No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

RICARDO IRIVE, Petitioner,

v.

JO GENTRY, 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 **Irive**

Petitioner Charles Irive 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. Counsel for Irive was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Dated this 12th Day of September 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

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

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QUESTION PRESENTED

DOES IT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL TO ALLOW A PLEA AGREEMENT THE DEFENDANT WISHED TO TAKE LAPSE DUE TO MISTAKE OR NEGLIGENCE?

LIST OF PARTIES

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

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TABLE OF AUTHORITIES

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OPINIONS BELOW

This Petition concerns two district court cases consolidated for appeal because they concerned the same Nevada court cases. (*See* App. G (Ninth Circuit opinion).)

The opinion concerns two lower court orders denying Petitioner Irive habeas relief. Both concerned the same Nevada criminal proceedings. (*See* App. B, E (district court orders).)

Only the consolidated Ninth Circuit decision is at issue in this petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished consolidated memorandum decision on June 14, 2019. (*See* App. G.) Irive mails and electronically files this petition within ninety days of the entry of that order. *See* Sup. Ct. R. 13(1); *see also* Sup. Ct. R. 30(1) (excluding the last day of the period if it falls on a federal holiday). 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 Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This petition concerns one discrete issue: Was defense counsel ineffective for negligently failing to affirm a favorable plea offer and allowing it to expire? Irive would have taken that offer but for his counsel's failure. This deficient performance forced Irive to undergo a hopeless jury trial. In Irive's companion case, trial court voiced annoyance at both the prosecutor and defense counsel for wasting the public's time and money on a frivolous trial. Had the attorneys acted more responsibly both the public and Irive would have benefited.

Before exploring the constitutional violation at issue, however, it is necessary to examine the procedural and factual history of the case.

A. Nevada Criminal Charges, Jury Verdict, and Criminal Judgment

This Petition involves two cases. In the first, Las Vegas Metropolitan Police Department officers arrested Ricardo A. Irive on September 20, 2009. The Clark County District Attorney (DA) followed by filing a criminal complaint on October 5, 2009, accusing Irive and co-defendant, Rosa Loya, with conspiracy and robbery.

The case proceeded to trial on June 1, 2010, and continued through June 3, 2010. The jury found Irive and Loya guilty on both counts.

The district court sentenced Irive on August 23, 2010. As reflected in the August 27, 2010 Judgment of Conviction, the court sentenced as follows: Count 1: 13 to 60 months; and Count 2: 72 to 180 months, with a consecutive 48 to 180 months for the deadly weapon enhancement. The court ordered Count 2 to run concurrently to Count 1. (*See* App. F.)

In the second case, On October 27, 2009, the DA filed an Information in the Eighth Judicial District Court, charging Irive with First Degree Kidnapping, Conspiracy to Commit Robbery, Battery with Intent to Commit a Crime, and Robbery. The DA charged co-defendant Loya with the same.

The trial on the remaining three counts began on June 7, 2010, and continued through June 10, 2010. The jury found both Irive and Loya guilty of all three counts.

The district court sentenced Irive on August 23, 2010. As reflected in the August 31, 2010 Judgment of Conviction, the court sentenced Irive as follows: Count 1—Life with the possibility of parole after five years, Count 2—24 to 72 months, and Count 3—16 to 180 months. All counts run concurrently to each other and concurrently to any other case. (*See* App. C.)

B. Direct Appeal and State Post-Conviction Proceedings

Irive took a direct appeal of both cases to the Nevada Supreme Court.

Neither decision is important to this Petition.

Irive then filed a proper person Nevada habeas petition in his original trial court. Among other grounds for relief Irive alleged a Sixth Amendment deprivation of his right to counsel due to counsel's failure to finalize a plea agreement.

The trial court dismissed Irive's petition without appointing counsel. The Nevada Supreme Court reversed finding the district court erred in denying Irive's post-conviction petition without appointing counsel.

Following the Nevada Supreme Court's order, the state district court held an evidentiary hearing on the pending petition on November 7, 2014. The district court later denied Irive's petition in a written order.

The Nevada Supreme Court issued its Order of Affirmance on December 18, 2015, affirming the judgment of the district court. It is this two-page written order that is the focus point of one of Irive's consolidated federal habeas petitions.

Federal Post-Conviction Proceedings

On February 3, 2016, Irive mailed a pro se Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody.

The State filed a Motion to Dismiss Petition for Writ of Habeas Corpus on December 3, 2015. The court denied the motion and reconsidered its earlier ruling by appointing the Federal Public Defender to represent Irive.

Irive amended his petition with the assistance of counsel.

The lower court denied this ground for relief on the merits. The order concerns two actions, this case and Irive's federal petition in a separate district of Nevada case—3:16-cv-00241-MMD-WGC, later consolidated for appeal. (*See* App. G (Ninth Circuit decision).) The cases and pleaded grounds for relief are related because, although they concern two separate Nevada robbery prosecutions, the plea bargain issue discussed herein would have resolved both prosecutions and involved the same operative nucleus of facts.

The federal district court summarized the facts of the two prosecutions as follows.

1. Case No. 3:15-cv-00487-MMD-WGC—The Robbery at the Pawnshop

This case involves a robbery in the parking lot of a Las Vegas EZ Pawn. The facts of the event are, with the exception of whether Irive could have known a firearm would be involved, are undisputed. Irive and an unidentified accomplice ("Chucky") approached two (2) victims outside the E Z Pawnshop on Las Vegas Boulevard in Las Vegas, Nevada, on or about September 10, 2009. This occurred at night. The parking lot was dark. *See Irive v. State*, 2011 WL 4847845 (Nev. 2011) (unpublished

The DA contended the intent of Irive and Chucky was to rob the victims of the money they had obtained from pawning items inside the shop. Co-Defendant Loya, a co-conspirator and Irive's girlfriend, acted as the get-a-way driver.

Upon approach, Chucky raised his shirt to display what the victims believed to be the handle of a black gun tucked in his waistband. Chucky never removed the object. The victims were only able to testify that they saw what seemed to be a gun. Chucky demanded money. When the victims balked, Irive ripped the necklace off Mr. Jamies' neck. Irive then punched Jaimes in the jaw and removed the man's wallet. Mr. Irive and Chucky fled the scene in the car driven by co-Defendant Loya.

Irive testified at trial that a mutual struggle occurred, and that the necklace was removed from the victim's neck because it got caught on his hand or arm as they exchanged blows. Irive did not know if his accomplice had a gun. Irive did not see a gun during the relevant events. Law enforcement never recovered a firearm or found the unknown accomplice.

2. Case No. 2:16-cv-00241-MMD-WCG—Kidnapping and Robbery

On Sunday, September 20, 2009, J.B., a seventeen-year-old women, was standing in front of a pay phone waiting for her boyfriend to pick her up to take her to work. While J.B. was waiting for her boyfriend, Irive and Loya pulled up in a red SUV. Loya, who was the driving the vehicle, began asking J.B. for help finding directions to Carroll and Lake Mead; an intersection that did not exist. J.B. told Loya that she knew where Lake Mead was but that Carroll did not intersection with Lake Mead.

Loya insisted that J.B. get in the SUV and help her with directions. Loya promised she would drive J.B. to work. Loya was reluctant but agreed because she felt that another woman would not harm her. Unknown to J.B., Irive was hiding in the back seat of the vehicle.

J.B. sat in the empty front passenger seat and began giving Loya directions. Loya began a conversation asking J.B. questions such as how much money she made at her work. J.B. became nervous and asked to get out of vehicle. Loya kept driving stating only that they were going somewhere close by.

Loya then made a right turn and Irive grabbed J.B. around the neck from his hiding place in the back seat. Irive demanded J.B. give him her gold jewelry. J.B. informed Irive that she her jewelry did not contain real gold. Irive stopped choking J.B. and threw her purse into the back seat of the SUV.

J.B. asked to be let go. Irive opened the door and pushed her out.

Meanwhile Las Vegas Patrol Officer Dolan witnessed J.B. exit the vehicle. J.B. was yelling and pointing at the red SUV. J.B. flagged down Officer Dolan and told him that someone in the vehicle had grabbed her neck and took her purse.

The SUV had made a U-turn and was now approaching Officer Dolan's position. Dolan motioned for the vehicle to stop. Dolan exited his car and approached

the driver of the vehicle. During Dolan's conversation with the driver, Loya, Irive leaned forward from the back seat and handed over J.B.'s purse. Dolan returned the purse to J.B. who was scared and crying.

Over objection, Dolan testified to noticing red marks around J.B.'s neck. Officer Dolan identified Irive as the person in the backseat of the SUV.

C. Facts Relevant to Plea Negotiations

Irive's trial counsel acknowledged that Irive wanted to accept a plea bargain in lieu of proceeding to trial. The DA offered a global plea offer that would have resolved this case and another pending robbery charged Irive faced. The deal would have allowed Irive to plead to just robbery and thereby avoid the five to life sentence imposed for Irive's kidnapping conviction. The offer would have also allowed Irive to reach a favorable result in his other robbery case.

Trial counsel informed Irive of the offer but did not tell him the offer would expire. Although Irive wanted to take the offer he held off on acceptance based on his counsel's advice. Trial counsel wished to conduct further investigation of the alleged victim. Trial counsel failed, however, to learn when the offer would expire. Trial counsel did not ask how long the prosecutor would hold the offer open because asking the question might remind the prosecutor that he should limit the terms of the offer. This is not a rational or strategic basis for failing to ascertain the limiting terms of a plea offer.

Trial counsel did not follow up on the offer. At the case's calendar call, the prosecutor announced ready and trial counsel then learned that the DA had revoked the offer. It was now too late for Irive to take the deal.

This record establishes that, but for counsel's ineffective assistance, Irive would have been able to resolve two robbery cases favorably. In spite of Irive expressed desire to resolve the case, counsel's mistake regarding the timeline of the offer deprived Irive of that right and doomed him to a trial that he could not win.

As the judge noted at sentencing this "case should have never gone to trial" as "there was virtually no defense."

Irive contends he was prejudiced by counsel's actions. But for the ineffective assistance of counsel, Irive would have taken a favorable plea offer and received a more lenient sentence in two separate cases.

D. The Federal District Court's Ruling

The court recognized that recent authority from the Supreme Court establishes that a defendant has the right to effective representation during plea negotiations. (*See* App. B (citing, inter alia, *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 556 U.S. 134 (2012)).) Since the case is a federal habeas action, however, Nevada is protected by the deferential standards set forth in 28 U.S.C. § 2254(d). Irive cannot prevail unless he can establish the Nevada Supreme Court opinion denying his ineffective assistance of counsel (IAC) was objectively unreasonable.

Irive cannot make this showing because he failed to establish crucial facts. The parties had not reduced the terms of the agreement were not reduced to writing. The terms of the offer were unclear.

The court agreed that Irive's counsel declined the DA's offer, despite Irive's willingness to plead, in order to conduct further investigation. Relations between defense counsel and the DA were poor with little communication occurring between the parties. Because the offer was not concrete, the Nevada Supreme Court's denial of the claim is reasonable.

Furthermore, the court found no showing of prejudice, but this aspect of the ruling is unclear. Prejudice in this context means that there is a reasonable probability that Irive would have taken the offer had counsel not allowed it to lapse. The court rules that since Irive could not clearly remember the terms of the offer at an evidentiary hearing that occurred years later, he could not demonstrate he would have taken the offer.

The court also voiced the need to afford deference to trial counsel's "handling of the plea negotiations." This is a curious ruling given that trial counsel, with fortitude and candor, concedes that she negligently, not because of tactics or strategy, allowed the prosecutor's plea offer to lapse.

Because Irive believes the district court's analysis of his Sixth Amendment claim is fundamentally flawed, he filed a timely notice of appeal and now hereby files this brief.

E. The Ninth Circuit's Consolidated Decision

The Ninth Circuit affirmed the lower court's denial. The Nevada Supreme Court's decision that trial counsel did not act deficient was neither contrary to, nor an unreasonable application of, clearly established federal law. (*See* App. G, at 45.) Irive's advice to counsel, that he delay taking the offer, was sound even though she later inadvertently let the offer lapse. (*See id.*)

The Court also found it was questionable whether Irive could establish prejudice given the terms of the offer were not concrete. (*See id.* at 45-46.)

Because Irive believes it is improper to let a favorable offer lapse that a client would have otherwise taken, this Petition follows.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO CLARIFY THAT THE DEFENSE COUNSEL'S DUTIES INCLUDE ENSURING THAT PLEA OFFERS ARE PROPERLY UNDERSTOOD BEFORE COMMITTING A DEFENDANT TO A COURSE OF ACTION THAT INADVERTENTLY CAUSES HIM TO LOSE THE BENEFIT OF THE OFFER.

It is well-established that plea bargaining is a critical stage in a criminal proceeding to which the right to effective counsel attaches. "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The right to adequate assistance of counsel cannot be defined or enforced without "taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Id.* "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.*

"During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel's 'dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.'" *Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *see also Padilla v. Kentucky*, 559 U.S. 356, 364–65 (2010) (holding that counsel's duty to consult with a defendant on the consequences of a plea extends to explaining deportation consequences). Ineffective assistance of counsel that causes a defendant to reject a favorable plea offer warrants habeas relief. *See Lafler*, 566 U.S. at 169–71.

Irive's trial counsel acknowledged that Irive wanted to accept a plea bargain in lieu of proceeding to trial. The DA offered a global plea offer that would have

resolved this case and another pending robbery charged Irive faced. The deal would have allowed Irive to plead to just robbery and thereby avoid the five to life sentence imposed for Irive's kidnapping conviction. The offer would have also allowed Irive to reach a favorable result in his other robbery case.

Trial counsel informed Irive of the offer but did not tell him the offer would expire. Although Irive wanted to take the offer he held off on acceptance based on his counsel's advice. Trial counsel wished to conduct further investigation of the alleged victim. Trial counsel failed, however, to learn when the offer would expire.

Trial counsel did not ask how long the prosecutor would hold the offer open because asking the question might remind the prosecutor that he should limit the terms of the offer. This is not a rational or strategic basis for failing to ascertain the limiting terms of a plea offer.

Trial counsel did not follow up on the offer. At the case's calendar call, the prosecutor announced ready and trial counsel then learned that the DA had revoked the offer. It was now too late for Irive to take the deal.

This record establishes that, but for counsel's ineffective assistance, Irive would have been able to resolve two robbery cases favorably. In spite of Irive expressed desire to resolve the case, counsel's mistake regarding the timeline of the offer deprived Irive of that right and doomed him to a trial that he could not win. As the judge noted at sentencing this "case should have never gone to trial" as "there was virtually no defense."

Mr. Irive was prejudiced by counsel's actions. But for the ineffective assistance of counsel, Irive would have taken a favorable plea offer and received a more lenient sentence in two separate cases.

The Ninth Circuit errs in proffering a strategic reason for what trial counsel admitted was a pure mistake. (*See* App. G., at 45-46.) It would be reasonable to hold off on accepting an offer to investigate the case. It is not reasonable to advice your client to wait without knowing when the offer will expire. Trial counsel filed a declaration and testified that she simply made a mistake. She assumed the offer would remain opening past calendar call. In that she was simply wrong.

Irive was clear that he wanted to accept the offer. But for counsel telling him to wait and then letting the deal expire, Irive would have accepted responsibility for both cases and avoided the pain of, not to mention the higher sentence attendant to, trial. Trial counsel did not make a strategic or tactical decision. Trial counsel negligently, or perhaps even recklessly, let the offer pass Irive by.

This constitute ineffective assistance of counsel. The Ninth Circuit decision should be reversed.

CONCLUSION

For the aforementioned reasons, and in the interests of justice and fair play, the Petitioner Irive respectfully requests that the Court grant this Petition for a Writ of Certiorari and reverse the Ninth Circuit's decision denying him habeas relief.

DATED this 12th Day of September 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

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Counsel for Petitioner **Irive**

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains **4,110** 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 12th day of September 2019.

Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 12th day of September 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:

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Counsel for Petitioner **Irive**

INDEX TO APPENDIX

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

APP. 001

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICARDO IRIVE,

Petitioner,

v.

JO GENTRY, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Case Number: 2:16-cv-00241-MMD-WGC

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

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

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

IT IS ORDERED AND ADJUDGED that petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 14) is denied and a certificate of appealability is granted with respect to Grounds 2 and 3 of the second amended petition.

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

4/25/2018
Date

DEBRA K. KEMPI
Clerk

/s/ L. Haywood
Deputy Clerk

APP. 002

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RICARDO IRIVE, Petitioner, v. JO GENTRY, *et al.*, Respondents.	Case No. 3:15-cv-00487-MMD-WGC ORDER
RICARDO IRIVE, Petitioner, v. JO GENTRY, *et al.*, Respondents.	Case No. 2:16-cv-00241-MMD-WGC ORDER

I. INTRODUCTION

These two actions are both petitions for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Ricardo Irive, a Nevada prisoner. In each case, the respondents have filed an answer, responding to Irive's claims, and Irive has filed a reply. Both cases are fully briefed, and before the Court for resolution with respect to the merits of Irive's claims. As the two petitions raise certain identical issues, the Court rules on both in this order. The Court will deny Irive's habeas petitions.

II. BACKGROUND

A. Case No. 3:15-cv-00487-MMD-WGC—The Robbery at the Pawnshop

Irive was convicted on August 27, 2010, following a jury trial in Nevada's Eighth Judicial District Court, in Clark County, of conspiracy to commit robbery and robbery with

use of a deadly weapon. (*See* Judgment of Conviction, Exh. 13 (ECF No. 14-14).) The crimes involved Irive and his associates robbing two customers of a Las Vegas pawnshop in the parking lot outside the pawnshop. Irive was sentenced for the conspiracy to commit robbery to thirteen months to five years in prison; for the robbery with use of a deadly weapon, he was sentenced to six to fifteen years in prison and a consecutive four to fifteen years in prison for the use of the deadly weapon, to run concurrently with the sentence for the conspiracy. (*See id*.)

Irive appealed, and the Nevada Supreme Court affirmed on November 18, 2011. (*See* Order of Affirmance, Exh. 17 (ECF No.14-18).)

Irive then filed a petition for writ of habeas corpus in the state district court on September 6, 2012. (*See* Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 24 (ECF No. 14-25); Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, Exh. 31 (ECF Nos. 15-6, 15-7).) The state district court held an evidentiary hearing, and then denied the petition. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 (ECF No. 15-11); Transcript of Hearing, April 7, 2014, Exh. 36 (ECF No. 15-12); Findings of Fact, Conclusions of Law and Order, Exh. 39 (ECF No. 15-15).) Irive appealed from that ruling, and the Nevada Supreme Court affirmed on July 21, 2015. (*See* Order of Affirmance, Exh. 43 (ECF No. 15-19).)

On February 9, 2015, Irive filed a second state habeas petition. (*See* Second Petition for Writ of Habeas Corpus, Exh. 45 (ECF No. 15-21).) The state district court dismissed that petition, ruling it procedurally barred. (*See* Court Minutes, July 20, 2015, Exh. 48 (ECF No. 15-24); Findings of Fact, Conclusions of Law and Order, Exh. 49 (ECF No. 15-25).) There is no indication in the record that Irive appealed from the dismissal of his second state habeas petition.

This Court received Irive's original federal habeas petition, initiating this action—Case No. 3:15-cv-00487-MMD-WGC—*pro se,* on September 23, 2015. (*See* Petition for Writ of Habeas Corpus (ECF No. 6).) Respondents filed a motion to dismiss Irive's original petition on December 3, 2015 (ECF No. 14). On May 4, 2016, the Court appointed counsel

to represent Irive, and denied the motion to dismiss, without prejudice, as moot. (*See* Order entered May 4, 2016 (ECF No. 22).)

With counsel, Irive then filed an amended petition for writ of habeas corpus (ECF No. 30), now the operative petition in this case, on December 23, 2016. Irive's amended petition asserts the following grounds for relief:

> 1. Irive received ineffective assistance of counsel, in violation of his federal constitutional rights, "when his trial attorney failed to adequately represent him during the plea bargaining stage by allowing a plea negotiation offered by the district attorney to lapse." (Amended Petition (ECF No. 30) at 14.)
>
> 2. Irive's conviction and sentence are in violation of his federal constitutional rights because the State "produced insufficient evidence at trial to support a deadly weapon enhancement." (*Id*. at 17.)
>
> 3. Irive received ineffective assistance of counsel on his direct appeal, in violation of his federal constitutional rights, because of "counsel's failure to preserve the record for Nevada Supreme Court review of the assignment of error that the trial court imposed a harsher sentence because Irive exercised his constitutional right to a jury trial." (*Id*. at 21.)

On February 14, 2017, respondents filed a motion to dismiss Irive's amended petition (ECF No. 32), contending that Ground 2 is barred by the statute of limitations. The Court denied the motion to dismiss on August 7, 2017 (ECF No. 37).

Respondents then filed an answer, responding to all three of Irive's claims, on November 6, 2017 (ECF No. 38). Irive filed a reply on February 27, 2018 (ECF No. 43).

B. Case No. 2:16-cv-00241-MMD-WGC – The Kidnapping and Robbery

Irive's other case involves Irive and an associate picking up a woman along a Las Vegas street, kidnapping her, and robbing her of her purse. In that case, Irive was convicted on August 31, 2010, after a jury trial in in Nevada's Eighth Judicial District Court, in Clark County, of first degree kidnapping, conspiracy to commit robbery and robbery. (*See* Judgment of Conviction, Exh. 25 (ECF No. 16-8).) Irive was sentenced to life in prison with the possibility of parole after five years for the kidnapping; for the conspiracy to commit robbery, he was sentenced to two to six years in prison; for the robbery, he was sentenced to sixteen months to fifteen years in prison; the sentences are to be served

///

concurrently with one another, and concurrently with his sentences in any other cases. *See id*.

Irive appealed, and the Nevada Supreme Court affirmed on December 27, 2011. (*See* Order of Affirmance, Exh. 31 (ECF No.16-14).)

Irive filed a petition for writ of habeas corpus in the state district court on August 8, 2012. (*See* Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 36 (ECF No. 16-19).) The state district court denied the petition on December 31, 2012. (*See* Findings of Fact, Conclusions of Law and Order, Exh. 43 (ECF No. 17-2).) Irive appealed, and the Nevada Supreme Court reversed and remanded on January 24, 2014, on account of the district court's failure to appoint counsel. (*See* Order of Reversal and Remand, Exh. 45 (ECF No. 17-4).) Back in the state district court, after appointment of counsel, Irive filed a supplemental memorandum of points and authorities in support of his petition. (*See* Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 50 (ECF No. 17-9).) The state district court held an evidentiary hearing on November 7, 2014. (*See* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 52 (ECF No. 17-11).) The state district court denied the petition on December 2, 2014. (*See* Findings of Fact, Conclusions of Law and Order, Exh. 54 (ECF No. 17-13).) Irive appealed again, and the Nevada Supreme Court affirmed on December 18, 2015. (*See* Order of Affirmance, Exh. 61 (ECF No. 17-20).)

Irive initiated his federal habeas action regarding this conviction—Case No. 2:16-cv-00241-MMD-WGC—*pro se*, on February 5, 2016. After the Court appointed counsel, Irive filed a second amended petition for writ of habeas corpus, which is the operative petition, on August 30, 2016 (ECF No. 14). Irive asserts the following claims in his second amended petition:

> 1. Irive's kidnapping conviction is in violation of his federal constitutional rights because the State "produced insufficient evidence at trial to support the charge of kidnapping." (Second Amended Petition (ECF No. 14) at 13.)
>
> 2. In violation of Irive's federal constitutional rights, "[t]he prosecutor shifted the burden of proof and commented on Irive's exercise of his right to remain silent." (*Id*. at 15.)

> 3. Irive received ineffective assistance of counsel, in violation of his federal constitutional rights, "when his trial attorney failed to adequately represent him during the plea bargaining stage by allowing a plea negotiation offered by the district attorney to lapse." (*Id*. at 18.)

The respondents filed an answer, responding to all Irive's claims, on October 31, 2016 (ECF No. 21). Irive filed a reply on March 2, 2017 (ECF No. 27).

III. DISCUSSION

A. 28 U.S.C. § 2254(d)

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

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B. The Claim Common to Both Cases: The Plea Bargaining

In both of his petitions, Irive claims that his trial counsel was ineffective because of her handling of plea bargaining with the prosecutor; specifically, Irive claims that the prosecutor made a favorable plea offer, encompassing both of Irive's cases, Irive's trial counsel advised him not to accept that offer, so that she could do further investigation, Irive rejected the offer, and then Irive's trial counsel let the offer expire, such that it was no longer available, and Irive had to face trial in both cases. (*See* First Amended Petition (ECF No. 30 in Case No. 3:15-cv-00487-MMD-WGC) 14-17; Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 18-21.)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of counsel must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id*. at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. In *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 556 U.S. 134 (2012), the Supreme Court applied these principles to claims of ineffective assistance of counsel in the course of plea bargaining.

Where a state court previously adjudicated the claim of ineffective assistance of counsel, under *Strickland*, establishing that the decision was unreasonable under AEDPA

is especially difficult. *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court instructed:

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

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

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

Irive asserted this claim in his state habeas petition in each of his two cases. The Nevada Supreme Court ruled as follows on the claim:

> Irive argues that trial counsel was ineffective for failing to inquire about and communicate to him the expiration date of a plea offer, which prevented him from accepting the offer before it was withdrawn by the State. At the evidentiary hearing, trial counsel testified that she informed Irive of the plea offer but advised him to give her time to investigate whether the plea offer would be beneficial before he considered accepting the offer. Trial counsel further testified that the prosecutor never explicitly provided an expiration date for the plea offer and that her conversations with the prosecutor left her with the impression that the plea offer would be available until trial. The district court determined that trial counsel's advice to Irive, decision to investigate, and belief as to when the plea offer would expire were reasonable in light of counsel's ongoing negotiations and communications with the prosecutor. We conclude that the district court's findings were not clearly erroneous and that substantial evidence supports the district court's decision that trial counsel's performance was reasonable. *See Strickland*, 466 U.S. at 689; *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (explaining that "trial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted).

(Order of Affirmance, Exh. 61 at 1-2 (ECF No. 17-20 in Case No. 2:16-cv- 00241-MMD-WGC at 2-3); *see also* Order of Affirmance, Exh. 43 at 2 (ECF No. 15-19 in Case No. 3:15-cv-00487-MMD-WGC at 3) (nearly identical ruling in other case).) The Court finds the state court's ruling on this claim to be reasonable.

This claim was a focus of the evidentiary hearings in Irive's state habeas cases. Irive's trial counsel testified at both of those evidentiary hearings. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 (ECF No. 15-11 in Case No. 3:15-cv-00487-MMD-WGC); Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 (ECF No. 31-13 in Case No. 3:15-cv-00487-MMD-WGC.)[1] (It is these exhibits that the Court refers to in the following discussion of this claim.).)

It is not entirely clear what offer was extended by the prosecutor early in the negotiations; there was no written plea offer. (*See*, *e.g.*, Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 9 (ECF No. 15-11 at 12) ("I can't remember the specific offer.").) At the evidentiary hearing, Irive testified that he, himself, did not know the terms of the offer that the prosecutor extended. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 60-64 (ECF No. 15-11 at 63-67).) However, there is evidence that the offer was for Irive to plead to "[r]obbery with use in one case and robbery with right to argue in the other case." (Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 11 (ECF No. 31-13 at 6).) Any offer extended by the prosecutor was contingent upon both Irive and his co-defendant accepting the offer. (*See*, *e.g.*, *id*. at 10 (ECF No. 15-11 at 13) ("And I remember having conversations with Mr. Maningo [co-defendant's counsel] about the fact that it was contingent, because Mr. Maningo may have gently given me a bit of a hard time, because he was trying to negotiate his cases too."); *id*. at 29-30 (ECF No. 15-11 at 32-33); *id*. at 45-47 (ECF No. 15-11 at 48-50); *see also* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 11 (ECF No. 31-13 at 6).)

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[1]These same transcripts can be found in Case No. 2-16-cv-241-MMD-WGC, Exhibit 47 (ECF No. 17-6) and Exhibit 52 (ECF No. 17-11).

Whatever the exact nature of the offer presented by the prosecutor, Irive's counsel testified that she declined the offer on Irive's behalf, after consulting with him, so that she could do further investigation:

> Well we—Mr. Irive and I talked about his choices, which would be either to fight both of his cases or go to trial. He—we made a decision together to go to trial on both cases. But all the while we were still open to negotiating with the District Attorney at the time which was Mr. Stege.

(Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 8 (ECF No. 15-11 at 11); *see also id*. at 11 (ECF No. 15-11 at 14); *id*. at 43-44 (ECF No. 15-11 at 46-47); *id*. at 57-58 (ECF No. 15-11 at 60-61) (Irive's testimony about declining the early offer); *see also* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 12-13 (ECF No. 31-13 at 7).)

There was also testimony by Irive's counsel to the effect that she made one or more counter-offers on Irive's behalf, but the prosecutor never accepted any of those. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 30 (ECF No. 15-11 at 33) ("[W]henever I gave a counter offer I was never given—there were times when I wasn't given a straight yes or no …."); *id*. at 45 (ECF No. 15-11 at 48) ("[L]ike I said when I gave a counter offer it wasn't clear if it was always — you know, we went back and forth for a greater part of a year."); *see also* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 9 (ECF No. 31-13 at 6) ("He gave me an offer at one point and I gave him a counteroffer and I kept waiting for him to get back to me as to the counteroffer and he wouldn't.").)

What is unclear—what Irive has never established—is what was left of the prosecution's offer, if anything, after counsel declined it and made counter-offers. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 9 (ECF No. 15-11 at 12) ("[I]t wasn't made clear all the time as we were going back and forth."); *id*. at 10 (ECF No. 15-11 at 13) ("[T]he negotiations change with each contact I had with Mr. Stege and I was never sure there was quite a meeting of the minds…."); *id*. at 30 (ECF No. 15-11 at 33) ("[I]t was difficult for me to reach an understanding as to what was given to me." "I didn't

feel like I really had a meeting of the minds with Mr. Stege.").) And, if there was anything left of the offer made by the prosecution, the evidence is that there was not a set date upon which the offer would expire. (*See id*. at 13 ECF No. 15-11 at 16) (testimony that Irive's counsel was not given an expiration date).)

Under these circumstances, as revealed by the evidence at the state-court evidentiary hearing, this Court finds that the Nevada Supreme Court's ruling on this claim was not objectively unreasonable. There is no showing that Irive's counsel acted unreasonably in advising Irive to decline the early offer in order to investigate further. There is no showing that Irive's counsel performed unreasonably with respect to any counter-offer she made on Irive's behalf. There is no showing that Irive's counsel performed unreasonably with respect to any further offer extended by the prosecutor after she declined the first offer. And, there is no showing that there was ever any definite expiration date set by the prosecutor with respect to any offer.

Furthermore, there is no showing of prejudice. At the evidentiary hearing, Irive could not state the terms of any offer extended by the prosecutor. And, Irive's counsel could only describe in very general terms the offer that Irive believes was allowed to lapse. It appears to be speculation by Irive that there was an open offer that he would have been willing to accept after he declined the original offer.

Affording counsel deference with respect to her handling of the plea negotiations, and affording the Nevada Supreme Court the deference it is due with respect to its ruling on this claim, this Court concludes that the Nevada Supreme Court's ruling, that there is no showing of ineffective assistance of counsel with regard to counsel's handling of Irive's plea negotiations, was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny habeas relief on this claim in both Irive's cases.

C. Ground 2 in Case No. 3:15-cv-00487-MMD-WGC

In Ground 2 of his amended petition in Case No. 3:15-cv-00487-MMD-WGC, Irive claims that the State produced insufficient evidence at his trial, in the pawnshop robbery

case, to support imposition of the deadly weapon enhancement. (*See* First Amended Petition (ECF No. 30) at 17-21.)

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

> … [A]ppellant Ricardo Irive asserts that insufficient evidence supports his conviction for robbery with the use of a deadly weapon because the State failed to prove that he knew his co-offender used a deadly weapon. We disagree because the evidence, when viewed in the light most favorable to the State, is sufficient to support the conviction beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).
>
> The jury heard testimony that Irive and his co-offender approached the victims outside of the pawnshop and demanded money. When the victims did not comply, the co-offender said he had a gun and would shoot them if they ran, and lifted up his shirt to reveal the handle of a gun tucked into his waistband. Irive then pulled the necklace off of one victim's neck and punched him in the jaw. Irive hit the victim a second time and took his wallet. He and his co-offender then left the scene of the robbery together. From this evidence a juror could reasonably infer that Irive knew of the use of the gun by his co-offender and was thus subject to the deadly weapon enhancement. [Footnote: Irive does not contest that he was liable as a principal for the robbery or that his co-offender was armed with and used a deadly weapon in the commission of the robbery. *See Brooks v. State*, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008).] *See* NRS 193.165(1); *Brooks*, 124 Nev. at 210 n.27, 180 P.3d at 661 n.27 (an unarmed offender uses a deadly weapon if he takes a victim's property while a co-offender holds the victim at gunpoint (citing *Anderson v. State*, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979))).

(Order of Affirmance, Exhibit 17 at 1-2 (ECF No. 14-18 at 2-3).)

The Due Process Clause of the Fourteenth Amendment prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court established the standard for a federal habeas court's review of the sufficiency of evidence. Under *Jackson*, a habeas petitioner claiming insufficiency of the evidence may obtain relief only if "it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Id*. at 319. Federal courts look to state law to determine the substantive elements of the criminal offense. *Id*. at 324 n.16.

Applying these standards, it is plain that there was sufficient evidence presented at trial for application of the deadly weapon enhancement. As the Nevada Supreme Court pointed out, there was evidence that, during the course of the robbery, Irive's co-offender said he had a gun and would use it if the victims did not comply, and he lifted up his shirt to reveal what appeared to the victims to be the handle of a gun tucked into his waistband. The evidence indicated that these actions by Irive's co-offender facilitated the robbery. A juror could reasonably have inferred that Irive knew of the use of a gun by his co-offender. The state courts' ruling on this claim was reasonable. The Court will deny habeas corpus relief on Ground 2 of Irive's amended petition in Case No. 3:15-cv-00487-MMD-WGC.

D. Ground 3 in Case No. 3:15-cv-00487-MMD-WGC

In Ground 3 of his amended petition in Case No. 3:15-cv-00487-MMD-WGC, Irive claims that he received ineffective assistance of counsel on his direct appeal, in violation of his federal constitutional rights, because of "counsel's failure to preserve the record for Nevada Supreme Court review of the assignment of error that the trial court imposed a harsher sentence because Irive exercised his constitutional right to a jury trial." (*See* First Amended Petition (ECF No. 30) at 21-24.)

Irive asserted this claim in his state habeas action, and, on the appeal in that case, the Nevada Supreme Court ruled on the claim as follows:

> Irive argues that appellate counsel's failure to provide this court with an audio-visual recording of the sentencing hearing precluded this court from considering on direct appeal whether the trial court erred in imposing a harsher sentence based on Irive's failure to take responsibility for his actions and his exercise of his constitutional right to trial. Irive fails to demonstrate a reasonable probability that, had appellate counsel provided this recording on direct appeal, his sentence would have been vacated. The audio-visual recording was played at the evidentiary hearing, and the record indicates that the trial court may have stated, "he didn't," after trial counsel argued that Irive had taken responsibility for his actions. At no point did the trial court state that it based its sentence on Irive's failure to take responsibility or his decision to go to trial and testify in his own defense; rather the trial court stated that it was imposing a harsher sentence because of Irive's criminal conduct and history. *See Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1033 (1997). Therefore, we conclude that the district court did not err in denying this claim.

(Order of Affirmance, Exhibit 43 at 4-5 (ECF No. 15-19 at 5-6).)

The Court finds this claim to be without merit. Irive makes no showing that the trial court based its sentencing of Irive, to any extent, on Irive's decision to go to trial and testify in his own defense. There is no showing that the outcome of the appeal would have been different had counsel provided the recording in question. Irive does not show that his counsel's performance was unreasonable, and he does not, at any rate, show prejudice. The state courts' rulings on this claim was reasonable. The Court will deny habeas corpus relief on Ground 3 of Irive's amended petition in Case No. 3:15-cv-00487-MMD-WGC.

E. Ground 1 in Case No. 2:16-cv-00241-MMD-WGC

In Ground 1 of his second amended habeas petition in Case No. 2:16-cv-00241-MMD-WGC, Irive claims that his kidnapping conviction is in violation of his federal constitutional rights because the State "produced insufficient evidence at trial to support the charge of kidnapping." (*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 13-15.)

Irive asserted this claim on his direct appeal, and the Nevada Supreme Court denied relief on the claim, ruling as follows:

> … Irive argues that the evidence was insufficient to support his conviction for first-degree kidnapping because there was no showing of intent on his part and the victim's testimony was inconsistent. After reviewing the evidence in the light most favorable to the prosecution, we conclude that any rational juror would have found all of the essential elements of first-degree kidnapping beyond a reasonable doubt. *See Mason v State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002). At trial, the victim testified that she agreed to get into the SUV driven by Irive's codefendant after the codefendant insisted that the victim show her how to get to her destination. However, upon approaching her purported destination, the codefendant continued to drive despite the victim's request to stop the SUV and let her out. Irive, who had been hiding in the back seat, grabbed the victim around her neck and demanded her gold jewelry and her purse. After the victim gave Irive her purse and explained that her jewelry was not real gold, the codefendant stopped the SUV, and Irive pushed the victim out of the SUV. This evidence was sufficient to support the conviction. While Irive contends that some of the victim's testimony contradicted her prior statements, it was for the jury to determine the weight and credibility to give the conflicting testimony. *See id*. at 559-60, 51 P.3d at 524.

(Order of Affrmance, Exh. 31 at. 1-2 (ECF No. 16-14 at 2-3).)

This claim is without merit. It is beyond any reasonable dispute that the ruling by the Nevada Supreme Court was reasonable. There was strong evidence presented at trial supporting Irive's kidnapping conviction. The Court will deny habeas corpus relief with respect to Ground 1 of Irive's second amended petition in Case No. 2:16-cv-00241-MMD-WGC.

F. Ground 2 in Case No. 2:16-cv-00241-MMD-WGC

In Ground 2 of his second amended habeas petition in Case No. 2:16-cv-00241-MMD-WGC, Irive claims that his federal constitutional rights were violated because "[t]he prosecutor shifted the burden of proof and commented on Irive's exercise of his right to remain silent." (*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 15-17.)

In making this claim, Irive first points out the following argument made by the prosecutor in his rebuttal closing argument:

> These—proof beyond a reasonable doubt is a burden that every single defendant has been held to in every single criminal case in every Court across the country since the country has been founded, and that is not an impossible burden, because people are convicted of crimes every single day.
>
> The Judge instructed you that beyond a reasonable doubt, reasonable doubt is one based on reason. It is not mere speculation, it is not mere possibility—

(*Id*. at 16; *see also* Transcript of Trial, June 10, 2010, Exh. 65 at 53 (ECF No. 17-24 at 16).) The defense objected on the grounds that the prosecutor was trying to quantify reasonable doubt and was shifting the burden of proof to the defense. (*See* Transcript of Trial, June 10, 2010, Exh. 65 at 53-54 (ECF No. 17-24 at 16).) In response, the prosecutor explained that he misspoke when he said defendants are held to the burden of proof, and, beyond that, he was restating the jury instruction. (*See id*.) The trial court overruled the objection. (*See id*.) Irive goes on in his claim to point out the following argument made by the prosecutor moments later:

> Now, I left a big old section in my notes here (indicating) for—to write down their saying that these crimes didn't occur.

> But if you listen to what they said, they never said these—conspiracy didn't occur, kidnapping didn't occur—

(*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 16-17; *see also* Transcript of Trial, June 10, 2010, Exh. 65 at 54-55 (ECF No. 17-24 at 16).) The defense objected, on the ground that this was burden shifting. (*See* Transcript of Trial, June 10, 2010, Exh. 65 at 55 (ECF No. 17-24 at 16).) The court overruled this objection as well, stating:

> So it's clear they don't have a burden. You can comment on their, their closing. So go ahead.

(Transcript of Trial, June 10, 2010, Exh. 65 at 55 (ECF No. 17-24 at 16).) Irive claims that the prosecutor's arguments drew attention to Irive's failure to testify and implied that he had a duty to come forward with evidence. (*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 17.)

Irive asserted this claim on his direct appeal, and the Nevada Supreme Court denied relief on the claim, ruling as follows:

> … Irive argues that the prosecutor committed misconduct during rebuttal closing argument because the prosecutor's comments improperly shifted the burden of proof to Irive and drew attention to his decision not to testify. We conclude that the challenged comments were improper, but that the error was harmless given the overwhelming evidence of guilt. *See Valdez v. State*, 124 Nev. 1172, 1188-89- 196 P.3d 465, 476-77 (2008). Further, to the extent that Irive argues that the challenged comments improperly referenced his failure to testify, we conclude that the comments did not directly remark on Irive's failure to take the stand and the prosecutor did not manifestly intend the comments as a reference to Irive's failure to testify on his own behalf. *See Barron v. State*, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989).

(Order of Affrmance, Exhibit 31 at 3 (ECF No. 16-14 at 4).)

The standard set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986), is the "clearly established law" governing claims of prosecutorial misconduct for purposes of habeas review under AEDPA. *See Ayala v. Chappell*, 829 F.3d 1081, 1114 (9th Cir. 2016). In *Darden*, the Supreme Court explained that "it is not enough that the prosecutor's remarks were undesirable or even universally condemned," but rather "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the

resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 180-81 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In determining whether arguments made by a prosecutor rise to the level of a due process violation, the court is to examine the entire proceedings, so that the prosecutor's remarks may be placed in their proper context. *Boyde v. California*, 494 U.S. 370, 384-85 (1990); *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

A criminal defendant has a right not to testify, and the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 616 (1965). "A prosecutor's comment is impermissible if it is 'manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *Beardslee v. Woodford*, 358 F.3d 560, 586 (9th Cir. 2004), quoting *United States v. Tarazon*, 989 F.2d 1045, 1051-52 (9th Cir. 1993).

However, "a 'comment on the failure of the *defense* as opposed to the *defendant* to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege.'" *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991) (quoting *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988) (emphasis in original)); *see also United States v. Tam*, 240 F.3d 797, 805 (9th Cir. 2001) ("[W]hen the government refers to 'defendant's arguments' but obviously is addressing the arguments made by defense counsel, there is no *Griffin* violation"). Read in context, the arguments of the prosecutor at issue in this case were commentary on the arguments made by defense counsel; they were not commentary on Irive's failure to testify. The prosecutor's arguments did not violate *Griffin*.

Furthermore, the prosecutor's arguments were not such as to shift the burden of proof to the defense. It was obvious—and the prosecutor confirmed in open court—that he misspoke when he said that defendants have been held to the burden of proof. The

trial court overruled the objection after hearing the prosecutor's explanation, and reinforced to the jury that the burden of proof was on the prosecution. Moreover, the prosecutor's argument that defense counsel did not claim that the crimes did not occur cannot reasonably be understood as shifting the burden of proof. And, even if the arguments of the prosecutor were arguably an improper shifting of the burden of proof, they were not such as to infect the trial with unfairness such as to render Irive's conviction a denial of due process.

The Court concludes that there was no constitutional error as asserted in this claim. The Nevada Supreme Court's ruling, rejecting this claim, was not contrary to, or an unreasonable application of, clearly established federal law as determined by United States Supreme Court. The Court will deny habeas corpus relief on Ground 2 of Irive's second amended petition in Case No. 2:16-cv-00241-MMD-WGC.

IV. CERTIFICATE OF APPEALABILITY

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

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

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

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

Miller-El, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

The Court has considered all of Irive's claims with respect to whether they satisfy the standard for issuance of a certificate of appealability. The Court determines that a certificate of appealability is warranted in each of Irive's cases. In Case No. 3:15-cv-00487-MMD-WGC, a certificate of appealability will be issued with respect to Ground 1 of Irive's amended habeas petition. In Case No. 2:16-cv-00241-MMD-WGC, a certificate of appealability will be issued with respect to Grounds 2 and 3 of Irive's second amended habeas petition.

V. CONCLUSION AND ORDERS

It is therefore ordered that, pursuant to Federal Rule of Civil Procedure 25(d), in each of the above-captioned actions, the Clerk of the Court will substitute Jo Gentry for Timothy Filson, on the docket, as the respondent warden, and update the captions of the actions to reflect this change.

It is further ordered that, in Case No. 3:15-cv-00487-MMD-WGC, petitioner's First Amended Petition for Writ of Habeas Corpus (ECF No. 30) is denied. Petitioner is granted a certificate of appealability with respect to Ground 1 of his amended petition for writ of habeas corpus. The Clerk of the Court is directed to enter judgment accordingly.

It is further ordered that, in Case No. 2:16-cv-00241-MMD-WGC, petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 14) is denied. Petitioner is granted a certificate of appealability with respect to Grounds 2 and 3 of his second amended petition for writ of habeas corpus. The Clerk of the Court is directed to enter judgment accordingly.

DATED THIS 25th day of April 2018.

MIRANDA M. DU,
UNITED STATES DISTRICT JUDGE

JOC

ORIGINAL

FILED

2010 AUG 31 A 8:54

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

09C258763-2
JOC
Judgment of Conviction
914171

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICARDO A. IRIVE
aka Ricardo Irive Avalos
#1974086

Defendant.

CASE NO. C258763-2

DEPT. NO. XIV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – FIRST DEGREE KIDNAPPING (Category A Felony), in violation of NRS 200.310, 200.320, COUNT 2 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380, and COUNT 3 - ROBBERY (Category B Felony), in violation of NRS 200.380; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT FIRST DEGREE KIDNAPPING (Category A Felony), in violation of NRS 200.310, 200.320, COUNT 2 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380, and COUNT 3 - ROBBERY (Category B Felony), in violation of NRS

2

200.380; thereafter, on the 23RD day of August, 2010, the Defendant was present in court for sentencing with his counsel, JEANNIE HUA, ESQ., thereupon using the presentence report from C259398 and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 – LIFE with possibility of Parole after FIVE (5) YEARS; AS TO COUNT 2 - TO A MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM parole eligibility of TWENTY-FOUR (24) MONTHS, and AS TO COUNT 3 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SIXTEEN (16) MONTHS, all counts CONCURRENT with each other and the Sentence is CONCURRENT to any other case; with THREE HUNDRED FORTY-EIGHT (348) DAYS Credit for Time Served.

DATED this 27th day of August, 2010

DONALD MOSLEY
DISTRICT JUDGE

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

APP. 022

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICARDO IRIVE,

Petitioner,

v.

JO GENTRY, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Case Number: 3:15-cv-00487-MMD-WGC

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

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

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

IT IS ORDERED AND ADJUDGED that petitioner's First Amended Petition for Writ of Habeas Corpus (ECF No. 30) is denied and a certificate of appealability is granted.

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

4/25/2018
Date

DEBRA K. KEMPI
Clerk

/s/ L. Haywood
Deputy Clerk

APP. 023

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RICARDO IRIVE, Petitioner, v. JO GENTRY, *et al.*, Respondents.	Case No. 3:15-cv-00487-MMD-WGC ORDER
RICARDO IRIVE, Petitioner, v. JO GENTRY, *et al.*, Respondents.	Case No. 2:16-cv-00241-MMD-WGC ORDER

I. INTRODUCTION

These two actions are both petitions for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Ricardo Irive, a Nevada prisoner. In each case, the respondents have filed an answer, responding to Irive's claims, and Irive has filed a reply. Both cases are fully briefed, and before the Court for resolution with respect to the merits of Irive's claims. As the two petitions raise certain identical issues, the Court rules on both in this order. The Court will deny Irive's habeas petitions.

II. BACKGROUND

A. Case No. 3:15-cv-00487-MMD-WGC—The Robbery at the Pawnshop

Irive was convicted on August 27, 2010, following a jury trial in Nevada's Eighth Judicial District Court, in Clark County, of conspiracy to commit robbery and robbery with

use of a deadly weapon. (*See* Judgment of Conviction, Exh. 13 (ECF No. 14-14).) The crimes involved Irive and his associates robbing two customers of a Las Vegas pawnshop in the parking lot outside the pawnshop. Irive was sentenced for the conspiracy to commit robbery to thirteen months to five years in prison; for the robbery with use of a deadly weapon, he was sentenced to six to fifteen years in prison and a consecutive four to fifteen years in prison for the use of the deadly weapon, to run concurrently with the sentence for the conspiracy. (*See id*.)

Irive appealed, and the Nevada Supreme Court affirmed on November 18, 2011. (*See* Order of Affirmance, Exh. 17 (ECF No.14-18).)

Irive then filed a petition for writ of habeas corpus in the state district court on September 6, 2012. (*See* Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 24 (ECF No. 14-25); Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, Exh. 31 (ECF Nos. 15-6, 15-7).) The state district court held an evidentiary hearing, and then denied the petition. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 (ECF No. 15-11); Transcript of Hearing, April 7, 2014, Exh. 36 (ECF No. 15-12); Findings of Fact, Conclusions of Law and Order, Exh. 39 (ECF No. 15-15).) Irive appealed from that ruling, and the Nevada Supreme Court affirmed on July 21, 2015. (*See* Order of Affirmance, Exh. 43 (ECF No. 15-19).)

On February 9, 2015, Irive filed a second state habeas petition. (*See* Second Petition for Writ of Habeas Corpus, Exh. 45 (ECF No. 15-21).) The state district court dismissed that petition, ruling it procedurally barred. (*See* Court Minutes, July 20, 2015, Exh. 48 (ECF No. 15-24); Findings of Fact, Conclusions of Law and Order, Exh. 49 (ECF No. 15-25).) There is no indication in the record that Irive appealed from the dismissal of his second state habeas petition.

This Court received Irive's original federal habeas petition, initiating this action—Case No. 3:15-cv-00487-MMD-WGC—*pro se,* on September 23, 2015. (*See* Petition for Writ of Habeas Corpus (ECF No. 6).) Respondents filed a motion to dismiss Irive's original petition on December 3, 2015 (ECF No. 14). On May 4, 2016, the Court appointed counsel

to represent Irive, and denied the motion to dismiss, without prejudice, as moot. (*See* Order entered May 4, 2016 (ECF No. 22).)

With counsel, Irive then filed an amended petition for writ of habeas corpus (ECF No. 30), now the operative petition in this case, on December 23, 2016. Irive's amended petition asserts the following grounds for relief:

> 1. Irive received ineffective assistance of counsel, in violation of his federal constitutional rights, "when his trial attorney failed to adequately represent him during the plea bargaining stage by allowing a plea negotiation offered by the district attorney to lapse." (Amended Petition (ECF No. 30) at 14.)
>
> 2. Irive's conviction and sentence are in violation of his federal constitutional rights because the State "produced insufficient evidence at trial to support a deadly weapon enhancement." (*Id*. at 17.)
>
> 3. Irive received ineffective assistance of counsel on his direct appeal, in violation of his federal constitutional rights, because of "counsel's failure to preserve the record for Nevada Supreme Court review of the assignment of error that the trial court imposed a harsher sentence because Irive exercised his constitutional right to a jury trial." (*Id*. at 21.)

On February 14, 2017, respondents filed a motion to dismiss Irive's amended petition (ECF No. 32), contending that Ground 2 is barred by the statute of limitations. The Court denied the motion to dismiss on August 7, 2017 (ECF No. 37).

Respondents then filed an answer, responding to all three of Irive's claims, on November 6, 2017 (ECF No. 38). Irive filed a reply on February 27, 2018 (ECF No. 43).

B. Case No. 2:16-cv-00241-MMD-WGC – The Kidnapping and Robbery

Irive's other case involves Irive and an associate picking up a woman along a Las Vegas street, kidnapping her, and robbing her of her purse. In that case, Irive was convicted on August 31, 2010, after a jury trial in in Nevada's Eighth Judicial District Court, in Clark County, of first degree kidnapping, conspiracy to commit robbery and robbery. (*See* Judgment of Conviction, Exh. 25 (ECF No. 16-8).) Irive was sentenced to life in prison with the possibility of parole after five years for the kidnapping; for the conspiracy to commit robbery, he was sentenced to two to six years in prison; for the robbery, he was sentenced to sixteen months to fifteen years in prison; the sentences are to be served

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concurrently with one another, and concurrently with his sentences in any other cases. *See id*.

Irive appealed, and the Nevada Supreme Court affirmed on December 27, 2011. (*See* Order of Affirmance, Exh. 31 (ECF No.16-14).)

Irive filed a petition for writ of habeas corpus in the state district court on August 8, 2012. (*See* Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 36 (ECF No. 16-19).) The state district court denied the petition on December 31, 2012. (*See* Findings of Fact, Conclusions of Law and Order, Exh. 43 (ECF No. 17-2).) Irive appealed, and the Nevada Supreme Court reversed and remanded on January 24, 2014, on account of the district court's failure to appoint counsel. (*See* Order of Reversal and Remand, Exh. 45 (ECF No. 17-4).) Back in the state district court, after appointment of counsel, Irive filed a supplemental memorandum of points and authorities in support of his petition. (*See* Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 50 (ECF No. 17-9).) The state district court held an evidentiary hearing on November 7, 2014. (*See* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 52 (ECF No. 17-11).) The state district court denied the petition on December 2, 2014. (*See* Findings of Fact, Conclusions of Law and Order, Exh. 54 (ECF No. 17-13).) Irive appealed again, and the Nevada Supreme Court affirmed on December 18, 2015. (*See* Order of Affirmance, Exh. 61 (ECF No. 17-20).)

Irive initiated his federal habeas action regarding this conviction—Case No. 2:16-cv-00241-MMD-WGC—*pro se*, on February 5, 2016. After the Court appointed counsel, Irive filed a second amended petition for writ of habeas corpus, which is the operative petition, on August 30, 2016 (ECF No. 14). Irive asserts the following claims in his second amended petition:

> 1. Irive's kidnapping conviction is in violation of his federal constitutional rights because the State "produced insufficient evidence at trial to support the charge of kidnapping." (Second Amended Petition (ECF No. 14) at 13.)
>
> 2. In violation of Irive's federal constitutional rights, "[t]he prosecutor shifted the burden of proof and commented on Irive's exercise of his right to remain silent." (*Id*. at 15.)

> 3. Irive received ineffective assistance of counsel, in violation of his federal constitutional rights, "when his trial attorney failed to adequately represent him during the plea bargaining stage by allowing a plea negotiation offered by the district attorney to lapse." (*Id*. at 18.)

The respondents filed an answer, responding to all Irive's claims, on October 31, 2016 (ECF No. 21). Irive filed a reply on March 2, 2017 (ECF No. 27).

III. DISCUSSION

A. 28 U.S.C. § 2254(d)

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

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B. The Claim Common to Both Cases: The Plea Bargaining

In both of his petitions, Irive claims that his trial counsel was ineffective because of her handling of plea bargaining with the prosecutor; specifically, Irive claims that the prosecutor made a favorable plea offer, encompassing both of Irive's cases, Irive's trial counsel advised him not to accept that offer, so that she could do further investigation, Irive rejected the offer, and then Irive's trial counsel let the offer expire, such that it was no longer available, and Irive had to face trial in both cases. (*See* First Amended Petition (ECF No. 30 in Case No. 3:15-cv-00487-MMD-WGC) 14-17; Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 18-21.)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of counsel must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id*. at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. In *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 556 U.S. 134 (2012), the Supreme Court applied these principles to claims of ineffective assistance of counsel in the course of plea bargaining.

Where a state court previously adjudicated the claim of ineffective assistance of counsel, under *Strickland*, establishing that the decision was unreasonable under AEDPA

is especially difficult. *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court instructed:

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

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

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

Irive asserted this claim in his state habeas petition in each of his two cases. The Nevada Supreme Court ruled as follows on the claim:

> Irive argues that trial counsel was ineffective for failing to inquire about and communicate to him the expiration date of a plea offer, which prevented him from accepting the offer before it was withdrawn by the State. At the evidentiary hearing, trial counsel testified that she informed Irive of the plea offer but advised him to give her time to investigate whether the plea offer would be beneficial before he considered accepting the offer. Trial counsel further testified that the prosecutor never explicitly provided an expiration date for the plea offer and that her conversations with the prosecutor left her with the impression that the plea offer would be available until trial. The district court determined that trial counsel's advice to Irive, decision to investigate, and belief as to when the plea offer would expire were reasonable in light of counsel's ongoing negotiations and communications with the prosecutor. We conclude that the district court's findings were not clearly erroneous and that substantial evidence supports the district court's decision that trial counsel's performance was reasonable. *See Strickland*, 466 U.S. at 689; *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (explaining that "trial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted).

(Order of Affirmance, Exh. 61 at 1-2 (ECF No. 17-20 in Case No. 2:16-cv- 00241-MMD-WGC at 2-3); *see also* Order of Affirmance, Exh. 43 at 2 (ECF No. 15-19 in Case No. 3:15-cv-00487-MMD-WGC at 3) (nearly identical ruling in other case).) The Court finds the state court's ruling on this claim to be reasonable.

This claim was a focus of the evidentiary hearings in Irive's state habeas cases. Irive's trial counsel testified at both of those evidentiary hearings. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 (ECF No. 15-11 in Case No. 3:15-cv-00487-MMD-WGC); Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 (ECF No. 31-13 in Case No. 3:15-cv-00487-MMD-WGC.)[1] (It is these exhibits that the Court refers to in the following discussion of this claim.).)

It is not entirely clear what offer was extended by the prosecutor early in the negotiations; there was no written plea offer. (*See*, *e.g.*, Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 9 (ECF No. 15-11 at 12) ("I can't remember the specific offer.").) At the evidentiary hearing, Irive testified that he, himself, did not know the terms of the offer that the prosecutor extended. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 60-64 (ECF No. 15-11 at 63-67).) However, there is evidence that the offer was for Irive to plead to "[r]obbery with use in one case and robbery with right to argue in the other case." (Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 11 (ECF No. 31-13 at 6).) Any offer extended by the prosecutor was contingent upon both Irive and his co-defendant accepting the offer. (*See*, *e.g.*, *id*. at 10 (ECF No. 15-11 at 13) ("And I remember having conversations with Mr. Maningo [co-defendant's counsel] about the fact that it was contingent, because Mr. Maningo may have gently given me a bit of a hard time, because he was trying to negotiate his cases too."); *id*. at 29-30 (ECF No. 15-11 at 32-33); *id*. at 45-47 (ECF No. 15-11 at 48-50); *see also* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 11 (ECF No. 31-13 at 6).)

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[1]These same transcripts can be found in Case No. 2-16-cv-241-MMD-WGC, Exhibit 47 (ECF No. 17-6) and Exhibit 52 (ECF No. 17-11).

Whatever the exact nature of the offer presented by the prosecutor, Irive's counsel testified that she declined the offer on Irive's behalf, after consulting with him, so that she could do further investigation:

> Well we—Mr. Irive and I talked about his choices, which would be either to fight both of his cases or go to trial. He—we made a decision together to go to trial on both cases. But all the while we were still open to negotiating with the District Attorney at the time which was Mr. Stege.

(Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 8 (ECF No. 15-11 at 11); *see also id*. at 11 (ECF No. 15-11 at 14); *id*. at 43-44 (ECF No. 15-11 at 46-47); *id*. at 57-58 (ECF No. 15-11 at 60-61) (Irive's testimony about declining the early offer); *see also* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 12-13 (ECF No. 31-13 at 7).)

There was also testimony by Irive's counsel to the effect that she made one or more counter-offers on Irive's behalf, but the prosecutor never accepted any of those. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 30 (ECF No. 15-11 at 33) ("[W]henever I gave a counter offer I was never given—there were times when I wasn't given a straight yes or no …."); *id*. at 45 (ECF No. 15-11 at 48) ("[L]ike I said when I gave a counter offer it wasn't clear if it was always — you know, we went back and forth for a greater part of a year."); *see also* Transcript of Evidentiary Hearing, November 7, 2014, Exh. 65 at 9 (ECF No. 31-13 at 6) ("He gave me an offer at one point and I gave him a counteroffer and I kept waiting for him to get back to me as to the counteroffer and he wouldn't.").)

What is unclear—what Irive has never established—is what was left of the prosecution's offer, if anything, after counsel declined it and made counter-offers. (*See* Transcript of Evidentiary Hearing, March 6, 2014, Exh. 35 at 9 (ECF No. 15-11 at 12) ("[I]t wasn't made clear all the time as we were going back and forth."); *id*. at 10 (ECF No. 15-11 at 13) ("[T]he negotiations change with each contact I had with Mr. Stege and I was never sure there was quite a meeting of the minds…."); *id*. at 30 (ECF No. 15-11 at 33) ("[I]t was difficult for me to reach an understanding as to what was given to me." "I didn't

feel like I really had a meeting of the minds with Mr. Stege.").) And, if there was anything left of the offer made by the prosecution, the evidence is that there was not a set date upon which the offer would expire. (*See id*. at 13 ECF No. 15-11 at 16) (testimony that Irive's counsel was not given an expiration date).)

Under these circumstances, as revealed by the evidence at the state-court evidentiary hearing, this Court finds that the Nevada Supreme Court's ruling on this claim was not objectively unreasonable. There is no showing that Irive's counsel acted unreasonably in advising Irive to decline the early offer in order to investigate further. There is no showing that Irive's counsel performed unreasonably with respect to any counter-offer she made on Irive's behalf. There is no showing that Irive's counsel performed unreasonably with respect to any further offer extended by the prosecutor after she declined the first offer. And, there is no showing that there was ever any definite expiration date set by the prosecutor with respect to any offer.

Furthermore, there is no showing of prejudice. At the evidentiary hearing, Irive could not state the terms of any offer extended by the prosecutor. And, Irive's counsel could only describe in very general terms the offer that Irive believes was allowed to lapse. It appears to be speculation by Irive that there was an open offer that he would have been willing to accept after he declined the original offer.

Affording counsel deference with respect to her handling of the plea negotiations, and affording the Nevada Supreme Court the deference it is due with respect to its ruling on this claim, this Court concludes that the Nevada Supreme Court's ruling, that there is no showing of ineffective assistance of counsel with regard to counsel's handling of Irive's plea negotiations, was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny habeas relief on this claim in both Irive's cases.

C. Ground 2 in Case No. 3:15-cv-00487-MMD-WGC

In Ground 2 of his amended petition in Case No. 3:15-cv-00487-MMD-WGC, Irive claims that the State produced insufficient evidence at his trial, in the pawnshop robbery

case, to support imposition of the deadly weapon enhancement. (*See* First Amended Petition (ECF No. 30) at 17-21.)

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

> … [A]ppellant Ricardo Irive asserts that insufficient evidence supports his conviction for robbery with the use of a deadly weapon because the State failed to prove that he knew his co-offender used a deadly weapon. We disagree because the evidence, when viewed in the light most favorable to the State, is sufficient to support the conviction beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).
>
> The jury heard testimony that Irive and his co-offender approached the victims outside of the pawnshop and demanded money. When the victims did not comply, the co-offender said he had a gun and would shoot them if they ran, and lifted up his shirt to reveal the handle of a gun tucked into his waistband. Irive then pulled the necklace off of one victim's neck and punched him in the jaw. Irive hit the victim a second time and took his wallet. He and his co-offender then left the scene of the robbery together. From this evidence a juror could reasonably infer that Irive knew of the use of the gun by his co-offender and was thus subject to the deadly weapon enhancement. [Footnote: Irive does not contest that he was liable as a principal for the robbery or that his co-offender was armed with and used a deadly weapon in the commission of the robbery. *See Brooks v. State*, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008).] *See* NRS 193.165(1); *Brooks*, 124 Nev. at 210 n.27, 180 P.3d at 661 n.27 (an unarmed offender uses a deadly weapon if he takes a victim's property while a co-offender holds the victim at gunpoint (citing *Anderson v. State*, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979))).

(Order of Affirmance, Exhibit 17 at 1-2 (ECF No. 14-18 at 2-3).)

The Due Process Clause of the Fourteenth Amendment prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court established the standard for a federal habeas court's review of the sufficiency of evidence. Under *Jackson*, a habeas petitioner claiming insufficiency of the evidence may obtain relief only if "it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Id*. at 319. Federal courts look to state law to determine the substantive elements of the criminal offense. *Id*. at 324 n.16.

Applying these standards, it is plain that there was sufficient evidence presented at trial for application of the deadly weapon enhancement. As the Nevada Supreme Court pointed out, there was evidence that, during the course of the robbery, Irive's co-offender said he had a gun and would use it if the victims did not comply, and he lifted up his shirt to reveal what appeared to the victims to be the handle of a gun tucked into his waistband. The evidence indicated that these actions by Irive's co-offender facilitated the robbery. A juror could reasonably have inferred that Irive knew of the use of a gun by his co-offender. The state courts' ruling on this claim was reasonable. The Court will deny habeas corpus relief on Ground 2 of Irive's amended petition in Case No. 3:15-cv-00487-MMD-WGC.

D. Ground 3 in Case No. 3:15-cv-00487-MMD-WGC

In Ground 3 of his amended petition in Case No. 3:15-cv-00487-MMD-WGC, Irive claims that he received ineffective assistance of counsel on his direct appeal, in violation of his federal constitutional rights, because of "counsel's failure to preserve the record for Nevada Supreme Court review of the assignment of error that the trial court imposed a harsher sentence because Irive exercised his constitutional right to a jury trial." (*See* First Amended Petition (ECF No. 30) at 21-24.)

Irive asserted this claim in his state habeas action, and, on the appeal in that case, the Nevada Supreme Court ruled on the claim as follows:

> Irive argues that appellate counsel's failure to provide this court with an audio-visual recording of the sentencing hearing precluded this court from considering on direct appeal whether the trial court erred in imposing a harsher sentence based on Irive's failure to take responsibility for his actions and his exercise of his constitutional right to trial. Irive fails to demonstrate a reasonable probability that, had appellate counsel provided this recording on direct appeal, his sentence would have been vacated. The audio-visual recording was played at the evidentiary hearing, and the record indicates that the trial court may have stated, "he didn't," after trial counsel argued that Irive had taken responsibility for his actions. At no point did the trial court state that it based its sentence on Irive's failure to take responsibility or his decision to go to trial and testify in his own defense; rather the trial court stated that it was imposing a harsher sentence because of Irive's criminal conduct and history. *See Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1033 (1997). Therefore, we conclude that the district court did not err in denying this claim.

(Order of Affirmance, Exhibit 43 at 4-5 (ECF No. 15-19 at 5-6).)

The Court finds this claim to be without merit. Irive makes no showing that the trial court based its sentencing of Irive, to any extent, on Irive's decision to go to trial and testify in his own defense. There is no showing that the outcome of the appeal would have been different had counsel provided the recording in question. Irive does not show that his counsel's performance was unreasonable, and he does not, at any rate, show prejudice. The state courts' rulings on this claim was reasonable. The Court will deny habeas corpus relief on Ground 3 of Irive's amended petition in Case No. 3:15-cv-00487-MMD-WGC.

E. Ground 1 in Case No. 2:16-cv-00241-MMD-WGC

In Ground 1 of his second amended habeas petition in Case No. 2:16-cv-00241-MMD-WGC, Irive claims that his kidnapping conviction is in violation of his federal constitutional rights because the State "produced insufficient evidence at trial to support the charge of kidnapping." (*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 13-15.)

Irive asserted this claim on his direct appeal, and the Nevada Supreme Court denied relief on the claim, ruling as follows:

> … Irive argues that the evidence was insufficient to support his conviction for first-degree kidnapping because there was no showing of intent on his part and the victim's testimony was inconsistent. After reviewing the evidence in the light most favorable to the prosecution, we conclude that any rational juror would have found all of the essential elements of first-degree kidnapping beyond a reasonable doubt. *See Mason v State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002). At trial, the victim testified that she agreed to get into the SUV driven by Irive's codefendant after the codefendant insisted that the victim show her how to get to her destination. However, upon approaching her purported destination, the codefendant continued to drive despite the victim's request to stop the SUV and let her out. Irive, who had been hiding in the back seat, grabbed the victim around her neck and demanded her gold jewelry and her purse. After the victim gave Irive her purse and explained that her jewelry was not real gold, the codefendant stopped the SUV, and Irive pushed the victim out of the SUV. This evidence was sufficient to support the conviction. While Irive contends that some of the victim's testimony contradicted her prior statements, it was for the jury to determine the weight and credibility to give the conflicting testimony. *See id*. at 559-60, 51 P.3d at 524.

(Order of Affrmance, Exh. 31 at. 1-2 (ECF No. 16-14 at 2-3).)

This claim is without merit. It is beyond any reasonable dispute that the ruling by the Nevada Supreme Court was reasonable. There was strong evidence presented at trial supporting Irive's kidnapping conviction. The Court will deny habeas corpus relief with respect to Ground 1 of Irive's second amended petition in Case No. 2:16-cv-00241-MMD-WGC.

F. Ground 2 in Case No. 2:16-cv-00241-MMD-WGC

In Ground 2 of his second amended habeas petition in Case No. 2:16-cv-00241-MMD-WGC, Irive claims that his federal constitutional rights were violated because "[t]he prosecutor shifted the burden of proof and commented on Irive's exercise of his right to remain silent." (*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 15-17.)

In making this claim, Irive first points out the following argument made by the prosecutor in his rebuttal closing argument:

> These—proof beyond a reasonable doubt is a burden that every single defendant has been held to in every single criminal case in every Court across the country since the country has been founded, and that is not an impossible burden, because people are convicted of crimes every single day.
>
> The Judge instructed you that beyond a reasonable doubt, reasonable doubt is one based on reason. It is not mere speculation, it is not mere possibility—

(*Id*. at 16; *see also* Transcript of Trial, June 10, 2010, Exh. 65 at 53 (ECF No. 17-24 at 16).) The defense objected on the grounds that the prosecutor was trying to quantify reasonable doubt and was shifting the burden of proof to the defense. (*See* Transcript of Trial, June 10, 2010, Exh. 65 at 53-54 (ECF No. 17-24 at 16).) In response, the prosecutor explained that he misspoke when he said defendants are held to the burden of proof, and, beyond that, he was restating the jury instruction. (*See id*.) The trial court overruled the objection. (*See id*.) Irive goes on in his claim to point out the following argument made by the prosecutor moments later:

> Now, I left a big old section in my notes here (indicating) for—to write down their saying that these crimes didn't occur.

> But if you listen to what they said, they never said these—conspiracy didn't occur, kidnapping didn't occur—

(*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 16-17; *see also* Transcript of Trial, June 10, 2010, Exh. 65 at 54-55 (ECF No. 17-24 at 16).) The defense objected, on the ground that this was burden shifting. (*See* Transcript of Trial, June 10, 2010, Exh. 65 at 55 (ECF No. 17-24 at 16).) The court overruled this objection as well, stating:

> So it's clear they don't have a burden. You can comment on their, their closing. So go ahead.

(Transcript of Trial, June 10, 2010, Exh. 65 at 55 (ECF No. 17-24 at 16).) Irive claims that the prosecutor's arguments drew attention to Irive's failure to testify and implied that he had a duty to come forward with evidence. (*See* Second Amended Petition (ECF No. 14 in Case No. 2:16-cv-00241-MMD-WGC) at 17.)

Irive asserted this claim on his direct appeal, and the Nevada Supreme Court denied relief on the claim, ruling as follows:

> … Irive argues that the prosecutor committed misconduct during rebuttal closing argument because the prosecutor's comments improperly shifted the burden of proof to Irive and drew attention to his decision not to testify. We conclude that the challenged comments were improper, but that the error was harmless given the overwhelming evidence of guilt. *See Valdez v. State*, 124 Nev. 1172, 1188-89- 196 P.3d 465, 476-77 (2008). Further, to the extent that Irive argues that the challenged comments improperly referenced his failure to testify, we conclude that the comments did not directly remark on Irive's failure to take the stand and the prosecutor did not manifestly intend the comments as a reference to Irive's failure to testify on his own behalf. *See Barron v. State*, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989).

(Order of Affrmance, Exhibit 31 at 3 (ECF No. 16-14 at 4).)

The standard set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986), is the "clearly established law" governing claims of prosecutorial misconduct for purposes of habeas review under AEDPA. *See Ayala v. Chappell*, 829 F.3d 1081, 1114 (9th Cir. 2016). In *Darden*, the Supreme Court explained that "it is not enough that the prosecutor's remarks were undesirable or even universally condemned," but rather "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the

resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 180-81 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In determining whether arguments made by a prosecutor rise to the level of a due process violation, the court is to examine the entire proceedings, so that the prosecutor's remarks may be placed in their proper context. *Boyde v. California*, 494 U.S. 370, 384-85 (1990); *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

A criminal defendant has a right not to testify, and the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 616 (1965). "A prosecutor's comment is impermissible if it is 'manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *Beardslee v. Woodford*, 358 F.3d 560, 586 (9th Cir. 2004), quoting *United States v. Tarazon*, 989 F.2d 1045, 1051-52 (9th Cir. 1993).

However, "a 'comment on the failure of the *defense* as opposed to the *defendant* to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege.'" *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991) (quoting *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988) (emphasis in original)); *see also United States v. Tam*, 240 F.3d 797, 805 (9th Cir. 2001) ("[W]hen the government refers to 'defendant's arguments' but obviously is addressing the arguments made by defense counsel, there is no *Griffin* violation"). Read in context, the arguments of the prosecutor at issue in this case were commentary on the arguments made by defense counsel; they were not commentary on Irive's failure to testify. The prosecutor's arguments did not violate *Griffin*.

Furthermore, the prosecutor's arguments were not such as to shift the burden of proof to the defense. It was obvious—and the prosecutor confirmed in open court—that he misspoke when he said that defendants have been held to the burden of proof. The

trial court overruled the objection after hearing the prosecutor's explanation, and reinforced to the jury that the burden of proof was on the prosecution. Moreover, the prosecutor's argument that defense counsel did not claim that the crimes did not occur cannot reasonably be understood as shifting the burden of proof. And, even if the arguments of the prosecutor were arguably an improper shifting of the burden of proof, they were not such as to infect the trial with unfairness such as to render Irive's conviction a denial of due process.

The Court concludes that there was no constitutional error as asserted in this claim. The Nevada Supreme Court's ruling, rejecting this claim, was not contrary to, or an unreasonable application of, clearly established federal law as determined by United States Supreme Court. The Court will deny habeas corpus relief on Ground 2 of Irive's second amended petition in Case No. 2:16-cv-00241-MMD-WGC.

IV. CERTIFICATE OF APPEALABILITY

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

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

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

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

Miller-El, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

The Court has considered all of Irive's claims with respect to whether they satisfy the standard for issuance of a certificate of appealability. The Court determines that a certificate of appealability is warranted in each of Irive's cases. In Case No. 3:15-cv-00487-MMD-WGC, a certificate of appealability will be issued with respect to Ground 1 of Irive's amended habeas petition. In Case No. 2:16-cv-00241-MMD-WGC, a certificate of appealability will be issued with respect to Grounds 2 and 3 of Irive's second amended habeas petition.

V. CONCLUSION AND ORDERS

It is therefore ordered that, pursuant to Federal Rule of Civil Procedure 25(d), in each of the above-captioned actions, the Clerk of the Court will substitute Jo Gentry for Timothy Filson, on the docket, as the respondent warden, and update the captions of the actions to reflect this change.

It is further ordered that, in Case No. 3:15-cv-00487-MMD-WGC, petitioner's First Amended Petition for Writ of Habeas Corpus (ECF No. 30) is denied. Petitioner is granted a certificate of appealability with respect to Ground 1 of his amended petition for writ of habeas corpus. The Clerk of the Court is directed to enter judgment accordingly.

It is further ordered that, in Case No. 2:16-cv-00241-MMD-WGC, petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 14) is denied. Petitioner is granted a certificate of appealability with respect to Grounds 2 and 3 of his second amended petition for writ of habeas corpus. The Clerk of the Court is directed to enter judgment accordingly.

DATED THIS 25th day of April 2018.

MIRANDA M. DU,
UNITED STATES DISTRICT JUDGE

APP. 041

JOC

ORIGINAL

2010 AUG 27 A 10:20

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICARDO A. IRIVE
aka Ricardo Irive Avalos
#1974086

Defendant.

CASE NO. C259398-2 ~~C258398-2~~

DEPT. NO. XVIII

09C259398 – 2
JOC
Judgment of Conviction
911433

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380, and COUNT 2 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 200.380, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 - CONSPIRACY TO COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380, and COUNT 2 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 200.380, 193.165; thereafter, on the 23rd day of

2

APP. 042

August, 2010, the Defendant was present in court for sentencing with his counsel, JEANNIE HUA, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, Indigent Defense Civil Assessment Fee of $250.00, and to PAY $510.00 RESTITUTION jointly and severally with co-defendant, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A MAXIMUM of SIXTY (60) MONTHS with a MINIMUM parole eligibility of THIRTEEN (13) MONTHS; and AS TO COUNT 2 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for Use of a Deadly Weapon, COUNT 2 to run CONCURRENT with COUNT 1; with THREE HUNDRED FORTY-THREE (343) DAYS Credit for Time Served. As the Fee and Genetic Testing have been previously imposed, the Fee and Testing in the current case are WAIVED.

DATED this 26th day of August, 2010

DAVID BARKER
DISTRICT JUDGE

APP. 043

NOT FOR PUBLICATION

FILED

JUN 14 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICARDO IRIVE, Petitioner-Appellant, v. JO GENTRY, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 18-15925 D.C. No. 3:15-cv-00487-MMD-WGC MEMORANDUM*

RICARDO IRIVE, Petitioner-Appellant, v. JO GENTRY, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 18-15927 D.C. No. 2:16-cv-00241-MMD-WGC

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

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

Submitted June 10, 2019**
San Francisco, California

Before: GOULD, IKUTA, and R. NELSON, Circuit Judges.

Nevada state prisoner Ricardo Irive appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petitions challenging his sentence in two discrete robbery trials. Irive argues he received ineffective assistance when his trial counsel advised him to delay accepting a global plea offer until she could investigate the strength of the state's case. He argues her mistaken representation that the offer would remain available until trial resulted in his facing trial and sentencing in both cases and receiving a higher sentence than offered in the initial global plea deal. We affirm the district court's denial of Irive's petitions.

We review the state court's adjudication of Irive's claims under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and can grant federal habeas relief only if Irive demonstrates the Nevada Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law," or "was based on an unreasonable determination of the facts." 28 U.S.C § 2254(d). Under AEDPA, the question before us is "not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied [the] deferential standard" set forth in *Strickland v.*

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Washington, 466 U.S. 668 (1984). *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

The Nevada Supreme Court's conclusion that Irive's trial counsel did not render deficient performance under *Strickland* was neither "contrary to" nor "an unreasonable application of . . . clearly established federal law." 28 U.S.C. § 2254(d)(1). Counsel's advice to Irive—to delay acceptance of the plea deal pending further investigation—was legally sound. Irive contends that it was unreasonable for counsel to fail to determine when the plea deal would expire, but counsel's decision not to inquire on this point—in an effort to avoid the prosecution limiting the offer—was a reasonable strategic decision. Under the circumstances, it was reasonable for the Nevada Supreme Court to conclude that trial counsel's conduct in plea bargaining met the *Strickland* standard. *See Lafler v. Cooper*, 566 U. S. 156, 163, 173-74 (2012).

Additionally, Irive has not shown that trial counsel's allegedly deficient performance prejudiced his defense. Because Irive claims he was harmed by rejecting the plea deal, he must demonstrate that but for trial counsel's mistaken representation there is a "reasonable probability" that the plea offer "would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms," and that his sentence under the plea agreement "would have been less severe" than the sentence

imposed. *Lafler*, 566 U.S. at 164.

Irive has not offered any evidence that his decision to defer acceptance of the plea offer pending further investigation was contingent on the ultimately mistaken representation that the offer would remain open until trial. Even if he had, Irive failed to demonstrate to the Nevada courts that his codefendant would also have accepted the contingent offer. He likewise failed to provide any evidence that the ambiguous offer would have been honored by the prosecution—which, given the negotiating landscape, is questionable. Consequently, Irive has not met the prejudice requirements of *Strickland* and the Nevada Supreme Court's finding that prejudice was not established is not unreasonable.

AFFIRMED.