

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEC 21 2018

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

GILBERT DEMETRIUS AGUILAR, AKA
Gilbert Demetrtus Aguilar,

Petitioner-Appellant,

v.

TIMOTHY FILSON and ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 18-16990

D.C. No. 3:12-cv-00397-MMD-WGC
District of Nevada,
Reno

ORDER

Before: TALLMAN and FRIEDLAND, Circuit Judges.

Appellant Gilbert Aguilar is represented by appointed counsel Mary Lou Wilson, Esq. The district court entered judgment denying habeas relief on July 10, 2018. Attorney Wilson did not file a timely notice of appeal for Aguilar. Aguilar filed pro se a notice of appeal on October 10, 2018.

Attorney Wilson and Aguilar have separately responded to this court's October 17, 2018, jurisdictional order to show cause. Wilson's response contends erroneously that a notice of appeal is unnecessary in habeas proceedings. *Cf. Fed. R. App. P. 4(a)(1); Washington v. Ryan*, 833 F.3d 1087, 1089-90 (9th Cir. 2016) (en banc) (timely filing of a notice of appeal is a jurisdictional requirement in proceedings under 28 U.S.C. § 2254), *cert. denied*, 137 S. Ct. 1581 (2017).

"Appendix A."

Moreover, Wilson did not comply with this court's deadlines for filing a request for certificate of appealability. *See* 9th Cir. R. 22-1(d). Aguilar's pro se response expresses frustration at Wilson's failure to file a notice of appeal.

Aguilar's pro se notice of appeal was not filed within 30 days from entry of the district court's judgment and he did not file a motion to extend time for appeal in the district court within the jurisdictional time limit. *See* 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(5)(A). Accordingly, the request for a certificate of appealability is denied because the notice of appeal was not timely filed. *See* 28 U.S.C. §§ 2107, 2253(c)(2).

Wilson's motion to extend time to file a request for certificate of appealability on Aguilar's behalf (Docket Entry No. 3) is denied as moot because this court lacks jurisdiction to entertain it.

The court admonishes Wilson for her failure to notice a timely appeal. Wilson's performance falls below the level expected of counsel appointed to represent defendants and petitioners under the Criminal Justice Act. We refer this matter to the CJA panel administrator for the District of Nevada for appropriate action, including whether attorney Wilson should remain on the CJA panel and whether replacement counsel should be appointed to assist Aguilar with any post-judgment motions.

The Clerk is directed to serve a copy of this order on attorney Wilson and on
appellant Gilbert Aguilar, #56067, at 1250 E. Arica Road, Eloy, Arizona 85131.

Any pending motions are denied as moot.

DENIED.

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 18-16990

Docketed: 10/15/2018

Nature of Suit: 3530 Habeas Corpus

Termed: 12/21/2018

Gilbert Aguilar v. Timothy Filson, et al

Appeal From: U.S. District Court for Nevada, Reno

Fee Status: Due

Case Type Information:

- 1) prisoner
- 2) state
- 3) 2254 habeas corpus

Originating Court Information:

District: 0978-3 : 3:12-cv-00397-MMD-WGC

Trial Judge: Miranda M. Du, District
Judge

Date Filed: 07/27/2012

Date Order/Judgment:	Date Order/Judgment	Date NOA Filed:	Date Rec'd COA:
EOD:	07/10/2018	10/12/2018	10/12/2018

Prior Cases:

None

Current Cases:

None

GILBERT DEMETRIUS AGUILAR,
AKA Gilbert Demetrus Aguilar
(State Prisoner: 56067)

Petitioner - Appellant,

Mary Lou Wilson, Esquire, Counsel
Direct: 775-771-8620

[COR LD NTC CJA Appointment]

Law Office of Mary Lou Wilson

2064 Regent Street

Reno, NV 89509

Gilbert Demetrius Aguilar
Terminated: 11/07/2018
[NTC Pro Se]
SAGUARO CORRECTIONAL
CENTER
1252 E. Arica Road
Eloy, AZ 85131

v.

TIMOTHY FILSON, substituted for
Renee Baker on 3/3/2017
Respondent - Appellee,

Heidi Parry Stern
[COR LD NTC Dep State Aty Gen]
AGNV - OFFICE OF THE NEVADA
ATTORNEY GENERAL (LAS
VEGAS)
555 East Washington Avenue
Las Vegas, NV 89101

ATTORNEY GENERAL FOR THE
STATE OF NEVADA
Respondent - Appellee,

Heidi Parry Stern
[COR LD NTC Dep State Aty Gen]
(see above)

GILBERT DEMETRIUS AGUILAR, AKA Gilbert Demetrtus Aguilar,

Petitioner - Appellant,

v.

TIMOTHY FILSON, substituted for Renee Baker on 3/3/2017; ATTORNEY
GENERAL FOR THE STATE OF NEVADA,

Respondents - Appellees.

10/15/2018 1 Open 9th Circuit docket: needs certificate of appealability.
Date COA denied in DC: 07/10/2018. Record on appeal
included: Yes. [11046803] (JMR) [Entered: 10/15/2018]

11:44 AM]

10/17/2018 2 Filed clerk order (Deputy Clerk: KMB): A review of the record suggests that this court may lack jurisdiction over the request for certificate of appealability because the notice of appeal was not filed within 30 days after the district court's judgment entered on July 10, 2018. See 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), (c). Within 21 days after the filing date of this order, appellant shall move for voluntary dismissal of the request for certificate of appealability or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of appellant's memorandum. If appellant does not comply with this order, the Clerk shall dismiss this request for certificate of appealability pursuant to Ninth Circuit Rule 42-1. The Clerk shall serve a copy of this order on both appellant personally and his counsel of record. [11050543] (AF) [Entered: 10/17/2018 02:13 PM]

11/04/2018 3 Filed (ECF) Appellant Gilbert Demetrius Aguilar Motion to extend time to file COA request until 12/21/2018. Included response to order to show cause dated 10/17/2018. Date of service: 11/04/2018. [11071047] [18-16990]--[COURT UPDATE: Edited docket text to reflect content of filing. 11/05/2018 by RY] (Wilson, Mary Lou) [Entered: 11/04/2018 09:48 AM]

11/06/2018 4 Filed Appellant Gilbert Demetrius Aguilar response to order to show cause dated 10/17/2018. Deficiency: party has counsel. Served on 10/31/2018. (Sent appellant copy of response per request) [11081595] (QDL) [Entered: 11/08/2018 10:50 AM]

12/06/2018 5 Criminal Justice Act electronic voucher created. (Counsel: Ms. Mary Lou Wilson, Esquire for Gilbert Demetrius Aguilar) [11113136] (TG) [Entered: 12/06/2018 04:16 PM]

12/21/2018 6 Filed order (RICHARD C. TALLMAN and MICHELLE T. FRIEDLAND) Appellant Gilbert Aguilar is represented by

appointed counsel Mary Lou Wilson, Esq. The district court entered judgment denying habeas relief on July 10, 2018. Attorney Wilson did not file a timely notice of appeal for Aguilar. Aguilar filed pro se a notice of appeal on October 10, 2018. Attorney Wilson and Aguilar have separately responded to this court's October 17, 2018, jurisdictional order to show cause. Wilson's response contends erroneously that a notice of appeal is unnecessary in habeas proceedings. Cf. Fed. R. App. P. 4(a)(1); Washington v. Ryan, 833 F.3d 1087, 1089-90 (9th Cir. 2016) (en banc) (timely filing of a notice of appeal is a jurisdictional requirement in proceedings under 28 U.S.C. § 2254), cert. denied, 137 S. Ct. 1581 (2017). Moreover, Wilson did not comply with this court's deadlines for filing a request for certificate of appealability. See 9th Cir. R. 22-1(d). Aguilar's pro se response expresses frustration at Wilson's failure to file a notice of appeal. Aguilar's pro se notice of appeal was not filed within 30 days from entry of the district court's judgment and he did not file a motion to extend time for appeal in the district court within the jurisdictional time limit. See 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(5)(A). Accordingly, the request for a certificate of appealability is denied because the notice of appeal was not timely filed. See 28 U.S.C. §§ 2107, 2253(c)(2). Wilson's motion to extend time to file a request for certificate of appealability on Aguilar's behalf (Docket Entry No. [3]) is denied as moot because this court lacks jurisdiction to entertain it. The court admonishes Wilson for her failure to notice a timely appeal. Wilson's performance falls below the level expected of counsel appointed to represent defendants and petitioners under the Criminal Justice Act. We refer this matter to the CJA panel administrator for the District of Nevada for appropriate action, including whether attorney Wilson should remain on the CJA panel and whether replacement counsel should be appointed to assist Aguilar with any postjudgment motions. The Clerk is directed to serve a copy of this order on attorney Wilson and on appellant Gilbert Aguilar, #56067, at 1250 E. Arica Road,

Eloy, Arizona 85131. Any pending motions are denied as moot. DENIED. [11131112] (RT) [Entered: 12/21/2018 02:35 PM]

12/21/2018 7 Sent document. Copy of court's 12/21/18 order - entry no 6. - sent to: Gilbert Aguilar, # 56067, 1250 E. Arica Road, Eloy, AZ 85131. [11131193] (RT) [Entered: 12/21/2018 02:50 PM]

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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 * * *

9 GILBERT DEMETRIUS AGUILAR, Case No. 3:12-cv-00397-MMD-WGC
10 Petitioner, ORDER
11 v.
12 TIMOTHY FILSON, *et al.*,
13 Respondents.

14
15 **I. INTRODUCTION**

16 This action is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by
17 Gilbert Demetrius Aguilar, a Nevada prisoner. The action is before the Court with respect
18 to the merits of the claims remaining in Aguilar's second amended habeas petition
19 ("Petition"). The Court will deny the Petition.

20 **II. BACKGROUND**

21 In its opinion on Aguilar's direct appeal, the Nevada Supreme Court described the
22 factual background of this case as follows:

23 On the evening of August 7, 1996, a store clerk ejected David and Gilbert
24 Aguilar from a Las Vegas 7-Eleven outlet for drinking alcohol on the
25 premises. Immediately thereafter, without apparent reason or provocation,
26 Gilbert attacked a man seated in his automobile in the store's parking lot. In
his attempt to flee, the man struck Gilbert with his automobile. Gilbert was
uninjured.

27 After retrieving rifles from their apartment, the pair returned to the 7-Eleven
28 parking lot in search of the man. Thinking that they recognized the driver of
a passing automobile, they both commenced firing, striking several cars and
houses in the process. Upon hearing the shooting, Mark Emerson, a nearby

"Appendix B"

1 resident, stepped outside onto his patio and telephoned the police.
2 Unfortunately, he was struck by the rifle fire and expired en route to a local hospital.

3 Police arrested David Aguilar that evening at the scene. Gilbert Aguilar was
4 not apprehended until nine days later. Both brothers were charged and
convicted as described. They were tried together in a single proceeding.

5 || (Order Dismissing Appeals, Exh. 5 at 2-3 (ECF No. 30-5 at 4-5).)

6 Aguilar was found guilty of conspiracy to commit murder, murder with the use of a
7 deadly weapon, possession of a firearm by an ex-felon, two counts of discharging a firearm
8 at or into a structure, and discharging a firearm at or into a vehicle. The State sought the
9 death penalty on the murder conviction. The jury, however, set Aguilar's penalty, for the
10 murder, at life imprisonment without the possibility of parole. The State sought adjudication
11 of Aguilar as a habitual criminal. The trial court ultimately sentenced Aguilar to the
12 following prison sentences, all to run consecutively: for the conspiracy to commit murder,
13 eight to twenty years; for the murder, two consecutive terms of life without the possibility
14 of parole; for possession of a firearm by an ex-felon, eight to twenty years; for each of the
15 two counts of discharging a firearm at or into a structure, eight to twenty years; and for
16 discharging a firearm at or into a vehicle, eight to twenty years. (See Judgment of
17 Conviction, Exh. 2 (ECF No. 30-2).) David was convicted of the same crimes, except for
18 being an ex-felon in possession of a firearm, but was sentenced differently.

19 Aguilar and his brother both appealed; the Nevada Supreme Court consolidated
20 their appeals, and on December 20, 1999, ruling on the merits of their claims, dismissed
21 the appeal. (See Order Dismissing Appeals, Exh. 5 (ECF No. 30-5).)

22 Aguilar filed his first state-court habeas corpus petition on September 8, 2000. (See
23 Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 7 (ECF No. 30-7).) The state
24 district court held an evidentiary hearing, and then denied the petition in a written order
25 filed on February 8, 2008. (See Findings of Fact, Conclusions of Law and Order, Exh. 14
26 (ECF No. 32).) Aguilar appealed, and the Nevada Supreme Court reversed and remanded
27 on September 5, 2008, directing the district court to appoint counsel. (See Order of
28 Reversal and Remand, Exh. 16 (ECF No. 32-2).) On remand, the state district court

1 appointed counsel for Aguilar, held a further evidentiary hearing, and again denied
2 Aguilar's petition in a written order filed on March 1, 2011. (See Findings of Fact,
3 Conclusions of Law and Order, Exh. 18 (ECF No. 32-4).) Aguilar appealed, and the
4 Nevada Supreme Court affirmed on March 9, 2012. (See Order of Affirmance, Exh. 21
5 (ECF No. 32-7).)

6 Aguilar initiated this federal habeas corpus action on July 27, 2012. (See Petition
7 for Writ of Habeas Corpus (ECF No. 8).) The Court appointed counsel for Aguilar (ECF
8 Nos. 18, 20), and, with counsel, Aguilar filed a first amended habeas petition on December
9 11, 2013 (ECF No. 30). Respondents filed a motion to dismiss the first amended petition.
10 (ECF No. 54.) On September 19, 2014, the Court granted that motion in part and denied
11 it in part; the Court found two claims to be unexhausted in state court, and granted Aguilar
12 an opportunity to make an election regarding those claims. (ECF No. 56.) Aguilar filed a
13 motion for a stay, to allow him to exhaust his unexhausted claims (ECF No. 57), as well
14 as a motion for leave of court to file a second amended petition (ECF No. 58). On May 19,
15 2015, the Court granted both motions. (ECF No. 60.) The case was then stayed, and
16 Aguilar filed his second amended petition, which is now the operative petition, on June 12,
17 2015. (ECF No. 62.)

18 Aguilar's second amended petition asserts six grounds for relief, the sixth with eight
19 sub-claims, as follows:

- 20 1. Aguilar's federal constitutional rights were violated because the trial
21 court admitted "highly prejudicial evidence of other wrongs."
- 22 2. Aguilar's federal constitutional rights were violated because the trial
23 court admitted "totally irrelevant evidence of a bayonet and machete being
24 found in defendant's apartment."
- 25 3. Aguilar's federal constitutional rights were violated as a result of
26 instructions given to the jury regarding the elements of first degree murder.
- 27 4. Aguilar's federal constitutional rights were violated because the trial
28 court refused admission of evidence offered by Aguilar regarding parole
eligibility.
- 29 5. Aguilar's federal constitutional rights were violated because the trial
30 court allowed the State to file a notice of habitual criminality after the jury's
verdicts in both phases of the trial.

1 6. Aguilar's federal constitutional rights were violated as a result of
2 ineffective assistance of his trial counsel.

3 6A. Trial counsel "was ineffective for failing to investigate and
4 present evidence that the weapon used to kill the victim belonged to
5 a police officer and that the police officer may have fired the fatal
6 shot."

7 6B. Trial counsel was ineffective for not preventing the admission
8 of evidence that Aguilar had a prior felony conviction.

9 6C. "Trial counsel was ineffective for failing to investigate and
10 present evidence that the weapon used to kill Mark Emerson
11 belonged to Officer Brian Debecker and that the officer may have
12 [fired] the fatal shot."

13 6D. "Trial counsel was ineffective for failing to effectively prevent
14 the admission of the tainted, unreliable and suggestive extra-judicial
15 and in-court photographic lineup identification"

16 6E. "Trial counsel was ineffective for failing to file a motion to
17 suppress the search of Gloria Olivares'[s] apartment."

18 6F. "Trial counsel was ineffective for failing to prevent the video
19 from the 7-11 from being admitted at trial and for failing to investigate
20 another theory of defense."

21 6G. "Trial counsel was ineffective for failing to move to suppress
22 the evidence of the palm print of David Aguilar found on the Maadi
23 semi-automatic rifle found in Gloria Olivares'[s] apartment."

24 6H. "Trial counsel was ineffective for failing to prevent Annette
25 Aguilar from testifying."

26 (Second Amended Petition (ECF No. 62), at 9-44.)

27 On July 2, 2015, Aguilar commenced a second state habeas action. (See Petition
28 for Writ of Habeas Corpus (Post-Conviction), Exh. 1 to Motion to Lift Stay (ECF No. 64-
1.) In an order filed September 14, 2015, the state district court denied Aguilar's petition,
2 finding that it was untimely and successive. (See Findings of Fact, Conclusions of Law
3 and Order, Exh. 2 to Motion to Lift Stay (ECF No. 64-2).) Aguilar appealed, and the Nevada
4 Supreme Court affirmed on April 14, 2016. (See Order of Affirmance, Exh. 5 to Motion to
5 Lift Stay (ECF No. 64-5).) The stay of this action was then lifted, on a motion by Aguilar,
6 on June 6, 2016. (See Order entered June 6, 2016 (ECF No. 65).)

7 Respondents filed a motion to dismiss Aguilar's second amended petition on
8 September 20, 2016. (ECF No. 68.) In that motion, Respondents asserted that Grounds 1

1 and 3 of the Petition are barred by the doctrine of procedural default, and should be
2 dismissed. On November 29, 2016, the Court granted the motion to dismiss in part and
3 denied it in part. (ECF No. 70.) The Court granted the motion with respect to Ground 1,
4 and dismissed that claim as procedurally defaulted; regarding Ground 3, the Court denied
5 the motion to dismiss, without prejudice to Respondents asserting the cause and prejudice
6 defense to that claim in their answer. (*Id.*)

7 Respondents filed an answer on April 27, 2017. (ECF No. 76.) Aguilar filed a reply
8 on June 7, 2017. (ECF No. 77.)

9 Aguilar's brother and codefendant, David Aguilar, also pursued a federal habeas
10 corpus action in this Court, and the Court denied relief in that case. (See Case No. 3:12-
11 cv-00315-MMD-VPC.) The Court takes judicial notice of the proceedings in that case.

12 **III. DISCUSSION**

13 **A. Standard of Review**

14 28 U.S.C. § 2254(d) sets forth the standard of review applicable in this case under
15 the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

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

19 (1) resulted in a decision that was contrary to, or involved an unreasonable
20 application of, clearly established Federal law, as determined by the
Supreme Court of the United States; or
~~or~~

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

22 28 U.S.C. § 2254(d).

23 A state court decision is contrary to clearly established Supreme Court precedent,
24 within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts
25 the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts
26 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]
27 and nevertheless arrives at a result different from [the Supreme Court's] precedent."

28 ///

1 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (first quoting *Williams v. Taylor*, 529 U.S. 362,
2 405-06 (2000); then citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

3 A state court decision is an unreasonable application of clearly established
4 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court
5 identifies the correct governing legal principle from [the Supreme Court's] decisions but
6 unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S.
7 at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires
8 the state court decision to be more than incorrect or erroneous; the state court's
9 application of clearly established law must be objectively unreasonable. *Id.* (quoting
10 *Williams*, 529 U.S. at 409).

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

21 **B. Ground 2**

22 In Ground 2 of his Petition, Aguilar claims that his federal constitutional rights were
23 violated because the trial court admitted "totally irrelevant evidence of a bayonet and
24 machete being found in defendant's apartment." (Second Amended Petition (ECF No. 62),
25 at 11-13.) The evidence at issue in this claim consisted of a machete and a bayonet found
26 in the apartment that was apparently rented by David Aguilar's girlfriend, Gloria. Those
27 items were found by the apartment manager, who turned them over to the police. (See
28 ///

1 Transcript of Trial, October 8, 1997, Exh. 29 at 2-7 (ECF No. 42 at 3-8) (testimony of
2 George Trombley); *id.* at 10-13 (ECF No. 42 at 11-14) (testimony of Howard Hall).)

3 The Nevada Supreme Court ruled on a related state-law claim, on Aguilar's direct
4 appeal, as follows:

5 On the day following the incident, the manager of the apartment complex in
6 which Gilbert and David resided found several rounds of ammunition, a
7 machete, and a bayonet in their apartment. This was accomplished at the
instance [sic] of the apartment owners. These items were all turned over to
the police.

8 At trial, the machete and bayonet were admitted into evidence over David's
9 relevancy objection. David challenges this ruling on appeal. [Footnote: Gilbert
10 does not seek review of this issue in his appeal. Again, because we
11 have consolidated these appeals, our ruling on this issue applies equally to
12 Gilbert.] The State contends that the items were relevant to show that Gilbert
may have returned to the apartment after the police's departure in order to
dispose of items other than the AK-47 that he might have been carrying on
the night of the shooting.

13 The determination of whether to admit evidence is within the sound
14 discretion of the district court, and such determinations will not be disturbed
15 unless manifestly wrong. See [*Petrocelli v. State*, 692 P.2d 503, 508 (Nev.
1985)]. NRS 48.015 defines "relevant evidence" as "evidence having any
16 tendency to make the existence of any fact that is of consequence to the
determination of the action more or less probable than it would be without
the evidence."

17 Neither the machete nor the bayonet tended to make the existence of any
18 fact of consequence regarding the charged offenses more probable than
without the evidence. As such, we conclude that the district court erred in
admitting the two items into evidence. However, we further conclude that the
error was harmless in light of the overwhelming evidence against both of
19 these appellants. See NRS 178.598 (Any error that does not affect
substantial rights shall be disregarded.); see also *Big Pond v. State*, 101
20 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (Whether error is harmless or
prejudicial depends on whether the issue of innocence or guilt is close,
quantity and character of error, and gravity of crime charged.); *Walker v.
21 State*, 113, Nev. 853, 872, 944 P.2d 762, 774 (1997).

22
23 (Order Dismissing Appeals, Exh. 5 at 3-4 (ECF No. 30-5 at 5-6).)

24 The state trial court's admission of evidence is not grounds for federal habeas
25 corpus relief unless a specific constitutional guarantee is violated, or the error is of such
26 magnitude that the result was a denial of the defendant's right to a fundamentally fair trial
27 guaranteed by due process clause of the federal constitution. See *Henry v. Kernan*, 197
28 F.3d 1021, 1031 (9th Cir. 1999). To show that improper admission of evidence violated

1 his due process rights, the federal habeas petitioner must demonstrate that the admission
2 of the challenged evidence “offends some principle of justice so rooted in the traditions
3 and conscience of our people as to be ranked as fundamental.” *Patterson v. New York*,
4 432 U.S. 197, 202 (1977) (internal citations and quotations omitted); *see also Montana v.*
5 *Egelhoff*, 518 U.S. 37, 43 (1996).

6 The United States Supreme Court “has not yet made a clear ruling that admission
7 of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to
8 warrant issuance of the writ.” *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009)
9 (citing *Carey v. Musladin*, 549 U.S. 70, 77 (2006)). Nor has the Supreme Court held that
10 the introduction of evidence of prior bad acts, or other evidence to show propensity to
11 commit a crime, violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (“[W]e
12 express no opinion on whether a state law would violate the Due Process Clause if it
13 permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged
14 crime.”). Citing the Supreme Court’s express reservation of judgment on the issue, the
15 Ninth Circuit Court of Appeals has held that federal habeas corpus relief is unavailable
16 based on a state court’s admission into evidence of prior bad acts or propensity evidence.
17 *See Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (rejecting habeas petitioner’s
18 challenge to introduction of propensity evidence because petitioner could point to no
19 Supreme Court precedent establishing that admission of such evidence violated
20 Constitution).

21 In its ruling on Aguilar’s direct appeal, the Nevada Supreme Court discussed the
22 question of the admissibility of the evidence regarding the machete and bayonet only on
23 state law grounds. The Nevada Supreme Court’s construction of Nevada law is
24 authoritative, and is not subject to review in this federal habeas corpus action. *See Estelle*,
25 502 U.S. at 67-68; *Bonin v. Calderon*, 59 F.3d 815, 841 (9th Cir. 1995). The Nevada
26 Supreme Court did not provide any analysis regarding Aguilar’s federal constitutional
27 claim. “Where a state court’s decision is unaccompanied by an explanation, the habeas
28 ///

1 petitioner's burden still must be met by showing there was no reasonable basis for the
2 state court to deny relief." *Harrington*, 562 U.S. at 98.

3 Aguilar points to no United States Supreme Court precedent that, as a federal
4 constitutional matter, precludes the introduction of evidence such as that at issue here,
5 and that was unreasonably applied by the Nevada Supreme Court.

6 Moreover, the evidence regarding the machete and the bayonet did not render
7 Aguilar's trial fundamentally unfair. There was overwhelming evidence presented at trial
8 showing Aguilar's guilt. The evidence at trial firmly established that Aguilar and his brother
9 committed violent crimes—they shot numerous rounds from semi-automatic weapons in
10 and around a Las Vegas apartment complex, and, in doing so, killed a person. (See, e.g.,
11 Transcript of Trial, October 2, 1997, Exh. 25 at 65-83 (ECF No. 37 at 66-84) (testimony of
12 Joyce Marie Brown, a resident of the apartment complex, who, on the night of the shooting,
13 saw Aguilar and his brother walk by her residence, with Aguilar carrying a gun); Transcript
14 of Trial, October 3, 1997, Exh. 26 at 11-23 (ECF No. 38 at 12-24) (testimony of Terry
15 Maldonado, who witnessed the shooting, and heard two different voices exclaim, "Did you
16 get him, did you get him?" and "Come out, motherfucker"); Transcript of Trial, October 3,
17 1997, Exh. 26 at 43-45 (ECF No. 38 at 44-46) (testimony of Mark Evans, who heard the
18 shooting, and also heard an angry voice say "Come out, motherfucker"); Transcript of
19 Trial, October 3, 1997, Exh. 26 at 57-97 (ECF No. 38 at 58-98) (testimony of Annette
20 Aguilar, Aguilar's girlfriend (she and Aguilar later married), who was with Aguilar before
21 the shooting, during part of the shooting, and after the shooting); Transcript of Trial,
22 October 3, 1997, Exh. 26 at 165-80 (ECF No. 38 at 166-81) (testimony of Marla Jean
23 Emerson, whose husband was killed, who heard the gunfire and saw her husband go out
24 onto their patio, heard her husband scream when he was shot, and saw Aguilar standing
25 with a gun near her fatally wounded husband, saying to her, "Who's in there?"); Transcript
26 of Trial, October 6, 1997, Exh. 27 at 74-99 (ECF No. 40 at 75-100) (testimony of Chad
27 Brown, a Las Vegas Metropolitan Police Department ("LVMPD") officer who responded to
28 the scene, and observed a person who looked like Aguilar shooting a gun, ordered the

1 shooter to put down his gun, was shot at, and exchanged fire with the shooter); Transcript
2 of Trial, October 6, 1997, Exh. 28 at 74-79 (ECF No. 41 at 88-93) (testimony of Rickey J.
3 Workman, an LVMPD crime scene analyst, who, soon after the shooting, found, in Gloria's
4 apartment, among other items, two AK-47 style semi-automatic rifles, and a pair of pants,
5 the pockets of which contained a wallet containing Aguilar's identification and twenty-three
6 live rifle cartridges of a size that could be shot by either of the two guns found in the
7 apartment); Transcript of Trial, October 8, 1997, Exh. 29 at 50-83 (ECF No. 42 at 51-84)
8 (testimony of Torrey Johnson, an LVMPD firearms examiner, whose testimony linked
9 bullet casings found at the scene of the crimes to the two rifles found in the apartment).)
10 In short, the evidence regarding the machete and bayonet was insignificant in the context
11 of the strong evidence showing Aguilar's guilt.

12 The Nevada Supreme Court reasonably affirmed the denial of relief with respect to
13 the claim that Aguilar's federal constitutional rights were violated by the admission of the
14 evidence regarding the machete and bayonet. Whether or not the admission of the
15 evidence was error under Nevada law, the admission of that evidence was not contrary
16 to, or an unreasonable application of, any clearly established federal law, and it did not
17 render Aguilar's trial unfair. The Court will deny habeas corpus relief on Ground 2.

18 **C. Ground 3**

19 In Ground 3, Aguilar claims that his federal constitutional rights were violated as a
20 result of instructions given to the jury regarding the elements of first degree murder.
21 (Second Amended Petition (ECF No. 62) at 13-19.)

22 In the order entered on September 19, 2014, the Court ruled that Ground 3 was, at
23 that time, wholly unexhausted. (See Order entered September 19, 2014 (ECF No. 56) at
24 4-5.) Then, while this action was stayed, Aguilar asserted this claim in his second state
25 habeas action, and the Nevada Supreme Court held that action was procedurally barred,
26 as it was untimely and successive, and further held that Aguilar did not show cause and
27 prejudice to overcome the procedural bar. (See Order of Affirmance, Exh. 5 to Motion to
28 ///

1 Lift Stay (ECF No. 64-5.) Therefore, Ground 3 is barred by the federal procedural default
2 doctrine absent a showing of cause and prejudice or a fundamental miscarriage of justice.

3 Aguilar has, in the past, argued that there is cause and prejudice, with respect to
4 the procedural default, to the extent that Ground 3 is based on the Ninth Circuit Court of
5 Appeals' decision in *Babb v. Lozowsky*, 704 F.3d 1246 (9th Cir. 2013), because *Babb* had
6 not yet been decided when his first state habeas action was completed. (See Motion for
7 Stay and Abeyance (ECF No. 57) at 4; Opposition to Motion to Dismiss (ECF No. 69) at
8 2-3.) However, in his reply to Respondents' answer, Aguilar does not assert that argument,
9 or any other coherent argument that he can show cause and prejudice or a miscarriage of
10 justice. (See Reply (ECF No. 77) at 4-5.)

11 And, at any rate—perhaps explaining Aguilar's abandonment of his argument—
12 *Babb* is no longer good law with regard to federal habeas petitioners, such as Aguilar
13 claims to be, whose convictions were not yet final when the Nevada Supreme Court
14 decided *Byford v. State*, 994 P.2d 700 (2000). See *Moore v. Helling*, 763 F.3d 1011, 1015-
15 18 (9th Cir. 2014). To the extent Ground 3 is based on *Babb*, the claim would fail.
16 Therefore, Aguilar cannot show prejudice.

17 The Court will deny relief on Ground 3 as it is barred by the procedural default
18 doctrine.

19 **D. Ground 4**

20 In Ground 4, Aguilar claims that his federal constitutional rights were violated
21 because the trial court refused admission of evidence offered by Aguilar regarding parole
22 eligibility. (Second Amended Petition (ECF No. 62) at 19-24.) The evidence that Aguilar
23 offered, and that was excluded by the trial court, was testimony of the chairman of the
24 Nevada State Parole Board, regarding the parole process, Aguilar's potential eligibility for
25 parole, and the factors that might be considered in determining Aguilar's parole eligibility.
26 As this Court understands Aguilar's position, he sought to introduce such evidence to
27 counter the prosecution's contention that he would pose a danger in the future, by showing
28 ///

1 that, if sentenced to life with the possibility of parole, his chances of being granted parole
2 would be slim.

3 Aguilar asserted this claim on his direct appeal, and the Nevada Supreme Court
4 ruled as follows:

5 At the penalty phase of the trial, Gilbert attempted to call the chairman of the
6 Nevada State Parole Board as a witness to testify about the parole process,
7 Gilbert's eligibility for parole, and the factors that might be considered in
determining Gilbert's parole eligibility. The district court refused to allow
8 Gilbert to call the witness, distinguishing *Geary v. State*, 112 Nev. 1434, 930
P.2d 719 (1996).

9 Gilbert contends that the exclusion of this evidence was error, because the
10 jury instructions provided did not adequately cover the points he was
11 attempting to establish through the chairman's testimony. [Footnote:
12 Specifically, Gilbert argues that the jury instructions did not outline the
13 factors the parole board considers in making parole determinations.
Because, David Aguilar was given consecutive sentences of life *with* the
possibility of parole, he is not a party to this issue on appeal.] The State
argues that the testimony Gilbert sought to introduce was unnecessary
because the court adequately instructed the jury on all sentencing options.

14 "By statute, questions of admissibility during the penalty phase of a capital
murder trial are largely left to the discretion of the trial judge." *Milligan v.*
15 *State*, 101 Nev. 627, 636, 708 P.2d 289, 295 (1985) (citing NRS 175.552).
We conclude that the district court did not abuse its discretion.

16 Here, the district court instructed the jury in the following manner:

17 The jury shall fix the punishment at:

18 (1) Life imprisonment without the possibility of parole, which
means exactly what it says, that the defendant shall not be eligible for
19 parole;

20 (2) Life imprisonment with the possibility of parole, with eligibility
for parole beginning when a minimum of 40 years has been served;

21 (3) A definite term of 100 years, with eligibility for parole beginning
when a minimum of 40 years has been served; or

22 (4) death

23 * * *

24
25 Life imprisonment with the possibility of parole is a sentence of life
imprisonment which provides that a defendant would be eligible for
26 parole after a period of forty years. This does not mean that he would
27 be paroled after forty years, but only that he would be eligible after
that period of time.

28

1 Life imprisonment without the possibility of parole means exactly what
2 it says, that a defendant shall not be eligible for parole.

3 If you sentence a defendant to death, you must assume that the
4 sentence will be carried out.

5 Although under certain circumstances and conditions the State Board
6 of Pardons Commissioners has the power to modify sentences, the
7 law does not allow the board to change either a death sentence or a
8 sentence of life without the possibility of parole to any lesser or
9 different sentence. Therefore, you are instructed that you may not
10 speculate as to whether the sentence you impose may be changed
11 at a later date.

12 The above-quoted jury instruction, in expressly stating to the jury that a
13 sentence of life without the possibility of parole cannot be commuted,
14 precluded the jury from having a "false choice" in deciding Gilbert's
15 sentence. Accordingly, we conclude that the trial court did not err in refusing
16 admission of Gilbert's evidence regarding his parole eligibility. Further, any
17 evidence regarding Gilbert's individual parole eligibility would have been
18 wholly speculative.

19 (Order Dismissing Appeals, Exh. 5 at 9-11 (ECF No. 30-5 at 11-13).)

20 The Nevada Supreme Court's analysis addressed only the question whether the
21 exclusion of Aguilar's evidence violated state law. This ruling, on the state-law claim, is
22 not subject to review here. See *Estelle*, 502 U.S. at 67-68; *Bonin*, 59 F.3d at 841. The
23 Nevada Supreme Court did not provide any analysis regarding Aguilar's claim that the
24 exclusion of the evidence violated his federal constitutional rights, and, again, "[w]here a
25 state court's decision is unaccompanied by an explanation, the habeas petitioner's burden
26 still must be met by showing there was no reasonable basis for the state court to deny
27 relief." *Harrington*, 562 U.S. at 98.

28 Aguilar points to no United States Supreme Court precedent that, as a federal
29 constitutional matter, required the state trial court to allow introduction of evidence such
30 as that at issue here, and that was unreasonably applied by the Nevada Supreme Court.

31 Aguilar cites *Simmons v. South Carolina*, 512 U.S. 154 (1994). (See Second
32 Amended Petition (ECF No. 62) at 21-22.) In *Simmons*, the Court held that inaccurate
33 instructions about parole eligibility may deprive a defendant of due process when the
34 defendant's future dangerousness is at issue in a capital sentencing. *Simmons*, 512 U.S.
35 at 163-66. In *Simmons*, the trial court refused the petitioner's request to instruct the jury

1 that a sentence of life imprisonment would include no possibility of parole. *Id.* at 160.
2 During the sentencing phase of the capital trial, “[t]he State raised the specter of the
3 petitioner’s future dangerousness,” but “[t]he jury was left to speculate about petitioner’s
4 parole eligibility when evaluating petitioner’s future dangerousness, and was denied a
5 straight answer about petitioner’s parole eligibility even when it was requested.” *Id.* at 165-
6 66. *Simmons* stands for the proposition that, in a capital sentencing, a jury must be
7 instructed regarding the defendant’s *ineligibility* for parole if sentenced to life in prison
8 without possibility of parole. The state trial court’s instructions to the jury in this case
9 complied with that requirement. The jury was instructed that, if sentenced to life in prison
10 with the possibility of parole, Aguilar would be eligible for parole, but if sentenced to life in prison
11 without the possibility of parole, he would be ineligible for parole. *Simmons* did not
12 require the trial court to allow the sort of testimony, of the chairman of the Nevada State
13 Parole Board, proffered by Aguilar. The Nevada Supreme Court did not unreasonably
14 apply *Simmons*.

15 Aguilar also cites *California v. Ramos*, 463 U.S. 992 (1983). In *Ramos*, the Court
16 held that instructions to a capital sentencing jury may include accurate information
17 regarding the Governor’s authority to commute a sentence of life without the possibility of
18 parole to a sentence including the possibility of parole. *Ramos*, 463 U.S. at 1001. *Ramos*
19 is plainly inapposite.

20 Aguilar has not shown that, in denying ~~relief~~ on this claim, the Nevada Supreme
21 Court unreasonably applied *Simmons* or *Ramos*, or any other Supreme Court precedent.
22 The Nevada Supreme Court reasonably determined that the exclusion of testimony of the
23 chairman of the Nevada State Parole Board was not contrary to, or an unreasonable
24 application of, any clearly established federal law. The Court will deny habeas corpus relief
25 on Ground 4.

26 **E. Ground 5**

27 In Ground 5, Aguilar claims that his federal constitutional rights were violated
28 because the trial court allowed the State to file a notice of habitual criminality after the

1 jury's verdicts in both phases of the trial. (Second Amended Petition (ECF No. 62) at 25-
2 28.) Aguilar contends that he was prejudiced by the timing of the notice of habitual
3 criminality, as follows:

4 This practice precluded the defense from using the possibility of an
5 enhanced sentence to argue in favor of Life With the Possibility of Parole.
6 Had the jury been aware of the fact that Aguilar may have received a
7 sentence of 100 years, in addition to two consecutive life sentences, it could
8 be that Aguilar would have received a sentence of Life Without the Possibility
9 of Parole.

10 (Id. at 25-26.)

11 Aguilar raised this claim on his direct appeal, and the Nevada Supreme Court ruled
12 as follows:

13 Following the penalty phase of the trial but before formal sentencing, the
14 State filed a notice that it would seek enhancement of Gilbert's sentence
15 under NRS 207.010, the Nevada habitual criminal statute. Gilbert argues
16 that the post-trial filing, pursuant to NRS 207.016, precluded him from using
17 the possibility of enhanced sentencing as a habitual criminal in support of a
18 sentence of life with the possibility of parole during the penalty phase of the
19 trial. The State argues that the notice was properly filed pursuant to the
20 statute.

21 NRS 207.016(2) provides, in relevant part, "a count pursuant to NRS
22 207.010 . . . may be separately filed after conviction of the primary offense,
23 but if it is so filed, sentence must not be imposed . . . until 15 days after the
24 separate filing." [Footnote, setting forth text of NRS 207.010(1), omitted.]
25 Gilbert contends that the notice was improperly filed because the beginning
26 of the penalty hearing constituted the commencement of sentencing.

27 We conclude that Gilbert's contention lacks merit. Although the filing of the
28 notice of habitual criminality against Gilbert may have added more time to
his sentence, the State acted within the confines of the relevant statute.

(Order Dismissing Appeals, Exh. 5 at 11-12 (ECF No. 30-5 at 13-14).)

Here again, the Nevada Supreme Court discussed only the state-law issue, which
is not subject to review in this case (see *Estelle*, 502 U.S. at 67-68; *Bonin*, 59 F.3d at 841);
the court did not discuss Aguilar's claim that the timing of the notice violated his federal
constitutional rights. "Where 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." *Harrington*, 562 U.S. at 98.

///

1 Aguilar cites *Gardner v. Florida*, 430 U.S. 349 (1977), in support of his claim, and
2 argues:

3 Not only was it improper for the state to file a Notice of Habitual Criminality
4 after the verdict but this practice infringed on the substantial rights of Aguilar.
5 See *Gardner v. Florida*, 430 U.S. 349 (1977) (holding that the accused must
be afforded the right to deny or explain evidence presented against him).

6 (Second Amended Petition (ECF No. 62), at 26.) In *Gardner*, the Supreme Court held that
7 a death sentence could not constitutionally be based on evidence—in that case,
8 information in a portion of a presentence report not disclosed to the defense—that was
9 not disclosed to the defense and that the defense was precluded from rebutting. *Gardner*,
10 430 U.S. at 362 (“We conclude that petitioner was denied due process of law when the
11 death sentence was imposed, at least in part, on the basis of information which he had no
12 opportunity to deny or explain.”). *Gardner* does not support Aguilar’s claim. First, the
13 defendant in *Gardner* was sentenced to death, and the Supreme Court’s ruling was based
14 in part on the notion that “death is a different kind of punishment from any other which may
15 be imposed in this country.” *Id.* at 357-58. And, second, the issue in *Gardner* was the fact
16 that the death sentence was based to some extent on evidence not disclosed to the
17 defense. That is not the case here. The issue in this case is the sufficiency of the notice
18 to Aguilar that the State would seek sentencing under the habitual criminal statute. It was
19 not unreasonable for the Nevada Supreme Court to determine that *Gardner* did not impose
20 a constitutional requirement of earlier notice that the State would seek sentencing of
21 Aguilar as a habitual criminal.

22 Aguilar also cites *Lockett v. Ohio*, 428 U.S. 586 (1978). In *Lockett*, the Supreme
23 Court held that “the Eighth and Fourteenth Amendments require that the sentencer not be
24 precluded from considering any aspect of a defendant’s character or record and any of
25 the circumstances of the offense that the defendant proffers as a basis for a sentence less
26 than death.” *Lockett*, 428 U.S. at 604. That holding has no bearing on the issue raised by
27 Aguilar in Ground 5.

28 ///

1 The Nevada Supreme Court did not unreasonably apply *Gardner* or *Lockett*, or any
2 other Supreme Court precedent. The Nevada Supreme Court reasonably determined that
3 the Aguilar's federal constitutional rights were not violated on account of the timing of the
4 notice of his sentencing under Nevada's habitual criminal statute. The Court will deny
5 habeas corpus relief on Ground 5.

6 **F. Ground 6**

7 In Ground 6, Aguilar claims that his federal constitutional rights were violated as a
8 result of ineffective assistance of his trial counsel. (Second Amended Petition (ECF No.
9 62) at 29-44.) Ground 6 includes eight separate claims of ineffective assistance of trial
10 counsel, designated Grounds 6A through 6H.

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

24 Where a state court has adjudicated a claim of ineffective assistance of counsel
25 under *Strickland*, establishing that the decision was unreasonable under the AEDPA is
26 especially difficult. *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court
27 instructed:

28 ///

1 The standards created by *Strickland* and § 2254(d) are both highly
 2 deferential, [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320,
 3 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply
 4 in tandem, review is “doubly” so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123
 5 (2009)]. The *Strickland* standard is a general one, so the range of reasonable
 6 applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal
 7 habeas courts must guard against the danger of equating unreasonableness
 8 under *Strickland* with unreasonableness under § 2254(d). When § 2254(d)
 9 applies, the question is not whether counsel’s actions were reasonable. The
 10 question is whether there is any reasonable argument that counsel satisfied
 11 *Strickland*’s deferential standard.

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

15 In Ground 6A, Aguilar claims that his trial counsel “was ineffective for failing to
 16 investigate and present evidence that the weapon used to kill the victim belonged to a
 17 police officer and that the police officer may have fired the fatal shot.” (Second Amended
 18 Petition (ECF No. 62) at 29-30.) And, similarly, in Ground 6C, Aguilar claims that his “[t]rial
 19 counsel was ineffective for failing to investigate and present evidence that the weapon
 20 used to kill Mark Emerson belonged to Officer Brian Debecker and that the officer may
 21 have [fired] the fatal shot.” (*Id.* at 33-35.)

22 Aguilar asserted these claims in his first state habeas action, and, after holding an
 23 evidentiary hearing, the state district court ruled:

24 [C]ounsel cannot be deemed ineffective for deciding against presenting a
 25 theory of the case that Officer Brian Debecker could have been the shooter
 26 because (1) there was no evidence to support this theory, (2) there was no
 27 evidence that Officer Debecker was anywhere near the 7-Eleven on the
 28 night in question, and (3) this would [have] allowed for the introduction of
 29 other crimes, namely, that the AK-45 assault rifle had been stolen a year and
 30 a half prior to trial and the thief had never been caught.

31 (Findings of Fact, Conclusions of Law and Order, Exh. 14 at 5 (ECF No. 32 at 7).) And,
 32 on the appeal in Aguilar’s first state habeas action, the Nevada Supreme Court ruled as
 33 follows:

34 [A]ppellants claim that trial counsel were ineffective for failing to investigate
 35 and present evidence that the weapon used to kill the victim belonged to a
 36 police officer and that the police officer may have fired the fatal shot.
 37 Appellants fail to demonstrate that trial counsel were deficient. Trial counsel
 38 testified at the evidentiary hearing that there was a tactical reason for not

1 presenting this evidence: one of the appellants had prior convictions or
 2 arrests for dealing in stolen weapons. Trial counsel made a tactical decision
 3 that they did not want the jury to hear that evidence and make a connection
 that appellants stole the guns used in the crime. Therefore, the district court
 did not err in denying this claim.

4 (Order of Affirmance, Exh. 21 at 2 (ECF No. 32-7 at 4).) The Nevada Supreme Court's
 5 ruling on this claim was reasonable. Aguilar claims his trial counsel was ineffective for
 6 failing to investigate whether Officer Debecker—who had apparently once owned the
 7 murder weapon, and from whom it had apparently been stolen some time before the
 8 crimes in this case—was at the scene of the crimes. However, Aguilar does not
 9 demonstrate what any such investigation would have shown. There has never been any
 10 showing that Officer Debecker was anywhere near the scene of the crimes. Furthermore,
 11 counsel made a reasonable tactical decision at trial not to raise the issue of the police
 12 officer's prior ownership of the gun, as it would have allowed an inference that Aguilar had
 13 stolen the gun.¹

14 In Ground 6B, Aguilar claims that his trial counsel was ineffective for not preventing
 15 the admission of evidence that Aguilar had a prior felony conviction. (Second Amended
 16 Petition (ECF No. 62) at 30-33.) On the appeal in his Aguilar's first state habeas action,
 17 the Nevada Supreme Court ruled on this claim as follows:

18 [A]ppellants claim that trial counsel were ineffective for failing to prevent the
 19 admission of evidence that appellant Gilbert had a prior felony conviction.
 20 Specifically, appellant Gilbert was also charged with felon in possession of
 21 a firearm, and this charge was read to the jury. Appellants fail to demonstrate
 22 that trial counsel were deficient. This case was tried prior to this court's
 23 decision in *Brown v. State*, which requires that a felon-in-possession count
 24 be bifurcated into a separate trial. 114 Nev. 11118, 1126, 967 P.2d 1126,
 1131 (1998). At the evidentiary hearing, trial counsel testified that they did
 25 in fact attempt to prevent the admission that appellant Gilbert had a prior
 26 felony conviction. This was unsuccessful. [Footnote: Trial counsel did keep
 27 the nature of the previous conviction from being introduced [at] trial by
 28 stipulating that Gilbert was a felon.]

29 ///

30 ¹In his federal habeas corpus action in this Court, David Aguilar asserted a similar
 31 claim, regarding his counsel's handling of the issue of the stolen gun; the Court denied
 32 David Aguilar relief on the claim. (See Case No. 3:12-cv-00315-MMD-VPC, ECF No. 71
 33 at 21-32.)

1 (Order of Affirmance, Exh. 21 at 4 (ECF No. 32-7 at 6).) The Nevada Supreme Court's
2 ruling on this claim was reasonable because Aguilar does not make any showing that his
3 counsel could have done anything beyond what was done to attempt to obtain a severance
4 of the ex-felon in possession of a firearm charge. After the evidentiary hearing in Aguilar's
5 first state habeas action, the state district court found that counsel did in fact move for
6 such a severance before trial, and then again after the trial had commenced. (See Findings
7 of Fact, Conclusions of Law and Order, Exh. 14 at 5-6 (ECF No. 32 at 7-8).) The state
8 district court found that the motions were futile given Nevada law at the time. (See *id.*)
9 Aguilar does not show these findings to be unreasonable determinations of the facts in
10 light of the evidence presented.

11 In Ground 6D, Aguilar claims that his trial counsel was "ineffective for failing to
12 effectively prevent the admission of the tainted, unreliable and suggestive extra-judicial
13 and in-court photographic lineup identification . . ." (Second Amended Petition (ECF No.
14 62) at 35-36.) This claim concerns the identification of Aguilar by witness Joyce Marie
15 Brown. On the appeal in Aguilar's first state habeas action, the Nevada Supreme Court
16 ruled on this claim as follows:

17 [A]ppellants claim that trial counsel were ineffective for failing to challenge
18 the photo line-up that was admitted at trial. Specifically, appellants claim that
19 the photo shows appellant Gilbert in his jail clothing. Appellants fail to
20 demonstrate that trial counsel were deficient. At the evidentiary hearing, trial
21 counsel testified that they did not believe they had any grounds to challenge
22 the photo line-up because while, to a person familiar with jail clothing, the
picture did show appellant Gilbert in his jail clothing, a person unfamiliar with
jail clothing would have thought he was wearing a t-shirt. Trial counsel is not
required to make futile objections. *Donovan v. State*, 94 Nev. 671, 584 P.2d
708 (1978).

23 (Order of Affirmance, Exh. 21 at 2-3 (ECF No. 32-7 at 4-5).) This part of the Nevada
24 Supreme Court's ruling was plainly reasonable; Aguilar makes no showing otherwise. To
25 the extent that Aguilar claims that the photographic lineup was presented to the witness
26 in a suggestive manner, in that the police officers allegedly prompted the witness, the
27 Nevada Supreme Court added, in a footnote:

28 ///

1 To the extent that appellant claims that trial counsel should have filed a
 2 pretrial motion to suppress the photo line-up because the officers may have
 3 prompted the eye witnesses, appellant failed to demonstrate that this claim
 4 had merit. Appellants failed to provide this court with a copy of the trial
 5 transcripts. The burden is on appellants to provide an adequate record
 enabling this court to review assignments of error. *See Thomas v. State*, 120
 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); *see also Greene v. State*, 96
 Nev. 555, 558, 612 P.2d 686, 688 (1980); *Jacobs v. State*, 91 Nev. 155, 158,
 532 P.2d 1034, 1036 (1975).

6 (*Id.* at 3 n.1.) This ruling, too, was reasonable, given the record before the Nevada
 7 Supreme Court. Aguilar does not show that there was any viable ground upon which his
 8 trial counsel could have successfully suppressed Joyce Marie Brown's identification
 9 testimony.²

10 In Ground 6E, Aguilar claims that his “[t]rial counsel was ineffective for failing to file
 11 a motion to suppress the search of Gloria Olivares'[s] apartment.” (Second Amended
 12 Petition (ECF No. 62) at 36-40.) And, in Ground 6G, Aguilar claims that his “[t]rial counsel
 13 was ineffective for failing to move to suppress the evidence of the palm print of David
 14 Aguilar found on the Maadi semi-automatic rifle found in Gloria Olivares'[s] apartment.”
 15 (*Id.* at 41-43.) Aguilar raised these claims in his first state habeas action, and the state
 16 district court ruled as follows:

17 Defendant's claim that counsel was ineffective for not challenging the search
 18 of Ms. Olivares'[s] apartment and allowing her to testify as to whether her
 19 consent was voluntary is without merit as neither [of the] Defendants had
 20 standing to object to the search of Ms. Olivares'[s] apartment. Neither
 21 Defendant lived at the apartment or had any possessory interest in the
 apartment. However, defense counsel did bring out the fact that the two
 assault weapons used in the shooting were found in Ms. Olivares'[s]
 apartment rather than Defendants' apartment and that no weapons were
 found in Defendants' apartment.

22 * * *

23 The warrantless search of Gloria Jean Olivares'[s] residence was properly
 24 conducted pursuant to voluntary consent. Defendants have no standing to
 25 contest the consensual search of Gloria Olivares'[s] home. Even assuming,
 26 *arguendo*, that Defendants did have proper standing to challenge the
 27 search, Ms. Olivares voluntarily consented to the search. At the grand jury
 hearing, Ms. Olivares testified that she voluntarily signed the consent form.

28

 ²This Court denied David Aguilar relief on a similar claim in his case. (See ECF No. 71 in Case No. 3:12-cv-00315-MMD-VPC, ECF No. 71 at 33-42.)

1 Q. Now sometime later that evening of August 7th, 1996, or going
2 into the early morning hours of August the 8th, do you recall
the police asking you for a consent to search your apartment?

3 A. Yes.

4 Q. And did you, in fact, give them consent to search the
5 apartment?

6 A. Yes.

7 Q. And you, in fact, signed the consent to search, is that correct?

8 A. Yes.

9 Q. Let me just show you this document. Does that appear to be a
copy of the consent to search?

10 A. Yes.

11 Grand Jury Transcript, pp. 97-8. In addition, Officer Mark Dwiggins testified
12 at trial that although Ms. Olivares wavered several times on whether to give
consent and even refused to sign twice, she ultimately signed a consent form
13 agreeing to the search to rule her out as having any involvement in the
incident. TT, Vol. VI, pp. 50-1.

14 (Findings of Fact, Conclusions of Law and Order, Exh. 14 at 6-7, 10 (ECF No. 32 at 8-9,
15 12).) Then, on the appeal in Aguilar's first state habeas action, the Nevada Supreme Court
16 ruled on this claim as follows:

17 [A]ppellants claim that trial counsel were ineffective for failing to file a motion
18 to suppress the search of David's girlfriend's apartment. Appellants fail to
demonstrate that trial counsel were deficient because they failed to
19 demonstrate that they had standing to challenge the search. The apartment
belonged to David's girlfriend and there was a restraining order preventing
20 him from entering the premises. Thus, they did not demonstrate that they
had a protected privacy interest in the apartment. *Rakas v. Illinois*, 439 U.S.
128, 130-31 n.1 (1978) ("The proponent of a motion to suppress has the
burden of establishing that his own Fourth Amendment rights were violated
21 by the challenged search."); *Katz v. United States*, 389 U.S. 347, 352 (1967)
(recognizing that the Fourth Amendment requires an inquiry into whether the
22 person claiming the protection was entitled to assume privacy at the place
and under the circumstances concerned); see also *State v. Taylor*, 114 Nev.
1071, 1077, 968 P.2d 315, 320 (1998) (recognizing that one must have an
23 objective and subjective expectation of privacy in the place to be searched).
24

25 * * *

26 [A]ppellants claim that counsel were ineffective for failing to prevent the
27 admission of forensics regarding the gun that was found in appellant's
girlfriend's apartment. Appellants claim that the fact that one of the guns had
28 appellant David's palm print on it was irrelevant evidence because it could
not be shown that the gun was the murder weapon. This claim lacks merit.

1 This evidence was highly probative because shells found at the scene
 2 matched the guns found in the girlfriend's apartment. [Footnote: The victim
 3 was killed by a shot that went completely through his body. The bullet was
 4 never recovered.]

5 (Order of Affirmance, Exh. 21 at 3-4, 6 (ECF No. 32-7 at 5-6, 8).) Aguilar does not make
 6 any showing that the state courts' rulings regarding the search—that Aguilar had no
 7 standing to challenge the search, and that Gloria's consent to the search was valid—were
 8 unreasonable in light of the evidence presented. Nor has Aguilar shown that further
 9 investigation by his counsel would have had any impact on those determinations. The
 10 Nevada Supreme Court's ruling on this claim was reasonable.³ And, to the extent that the
 11 Nevada courts determined that the evidence of David Aguilar's palm print on one of the
 12 guns was relevant evidence, that is a ruling on a matter of state law, beyond the purview
 13 of this federal habeas court. *See Estelle*, 502 U.S. at 67-68; *Bonin*, 59 F.3d at 841. Aguilar
 14 makes no showing that the admission of that evidence violated his federal constitutional
 15 rights. The Nevada Supreme Court's rulings on the claims in Ground 6E and 6G were
 16 reasonable in light of the evidence presented.

17 In Ground 6F, Aguilar claims: "Trial counsel was ineffective for failing to prevent the
 18 video from the 7-11 from being admitted at trial and for failing to investigate another theory
 19 of defense." (Second Amended Petition (ECF No. 62) at 40-41.) On the appeal in Aguilar's
 20 first state habeas action, the Nevada Supreme Court ruled as follows on such a claim:

21 [A]ppellants claim that counsel were ineffective for failing to prevent the
 22 video from 7-11 from being admitted at trial. Specifically, they claim that trial
 23 counsel failed to question the authenticity of the tape's time stamp or the
 24 editing techniques. Further, trial counsel never filed a motion to suppress the
 25 videotape. Appellants fail to demonstrate that trial counsel were deficient.
 26 Appellants fail to demonstrate that there was reason to question the
 27 authenticity of the time stamp or editing techniques. Further appellants fail
 28 to demonstrate that a motion to suppress would have been successful.

29 * * *

30 [A]ppellants claim that trial counsel were ineffective for failing to investigate
 31 another defense. [Footnote omitted.] Specifically, appellants claim trial
 32 counsel should have attempted to identify a man who was at the 7-11 and

33 ³This Court denied David Aguilar relief on a similar claim in his case. (See Case
 34 No. 3:12-cv-00315-MMD-VPC, ECF No. 71 at 43-50.)

1 may have met the description of the shooter. Appellants fail to demonstrate
 2 that trial counsel were deficient. Trial counsel testified that they did not
 3 pursue this theory because it was impossible to identify who this man was.
 4 Further, trial counsel testified at the evidentiary hearing that the witness who
 5 gave the description of the shooter identified appellant Gilbert as the shooter
 6 in court. Therefore, the district court did not err in denying this claim.

7 (Order of Affirmance, Exh. 21 at 6-7 (ECF No. 32-7 at 8-9).) Regarding the first part of
 8 Ground 6F—that Aguilar’s trial counsel was ineffective for failing to prevent the admission
 9 of the videotape into evidence—the claim is meritless; Aguilar makes no allegation or
 10 argument whatsoever in this case as to how his counsel could have prevented the
 11 admission of the videotape into evidence.⁴ (See Second Amended Petition (ECF No. 62)
 12 at 40-41.) As for the second part of Ground 6F—that trial counsel was ineffective for not
 13 investigating another theory of defense based on the videotape—Aguilar does not show
 14 the Nevada Supreme Court’s ruling to be unreasonable. Aguilar has never made any
 15 showing that his trial counsel could have identified the person seen on the videotape, or
 16 that trial counsel could have done anything further to develop a defense based on that
 17 evidence.⁵

18 Finally, in Ground 6H, Aguilar claims: “Trial counsel was ineffective for failing to
 19 prevent Annette Aguilar from testifying.” (Second Amended Petition (ECF No. 62) at
 20 43-44.) On the appeal in Aguilar’s first state habeas action, the Nevada Supreme Court
 21 ruled on this claim as follows:

22 [A]ppellants claim that counsel were ineffective for failing to prevent a witness, appellant Gilbert’s girlfriend, from testifying at trial. Specifically,
 23 appellants claim that the girlfriend was coerced and that her testimony
 24 should have been inadmissible based on marital privilege. Appellants fail to demonstrate that trial counsel were deficient. First, appellants fail to present any evidence that the girlfriend was coerced into testifying. Second, the marital privilege does not apply to girlfriends. [Footnote: To the extent that Gilbert appears to claim that he and his girlfriend were in a common-law
 25 marriage relationship, NRS 49.295 still would not apply. Nevada does not recognize common-law marriages. NRS 122.010.] NRS 49.295. Further, trial

26 _____
 27 ⁴This Court denied David Aguilar relief on a similar claim in his case. (See ECF No.
 28 71 in Case No. 3:12-cv-00315-MMD-VPC, ECF No. 71 at 50-57.)

⁵Here, too, this Court denied David Aguilar relief on a similar claim in his case. (See Case No. 3:12-cv-00315-MMD-VPC, ECF No. 57-63.)

counsel testified at the evidentiary hearing that they argued against allowing this witness to testify to the point that the district court threatened to hold them in contempt.

(Order of Affirmance, Exh. 21 at 5 (ECF No. 32-7 at 7).) This claim is meritless. The Nevada Supreme Court's application of the marital privilege was a matter of state law, not subject to review in this federal habeas action. See *Estelle*, 502 U.S. at 67-68; *Bonin*, 59 F.3d at 841. And, Aguilar's contention that Annette's testimony was coerced is conclusory; Aguilar does not establish that there was any viable basis for his counsel to have prevented her testimony. The Nevada Supreme Court's ruling on the claims in Ground 6H was reasonable in light of the evidence presented, and it was not contrary to, or an unreasonable application of, Supreme Court precedent.

In sum, Aguilar does not show any of the Nevada Supreme Court's rulings on his claims of ineffective assistance of counsel to have been contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent, and Aguilar does not show any of those rulings to have been unreasonable in light of the evidence presented. The Court will deny habeas corpus relief on the claims in Ground 6.

IV. CERTIFICATE OF APPEALABILITY

The standard for issuance of a certificate of appealability is governed by 28 U.S.C. § 2253(c). The Supreme Court has interpreted section 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). Applying this standard, the Court finds that a certificate of appealability is unwarranted.

V. CONCLUSION

It is therefore ordered that the Second Amended Petition for Writ of Habeas Corpus (ECF No. 62) is denied.

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

2 It is further ordered that the Clerk of the Court is to enter judgment accordingly.

3 DATED THIS 10th day of July 2018.

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MIRANDA M. DU,
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GILBERT DEMETRIUS AGUILAR,

Petitioner,

v.

TIMOTHY FILSON, et al.,

JUDGMENT IN A CIVIL CASE

Case Number: 3:12-cv-00397-MMD-WGC

Respondents.

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

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

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

IT IS ORDERED AND ADJUDGED that the Second Amended Petition for Writ of Habeas Corpus (ECF No. 62) is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Petitioner is denied a certificate of appealability.

~~IT IS FURTHER ORDERED AND ADJUDGED that judgment is hereby entered.~~

7/10/2018

Date

DEBRA K. KEMPI

Clerk



/s/ L. Haywood

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 28 2019

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

GILBERT DEMETRIUS AGUILAR, AKA
Gilbert Demetrus Aguilar,

Petitioner-Appellant,

v.

TIMOTHY FILSON, substituted for Renee
Baker on 3/3/2017 and ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 18-16990

D.C. No. 3:12-cv-00397-MMD-WGC
District of Nevada,
Reno

ORDER

Before: CANBY and GRABER, Circuit Judges.

The motion for reconsideration (Docket Entry No. 8, supplemented by
Docket Entry Nos. 9 & 10) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

The Clerk is directed to serve a copy of this order on attorney Mary Lou
Wilson and on appellant Gilbert Aguilar, #56067, at 1250 E. Arica Road, Eloy,
Arizona 85131.

“Appendix C”

**Additional material
from this filing is
available in the
Clerk's Office.**