No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN ALFORD, Petitioner,

v.

DWIGHT NEVEN, WARDEN; ATTORNEY GENERAL FOR THE STATE OF NEVADA, 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

RENE L. VALLADARES
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Counsel for Petitioner **Alford**

Petitioner Brian Alford 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 federal district court for the District of Nevada and in the United States Court of Appeals for the Ninth Circuit. The United States District Court for the District of Nevada appointed counsel for Alford for his post-conviction proceedings 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 28th Day of May 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

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

_____

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QUESTION PRESENTED

WHETHER IT IS PERMISSIBLE FOR A STATE CRIMINAL COURT TO PREDICATE FELONY MURDER LIABILITY ON AN ALLEGATION OF BURGLARY THAT LACKS SUFFICIENT BASES IN LAW AND FACT SUCH THAT THE PROSECUTION COULD NOT ESTABLISH THE ALLEGATION UNDER EVEN A PROBABLE CAUSE STANDARD?

LIST OF PARTIES

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

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On June 5, 2017, the United States District Court for the District of Nevada filed a written order dismissing Petitioner Alford's 28 U.S.C. § 2254 petition for writ of habeas corpus. (*See* Appendix (App.) B.) The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum denying Alford's appeal of that decision on February 27, 2019. (*See* App. A.) Both decisions are unpublished.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished memorandum and order denying Alford' federal post-conviction appeal on February 27, 2019. (*See* App. A, 1-3.) Alford 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

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.

The Nevada burglary statute is also at issue. It reads, in pertinent part:

205.060. Burglary: Definition; penalties; venue; exception

> 1. Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary.
> 2. Except as otherwise provided in this section, a person convicted of burglary is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000. A person who is convicted of burglary and who has previously been convicted of burglary or another crime involving the forcible entry or invasion of a dwelling must not be released on probation or granted a suspension of sentence.

STATEMENT OF THE CASE

A. Nevada Criminal Charges and Trial

This case began on January 2, 2008, with Brian Alford and his codefendant arrests following the death of Jerome Castro in Reno, Nevada.

Pretrial litigation continued for more than a year before, on January 9, 2009, the District Attorney [hereinafter DA or State] for the Second Judicial District of Nevada, Reno, Nevada, charged Brian Alford in a Second Amended Information with Murder with the Use of a Deadly Weapon (Count 1), Attempted Robbery with the Use of a Deadly Weapon (Count 2), and Attempted Robbery with the Use of a Deadly Weapon (Count 4).

Co-defendant Brandon Alford, Brian Alford's twin brother, entered into a plea agreement with the DA allowing him to plead to a single count of battery with a deadly weapon.

Brian Alford elected to proceed to trial. Alford's five-day trial commenced on January 12, 2009, and concluded on January 16, 2009. At the end of trial, the jury convicted Alford on Count 1, Murder in the First Degree with the Use of a Firearm. The jury was unable to reach a unanimous verdict on the robbery count. At Alford's sentencing, the DA dismissed that charge.

Alford waived his right to a jury penalty hearing and agreed to be sentenced by the trial court.

That court imposed the following sentence:

Count 1–Murder in the First Degree with the Use of a Firearm: Twenty years to life in prison plus a consecutive term of 43 to 192 months for the use of deadly weapon enhancement.

(*See* App. D (written judgment).)

B. Alford's Direct Appeal Decision

Alford filed a timely notice of appeal. The Nevada Supreme Court docketed the appeal as Case No. 53415. Following oral argument, on July 22, 2010, the court issued an unpublished Order of Affirmance, denying Alford's appeal *in toto*. (*See* App. C.)

C. Post-Conviction Proceedings

Following the Nevada Supreme Court's denial of Alford's direct appeal, Alford began state post-conviction proceedings. A state district court denied that petition in a written order. The Nevada Supreme Court affirmed that denial on December 17, 2013.

State post-conviction proceedings have limited relevance to this petition as it concerns an issue Alford raised on direct appeal. (*See* App. C (Nevada Sureme Court's direct appeal decision).)

Alford mailed his 28 U.S.C. § 2254 petition to a District of Nevada federal court on February 27, 2014. That court appointed the Federal Public Defender to represent Alford.

Thereafter Alford filed an amended petition with supporting state-court-record exhibits. Respondent Warden, represented by the Attorney General for the State of Nevada [hereinafter State] filed a motion to dismiss alleging both Grounds 4 and 5(B) of the amended petition were not cognizable and unexhausted.

Finding the State's response to have merit, at least in part, Alford then filed a Second Amended Petition. This is the operative petition for the purposes of this petition; in particular Ground Four which alleges the DA submitted insufficient evidence of the commission of burglary thereby rendering Alford's first degree murder conviction invalid.

On August 25, 2016, the lower court denied Alford's petition on the merits. (*See* App. B.)

D. The Ninth Circuit's Decision

The Ninth Circuit denied Alford's appeal. The court found that, when examining the evidence in a light most favorable to the prosecution, "a rational jury could conclude that Alford committed burglary under Nev. Rev. Stat. § 205.060, the felony underlying the state's felony-murder theory, by entering Castro's (the decedent) home with the intent to commit battery." (App. A, 2-3.)

E. Summary of Relevant Facts

In Ground Four of Alford's Second Amended Petition he alleges that the prosecutor failed to establish that Alford's accidental shooting of the victim constituted felony murder because the incident involved mutual combat, instigated by the victim, and therefore the shooting did not, and could not, have been committed during the course of another felony. There is no other qualifying felony upon which to attach the accidental shooting. *See* Nev. Rev. Stat. 200.030(1)(B) (West 2018) (listing felony murder qualifying crimes as "sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person").

To appreciate the truth of this assertion it is necessary to examine the facts of the case.

There are quite a few characters and a long series of events involved in the death of the victim, Jerome Castro. Brian Alford does not make an appearance until the end of the incident which culminated with Brian Alford's gun accidentally going off during mutual combat between Alford and Castro.

Brian Alford has a twin brother, Brandon Alford, who is involved in the incident.

Castro lived in a mobile home in Reno, Nevada. He lived there with his brother Niko and his friend Crystal Hall. That mobile home is where the final physical altercation and eventual shooting of Castro took place.

The story begins the night before the accidental shooting of Castro. Jerome has a sister, Shanika Thompson. On December 29, 2007, Shanika, Loren Dudley and Melissa (Missy) Simcoe went out to some nightclubs. Shanika and Missy had young children who remained at Castro's trailer. They spent the night drinking. At some point during the evening they met up with Brandon Alford. This led to more drinking, in addition to Missy and Shanika taking ecstasy.

The group, now composed of four individuals, eventually went to Missy Simcoe's apartment. Shanika, now extremely intoxicated, was ready to go home. Loren called Jasper Jackson (the father of Shanika's child) and asked him to come pick up Shanika and take her home. Jasper arrived and he and Loren found Shanika unconscious on the floor. Jasper and Loren carried Shanika out of the house and took her back to Castro's trailer. There, Castro grew agitated because Shanika was under the influence to a dangerous degree.

Meanwhile Missy and Brandon Alford remained at Missy's house and continued to drink. It was during this time that Missy and Brandon testified that they started to receive threatening phone calls from Jasper Jackson, Shanika's boyfriend. Jasper was upset with Missy because Shanika was under the influence. Because of these threats Missy decided that she needed to go pick up her children from Castro's trailer.

Before Brandon and Missy went to Castro's trailer they met up with the defendant, Brian Alford. Brandon had asked Alford to meet him and Missy so that they could all go to Castro's trailer together. Alford, Brandon and Missy proceeded to Castro's trailer to pick up Missy's children. Alford and Brandon picked up firearms on the way for protection because of the threats received from Jasper Jackson.

After they arrived at the trailer Castro confronted Brandon about forcing ecstasy pills onto his sister Shanika. Things got heated and Alford stood up and stated "let's take this outside." Castro agreed. Castro, Brandon and Alford proceeded towards the door. However, when Alford and Brandon walked outside Castro closed and locked the door behind them leaving Brandon and Alford out on the front porch.

As Alford and Brandon stood on the porch, a fight ensued between Missy and Crystal Hall inside the trailer. Missy grabbed a knife which Castro took from her. Missy eventually gathered her children and unlocked the door to leave the residence. She then exited the trailer with her children. Then Castro tried to close the front door. Brian Alford spit then allegedly spit in his face. A fistfight began between Alford and Castro. There is conflicting information in the record as to who threw the first punch but the weight of the evidence suggests Castro was the instigator. A fistfight started between Loren Dudley and Brandon Alford shortly thereafter.

The altercations, which initially started outside on the front porch (although, Alford admits there is some contrary evidence suggesting the fight started in the front door's threshold), tumbled into the trailer. At some point, although there is conflicting evidence on this point, Brian Alford's pistol ended up on the floor. Castro reached for the pistol. Brian beat him to it. The pistol accidentally fired while Alford was using it as blunt force instrument to defend himself from Castro.

The shot went through Castro's arm and glanced his skull without penetration. The prosecutor's medical expert believed, although the medical evidence was unclear, that Castro died from the concussive force of the glancing blow to his head.

Both Alford and Brandon were offered plea deals by the District Attorney. Brandon accepted his plea offer and pleaded guilty to battery with a deadly weapon. Alford, unfortunately, did not. A jury convicted Alford of first-degree murder. It could not have been on the theory of premeditation and deliberation given these fact. The conviction can only be supported under a felony murder theory.

Because the record facts do not support the commission of a first degree murder under any permissible theory, this is the rare case where a defendant's conviction should be overturned based on insufficiency of the evidence. Underlying that conclusion, however, is a more important issue. Can it be, as the Nevada Supreme Court reaffirmed in Alford's direct appeal, that "the underlying felony need not be proven or even pleaded to sustain a prosecution for felony murder." (App. C, 36 (citing *Holmes v. State*, 972 P.2d 337, 341 (Nev. 1998)).)

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE NINTH CIRCUIT'S DECISION AND DETERMINE THE IMPORTANT FEDERAL QUESTION OF WHETHER A FELONY-MURDER CONVICTION CAN BE SUSTAINED WHEN THE PROSECUTION DOES NOT PROOF THE ELEMENTS OF THE UNDERLYING FELONY

The DA's theory of conviction was felony murder based on the premise that Alford developed the specific intent to commit a burglary in the middle of a fistfight. Burglary requires, inter alia, entering a residence with the intent to commit a felony therein. Alford entered Castro's residence in the middle of a mutual fight between himself and Castro. As the jury note demonstrates, the evidence shows that both Alford and Castro tumbled into the house during the fracas. The DA lacked a cogent theory for burglary which explains why the justice court dismissed those counts after the preliminary examination.

It is untenable to suggest the DA proved beyond a reasonable doubt that a burglary occurred when that same evidence could not even support a finding of probable cause.

Yet, as the Nevada Supreme Court notes, it and many jurisdictions do not require that the prosecution prove, or even plead, the underlying felony supporting a

felony-murder charge. Alford respectfully suggests this violates the long-standing constitutional principle that all elements of an offense must be pleaded and proven beyond a reasonable doubt. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) ("Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))).

A. A Felony Murder Theory of Conviction is Unviable Because the DA Failed to Prove the Commission of a Felony

The DA centered its argument on the theory that Alford could be found guilty of felony murder. Although the DA proposed burglary as the predicate felony, no burglary occurred as a matter of fact and law. It is absurd to suggest that someone could form the specific intent to enter a premise with the intent to commit another felony in the middle of a fist-fight. It is quite surprising that a man is serving a life sentence based on this facially flimsy rationale.

There is no question that burglary is a specific intent crime that requires entering a residence with the intent to commit a felony therein. *See Sheriff, Clark County, Nev. v. Stevens*, 630 P.2d 256, 257 (Nev. 1981). Specific intent, also known as a free-floating mental state, is not a conscious state that can be achieved in the heat of battle. Unlike general intent, specific intent connotes a higher mental state that requires a deliberate desire and actual cogitation. A conscious purpose to achieve a specific criminal goal in a specific way at a specific time and place. *See United States v. Bailey*, 444 U.S. 394, 402-04 (1980). The specific intent requirement must be proven beyond a reasonable doubt. *See Crawford v. State,* 121 P.3d. 582, 585 (Nev. 2005).

Here, Alford entered Castro's residence in the middle of a mutual fight between himself and Castro. He did not specifically enter the residence in order to then commit a felony; at worst it was to commit the misdemeanor crime of simple battery. There is no question the situation was heated. As Alford and Castro fought they tumbled into the residence from the porch. There was insufficient time for Alford to form the intent to commit a burglary.

Moreover, the DA had a critical temporal sequencing problem. There is but one single criminal transaction that occurred. One fight during which an accidental shooting occurred. The DA's theory is based on the commission of two separate crimes during one criminal transaction. As this Court has recognized, principles of statutory construction caution against pyramiding crimes and punishments based on a single transaction. *See, e.g., Ball v. United States*, 470 U.S. 856, 861 (1985); *United States v. Anderson*, 850 F.2d 563 (9th Cir. 1988). Here the DA spun off multiple crimes from one fist-fight. In this single unitary high-energy and traumatic transaction Alford supposedly concurrently formed the intent to commit a battery and the specific intent to commit a burglary. By falling into the house Alford committed both a burglary, a murder, and an assault; all at the same time.

It would be quite a remarkable individual to simultaneously develop and harbor such a constellation of mental states and intent while being battered by adult male. Such compounding of charges is nonsensical as even the Nevada Supreme Court agrees. *See, e.g., Salazar v. State*, 70 P.3d 749, 751-52 (Nev. 2003) (recognizing that a defendant cannot be convicted of both mayhem and assault with a deadly weapon based on the same assault).

Yet here the core issue is that Alford's conviction violates the core constitutional principle that all elements of a crime must be pleaded and proven beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged").

In the felony-murder context, courts have lost sight of this principle. Not only do many jurisdictions not require the underlying felony be proved beyond a reasonable doubt, they don't even require that felony be charged. *See, e.g., Stephens v. Borg*, 59 F.3d 932, 935 (9th Cir.1995); *People v. Thomas*, 740 P.2d 419, 425 n.5 (Cal. 1987); *see also State v. Clark*, 386 S.E.2d 191, 194 (N.C. 1989) (explaining that a murder indictment in the form prescribed by statute will support a first degree murder verdict based upon any theory set forth in the first degree murder statute).

This question has engendered a split of authority at both the federal and state level. For instance, in United States v. Greene, 834 F.2d 1067, 1071 (D.C. 1987), the court notes that "the Government must prove beyond a reasonable doubt all the positive elements of the underlying felony." In that case, even the Government "readily concedes this point." See Greene, 834 F.2d at 1071 n.7. Not so in Nevada where the underlying felony need not be proven or even pleaded. (*See* App. C, 36.)

In order to address this issue of constitutional import that has engendered a split of authority, Alford submits this petition seeking further review of this pivotal question.

CONCLUSION

For the aforementioned reasons, and in the interests of justice and fair play, the Petitioner Brian Alford respectfully requests that the Court grant this Petition for a Writ of Certiorari and require further briefing on the following important federal question: "Can a felony-murder conviction stand when the underlying felony is neither pleaded nor proved beyond a reasonable doubt."

DATED this 28th Day of May 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

JASON F. CARR
Counsel of Record
Assistant Federal Public Defender
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Counsel for Petitioner **Alford**

II. CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3,806 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Dated this 28th day of May 2019.

Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 28th day of May 2019, 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:

Amanda Sage
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Respectfully submitted,

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INDEX TO APPENDIX

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APP. 001

FILED

FEB 27 2019

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN ALFORD, Petitioner-Appellant, v. DWIGHT NEVEN, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-16358 D.C. No. 2:14-cv-00333-APG-NJK **MEMORANDUM**[*]

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted February 13, 2019
San Francisco, California

Before: McKEOWN, W. FLETCHER, and MURGUIA, Circuit Judges.

On December 30, 2007, Brian Alford engaged in a fight with Jerome Castro at Castro's trailer home in Reno, Nevada. During the fight, Alford beat Castro with his gun, and a single shot was fired. The bullet grazed Castro's head, causing a fatal

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

head injury. Nevada charged Alford with first-degree murder and advanced both premeditated- and felony-murder theories at trial. The jury, in a general verdict, convicted Alford of first-degree murder. The Nevada Supreme Court held that sufficient evidence supported Alford's conviction. On federal habeas corpus, the district court agreed. We granted a Certificate of Appealability on the issue of whether the evidence at trial was sufficient to support Alford's first-degree murder conviction based on a felony-murder theory.

A conviction is supported by insufficient evidence when no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virgini*a, 443 U.S. 307, 319 (1979). A court applying *Jackson* must resolve any conflicting testimony in favor of the prosecution. *Id*. at 326. Under the Anti-Terrorism and Effective Death Penalty Act, which governs this case, a federal court may overturn a state court decision rejecting a sufficiency of the evidence challenge "only if the state court decision was 'objectively unreasonable.'" *Coleman v. Johnson*, 566 U.S. 650, 651 (per curiam) (quoting *Cavazos v. Smith*, 565 U.S. 1, 4 (2011) (per curiam)).

The testimony at Alford's trial, taken in the light most favorable to the prosecution, revealed that after being closed out of Castro's house, Brian Alford spit on Castro and then "pushed in the door and started fighting with [Castro]." On the

basis of this evidence, a rational jury could conclude that Alford committed burglary under Nev. Rev. Stat. § 205.060, the felony underlying the state's felony-murder theory, by entering Castro's home with the intent to commit battery. The Nevada Supreme Court's decision that sufficient evidence supported Alford's conviction for first-degree murder was not objectively unreasonable.

AFFIRMED.

APP. 004

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

BRIAN ALFORD, Petitioner, v. DWIGHT NEVEN, et al., Respondents.	Case No. 2:14-cv-00333-APG-NJK **ORDER**

Petitioner Brian Alford's counseled, second-amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is before the court for final disposition on the merits (ECF No. 29).

I. Procedural History and Background

On January 16, 2009, a jury found petitioner guilty of first-degree murder. Exh. 38.[1] Alford entered into a stipulation with the State to waive the jury for the sentencing phase. Exh. 40. On March 6, 2009, the state district court sentenced Alford to life with the possibility of parole after 20 years, with a consecutive term of 43 to 192 months for the deadly weapon enhancement, and judgment of conviction was entered. Exhs. 41, 42.

The Nevada Supreme Court affirmed Alford's conviction on July 22, 2010, and remittitur issued on August 16, 2010. Exhs. 54, 56.

[1] Exhibits referenced in this order are exhibits to the first-amended petition, ECF No. 13, and are found at ECF Nos. 8-12.

Alford filed a state postconviction petition for writ of habeas corpus, and the state district court appointed counsel. Exhs. 58, 59, 60. The state district court granted the State's motion to dismiss the petition on the basis that all claims either were or could have been raised on direct appeal or failed to plead sufficient claims for ineffective assistance of counsel. Exh. 64. The Nevada Supreme Court affirmed the dismissal of the petition on December 17, 2013, and remittitur issued on January 13, 2014. Exhs. 73, 74.

Alford dispatched his federal habeas petition for mailing on February 27, 2014 (ECF No. 4). This court granted petitioner's motion for appointment of counsel; Alford filed a counseled, first-amended petition on June 2, 2014 (ECF No. 13). In response to respondents' motion to dismiss (ECF No. 16), Alford filed a motion for leave to file a second-amended petition (ECF No. 21). Respondents indicated that they did not oppose the filing of a second-amended petition (ECF No. 27). This court granted leave to file the second-amended petition (ECF No. 27). Alford filed the second-amended petition, and respondents answered (ECF Nos. 29, 35).

II. Legal Standard -- AEDPA

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the legal standards for this court's consideration of the petition in this case:

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

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). This Court's ability to grant a writ is limited to cases where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

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

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

To the extent that the state court's factual findings are challenged, the "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id*. The governing standard is not satisfied by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

> .... [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*, 563 U.S. at 181.

III. Instant Petition

The court considers the grounds out of numerical order, addressing ground 4 first.

Ground 4

Alford argues that insufficient evidence was presented by which a jury could have convicted him of first-degree murder (ECF No. 29, pp. 17-19). He contends that the prosecution failed to present sufficient evidence of willfulness, deliberation, and premeditation. With respect to the State's felony-murder theory, Alford asserts that the prosecution failed to present sufficient evidence of burglary or robbery. He also claims that the trial court's error in failing to clear up the jury's confusion with respect to the elements of burglary contributed to the erroneous verdict. *Id*.

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)). On federal habeas corpus review of a judgment of conviction pursuant to 28 U.S.C. § 2254, the petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id*. at 324. "[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id*. at 324 n.16. On habeas review, this court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution and must defer to such resolution. *Id*. at 326. Generally, the credibility of witnesses is beyond the scope of a review of the sufficiency of the evidence. *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

The trial witnesses testified similarly as to the events leading up to the shooting. Melissa (Missy) Simcoe, Loren Dudley, Shanika Thompson and Brandon Alford were out drinking, taking ecstasy and going to various clubs and bars on the night in question. *See, e.g*., exh. 32, pp. 791-832, 837-868. Thompson became very intoxicated and "out of it," and they took her to Simcoe's house. Thompson's boyfriend Jasper Jackson arrived, was angry about Thompson's condition, took her with him and left. Thereafter, Jackson started calling Simcoe on her cell phone, angry and threatening her. Jackson had taken Thompson to the home of Thompson's brother, Jerome Castro. Simcoe's children had also been left at Castro's earlier while the group went out that night. Brandon called his twin brother Brian to meet up with him. Due to Jackson's threatening calls the brothers stopped at their house and each got a gun, then ultimately the brothers and Simcoe drove to Castro's home. Dudley was already there; Jackson was not there. *Id*., *see also* exh. 32, pp. 714-777, 780-83.

The defendant Brian Alford testified as follows: when he went over to Castro's house, he thought that Jackson would be there; he did not know that Castro and Dudley

would be there. Exh. 32, pp. 791-832, 837-868. Brian testified that Castro was upset about his sister's condition, blamed Brandon, and twice approached Brandon aggressively. Brian intervened and said that if they were going to fight, they should all go outside. *Id*. at 816. The Alford brothers went outside, and the door was shut behind them. They heard yelling and references to someone wielding a knife inside. The door opened, Castro and Simcoe and her children were in the doorway. Brian grabbed Simcoe and pulled her out of the house; he also pulled her older son out. As he bent to pick up her infant in a car seat, someone said to Brian "don't let me catch you downtown." *Id*. at 822. In response, Brian spit on Castro. Castro rushed at Brian, swinging. They fought, and Brian pushed Castro back into the house. Brandon and Dudley also began fighting each other inside the house. Castro went down, Brian realized his gun had fallen out of his clothing, and he saw Castro reach for it. Brian kicked the gun away from Castro. Brian picked up the gun and began striking Castro on the sides of the head with it. The gun went off accidently, surprising Brian. He thought he might have shot himself in the leg, then thought he might have shot Brandon in the back. He checked and saw that he hadn't shot Brandon; then he patted down Castro and Dudley for weapons. He did not see blood on Castro and did not think he'd shot Castro. He and Brandon backed out of the house. Brian drove home, and when he walked into the house he saw a "big hole" in his leg and thought he had shot himself. *Id*. at 831.

On cross examination Brian stated that after Castro was down Brian continued striking him, hard, on both sides of the head, and he believed that he had broken Castro's jaw and/or given him a concussion. Brian testified that he could not recall if Castro was in a defensive posture. He stated that when neither Castro nor Dudley was moving, even though they no longer posed a threat, he patted them both down for weapons and kicked Castro again in the ribs before leaving with his brother. *Id*. at 861.

On redirect Brian testified that when he left he saw no blood, he thought Castro was alive and did not think Castro had been shot. *Id*. at 867.

Detective David Philip Jenkins testified for the State that police obtained search warrants for the Alford brothers' home, they were arrested there after the incident, and the guns were found. Exh. 30, pp. 401-430, 436-437-457. Jenkins stated that when Brian was arrested, he mentioned having shot someone and referred to it as an accident. *Id*. at 413.

Once Brian had been arrested, he asked to speak to his girlfriend, Tarina Weatherhead. At the police station, Jenkins allowed Weatherhead and Brian Alford to speak in an interview room and videotaped the conversation. The videotape was admitted at trial, and Jenkins also testified about Alford and Weatherhead's exchange. Exh. 30, pp. 417-422. Weatherhead suggested to Alford that what had happened must have been an accident or self defense. Alford replied that it is not self defense when you're beating a man with a gun or beating someone. Alford said a second time that it was not self defense. Alford told Weatherhead that Castro was arguing with the Alford brothers inside the house. They were all going to take their disagreement outside. When the Alford brothers stepped outside, Castro locked the door behind them. Alford heard a commotion inside, he yelled for Simcoe to come out with her children. The front door eventually opened, an infant car seat was passed outside to Alford, then Castro spit in Alford's face. Alford swung at Castro, then pushed him through the door into the house. They were trading blows, the gun Alford had fell out of his clothing on to the floor, Castro reached for the gun, but Alford picked up the gun. Alford then was striking Castro about the head and face with sweeping motions to the left and right; Castro was on his back with his hands raised in a defensive posture. As Alford was beating Castro, the gun discharged. Alford told Weatherhead that he thought he might have broken Castro's jaw or given him a concussion at the worst. He said it was not self defense and he would have to pay for what he had done, he said he thought it might be

manslaughter, then a second time, a short time later, he said "I hope it would be manslaughter." Jenkins let the pair talk in the interview room for about thirty-five to forty minutes. *Id*.

Thereafter, Weatherhead was removed from the interview room, and Jenkins and another detective sat down to interview Alford. Jenkins stated that they read Alford his *Miranda* rights at that time. Alford told the detectives that when Simcoe was handing her infant in the car seat out the door to Alford, Alford saw Castro and spat in Castro's face. *Id*. at 429. In response, Castro began swinging at Alford. Alford pushed Castro inside and against a wall; Alford described the altercation as a "hockey fight." He said the gun fell to the ground, Castro reached for it, Alford grabbed the gun by its grip and began beating Castro about the face and head area. Castro fell down to the ground on his back with his hands up in a defensive posture. The gun discharged, which caught Alford very much by surprise. He initially thought the shot had come from Brandon and Dudley. He stated that Castro and Dudley were then unconscious or semi-conscious and he decided at that point that he would search them to see if they had anything worth taking. He said he searched them but didn't find anything.

Jenkins testified that he went to check the recording device and realized that only part of his interview with Alford had been recorded. He began recording again, and tried to get Alford to adopt or summarize what he had already told them, which Alford did.

On cross examination, Jenkins testified that Alford did not talk about searching either of the men in the recorded portion of the interview. *Id*. at 442. He confirmed that Alford did not say anything about searching anyone to Weatherhead and that the only time Alford referenced it was the portion of the interview that was not recorded due to malfunction. He also agreed that about $350 was recovered from Castro's pocket. *Id*. at 445.

Jenkins testified that that he recorded Weatherhead and Alford's conversation pursuant to policy and procedure that the unsupervised activities of an inmate in custody are to be monitored. He also acknowledged that there was potentially investigative value to listening to the conversation. *Id*. at 449. Jenkins said that he did not tell Weatherhead or Alford that their conversation would be secret, "in fact, just the opposite." *Id*. at 449-450. On re-direct, Jenkins testified that he took notes contemporaneously with the entire interview (including the portion that was not recorded) and that he had made note that Alford said he searched Castro and Dudley. *Id*. at 454.

Crystal Hall, Castro's roommate, testified as follows: she was home sleeping that night because she had to work the next day, and the commotion when the Alfords arrived woke her. Exh. 29, pp. 144-230. She testified that as Missy Simcoe was leaving the residence with her kids, Brian, standing on the porch, said to Castro "we'll find you on the streets," then spit in Castro's face. *Id*. at 172. She stated that Alford threw the first punch and pushed back through the doorway into the home. Brian pulled out a gun and raised it up over Castro's head. It looked to her like Brian had his finger on the trigger. She never saw any struggle between the two for the gun; she never saw the gun on the floor and never saw either man bend over to the floor. Once she saw the gun, she grabbed the two children who were present and went with another woman into a back bedroom. She started to dial 911 when she heard one gunshot. Shanika Thompson was in the room where the men had been fighting and started screaming and somebody swore at her and told her to shut up "or we're going to shoot you next." *Id*. at 178. While Hall was on the phone with the 911 operator, she went back out to the living room where she saw Castro lying face down, saw blood and observed that Castro was breathing very hard, as if he were snoring.

On cross examination, Hall testified that the wound on Castro's head looked as if the bullet had "skimmed off." *Id*. at 196. When pressed by defense counsel, she reiterated

that it was Brian Alford who spit in Castro's face, Castro continued to try to shut the door, and then Brian threw the first punch. *Id*. at 214-215. She stated that she did not see Brian draw the gun, she just saw the gun in his hand. On redirect Hall testified that she was certain the gun was never on the floor. *Id*. at 226-227.

Loren Dudley, who was at Castro's home with him when the Alford brothers arrived, testified as follows. Exh. 30, pp. 243-321. He testified as Hall did that after Missy and her children went out the door, Castro was closing the door, and then Brian appeared in the doorway, spit in Castro's face, and threw the first punch. *Id*. at 262-263. Dudley began fighting with Brandon Alford. At some point he heard someone say "you're not so tough now," then he heard a gunshot and saw a muzzle flash. *Id*. at 264. Then Brandon was hitting Dudley on the side of the head with something, which turned out to be a pistol. Dudley was losing consciousness; he could see the Alford brothers go through Castro's pockets, then they came over and went through Dudley's pockets. Dudley could not recall whether they patted the outside of his clothing or reached into his pockets. On cross examination, defense counsel showed Dudley a transcript from a hearing about two months after the incident in which Dudley testified that it was Castro who threw the first punch.

Brandon Alford testified to the following: he and Brian were out on the porch waiting for Simcoe, the door opened up, Simcoe came out, Castro came out, and threw the first punch at Brian. Exh. 32, pp. 714-777, 780-83. Brandon started fighting with Loren Dudley. A gun went off; Brandon did not know who was shooting or what was going on, and he kept fighting Dudley. He turned around and saw Brian hit Castro with the gun. Brandon picked up his own gun and struck Dudley with it. He testified that neither he nor Brian went through either of the other two men's pockets. He stated that he saw Brian pat down both men to see if they had any weapons. *Id*. at 748.

Neurosurgeon Dr. Michael H. Song testified that he performed emergency surgery on Castro when he was brought to the hospital. Exh. 31, pp. 531-542. Song testified

that Castro had a bullet that went underneath his scalp and did not penetrate his skull, but because of the trauma from the bullet hitting the skull, Castro suffered a severe closed head injury. Though in Song's opinion it was unlikely to be successful, he operated to try to relieve brain swelling. He completed the operation, left the operating room, and was immediately called back because Castro's heart had stopped. Song stated that the cause of death was massive brain swelling from the gunshot wound. *Id*.

Dr. Ellen Clark, a forensic pathologist and Chief Medical Examiner for Washoe County, testified. Exh. 31, pp. 614-639. She stated that she performed the autopsy on Castro, and in her opinion the cause of death was gunshot wounds to the head and arm and the manner of death was homicide. *Id*. at 620. The bullet passed through Castro's arm and hit his head. *Id*.

In ground 4, Alford argues that the prosecution failed to present sufficient evidence of willfulness, deliberation, and premeditation. Alford also asserts that the prosecution failed to present sufficient evidence of burglary or robbery to support felony murder. Further, he claims that the trial court's error in failing to clear up the jury's confusion with respect to the elements of burglary contributed to the erroneous verdict (ECF No. 29, pp. 17-19).

Affirming the conviction, the Nevada Supreme Court reasoned:

> "where there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony." *Bolden v. State*, 624 P.2d 20, 20 (Nev. 1981) [internal quotations and citations omitted]. Additionally, an entry into a dwelling with the intent to commit battery may support a felony-murder charge. *State v. Contreras*, 46 P.3d 661, 664 (Nev. 2002).
>
> We conclude that there was sufficient evidence presented to support Alford's conviction for first-degree murder with the use of a deadly weapon. There was evidence presented to the jury that as Castro attempted to shut his front door on Alford, Alford spit on Castro and prevented Castro from shutting the door by pushing the door in. Additionally, evidence was presented that Alford started the fight that ultimately led to Castro's death. While Alford did present his theory of the case that the fight started on Castro's front porch and then moved inside during the mutual combat, the jury determined that the State's evidence

> was more credible. As such, we cannot say that any rational trier of fact could not have found Alford guilty on the facts presented at trial. Thus, we conclude Alford's argument is without merit.

Exh. 54, pp. 6-7.

Alford has failed to demonstrate that the Nevada Supreme Court's conclusion was contrary to or an unreasonable application of federal law. He has not shown that the evidence was insufficient to support intentional and premeditated murder or felony murder with burglary as the underlying felony. Evidence was presented at trial that, after being locked out of Castro's house, Brian spit on Castro, then punched and pushed Castro back into the house with the intent to batter Castro. With respect to intentional and premeditated murder, evidence was presented that Brian stopped at home and got a gun, fought with Castro, and—especially according to Crystal Hall – pulled his pistol, pointed it toward Castro and fired a shot.

With respect to felony murder, the relevant portion of NRS 205.060(1) prescribed at that time that a person who enters any house with the intent to assault or batter any person is guilty of burglary. As the Nevada Supreme Court noted, Alford's defense theory was that he and Castro were engaged in "mutual combat" that began on the porch and moved inside and that such a mutual fight does not comport with the definition of burglary. Nevertheless, evidence was presented that Brian pushed Castro into the house. Alford also complains that the district court mishandled a jury question. A juror asked 'if in the course of the fighting on the porch and the threshold of the house the fight moves into the house, is this burglary? More specifically on the part of the defendant, even if both parties are committing assault?" Exh. 34. The judge referred the jury to the jury instruction that set forth the elements of burglary. Exh. 37, jury instruction no. 28. The instruction provides that entry must be made with the intent to commit assault or battery, even if entry is made with the consent of the owner. The instruction then defines assault and battery. *Id*. Alford does not even argue that the instruction incorrectly defines burglary under Nevada law.

Alford has failed to demonstrate that the Nevada Supreme Court's decision with respect to federal ground 4 was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or 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). Federal habeas relief is denied as to ground 4.

Grounds 3 & 5

Alford argues that the trial court abused its discretion throughout trial by allowing the case to proceed on insufficient evidence and allowing inadmissible evidence at trial (ECF No. 29, pp. 20-21).

As ground 5(A), Alford contends that the trial court violated Alford's due process rights by admitting the secretly-recorded conversation between Alford and his girlfriend, which was illegally obtained and prejudicial. He claims that police did not advise him that he was being recorded, nor did they advise him that police were using Weatherhead as an agent of the State. *Id*.

Relatedly, Alford claims in ground 3 that the trial court improperly admitted Detective Jenkins' testimony regarding the videotaped conversation between Alford and his girlfriend, Tarina Weatherhead, in violation of Alford's Fifth and Fourteenth Amendment due process rights (ECF No. 29, p. 17). He asserts that it was cumulative of the videotaped conversation that was played for the jury.

The Nevada Supreme Court rejected these claims:

> Alford argues that the district court abused its discretion in admitting into evidence a conversation, videotaped by Detective David Jenkins, between Alford and Weatherhead at the police station following his arrest. Alford further contends that Weatherhead was used as an agent of the police and he was interrogated while in custody without having been informed of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree because Alford failed to file a motion to suppress this evidence or object to its admission at trial.
>
> "[T]his court may review plain error or issues of constitutional dimension *sua sponte* despite a party's failure to raise an issue below." *Murray v. State*, 930 P.2d 121, 124 (1997). "[P]lain error is error which

> either had a prejudicial impact on the verdict when viewed in context of the trial as a whole or seriously affects the integrity or public reputation of the judicial proceedings." *Parodi v. Washoe Medical Center, Inc.*, 892 P.2d 588, 590 (Nev. 1995) [internal quotations and citations omitted].
>
> NRS 174.125(1) addresses the filing of a motion to suppress and states:
>
> All motions in a criminal prosecution to suppress evidence, for a transcript of former proceedings, for a preliminary hearing, for severance of joint defendants, for withdrawal of counsel, and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial, unless the opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion before trial.
>
> We have held that a civilian may be deemed a police agent when that civilian makes an express agreement with the police to speak to a suspect who is then in custody. *Boehm v. State*, 944 P.2d 269, 271 (Nev. 1997).
>
> We conclude that all of Alford's arguments are without merit because he failed to file a motion to suppress or object to the admission of the evidence at issue. Specifically, since Alford failed to file a motion to suppress the videotaped conversation, there is no order from the district ruling on the admissibility of the interview for this court to review. Further, Alford has show no evidence that Weatherhead made an agreement with Detective Jenkins to elicit statements from Alford during the conversation, thus failing to show that Weatherhead should be seen as an agent of the police. Additionally, Alford failed to make any argument which shows that the district court committed plain error, failed to show that the admission of this evidence had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or seriously affected the integrity or public reputation of the judicial proceedings. As such, we conclude that the district court did not abuse its discretion in admitting the videotaped conversation between Alford and Weatherhead.

Exh. 54, pp. 10-12.

This claim is bare and conclusory; Alford points to no evidence to support his contention that Weatherhead had any agreement with the State. In fact, Detective Jenkins testified that after he was arrested Alford repeatedly asked to speak to Weatherhead. When Jenkins was asked if he told Alford his conversation with his girlfriend in the police station interview room would be confidential, Jenkins testified that he did not say that and followed up with: "in fact, just the opposite." Exh. 30, pp. 449-

450. There is no evidence that Weatherhead was in any way "interrogating" Jenkins as an agent of the state. Therefore, Alford's rights under *Miranda*, which applies to custodial interrogations, were not even implicated. Grounds 3 and 5(A) are meritless.

In ground 5(B), Alford claims that the trial court improperly limited defense counsel's cross-examination of Loren Dudley and Brandon Alford (ECF No. 29, p. 21). He states that the trial court refused to permit questions about the fact that Brandon was convicted of battery with a deadly weapon, not robbery or burglary. He also stated that the court did not allow defense counsel to impeach Dudley with evidence of his prior probation violation.

The Nevada Supreme Court denied this claim on direct appeal:

> Alford argues that the district court improperly curtailed cross-examination of key witnesses, thereby depriving him of his Sixth Amendment right to confrontation. Alford contends that the district court erred in not allowing him to cross-examine Brandon about the facts underlying Brandon's felony conviction for battery with a deadly weapon for his role in the fight between Brandon and Dudley. Alford further contends that the district court erred in failing to allow him to impeach Dudley with a probation violation from a 2006 burglary conviction. We disagree.
>
> "Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed *de novo*." *Mendoza v. State*, 130 P.3d 176, 182 (Nev. 2006).
>
> "The Sixth Amendment's Confrontation Clause provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. This right is secured for defendants in state as well as in federal criminal proceedings." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) [internal quotations or citations omitted]. "The Court has emphasized that a primary interest secured by the [Confrontation Clause] is the right of cross-examination." *Id*. An "accused [has the right] to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).
>
> We conclude that Alford's argument is without merit because he has failed to show that he was entitled to cross-examine either Brandon or Dudley on the specific issues complained of. Alford has failed to cite to any caselaw that supports his proposition that the jury had a right to hear the underlying facts regarding Brandon being found guilty of battery with a deadly weapon. Further, evidence of Dudley's parole violation, which was

> in no way relevant to Alford's trial, would only have been introduced to show Dudley's general bad character. This type of character evidence is not admissible under NRS 48.045. As such we conclude that the district court did not improperly curtail Alford's ability to cross-examine Brandon or Dudley.

Exh. 54, pp. 16-18.

Alford argues that his Sixth Amendment rights were violated because defense counsel could not elicit from Brandon the fact that based on the events at issue he entered into a guilty plea agreement for battery with a deadly weapon. This court notes that the defense called Brandon as a witness, and it is unclear that the Sixth Amendment right to confront witnesses against the defendant is implicated at all. Moreover, Alford points to no clearly established U.S. Supreme Court law that holds that he had a specific right to question Brandon as to the guilty plea agreement. Moreover, Alford certainly has not shown that the state court's evidentiary determination that evidence of Dudley's parole violation was entirely irrelevant and would only be introduced to show general bad character was incorrect or ran afoul of Alford's federal constitutional rights.

Alford has failed to demonstrate that the Nevada Supreme Court decision with respect to ground 3 and either part of ground 5 was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or 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). Accordingly, grounds 3 and 5 are denied.

Ground 2

Alford asserts that the trial court used improper jury instructions in violation of his Fifth and Fourteenth Amendment due process rights (ECF No. 29, pp. 14-16).

To obtain relief based on an error in instructing the jury, a habeas petitioner must show the "'instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Where the defect is the failure to give an instruction, the inquiry is the same, but the burden is even heavier because an omitted

or incomplete instruction is less likely to be prejudicial than an instruction that misstates the law. *See Henderson v. Kibbe*, 431 U.S. 145, 155-157 (1977); *see also Estelle*, 502 U.S. at 72.

In ground 2(A) Alford argues that the jury instructions regarding the felony murder rule improperly reduced the State's burden (ECF No. 29, p. 15). Jury instruction 26 provided the following:

> Whenever death occurs during the perpetration or attempted perpetration of certain felonies, which are: sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse, or abuse of an older person, the killing constitutes MURDER IN THE FIRST DEGREE. This is the felony murder rule.
>
> In regard to the felony murder alternative, the State is not required to prove that the killing was committed with malice, premeditation, or deliberation. An unlawful killing of a human being, whether intentional, unintentional, or accidental, which is committed in the perpetration or attempted perpetration of the felonies listed above is first degree murder.
>
> Therefore, the elements of FELONY MURDER OF THE FIRST DEGREE, as alleged in this case are:
>
> 1) The defendant did willfully and unlawfully;
>
> 2) Perpetrate or attempt to perpetrate the felony crime of burglary; and
>
> 3) The killing occurred during the perpetration or attempted perpetration of the burglary.
>
> Exh. 37, p. 29.
>
> Jury instruction no. 28 prescribed the elements of burglary:
>
> (1) The defendant entered any house, room, apartment, or other building structure;
>
> (2) With the intent to commit assault or battery on any person, or larceny, or any felony therein.
>
> Exh. 37, p. 31. That instruction also defined the terms assault and battery. *Id*.

The justice court had found that the prosecution had failed to submit sufficient evidence to bind over a burglary charge to the district court. Alford argues that insufficient evidence of burglary was presented at trial. He contends that because the jury instructions contained the elements of burglary as well as robbery, the State's burden to prove a valid underlying felony in order to present a viable theory of felony murder was reduced (ECF No. 29, p. 15).

Rejecting this claim on direct appeal, the Nevada Supreme Court explained:

> "Pursuant to NRS 200.030, the commission of a felony and premeditation are merely alternative means of establishing the single *mens rea* element of first degree murder, rather than constituting independent elements of the crime." *Holmes v. State*, 972 P.2d 337, 341 (Nev. 1998). In *Holmes*, we held that: ". . . . Although the justice court had dismissed the felony robbery charge due to insufficient evidence, the State was not precluded from advancing the theory at trial that [the defendant] had murdered [the victim] during the commission of a robbery." *Id*. at 342.
>
> We conclude that Alford's argument is without merit because we, along with other jurisdictions, have continued to hold that the underlying felony need not be proved or even be pleaded to sustain a prosecution for felony murder. *See id*. (stating that "[c]onsistent with our approach, many jurisdictions have held that the State may seek a conviction for murder based on a theory of felony-murder without even charging the underlying predicate felony.") As such, we conclude that the district court did not abuse its discretion in instructing the jury to utilize the burglary allegation against Alford to substantiate malice for the purpose of a first-degree murder charge.

Exh. 54, p. 8.

In addressing ground 4, above, the court discussed how Alford has not demonstrated that the State presented insufficient evidence of burglary. Alford has not shown that the jury instructions on the felony-murder rule were erroneous, much less that that either "'instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Estelle*, 502 U.S. at 72.

Next, Alford contends in ground 2(B) that the trial court erred because it failed to instruct the jury that the State was required to show, beyond a reasonable doubt, that Alford did not act in the heat of passion (ECF No. 29, p. 16).

The Nevada Supreme Court rejected the claim:

> Alford argues that the district court abused its discretion in instructing the jury on the State's burden of proof to prove beyond a reasonable doubt that he did not act in the heat of passion with the requisite legal provocation. We disagree.
>
> We have held that "the district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions." *Runion v. State*, 13 P.3d 52, 58 (Nev. 2000). Further, "[a] jury is presumed to follow its instructions." *Leonard v. State*, 17 P.3d 397, 405 (Nev. 2001) [internal quotations and citations omitted].
>
> We conclude that Alford's argument is without merit because the jury was properly instructed on the State's burden of proof. Additionally, since Alford did not object to the instructions given by the district court, and did not provide the district court with a proposed jury instruction on manslaughter, it is inappropriate for him now to complain that the district court erred in failing to give such an instruction. As such, we conclude that the district court did not abuse its discretion in instructing the jury concerning manslaughter.

Exh. 54, p. 9.

Alford has not carried his burden of showing that the state supreme court's decision was arbitrary, unreasonable, or contrary to federal law. He has not shown that his due process rights were violated when the trial court did not instruct the jury that the State was required to show, beyond a reasonable doubt, that Alford did not act in the heat of passion. Alford's theory of defense was that the gun accidently discharged. But the State did not rely solely on a theory of premeditation and deliberation. The State argued alternatively that Alford was guilty of first-degree murder under the felony-murder rule because the killing occurred during the commission of a burglary.

In ground 2(C) Alford asserts that the trial court failed to properly address a jury question, allowing the jury to find Alford guilty of felony murder based on the invalid burglary predicate theory (ECF No. 29, p. 16). Again, as discussed above with respect

to ground 4, a juror submitted a question to the court: "if in the course of the fighting on the porch and the threshold of the house the fight moves into the house, is this burglary? More specifically on the part of the defendant, even if both parties are committing assault?" Exh. 34. In response, the court referred the jury to the jury instruction that stated the elements of burglary. Exh. 37, jury instruction no. 28 (set forth above). And again, Alford does not even argue that the instruction incorrectly defines burglary under Nevada law. Further, while Alford's theory was that of "ongoing mutual combat that spill[ed] into a residence," evidence was also presented that would support a conclusion that Alford entered the residence with the intent to assault or batter Castro.

Alford has failed to demonstrate that the Nevada Supreme Court decision with respect to any part of federal ground 2 was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or 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). Federal habeas relief is, therefore, denied as to ground 2.

Ground 1

Alford contends that his trial counsel rendered ineffective assistance in violation of his Sixth Amendment rights (ECF No. 29, pp. 11-14). Ineffective assistance of counsel claims are governed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id*. To establish prejudice, the defendant must

show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id*. Additionally, any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's burden to overcome the presumption that counsel's actions might be considered sound trial strategy. *Id*.

Ineffective assistance of counsel under *Strickland* requires a showing of deficient performance of counsel resulting in prejudice, "with performance being measured against an objective standard of reasonableness, . . . under prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations omitted). When the ineffective assistance of counsel claim is based on a challenge to a guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

If the state court has already rejected an ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary to, or an unreasonable application of, the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id*.

The United States Supreme Court has described federal review of a state supreme court's decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). The Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403 (internal

citations omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has specifically reaffirmed the extensive deference owed to a state court's decision regarding claims of ineffective assistance of counsel:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id*. at 689, 104 S.Ct. 2052; *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*, 556 U.S. at ——, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at ——, 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 whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington, 562 U.S. at 105. "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 104 (quoting *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id*. (internal quotations and citations omitted).

In the first part of ground 1, Alford alleges that trial counsel failed to conduct sufficient pretrial investigation to discover that Detective Jenkins had secretly recorded a conversation between Alford and his girlfriend, failed to file a motion to suppress the contents of the taped conversation, and failed to object to Detective Jenkins' testimony regarding the conversation (ECF No. 29, pp. 11-14).

Affirming the dismissal of this claim, the Nevada Supreme Court pointed out that Alford failed to provide it with the trial transcripts. The state supreme court concluded that Alford failed to demonstrate how a pretrial interview with Detective Jenkins would

have altered the trial testimony or the outcome of the trial. Exh. 73, p. 2. That court continued:

> [Alford] argues that trial counsel was ineffective for failing to file a motion to suppress, or make an objection to the admission of, the recorded conversation between appellant and his girlfriend. Appellant argues that Detective Jenkins secretly recorded the conversation without first informing him of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant fails to demonstrate deficiency or prejudice as he fails to show that a motion to suppress would have been successful.

Id. at 2-3.

The state district court dismissed this claim in Alford's state postconviction petition, finding that Alford failed to demonstrate prejudice or any likelihood that a motion to suppress would have been granted. The court noted *Miranda* governs custodial interrogations and that, to determine whether a custodial interrogation without proper prior *Miranda* warnings occurred, the court examines whether the suspect was (1) in custody, (2) being questioned by an agent of the police, and (3) subject to "'interrogation.'" Exh. 64, p. 7 (quoting *Boehm v. State*, 944 P.2d 269, 271 (Nev. 1997)). The court continued:

> Here, unlike the cases where the Nevada Supreme Court has found a violation of *Miranda* and the Nevada Constitution, there is no evidence or specific allegation to warrant a conclusion that Weatherhead was acting as an agent of the police. To the contrary, the evidence adduced at trial indicates that Weatherhead was acting on her own, not at the behest of the police, and that petitioner and Weatherhead entered into a totally voluntary conversation. Nothing indicates that Weatherhead had any agreement to act on behalf of or cooperate with the police. The failure to file [a motion to suppress] did not prejudice petitioner.

Id.

Alford now argues that if the videotaped conversation—in which he denies having acted in self defense—and Jenkins' testimony about the conversation had not been admitted, it is reasonably probable that the jury would have "come to a different conclusion regarding Alford's level of criminal conduct" (ECF No. 29, p. 12). This assertion is belied by the testimony of the witnesses. Moreover, as no evidence

supported the contention that Weatherhead acted as an agent for the State, Alford cannot demonstrate that a motion to suppress had any likelihood of success. Alford has failed to demonstrate prejudice.

As the second part of ground 1, Alford contends that his trial counsel was ineffective for failing to object to jury instructions or submit proper jury instructions on the murder charge (ECF No. 29, p. 14). He argues that defense counsel should have proffered an instruction stating that it is the State's burden to prove beyond a reasonable doubt that the defendant was not acting in the heat of passion or operating under other legal provocation.

The Nevada Supreme Court stated that Alford failed to provide it with trial transcripts or jury instructions for its review and failed to demonstrate that the district court erred in dismissing this claim. Exh. 73, p. 3.

The state district court stated that Alford "fail[ed] to articulate how either of these actions by his trial counsel would have affected the potential outcome of the verdict." Exh. 64, p. 7.

Alford's claim that the court erred in not giving such instruction was denied above. He has not demonstrated that had his trial counsel submitted the instruction there was a reasonable probability of a different verdict. His own testimony was that the gun went off accidently, not that he acted in the heat of passion or in response to legal provocation. Alford has failed to demonstrate that the Nevada Supreme Court's decision affirming the dismissal of the claims in federal ground 1 is contrary to, or involves an unreasonable application of, *Strickland*, or 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). The court accordingly denies ground 1.

Therefore, the petition is denied in its entirety.

IV. Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a 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) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

Having reviewed its determinations and rulings in adjudicating Alford's petition, the court finds that none of those rulings meets the *Slack* standard. The court therefore declines to issue a certificate of appealability for its resolution of any of Alford's claims.

V. Conclusion

IT IS THEREFORE ORDERED that the second-amended petition (ECF No. 29) is **DENIED** in its entirety.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly and close this case.

DATED: 5 June 2017.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APP. 029

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN LAMONT ALFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53415

FILED

JUL 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a firearm. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant Brian Lamont Alford was charged with one count of open murder in the death of Jerome Castro stemming from an incident that took place at Castro's home in Reno, Nevada. Alford was called by his brother, Brandon, to accompany Brandon and Brandon's girlfriend, Melissa Simcoe, to Castro's house to get Simcoe's children, one of which was Brandon's child. Brandon and Simcoe believed they needed to pick up the children because Castro was upset with Brandon and Simcoe for getting Castro's sister, Shanika Thompson, very intoxicated earlier in the night.

On the way to Castro's house, Alford and Brandon stopped to pick up weapons because Brandon told Alford that Castro made threats against him and Simcoe. Upon arriving at Castro's house, a fight broke out, with Alford and Brandon fighting with Castro and his friend, Loren Dudley. During this fistfight, Alford's gun came out of it holster. Alford beat Castro with the butt of the gun, and a single shot was fired. The bullet went through Castro's arm and hit him in the forehead, but did not

penetrate or fracture his skull. Castro died from his injuries later that evening.

Alford was bound over for trial on the charges of open murder with the use of a deadly weapon and attempted robbery with the use of a deadly weapon. However, the magistrate dismissed the third charge against Alford, burglary.

After being bound over for trial, Alford filed a pretrial writ of habeas corpus. Alford challenged the State's ability to allege felony murder based upon a burglary count that was dismissed without probable cause by the magistrate, as well as on other grounds. The district court denied Alford's writ of habeas corpus.

Following a five-day jury trial, Alford was convicted of first-degree murder with the use of a deadly weapon. The district court sentenced Alford to life in prison with the possibility of parole after 20 years, with a consecutive sentence of 192 months for the use of a deadly weapon, and with parole eligibility after 43 months.[1]

On appeal, Alford argues that: (1) the district court abused its discretion in denying his pretrial writ of habeas corpus, (2) there was insufficient evidence to sustain his conviction, (3) the district court abused its discretion in giving certain jury instructions, (4) the district court abused its discretion in admitting certain evidence, (5) the district court erred in curtailing the cross-examination of key witnesses, (6) the district court abused its discretion in granting the State's motion to amend the information, (7) the district court abused its discretion in denying his

[1]The parties are familiar with the additional facts and we do not recount them further except as is necessary for our disposition.

motion for a new trial, (8) his convictions should be reversed because of prosecutorial misconduct, and (9) his convictions should be reversed under the doctrine of cumulative error. We conclude that all of Alford's arguments are without merit and thus affirm the judgment of the district court.

Pretrial writ of habeas corpus

Alford argues that the district court abused its discretion in denying his pretrial writ of habeas corpus because requiring him to face trial based upon the evidence received at the preliminary hearing violates the rule of corpus delicti.[2] Alford further argues that if there is insufficient evidence to demonstrate probable cause on the underlying felony, prosecution under the felony-murder rule should not be permitted to go forward. We disagree.

Standard of review

"The sole function of this court is to determine whether all of the evidence received [during the preliminary hearing] . . . establishes probable cause to believe that an offense has been committed and that the defendant[ ] committed it." Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). This court is "not now concerned with the prospect that the evidence presently in the record may, by itself, be insufficient to sustain a conviction." Id.

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[2]Corpus delicti means "body of the crime" in Latin. Black's Law Dictionary 395 (9th ed. 2009).

Corpus delicti

NRS 171.206 deals with the procedure for binding a defendant over for trial after a preliminary hearing and states:

> If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold [him] to answer in the district court; otherwise the magistrate shall discharge [him]. The magistrate shall admit the defendant to bail as provided in this title. After concluding the proceeding the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail [taken by him].

The corpus delicti rule is a "doctrine that prohibits a prosecutor from proving the corpus delicti based solely on a defendant's extrajudicial statements" and forces the prosecution to "establish the corpus delicti with corroborating evidence." Black's Law Dictionary 395 (9th ed. 2009). We have held that "[i]t has long been established that the corpus delicti must be demonstrated by evidence independent of the confessions or admissions of the defendant." Sheriff v. Dhadda, 115 Nev. 175, 180-81, 980 P.2d 1062, 1065 (1999). Further "[t]he corpus delicti may be established by purely direct evidence, partly direct and partly circumstantial evidence, or entirely circumstantial evidence." Sheriff v. Middleton, 112 Nev. 956, 962, 921 P.2d 282, 286 (1996). We have also held that:

> Although medical evidence as to the cause of death is often critical in establishing that a death occurred by criminal agency, there is no requirement that there be evidence of a specific cause of death. The state is required only to show

> a hypothesis that death occurred by criminal agency; it is not required to show a hypothesis of a specific cause of death.

Id.

We conclude that Alford's argument is without merit because the evidence presented by the State at the preliminary hearing was sufficient to establish that Castro may have died from criminal agency. Specifically, there was evidence that: (1) Alford was in possession of a gun when Castro was shot, (2) Castro was shot through the arm and struck in the forehead with a bullet, and (3) Castro died while in surgery that centered on the bullet wound sustained to his forehead. As such, the district court did not err in denying Alford's pretrial writ of habeas corpus.

The felony-murder rule

"Pursuant to NRS 200.030, the commission of a felony and premeditation are merely alternative means of establishing the single mens rea element of first degree murder, rather than constituting independent elements of the crime." Holmes v. State, 114 Nev. 1357, 1363-64, 972 P.2d 337, 341 (1998). In Holmes, we held that:

> premeditation and felony-murder are alternate theories upon which the State may rely in its attempt to establish the mens rea element of the crime of first degree murder. Although the justice's court had dismissed the felony robbery charge due to insufficient evidence, the State was not precluded from advancing the theory at trial that [the defendant] had murdered [the victim] during the commission of a robbery.

Id. at 1364, 972 P.2d at 342.

We conclude that Alford's argument regarding the underlying felony is without merit because we have long held that a defendant does not need to be bound over on the underlying felony charge for the State to

present a theory of felony murder. See id. Thus, even though Alford was not bound over on the burglary charge, it was proper for the district court to allow the State to advance the theory of felony murder. As such, the district court did not err in denying Alford's writ of habeas corpus based on the fact that the State had advanced a theory of felony murder.

Sufficient evidence

Alford argues that there was insufficient evidence presented by the State at trial to sustain his first-degree murder conviction. We disagree.

Standard of review

We will not reverse a jury's verdict on appeal if that verdict is supported by substantial evidence. Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). "There is sufficient evidence [to support a conviction] if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

We have also held "'that where 'there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony.'" Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) (quoting Stewart v. State, 94 Nev. 378, 379, 580 P.2d 473, 473 (1978) (quoting Hankins v. State, 91 Nev. 477, 477, 538 P.2d 167, 168 (1975))). Additionally, an entry into a dwelling with the intent to commit battery may support a felony-murder charge. State v. Contreras, 118 Nev. 332, 337, 46 P.3d 661, 664 (2002).

We conclude that there was sufficient evidence presented to support Alford's conviction for first-degree murder with the use of a deadly weapon. There was evidence presented to the jury that as Castro

attempted to shut his front door on Alford, Alford spit on Castro and prevented Castro from shutting the door by pushing the door in. Additionally, evidence was presented that Alford started the fight that ultimately led to Castro's death. While Alford did present his theory of the case that the fight started on Castro's front porch and then moved inside during the mutual combat, the jury determined that the State's evidence was more credible. As such, we cannot say that any rational trier of fact could not have found Alford guilty on the facts as presented at trial. Thus, we conclude that Alford's argument is without merit.

Jury instructions

Alford argues that the district court abused its discretion in both improperly instructing the jury on the felony-murder rule to imply malice and in failing to instruct the jury regarding the State's burden of proof. Alford further argues that the felony-murder rule should be set aside by this court because the rule leads to the denial of due process by relieving the State of the burden of proving a defendant's state of mind. We disagree.

Standard of review

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (citing Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). If the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason, then the district court abused its discretion. Id.

Felony-murder rule jury instruction

"Pursuant to NRS 200.030, the commission of a felony and premeditation are merely alternative means of establishing the single mens rea element of first degree murder, rather than constituting independent elements of the crime." Holmes v. State, 114 Nev. 1357, 1363-64, 972 P.2d 337, 341 (1998). In Holmes, we held that:

> premeditation and felony-murder are alternate theories upon which the State may rely in its attempt to establish the mens rea element of the crime of first degree murder. Although the justice's court had dismissed the felony robbery charge due to insufficient evidence, the State was not precluded from advancing the theory at trial that [the defendant] had murdered [the victim] during the commission of a robbery.

Id. at 1364, 972 P.2d at 342.

We conclude that Alford's argument is without merit because we, along with other jurisdictions, have continued to hold that the underlying felony need not be proved or even be pleaded to sustain a prosecution for felony murder. See id. (stating that "[c]onsistent with our approach, many jurisdictions have held that the State may seek a conviction for murder based on a theory of felony-murder without even charging the underlying predicate felony.") As such, we conclude that the district court did not abuse its discretion in instructing the jury to utilize the burglary allegation against Alford to substantiate malice for the purpose of a first-degree murder charge.

Manslaughter jury instruction

Alford argues that the district court abused its discretion in instructing the jury on the State's burden of proof to prove beyond a reasonable doubt that he did not act in the heat of passion with the requisite legal provocation. We disagree.

We have held that "the district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions." Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Further, "'[a] jury is presumed to follow its instructions.'" Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

We conclude that Alford's argument is without merit because the jury was properly instructed on the State's burden of proof. Additionally, since Alford did not object to the instructions given by the district court, and did not provide the district court with a proposed jury instruction on manslaughter, it is inappropriate for him now to complain that the district court erred in failing to give such an instruction. As such, we conclude that the district court did not abuse its discretion in instructing the jury concerning manslaughter.

Setting aside the felony-murder rule

The felony-murder rule has been codified by statute in this state since the days of statehood. See State v. Gray, 19 Nev. 212, 219, 8 P. 456, 460 (1885) (stating the felony-murder rule and citing 1 Compiled Laws of Nevada, § 2323 at 560 (Bonnifield & Healy 1873)).

We conclude that Alford's argument is without merit because it is not our place to rewrite a statute, especially one that has been around since the days of statehood. See City of Las Vegas v. Dist. Ct., 118 Nev. 859, 867, 59 P.3d 477, 483 (2002). As such, we further conclude that we

should not set aside the felony-murder rule and should leave this task to the Legislature if it sees fit to do so.

Admission of evidence

Alford argues that the district court abused its discretion in admitting: (1) the testimony of Detective Jenkins regarding a conversation between Alford and his girlfriend, Tarina Weatherhead; (2) the testimony of Detective Jenkins regarding a second interview between Alford and Detective Jenkins; and (3) bad acts evidence.

Standard of review

"District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998). We will not disturb a trial court's ruling on this issue without a showing of a clear abuse of discretion. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), overruled on other grounds by Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006).

The testimony of Detective Jenkins regarding a conversation between Alford and Weatherhead

Alford argues that the district court abused its discretion in admitting into evidence a conversation, videotaped by Detective David Jenkins, between Alford and Weatherhead at the police station following his arrest. Alford further contends that Weatherhead was used as an agent of the police and he was interrogated while in custody without having been informed of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). We disagree because Alford failed to file a motion to suppress this evidence or object to its admission at trial.

"[T]his court may review plain error or issues of constitutional dimension sua sponte despite a party's failure to raise an issue below." Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997). "[P]lain error is error which either had a prejudicial impact on the verdict when viewed in context of the trial as a whole or seriously effects the integrity or public reputation of the judicial proceedings." Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), judgment vacated on other grounds by Libby v. Nevada, 516 U.S. 1037 (1996)) (internal quotations omitted).

NRS 174.125(1) addresses the filing of a motion to suppress and states:

> All motions in a criminal prosecution to suppress evidence, for a transcript of former proceedings, for a preliminary hearing, for severance of joint defendants, for withdrawal of counsel, and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial, unless an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion before trial.

We have held that a civilian may be deemed a police agent when that civilian makes an express agreement with the police to speak to a suspect who is then in custody. Boehm v. State, 113 Nev. 910, 913, 944 P.2d 269, 271 (1997).

We conclude that all of Alford's arguments are without merit because he failed to file a motion to suppress or object to the admission of the evidence at issue. Specifically, since Alford failed to file a motion to suppress the videotaped conversation, there is no order from the district court ruling on the admissibility of the interview for this court to review.

Further, Alford has shown no evidence that Weatherhead made an agreement with Detective Jenkins to elicit statements from Alford during the conversation, thus failing to show that Weatherhead should be seen as an agent of the police. Additionally, Alford failed to make any argument which shows that the district court committed plain error, failed to show that the admission of this evidence had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or seriously affected the integrity or public reputation of the judicial proceedings. As such, we conclude that the district court did not abuse its discretion in admitting the videotaped conversation between Alford and Weatherhead.

The testimony of Detective Jenkins regarding an interview between Alford and Detective Jenkins

Following Alford's conversation with Weatherhead, he was interviewed by Detective Jenkins. During this interview, Alford told Detective Jenkins that the gun had gone off accidently and that he never intended to kill anyone. However, due to a recorder malfunction Alford's interview was not recorded and Detective Jenkins then had to re-interview Alford after replacing the broken tape recorder with a tape recorder that worked.

Alford argues that the district court improperly admitted testimony from Detective Jenkins regarding the interview between him and Alford because of the gross negligence of the police in losing or failing to properly record that interview. Alford thus contends that the district court abused its discretion in admitting the taped interview that Detective Jenkins took from him after learning that the original interview had not been recorded. Alford further argues that while he may not be able to show bad faith on the part of Detective Jenkins, he certainly can show

that Detective Jenkins's conduct was grossly negligent, thus establishing a due process violation. We disagree.

To establish a due process violation based upon the State's failure to gather evidence, a defendant must show: (1) that the State failed to gather evidence that is constitutionally material, i.e., that raises a reasonable probability of a different result if it had been available to the defense; and (2) that the failure to gather the evidence was the result of gross negligence or a bad faith attempt to prejudice the defendant's case. See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998).

We conclude that Alford's argument is without merit because he has failed to show bad faith or gross negligence on the part of Detective Jenkins in failing to record the interview between Alford and Detective Jenkins. Specifically, Alford has shown nothing that indicates that Detective Jenkins purposefully failed to tape the interview or that Detective Jenkins knew, or had reason to know, that the tape recorder would fail during the interview. Further, Alford has failed to show that he was prejudiced by the interview failing to be recorded. Upon realizing that the tape recording equipment had failed, Detective Jenkins immediately placed new equipment in the interview room and re-interviewed Alford based on the previous interview. As such, we conclude that the district court did not abuse its discretion in admitting the taped interview.

Uncharged bad acts evidence

NRS 48.045(2) addresses the admission of uncharged bad acts evidence and states that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for

> other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Our "principal concern with admitting such [uncharged bad] acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because the jury believes the accused is a bad person." Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000); see Berner v. State, 104 Nev. 695, 696-97, 765 P.2d 1144, 1145-46 (1988).

The uncharged bad acts of others

On the night of the incident, Brandon was introduced to Dudley and Thompson by Simcoe at a club in downtown Reno. After the four left the club, they continued drinking, took ecstasy, and ended up at Simcoe's house. On the way to her house, Simcoe asked Thompson if she would be interested in engaging in a threesome with her and Brandon, to which Thompson said no. All of these events were admitted into evidence at trial by the district court.

Alford argues that the district court abused its discretion in admitting into evidence the uncharged bad acts of others the night of the incident. Alford contends that the uncharged bad acts of Brandon, Simcoe, Dudley, and Thompson were far more prejudicial than probative because it portrayed him as someone who would engage in such deviant sexual behavior, even though he was not present for any of these alleged incidents.

We conclude that Alford's argument is without merit because our principle concern in the exclusion of such bad acts evidence is not present here. Specifically, all of the evidence Alford takes issue with was

about other people, and we cannot say that this is the type of bad acts evidence we seek to keep from being admitted.[3] Furthermore, this evidence goes directly to show Alford's motive for bringing a gun with him to Castro's house. As such, we conclude that the district court did not abuse its discretion in admitting this evidence.

Arrest evidence

Alford argues that the district court abused its discretion in admitting evidence of police activity in the arrest setting of the case and evidence of Brandon resisting arrest. Alford contends that the evidence of Brandon's escape, recapture, and location were completely irrelevant to Alford's own arrest.

We conclude that Alford's argument is without merit because the evidence of his and Brandon's arrest were specifically used to demonstrate how other evidence was collected in this case. As such, we conclude that the district court did not abuse its discretion in admitting this evidence.

Destruction of evidence by Brandon

Alford argues that the district court abused its discretion in admitting evidence that Brandon had burned the jersey he was wearing the night of the incident prior to his arrest.

We conclude that Alford's argument is without merit because he has failed to show he was prejudiced by this evidence. Further, this

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[3]Under NRS 48.045(2) evidence of uncharged bad acts is inadmissible to prove the character of a person in order to prove he acted in conformity therewith. Evidence regarding the prior bad acts of others does not relate to Alford, who was on trial in this instance.

evidence certainly goes to Brandon's credibility as a witness. As such, we conclude that the district court did not abuse its discretion in admitting this evidence.

Cross-examination of key witnesses

Alford argues that the district court improperly curtailed cross-examination of key witness, thereby depriving him of his Sixth Amendment right to confrontation. Alford contends that the district court erred in not allowing him to cross-examine Brandon about the facts underlying Brandon's felony conviction for battery with a deadly weapon for his role in the fight between Brandon and Dudley. Alford further contends that the district court erred in failing to allow him to impeach Dudley with a probation violation from a 2006 burglary conviction. We disagree.

Standard of review

"Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed de novo." Mendoza v. State, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006).

"The Sixth Amendment's Confrontation Clause provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' This right is secured for defendants in state as well as in federal criminal proceedings." Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (quoting Pointer v. Texas, 380 U.S. 400, 400-01 (1965) (alteration in original)). "The Court has emphasized that 'a primary interest secured by [the Confrontation Clause] is the right of cross-examination.'" Id. (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965) (alteration in original)). An "accused [has the right] to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656 (1984).

We conclude that Alford's argument is without merit because he has failed to show that he was entitled to cross-examine either Brandon or Dudley on the specific issues complained of. Alford has failed to cite to any caselaw that supports his proposition that the jury had a right to hear the underlying facts regarding Brandon being found guilty of battery with a deadly weapon. Further, evidence of Dudley's parole violation, which was in no way relevant to Alford's trial, would only have been introduced to show Dudley's general bad character. This type of character evidence is not admissible under NRS 48.045.[4] As such, we conclude that the district

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[4]NRS 48.045 states:

> 1. Evidence of a person's character or a trait of his . . . character is not admissible for the purpose of proving that [he] acted in conformity therewith on a particular occasion, except:
>
> (a) Evidence of [his] character or a trait of his . . . character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;
>
> (b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence; and
>
> (c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support his . . . credibility, within the limits provided by NRS 50.085.
>
> 2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that [he] acted in conformity

continued on next page . . .

court did not improperly curtail Alford's ability to cross-examine Brandon or Dudley.

The State's motion to amend the information

The State filed its original information on February 26, 2008. On June 12, 2008, the State filed its first amended complaint, without leave from the district court. On December 26, 2008, the State moved the district court for leave to file a second amended information. On January 8, 2009, the district court granted the State's motion for leave to file a second amended information and the State filed a second amended complaint on January 9, 2009.

Alford argues that the district court abused its discretion in granting the State's motion to amend the information because it was filed too late, thus denying Alford his Fifth Amendment right to a fair trial and to due process. We disagree.

Standard of review

The decision to allow the State to amend an information rests soundly within the discretion of the district court. Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

NRS 173.095(1), which concerns the amendment of an indictment or information in a criminal prosecution, states: "[t]he court may permit an indictment or information to be amended at any time

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. . . continued

> therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." "The State is required to give adequate notice to the accused of the various theories of prosecution." State v. Dist. Ct., 116 Nev. 374, 377, 997 P.2d 126, 129 (2000). As such, "[a]mendment of the information prior to trial is an appropriate method for giving the accused the notice to which he or she is entitled." Id. at 378, 997 P.2d at 129.

We conclude that Alford's argument is without merit because he has failed to show that he was prejudiced by the district court's granting of the State's motion to amend the information. Specifically, the State's new theory of prosecution was that there may have been an alternative way that Castro died and this theory was consistent with Alford's theory of defense. Thus, Alford cannot claim that he was unprepared for the State's new theory of prosecution since it was the integral argument he used in his defense. Additionally, the State did not charge Alford with an additional or different offense but only added a new theory of prosecution. As such, we conclude that the district court did not abuse its discretion in granting the State's motion to amend the information as Alford has failed to show that his Fifth Amendment right to a fair trial was violated.

Alford's motion for a new trial

Alford argues that the district court abused its discretion in denying his motion for a new trial based on conflicting evidence. Alford contends that the evidence presented in this case did not equate to a first-degree murder conviction and, as such, the district court should have granted his motion for a new trial. We disagree.

Standard of review

"'The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse.'" Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

"Motions for a new trial in criminal cases are governed by NRS 176.515." State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994). NRS 176.515(4) states that "[a] motion for a new trial based on any other grounds [other than newly discovered evidence] must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period." We have consistently held that pursuant to NRS 176.515(4) regarding 'other grounds,' a district court may grant a motion for a new trial based on an independent evaluation of the evidence, and stated that "'"[h]istorically, Nevada has empowered the trial court in a criminal case where the evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt."'" Purcell, 110 Nev. at 1393, 887 P.2d at 278 (quoting Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (quoting State v. Busscher, 81 Nev. 587, 589, 407 P.2d 715, 716 (1965))).

We have also held that:

> [A] conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from

> the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable doubt.

State v. Walker, 109 Nev. 683, 685-686, 857 P.2d 1, 2 (1993).

Here, the district court evaluated the evidence presented to the jury and determined that the totality of the evidence presented proved Alford's guilt beyond a reasonable doubt. This decision was well within the district court's discretion and Alford has failed to show that the district court's decision was clearly an abuse of that discretion. As such, we conclude that the district court did not abuse its discretion in denying Alford's motion for a new trial based on conflicting evidence.

Alleged prosecutorial misconduct

Alford argues that his Fifth Amendment right to a fair trial was violated by specific acts of prosecutorial misconduct. Alford assigns error to the prosecutor improperly: (1) vouching for a State witness during closing argument, and (2) arguing that Alford was a liar during closing argument. Specifically, Alford takes issue with the prosecutor vouching for the accuracy and credibility of the testimony of a witness and the prosecutor stating that Alford told an untruth and fabricated his story of the night in question. We disagree. We also note that Alford failed to object to either of the prosecutor's statements at trial.

Standard of review

When determining if "prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (citing Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). "This court must consider the context of such statements and [note that the]

'criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Id. (quoting Thomas, 120 Nev. at 47, 83 P.3d at 825) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

> When an error has not been preserved, this court employs plain-error review. Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.

Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." U. S. v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993).

We conclude that Alford's argument is without merit because he has failed to show that the prosecutor's statements rise to the level of plain error. Specifically, the prosecutor did not necessarily vouch for the witness's testimony but merely stated that it appeared that Alford's testimony seemed to corroborate the witness's testimony. Further, the prosecutor did not specifically call Alford a liar, but merely alluded to the fact that Alford had changed his story several times. As such, we conclude that Alford's conviction should not be overturned because of prosecutorial misconduct because, even if there was any misconduct present here, Alford has failed to show that it rises to the level of plain error.

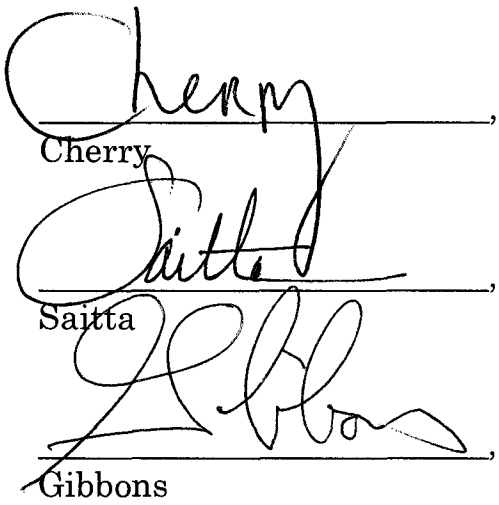
APP. 051

Cumulative error

We conclude that, because the district court did not err on any issue presented by Alford, the cumulative error doctrine does not apply.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

APP. 052

CODE 1850

FILED

MAR 06 2009

HOWARD W. CONYERS, CLERK
By: DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

Case No. CR08-0261A

BRIAN LAMONT ALFORD,

Dept. No. 7

Defendant.

/

JUDGMENT

The Defendant, having been found Guilty by a Jury, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

Brian Lamont Alford is guilty of the crime of Count I – Murder in the First Degree with the Use of a Firearm, a violation of NRS 200.010, NRS 200.030 and NRS 193.165, a felony, as charged in the Information, and that he be punished by imprisonment in the Nevada State Prison for a term of Life With the Possibility of Parole after a minimum of Twenty (20) years has been served, to include a consecutive term of Forty-Three (43) to One Hundred and Ninety (192) months in the Nevada State Prison for the Use of a Deadly Weapon enhancement, with credit for Four Hundred and Thirty-One (431) days time served, and by payment of restitution in the amount of Three Thousand Five Hundred Dollars ($3,500.00). As to Count II of the Information, the State's Motion to Dismiss is hereby granted.

APP. 053

It is further ordered that the Defendant shall pay the statutory Twenty-Five Dollar ($25.00) administrative assessment fee, the One Hundred Fifty Dollar ($150.00) DNA testing fee, and submit to a DNA analysis to determine the presence of genetic markers, if not previously ordered, and reimburse the County of Washoe the sum of Five Hundred Dollars ($500.00) for legal representation.

Dated this 6th day of March, 2009.

Patrick Flanagan

DISTRICT JUDGE

ORIGINAL

CODE: 2840

FILED

JUN 13 2008

HOWARD W. CONYERS, CLERK
By: D. Mansfield
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Application of
BRIAN LAMONT ALFORD,

Petitioner,

For a Writ of Habeas Corpus.

Case No. CR08-0261A

Dept. No. 9

_____/

ORDER

The Court has reviewed and considered Petitioner, BRIAN LAMONT ALFORD's (hereinafter "Mr. Alford"), pre-conviction *Petition for Writ of Habeas Corpus*, filed by and through counsel, John P. Springgate, Esq., on April 16, 2008.

Mr. Alford contends that the evidence adduced at his preliminary hearing was insufficient to establish probable cause that an offense was committed and that Mr. Alford committed that offense, and that the State failed to establish the requisite elements to charge him under the felony murder rule.

Mr. Alford brings his petition for habeas relief on the following grounds: 1) there was insufficient evidence to establish corpus delecti of the crime of murder without Mr. Alford's statements; 2) there is no proof of cause of death at the preliminary hearing; 3) it was impermissible to allege murder by virtue of the "felony murder rule" without the defendant being bound over for trial on the underlying alleged felony, a burglary; and 4) there was insufficient evidence at the preliminary hearing to establish attempted robbery.

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APP. 055

I. Standard of Review

Pursuant to NRS 34.360, "[e]very person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." A writ of habeas corpus is an extraordinary remedy "to allow the presentation of questions of law that cannot otherwise be reviewed, or that are so important as to render ordinary procedure inadequate and justify the extraordinary remedy." *Dir., Nev. Dept. of Prisons v. Arndt*, 98 Nev. 84, 85, 640 P.2d 1318, 1319 (1982), *quoting State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 417 P.2d 148 (1966). "[U]se of the extraordinary writ is warranted only to challenge present custody or restraint and the legality of that confinement." *Arndt*, 98 Nev. at 86. (Additional citations omitted).

"In habeas corpus proceedings brought by one indicted in a crime, the court can only inquire into whether there exists any substantial evidence which, if true, would support a verdict of conviction." *Sheriff, Washoe County v. Dhadda*, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999)(additional citations omitted).

II. Substantial evidence was presented at the preliminary hearing to support a verdict of conviction as to the murder and robbery charges.

"An accused must be held to answer if it appears from the preliminary examination 'that there is probable cause to believe that an offense has been committed and that the defendant has committed it.'" *Id., citing* NRS 171.206; *see also Domingues v. State*, 112 Nev. 683, 917 P.2d 1364 (1996). "The magistrate is not concerned with the sufficiency of the evidence to justify conviction." *Id., citing State v. Fuchs*, 78 Nev. 63, 368 P.2d 869 (1962). "Sufficient cause is shown to order those charged to stand trial if the evidence received will support a reasonable inference that they committed the crimes." *Id., citing Beasley v. Lamb*, 79 Nev. 78, 378 P.2d 524 (1963); *see also Sheriff, Washoe County v. Shade*, 109 Nev. 826, 858 P.2d 840 (1993)(holding that a finding of probable cause sufficient to bind an accused over for trial may be based on slight, even marginal evidence, because it does not involve determination of guilt or innocence of accused).

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A. Evidence presented by the State apart from Mr. Alford's statements sufficiently established *corpus delicti*.

To establish *corpus delicti* in a murder case, the state must show 1) the fact of death, and 2) that death occurred through the criminal agency of another. *See* Dhadda, 115 Nev. at 179-80.

"In assessing whether there is sufficient independent evidence of the *corpus delicti*, a reviewing court should assume the truth of the state's evidence and all reasonable inferences from it in a light most favorable to the state." Dhadda, 115 Nev. at 180.

However, "[t]he *corpus delicti* of a crime must be proven independently of the defendant's extrajudicial admissions." *See* Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996), *citing* Hooker v. Sheriff, 89 Nev. 89, 506 P.2d 1262 (1973).

The record reflects that testimonial evidence from Crystal Hall, Loren Dudley, and Shanika Thompson established that Mr. Alford had engaged in a fight with Jerome Castro, which involved Mr. Alford allegedly striking Mr. Castro in the head with a gun, with the gun subsequently discharging.

In addition, Officer Nicholas Duralde of the Reno Police Department, who accompanied Mr. Castro to the hospital and witnessed his death, also testified that he observed a gunshot wound to Mr. Castro's right forearm, along with an entry and exit wound to his forehead.

Assuming the truth of this evidence and all reasonable inference from it in the light most favorable to the State, the Court finds the evidence constitutes independent proof sufficient to establish *corpus delicti*. Furthermore, the Court finds the evidence presented at the preliminary hearing, including the testimony of Officer Duralde, sufficiently established Mr. Castro's cause of death.

B. Nevada law allows the State to pursue the homicide charge under the "felony murder rule" despite the fact that Mr. Alford was not bound over for trial on the original burglary charge.

Under Nevada law, "the State may seek a conviction for murder based on a theory of felony-murder without even charging the underlying predicate felony." *See* Holmes v. State, 114 Nev. 1357, 1364, 972 P.2d 337, 343 (1998). In *Holmes*, *supra*, the Nevada Supreme Court construed NRS 200.030 as follows:

> Pursuant to NRS 200.030, the commission of a felony and premeditation are merely alternative means of establishing the single *mens rea* element of first degree murder, rather than constituting independent elements of the crime.
>
> 114 Nev. at 1363-64, *citing* Schad v. Arizona, 501 U.S. 624, 637, 111 S.Ct. 2491 (1991).
>
> Consistent with our approach, many jurisdictions have held that the State may seek a conviction for murder based on a theory of felony-murder without even charging the underlying predicate felony.
>
> (Additional citations omitted.)
>
> Accordingly, we reiterate that premeditation and felony-murder are alternate theories upon which the State may rely in its attempt to establish the mens rea element of the crime of first degree murder.
>
> 114 Nev. at 1364.

Therefore, the Court finds that the State may advance the alternate theory of felony murder at trial even though the burglary charge was dropped.

C. There was sufficient evidence presented at the preliminary hearing to establish attempted robbery.

NRS 200.381(1) defines the crime of robbery as:

> Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
>
> (a) Obtain or retain possession of the property;
>
> (b) Prevent or overcome resistance to the taking; or
>
> (c) Facilitate escape.
>
> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

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APP. 058

After reviewing the record, the Court finds that the evidence presented by the State at the preliminary hearing established sufficient probable cause to support the robbery charge.

Accordingly, and good cause appearing, IT IS HEREBY ORDERED that Defendant Brian Lamont Alford's pre-conviction *Petition for Writ of Habeas Corpus* is DENIED.

DATED: This 13 day of June, 2008.

DISTRICT JUDGE

APP. 059

CERTIFICATE OF MAILING

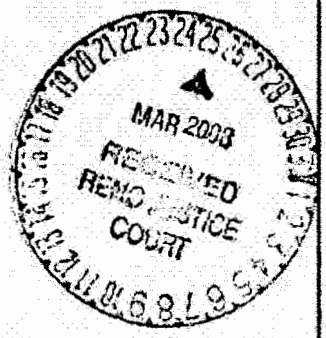
Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 13 day of June, 2008, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Luke Prengaman, Esq.
Deputy District Attorney
Washoe County District Attorney's Office
(via interoffice mail)

John P. Springgate, Esq.
Law Offices of John Springgate
203 Arlington Avenue
Reno, NV 89501

Sheila Mansfield

ORIGINAL



IN THE JUSTICE COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE HAROLD ALBRIGHT, JUSTICE OF THE PEACE

THE STATE OF NEVADA, Plaintiff, vs. BRANDON LAMONT ALFORD and BRIAN LAMONT ALFORD, Defendants.	Case No. RCR2008-039006 Dept No. 4

TRANSCRIPT OF PROCEEDINGS

Preliminary Hearing

February 20, 2008

Reported by: WENDY L. PEARSON, NV CSR #329, CA CSR #9185

MR. PRENGAMAN: Now, as far as attempted robbery with the use of a deadly weapon, the law says that if you take advantage --

THE COURT: Okay. I agree with you on that.

The burglary was what I was concerned about.

Go ahead, Mr. Springgate.

MR. SPRINGGATE: Thank you.

MS. RIGGS: Your Honor, may I briefly respond on a point that Mr. Prengaman made regarding the privilege, because I do think it's important here, your Honor?

THE COURT: Okay.

MS. RIGGS: The only way this is not a burglary is if my client had a privilege.

You'll recall that the testimony from Mr. -- from Detective Chalmers is that my client perceived that Mr. Castro was beating his brother while his brother was holding a baby in his hand. He is acting in defense of his bother, and he is exercising the privilege of defense of others, your Honor.

Thank you.

THE COURT: All right.

MR. SPRINGGATE: Thank you.

As to the burglary with regard to Brian Alford -- the problem, first, as to the burglary is -- and this has already been discussed. It seems clear from the testimony, even from

Mr. Dudley's testimony when he re-read his statements when he was pressured, that the fight's outside.

Burglary, I believe, requires a specific intent to commit a crime therein at the entry, and the evidence is that these people are involved in a four-way affray at the time that they go into the residence. There is no entry with intent, and, therefore, the burglary is not made.

The evidence is similarly weak with regard to the robbery. The only evidence with regards to the robbery is Mr. Dudley saying that they were patted down.

The problem with that is robbery is, of course, the specific intent to use -- to take the property from them by means of force or fear.

Castro, it's clear from the evidence, had money on him. Dudley had his wallet on him. Nothing was taken from any of the bodies. The inferences to be led therefrom are not that it's a robbery. The inference is that they're patting them down for weapons before they exit the premises.

So neither the burglary nor the robbery are made even through slight or marginal evidence.

The real problem arises in the murder. Counsel knows he's got a real serious problem. The corpus delecti in murder, of course, is death as a result of criminal agency, and he can't establish cause of death.

He's got 19, which is not admitted, and he's got Officer Duralde, or whatever, who testified -- or one of them testified as to conversations with the doctor, I assume, as to cause of death.

We've got a death. We don't have a death as a result of criminal agency. Most importantly, of course, you can't make that with the comments or the statements of the parties, or you're violating the corpus delecti rule.

We don't have the autopsy. We don't have the doctor who did the autopsy. We don't have Dr. Song. (Phonetic.) We don't have the physician, and I don't believe I have ever done a murder prelim without somebody indicating cause of death, which is, kind of, important in a murder. Of course, the allegations regarding felony murder fall with the burglary and the robbery.

But I'll submit it's apparent on its face there's a real significant problem. Counsel knows he's got a real significant problem with that.

MR. PRENGAMAN: Your Honor, I'd object to that. I don't believe I have a problem, and if he wants to argue the facts, he can do it, but he shouldn't talk about my intent.

THE COURT: Okay. Please restrain yourself, Mr. Springgate.

MR. SPRINGGATE: Okay. That's fine.

The point is -- is that based on the evidence that we have here and the complete absence of any sort of medical testimony to -- establishing death as a result of criminal agency, you can't get to murder.

Count I, II and III -- Counts I, II and III should fall and should not be bound over on.

THE COURT: All right. Mr. Prengaman.

MR. PRENGAMAN: Well, your Honor, with regards to the -- the murder, there are three alternatives alleged. First, open murder. That's the first paragraph, and according to the case law, the Defendant should be bound over if either first degree or any of the lessers are established by probable cause. That includes second degree or any type of manslaughter, any of the lessers. He should be bound over on open murder.

The second paragraph alleges first degree felony murder committed in the course of and continuing after a burglary, and the third paragraph alleges second degree felony murder, murder committed pursuant to Nunan (Phonetic) and Morris (Phonetic), a murder committed. The Defendant engaged in an inherently dangerous felony which causes death.

Your Honor, I've established the corpus delecti in this case. Again, the burden is -- is probable cause.

You have an individual who is at this residence. He

is beaten in the head by the admission of the Defendant, but irrespective of that, he is -- he is -- his head -- his wounds are to the arm and to the head.

The only person inflicting those wounds by anyone's testimony, even excluding the Defendant's, is -- is Brian Alford.

He is immediately taken from the residence. He goes to the hospital. He goes into surgery where -- where the surgeon's working on his head. Shortly after that, he codes out and dies.

Did the Defendant -- does that establish a cause of death by criminal agency?

I submit overwhelming, your Honor. He gets a beating and -- and/or a shot in the residence. As a result, he died at the hospital shortly thereafter.

Does that show criminal agency?

Absolutely.

Now, with regard to the --

And, again, your Honor, do you -- does, your Honor, have any questions about that that you want me to address?

THE COURT: No, I don't. I think that's established.

MR. PRENGAMAN: Your Honor -- and then with regard --

THE COURT: The burglary -- the burglary is one I'm concerned about with Mr. Brian Lamont Alford, also.

MR. PRENGAMAN: Your Honor, with regard to the burglary, I would suggest that the evidence of burglary is even stronger against Brian than it is against Brandon.

In this case, you have the testimony of Crystal Hall as well as that of Loren Dudley that Jerome Castro --

What is Jerome doing?

He wants the Defendants out. He opens the door for Melissa Simcoe to leave. He is tying to close the door. Brian Alford spits on him and then punches him, and both Crystal Hall and -- and Mr. Dudley both indicated that.

Who's the primary aggressor?

It is this Defendant Brian Alford. He is the aggressor, and according to Crystal Hall, the punch occurs inside. He comes inside and -- and punches.

But, in any event, again, your Honor, he is attacked. He attacks -- he attacks Mr. Castro, and, in fact, whether the -- that initial punch occurred while he was standing outside, Castro was inside, so when he punched him, he punched into the residence. He punched Castro.

Was his intent to batter?

Absolutely.

Thereafter, if Mr. Castro defends himself, is he privileged to do so?

Again, absolutely he is.

Does the Defendant have any legal justification for going into the residence, pushing in, entering under any circumstance to continue to hit and strike Mr. Castro?

He does not. He has no privilege.

And it cannot be -- I would submit it cannot with a straight face be said that this was -- it was an affray between Mr. Castro and Brian Alford. Brian Alford spit on him and then punched him, and Mr. Castro defended himself.

But is that an affray for a person to be attacked inside while he's standing inside his own home?

The Defendant then comes into the home, continues to attack him, and he's unable to defend himself. I would submit, your Honor, that the Defendant -- if that first punch -- when he punches Jerome Castro, even when he, excuse me, spits on him while he's standing in the residence, he's committed that battery, but it is the punching into the residence initially. It is the going inside thereafter to continue the attack.

That's not an affray. That's a guy who gets attacked and who defends himself, who's fighting to defend himself.

So I would submit, your Honor, that the -- that the burglary has been established by slight or marginal evidence. The intent of the Defendant is clear. Upon entry, his intent was to batter Mr. Castro.

He is mad at him. He wanted to fight him earlier.

Your Honor, he -- he was the one who threw out the suggestion, "Let's take it outside."

According to the law in Nevada, if a killing occurs either during or in an unbroken chain of events after one the enumerated felonies, burglary being one of them, that's felony murder, and I submit I've established not only the charged count of burglary in Count II, but the first degree burglary theory.

And I would submit that, again, after that, when he's got Mr. Castro on the ground and he starts beating him with the gun, battery with -- battery with a deadly weapon -- I would submit that I've established that.

And certainly, there's no privilege there to bring the -- the -- a blunt object of any kind to -- even if you assume it's a fistfight. No privilege there. He is engaged in a battery with a deadly weapon that is inherently dangerous, and in the course of that, he caused the death of Jerome --

THE COURT: Well, I --

MR. PRENGAMAN: -- Castro.

So I'd submit I've shown second degree felony murder theory alleged as well.

THE COURT: I believe that there's probable cause to believe that the crime murder with the use of a deadly weapon and attempted robbery with the use of a deadly weapon were

committed as to Brian Lamont Alford -- those crimes. I bind him over to District Court on those crimes.

I do not find there's probable cause as to the crime of burglary.

I believe there's probable cause to believe that the crime of battery with a deadly weapon was committed by Brandon Lamont -- or was committed, and the crime of attempted robbery with the use of a deadly weapon was committed as alleged in Count VI, and being an ex-felon in possession of a firearm as alleged in Counts VII were committed and that the -- Brandon Lamont Alford committed those crimes.

And I do not find there's probable cause to believe that the crime of burglary as alleged in Count V was committed.

MR. PRENGAMAN: And so just to clarify, your Honor, you bound over on all counts except Count II and Count V?

THE COURT: Yes.

And the evidence --

Where do you want the evidence to go? Back to the State?

Any objection, Ms. Riggs?

MS. RIGGS: Pardon me, your Honor?

THE COURT: Can the State get the evidence back?

MS. RIGGS: That's fine with me, your Honor.

THE COURT: Mr. Springgate?

MR. SPRINGGATE: Yes, your Honor.

THE COURT: All right. It will be returned to the State.

MR. PRENGAMAN: Thank you, your Honor.

THE COURT: All right.

And, again, I want to thank the audience very, very much for your professionalism and for being so good. It's been a long, hard day, and I do the best I can for everyone.

So thank you all very much. I appreciate the fact that you were all so courteous.

Thank you.

THE BAILIFF: Please rise.

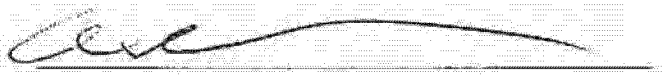
(Proceedings concluded.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, WENDY PEARSON, a Certified Court Reporter, do hereby certify that I reported the proceedings in the within entitled cause, and that I was present on Wednesday, February 20, 2008, at the hour of 9:24 a.m. of said day, and reported the proceedings had and testimony given therein in the Preliminary Hearing of the case of THE STATE OF NEVADA, Plaintiff, vs. BRANDON LAMONT ALFORD and BRIAN LAMONT ALFORD, Defendants, Case No. RCR2008-039006.

That the foregoing transcript, consisting of pages numbered 1 to 334, both inclusive, is a full, true and correct transcript of my said stenotype notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the Preliminary Hearing of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 5th day of March, 2008.



WENDY L. PEARSON, CSR #329, #9186