993) (citations omitted).

[12] *Darden v. Wainwright*, 477 U.S. 168, 171 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

improper, Joshlin failed to demonstrate prejudice sufficient to warrant reversal of his conviction.[13]

Though it was inappropriate for the prosecutor to suggest that the defendants' guilt could be determined by their appearances, her comments were, in essence, an argument that the presumption of innocence had been overcome by the evidence presented at trial. The judge instructed the jury that its verdict should be based on the evidence presented at trial and that counsel's arguments were not evidence.[14] And there was overwhelming evidence of Joshlin's guilt presented at trial. Additionally, the comments about the defendants' clothes were an "invited response" to defense counsels' suggestion during closing argument that the testifying police officers wore their uniforms to boost their credibility[15] and thus did not unfairly prejudice Joshlin.[16]

I do not find that, given the weight of the evidence against Johnson, the challenged comments so infected his trial with unfairness that it amounts to a denial of due process. I therefore find that, even under the more favorable de novo standard, Joshlin is not entitled to habeas relief on ground one.

2. Ground two—insufficient evidence

Joshlin next argues that there was insufficient evidence at trial to support his convictions for murder and attempted murder. He claims that the state failed to present sufficient proof that he was at the scene of the shooting at all: none of the victims identified him as one of the shooters, he has consistently denied being at the murder scene or knowing any of the victims, and there was no evidence of intent to kill.

In reviewing sufficiency-of-evidence claims, federal courts ask only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

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[13] ECF No. 19 at 3–4.

[14] ECF No. 17-2 at 39.

[15] ECF No. 17-6 at 68–69 and ECF No. 23-1 at 31.

[16] *See Darden*, 477 U.S. at 182 (noting that "the idea of an 'invited response' is not to excuse improper comments, but to determine their effect on the trial as a whole").

essential elements of the crime beyond a reasonable doubt."[17] Where the state court applies this standard, federal habeas courts ask only whether the state court's application was "objectively unreasonable."[18]

The Nevada Supreme Court correctly applied this standard on direct appeal, noting that Joshlin was charged with premeditated murder as a direct actor, coconspirator, and aider and abettor.[19] The Court's decision is also not based on an unreasonable application of the facts in light of the evidence presented. Nevada law follows general conspiracy principles and does not distinguish between "an aider or abettor to a crime and an actual perpetrator of a crime; both are equally culpable."[20] A jury therefore could have found Joshlin guilty beyond a reasonable doubt even though the testimony at trial established that Matthews fired the fatal gun shot. There was also evidence that Joshlin was directly involved in the shooting and had specific intent to kill. Ten bullet casings found at the scene of the shooting matched the Glock pistol recovered from the dumpster, and one of the arresting officers identified Joshlin as the individual who fled from the carjacked Lincoln carrying a Glock pistol. The Nevada Supreme Court's ruling was not objectively unreasonable, and viewed in the light most favorable to the prosecution, a rational juror could have found Joshlin guilty of murder and attempted murder beyond a reasonable doubt based on this evidence.

B. Ineffective assistance of counsel under 28 U.S.C. § 2254(d)

In *Strickland v. Washington*, the United States Supreme Court established a two-prong test for ineffective-assistance-of-counsel claims.[21] A petitioner must show (1) that the defense attorney's representation "fell below an objective standard of reasonableness" and (2) that the attorney's deficient performance prejudiced the defendant so severely that "there is a reasonable probability

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[17] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[18] *See Boyer v. Belleque*, 659 F.3d 957, 954–65 (9th Cir. 2001).

[19] ECF No. 19 at 2–3.

[20] *Sharma v. State*, 56 P.3d 868, 870 (Nev. 2002).

[21] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[22] If a state court has adjudicated a claim of ineffective assistance of counsel, federal habeas courts ask only "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."[23] Joshlin has not met his burden for any of his remaining claims.

1. Ground 3(a)—Ineffective Assistance of Counsel for failing to challenge identification

Joshlin contends that his trial counsel was constitutionally ineffective for failing to present a defense that Joshlin was not the person Officer Cupp chased and for conceding that Joshlin was in fact the person that Officer Cupp chased.[24] The Nevada Supreme Court rejected this claim on direct appeal. The Court found that Joshlin failed to show that his counsel was ineffective for conceding that Joshlin was the man officer Cupp chased. The Court explained that Joshlin's counsel argued that Joshlin was not one of the people who got out of the hijacked Lincoln but instead just happened to be in the area, and he argued that Officer Cupp mistakenly began chasing him thinking that he was one of the hijackers.[25] The Court also concluded that Joshlin failed to show prejudice, reasoning that "there was an almost continuous line of sight of [Joshlin] from the vehicle crash to being found in the dumpster" and thus Joshlin failed to demonstrate that "a defense that he was not the person Officer Cupp chased" would have had a reasonable probability of producing a different result at trial.[26]

There is a reasonable argument that Joshlin's counsel satisfied *Strickland*'s deferential standard. The testimony of Officers Cupp and Rios established that there was a very small gap

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[22] *Id.* at 694.

[23] *Harrington*, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994–95 (9th Cir. 2010) (acknowledging double deference required for state court adjudications of *Strickland* claims).

[24] ECF No. 15-3 at 85–88.

[25] ECF No. 20-3 at 3–4.

[26] *Id.*

between when Officer Cupp lost sight of his suspect and when Officer Rios located him.[27] Officer Cupp testified that he arrived at the dumpster no more than two minutes after losing sight of Joshlin and was immediately able to identify him as the person who he had been chasing.[28] Joshlin's counsel was not constitutionally ineffective for making the strategic choice not to present a defense that Joshlin was not the person Officer Cupp had been chasing and to instead argue that, although he was the person being chased, he was not connected with the hijacking or shooting. Ground 3(a) is denied.

2. Ground 3(b)—Ineffective Assistance of Counsel for failing to request a jury instruction on constructive possession

In ground 3(b), Joshlin argues that his counsel should have requested a jury instruction on constructive possession and argued that there was not a sufficient connection between Joshlin and the firearm for him to be in possession of it. The Nevada Supreme Court rejected this claim on direct appeal, finding that Joshlin failed to show prejudice. The Court reasoned that, "[g]iven the fact that [Joshlin] was continuously chased from the vehicle to the dumpster, he was viewed with the gun by one of the officers, and the gun was found under his left hand in the dumpster," Joshlin had not shown a reasonable probability of a different outcome had trial counsel focused more on a constructive theory of possession.[29] The Nevada Supreme Court's application of *Strickland* was not objectively unreasonable and there is a reasonable argument that Joshlin's counsel satisfied *Strickland*. Joshlin is therefore not entitled to federal habeas relief on ground 3(b).

C. I decline to issue a certificate of appealability.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of a denial of a constitutional right"[30] by showing that "reasonable jurists would find the district court's

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[27] ECF No. 16-2 at 36–52; ECF No. 16-3 at 126–34.

[28] ECF No. 16-2 at 41–43.

[29] ECF No. 20-3 at 5.

[30] 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

assessment of the constitutional claim debatable or wrong."[31] To meet this threshold, the petitioner must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues differently, or that the questions are adequate to deserve encouragement to proceed further.[32] Because no reasonable jurist would find my conclusion that Joshlin's grounds for relief fail on their merits debatable or wrong, I decline to issue Joshlin a certificate of appealability.

Conclusion

Accordingly, IT IS HEREBY ORDERED that Joshlin's second-amended petition for writ of habeas corpus **[ECF No. 41] is DENIED, and I decline to issue a certificate of appealability.**

The Clerk of Court is directed to enter judgment for respondents and against Joshlin and CLOSE THIS CASE.

Dated this 25th day of August, 2016

Jennifer A. Dorsey
United States District Judge

[31] *Slack*, 529 U.S. at 484.

[32] *Id.*

IN THE SUPREME COURT OF THE STATE OF NEVADA

PIERRE JOSHLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49947

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, first-degree murder with the use of a deadly weapon, three counts of attempted murder with the use of a deadly weapon, conspiracy to commit robbery, and two counts of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge. Appellant Pierre Joshlin raises five claims.

First, Joshlin challenges the sufficiency of the evidence to support his convictions. The evidence shows Joshlin, his codefendant, Jemar Matthews, and two other young men walked up to four people visiting outside a house and opened fire, killing one woman and injuring another. Moments later, Joshlin, Matthews, and their cohorts happened upon two couples about to exit a parked car. The men ordered the occupants out of the car at gunpoint and drove away at a high rate of speed. A police chase ensued. When the carjacked vehicle came to a stop, the four men fled on foot. In the dumpster where Joshlin was eventually apprehended, police officers found a pair of black gloves, which contained gunshot residue, and a Glock pistol, which matched bullet casings

recovered from the murder scene.[1] Although none of the victims identified Joshlin, a police officer identified him as the individual who fled from the carjacked vehicle carrying a Glock pistol. Considering the evidence in the light most favorable to the prosecution, we conclude that a rational jury could find appellant guilty of the charged offenses beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Second, Joshlin argues that the district court erred by admitting evidence of gunshot residue tests because the evidence was irrelevant, the material tested was improperly preserved, he was given inadequate notice of the evidence, and expert testimony on the matter was inadmissible. However, Joshlin stipulated to the admission of this evidence, including expert testimony. Accordingly, we conclude that Joshlin cannot complain that admission of this evidence was error. See Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

Third, Joshlin contends that the prosecutor committed misconduct by referring to Matthews' SCOPE criminal history during his examination of a police officer and inviting the jury during closing argument to stare at the defendants and consider whether they looked innocent. Because Joshlin did not object to the challenged testimony or argument, we review this claim for plain error. See Baltazar-Monterrosa

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[1]Although the Glock pistol was not the murder weapon, Joshlin was charged with premeditated murder as a direct actor, coconspirator and aider and abetter.

v. State, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). As to the SCOPE reference, Joshlin fails to demonstrate how a reference to Matthews' SCOPE criminal history affected his substantial rights. As to the prosecutor's argument, although the argument was improper, cf. Nau v. Sellman, 104 Nev. 248, 251, 757 P.2d 358, 360 (1988) (stating that expert witness' comment that defendant "acted like a guilty guy" during preliminary hearing was improper); see U.S. v. Schuler, 813 F.2d 978, 981-82 (9th Cir. 1987) (concluding that prosecutorial comment on defendant's nontestifying behavior impinges on constitutional right to fair trial and right not to testify), we conclude that Joshlin failed to demonstrate prejudice sufficient to warrant reversal of his convictions.

Fourth, Joshlin argues that the district court abused its discretion by admitting improper opinion testimony from a police officer related to his identification of Matthews. Because Joshlin did not object to the challenged testimony, we review this claim for plain error. Baltazar-Monterrosa, 122 Nev. at 614, 137 P.3d at 1142. Joshlin fails to adequately explain how the challenged evidence affected his substantial rights. Therefore, we deny relief.

Fifth, Joshlin contends that the district court erred by refusing to grant him additional peremptory challenges. However, NRS 175.051 allows eight peremptory challenges for each side where an offense charged is punishable by life in prison or death. Because the defendants were afforded the statutory number of peremptory challenges, we conclude

that the district court did not err in this regard.[2] Cf. NRS 175.051; White v. State, 83 Nev. 292, 297, 429 P.2d 55, 58 (1967).

Having considered Joshlin's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. David B. Barker, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]In raising this claim, Joshlin relies on NRS 16.040; however, that statute speaks to peremptory challenges allowed in civil practice.

JOC

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

PIERRE JOSHLIN
#2589610

Defendant.

CASE NO. C228460

DEPT. NO. XVIII

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of NRS 199.480, 200.010, 200.030; COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; COUNTS 3, 4, 5, – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT 7 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380; COUNTS 8 & 9 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 200.380, 193.165, and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of NRS

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199.480, 200.010, 200.030; COUNT 2 – FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; COUNT 3 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT 4 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT 5 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT 7 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380; COUNTS 8 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 200.380, 193.165, COUNTS 9 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 200.380, 193.165, thereafter, on the 9TH day of July, 2007, the Defendant was present in court for sentencing with his counsel, PHILLIP SINGER, ESQ., and good cause appearing, COUNTS 6, 10 & 11 - CO-DEFENDANT.

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the $25.00 Administrative Assessment Fee, $418.85 Restitution, and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-SIX (26) MONTHS; AS TO COUNT 2 - TO LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS for the Use of a Deadly Weapon; AS TO COUNT 3 - TO A MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM Parole Eligibility of FORTY-

EIGHT (48) MONTHS, plus an EQUAL and CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for the Use of a Deadly Weapon; AS TO COUNT 4 - TO A MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, plus an EQUAL and CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for the Use of a Deadly Weapon; AS TO COUNT 5 - TO A MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, plus an EQUAL and CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for the Use of a Deadly Weapon; AS TO COUNT 7 – TO A MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS; AS TO COUNT 8 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of FORTY (40) MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS MAXIMUM and FORTY (40) MONTHS MINIMUM for the Use of a Deadly Weapon; AS TO COUNT 9 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of FORTY (40) MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS MAXIMUM and FORTY (40) MONTHS MINIMUM for the Use of a Deadly Weapon, ALL COUNTS TO RUN CONCURRENT; with THREE HUNDRED (300) DAYS credit for time served.

DATED this 13th day of July, 2007

DAVID BARKER
DISTRICT JUDGE

CC