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APP.0001

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL A. RAMET, Petitioner-Appellant, v. ROBERT LEGRANDE; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 18-15206 D.C. No. 3:14-cv-00452-MMD-WGC District of Nevada, Reno ORDER DENYING PFREB AND MOTION TO EXPAND RECORD ON APPEAL

Before: McKEOWN and GOULD, Circuit Judges, and LASNIK,* District Judge.

The panel has voted to deny the petition for panel rehearing. The petition for panel rehearing is DENIED.

The full court was advised of the petition for rehearing en banc. No judge requested a vote on whether to rehear the matter en banc. The petition for rehearing en banc is DENIED.

Petitioner-Appellant's motion to expand the record on appeal is also DENIED. *See Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

APP.0002

No. 18-15206

(Before the Honorable M. Margaret McKeown and Ronald M. Gould, Circuit Judges, and Robert S. Lasnik, District Judge; Memorandum filed May 28, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Daniel A. Ramet,

Petitioner-Appellant,

v.

Robert LeGrande, et al.,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Nevada (Reno)
District Court Case No. 3:14-cv-00452-MMD-WGC
Honorable Miranda M. Du, United States District Judge

Petition for panel rehearing and rehearing en banc

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STATEMENT IN SUPPORT OF REHEARING

Daniel Ramet strangled his 20-year-old daughter Amy to death and admitted he took a break in the middle of strangling her. Despite those undisputed facts, trial counsel unreasonably advised Mr. Ramet to turn down a favorable plea deal (for 15 years to life) the hopes of securing a manslaughter conviction at trial. That advice overlooked devastating admissions Mr. Ramet made in recorded jailhouse phone calls, as well as the law governing manslaughter. Based on this incompetent advice, Mr. Ramet went to trial, received a first-degree murder verdict, and is now serving life without parole. He therefore received ineffective assistance during the plea negotiations. *See Lafler v. Cooper*, 566 U.S. 156 (2012).

The panel erroneously rejected this claim. Its decision relied on two mistakes: a factual mistake that warrants panel rehearing, and a legal mistake that justifies en banc rehearing.

First, Mr. Ramet made damaging admissions in recorded jailhouse phone calls: critically, he said he stopped strangling Amy for a while and then decided to continue strangling her. That statement all but guaran-

teed a first-degree murder conviction. Mr. Ramet's attorney provided deficient advice during the plea negotiations by failing to take those calls into account.

The panel rejected this argument. In its view, Mr. Ramet hadn't proven his lawyer "had access to the jailhouse recordings before he advised Ramet to reject the plea offer." Slip op. at 4. Neither the State nor the lower court made this claim; the panel raised it sua sponte. In truth, the State turned over the recordings at least by December 2006, and the plea negotiations remained open until the trial began in late May 2007. The panel's decision relies on an un-briefed factual error, and the panel should grant rehearing to correct it.

Second, no reasonable lawyer would've thought this was a manslaughter case: manslaughter requires a serious provocation, and Amy's insults didn't qualify. The panel disagreed. As the opinion put it, even if the attorney "gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial," that wouldn't satisfy *Lafler*. Slip op. at 5. This reasoning conflicts with *Lafler* itself, among other binding authority. The Court should rehear this case en banc to maintain the uniformity of its decisions. *See* Fed. R. App. P. 35(b)(1)(A).

STATEMENT OF THE CASE

Mr. Ramet strangled Amy to death. At the time, he was suffering hard times: he lost his job; his wife left him; he ran out of money for food; and his house lacked power or running water. EOR 408 (Tr. at 203), 546-47 (Tr. at 103-07), 549 (Tr. at 115), 552-53 (Tr. at 121-25). Despite these problems, Amy moved back in with him. One day, she got fed up with their living conditions and lit into Mr. Ramet, calling him a loser and suggesting he commit suicide, as his father had. EOR 554 (Tr. at 128-31). Mr. Ramet snapped and killed Amy. *Id.*

For about a month, Mr. Ramet kept Amy's decomposing body in a bedroom, and he disguised her disappearance by sending text messages from her phone. Eventually, Amy's relatives became suspicious and tried breaking into the house. The police responded and noticed the smell of decomposition. EOR 118, 367-68 (Tr. at 36-41), 373-74 (Tr. at 60-67). They got a search warrant and arrested Mr. Ramet.

Detectives spoke to Mr. Ramet, who gave a full confession. EOR 121-214. Once he got to jail, he began calling Delsie (his surviving daughter). Those jail calls were monitored and recorded. On them, Mr. Ramet told Delsie the strangling took "longer than" "five minutes." EOR 274.

He admitted he took a break mid-way through: Amy "passed out and then came to a little bit," and he "grabbed her again." EOR 274-75. The break lasted a "few minutes." EOR 277. He decided to start strangling Amy again because he "didn't want her to suffer" by being "brain dead or something." EOR 276; *see also* EOR 293.

The State offered Mr. Ramet a plea deal for 15 years to life. If Mr. Ramet went to trial, he faced an overwhelming risk of a first-degree murder conviction and a maximum sentence of life without parole. But Mr. Ramet's attorney recommended he go to trial because the attorney thought they had "a really good shot at a manslaughter" verdict. EOR 911. Mr. Ramet took that advice. At trial, he testified in his own defense; his account of the strangling, including the break, matched his statements on the jail calls. The jury convicted Mr. Ramet of first-degree murder and sentenced him to life without parole. EOR 691-92. Mr. Ramet appealed. In its opinion, the Nevada Supreme Court said the evidence of first-degree murder was overwhelming because Mr. Ramet confessed "he strangled his daughter, stopped and checked her pulse, and then continued to strangle her." EOR 51.

Mr. Ramet pursued state post-conviction relief and argued his attorney was ineffective for recommending he turn down the deal. His trial attorney, Norman Reed, testified at an evidentiary hearing. Mr. Reed agreed he'd "discouraged" Mr. Ramet from taking the deal. EOR 910. The case "haunt[ed]" him, because his advice was "very bad"; he "should've never told him to turn down that offer." EOR 910-11. Mr. Reed recommended going to trial because he thought Mr. Ramet had "a really good shot at a manslaughter" verdict. EOR 911. But Mr. Ramet made "a number of incriminating statements" on the stand—presumably his description of the break—and Mr. Reed "completely didn't see that [testimony] coming." EOR 913; *see also* EOR 920. Both Mr. Reed and Mr. Ramet agreed that if Mr. Reed had recommended accepting the deal, Mr. Ramet probably would've taken it. EOR 912, 914, 935.

The state district court denied relief, and the Nevada Supreme Court affirmed. It said Mr. Reed's advice wasn't flawed because Mr. Ramet gave damaging surprise testimony at trial that Mr. Reed "'didn't see coming'"; "it was only after hearing [that] testimony" that Mr. Reed "realized he should have counseled [Mr. Ramet] to accept the plea offer."

EOR 42 (internal elisions omitted). The court also said there was "no allegation that counsel misunderstood the applicable law." *Id.*

Mr. Ramet pursued federal habeas relief. He argued Mr. Reed provided ineffective advice for two reasons. First, Mr. Reed hadn't been aware his client was going to make damaging admissions (i.e., his description of the break) on the stand. But Mr. Ramet made similar admissions in the jail calls, and the attorney was unjustifiably caught off guard by his materially identical testimony. Second, Mr. Reed thought this was a manslaughter case, but no reasonable attorney would agree: manslaughter requires a "serious provocation," and the alleged provocation in this case—a daughter's insults—was never going to fit the bill.

The lower court rejected this claim. It agreed "Reed's assessment of Ramet's chances at trial was clearly misguided" because Mr. Reed "underestimated the possibility that the State would be able to prove first degree murder," and because he was "unjustifiably-optimistic" about the chances of a manslaughter verdict. EOR 12-13. But the lower court thought his advice wasn't bad enough to warrant relief. EOR 13.

Mr. Ramet appealed, and the panel issued an opinion affirming the lower court. As for the jail calls, the panel mistakenly concluded Mr.

Ramet hadn't proven his lawyer "had access to the jailhouse recordings before he advised Ramet to reject the plea offer" (slip op. at 4)—even though neither the State nor the lower court had raised that issue. As for the question of adequate provocation, the panel argued that even if Mr. Reed "gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial," that wouldn't constitute deficient performance. Slip op. at 5.

Mr. Ramet now requests panel rehearing or rehearing en banc.

ARGUMENT

The panel's opinion contains two critical errors. First, the opinion relies on a factual error, which the panel introduced sua sponte; the panel should grant rehearing to correct this error. Second, the decision relies on a legal error regarding *Lafler* claims, and the Court should grant rehearing en banc to address this mistake.

I. The panel should grant rehearing because the attorney had access to the jail calls during the plea negotiations.

The panel should grant rehearing to fix a factual mistake regarding the duration of the plea negotiations.

A. Mr. Ramet made damaging admissions in jail calls, so the attorney should've been ready for that testimony.

Mr. Ramet's attorney (Mr. Reed) provided ineffective assistance during the plea negotiations in part because Mr. Reed was unjustifiably blindsided by Mr. Ramet's trial testimony. Mr. Reed testified his client made "a number of incriminating statements" (i.e., the description of the break) on the stand, and Mr. Reed "completely didn't see that [testimony] coming." EOR 913. But no reasonable attorney could've been caught off guard, since Mr. Ramet made identical admissions in the jail calls. EOR 274-77, 293. These admissions provided dispositive evidence of first-degree murder because they showed Mr. Ramet deliberated over the killing. Opening Brief ("OB") at 35-36. Mr. Reed performed deficiently by failing to pick up on this problem.

Relatedly, Mr. Reed suggested his client's testimony was the key problem at trial, but in fact the jail calls alone sunk the defense's case. Indeed, during closing arguments, the State repeatedly directed the jury's attention to the jail calls, as opposed to Mr. Ramet's testimony. *See* EOR 610-13 (Tr. at 16-20, 24-26) (quoting from the calls); EOR 620 (Tr. at 56) ("[W]e have made I guess you could say a big deal about the jail

phone calls."); EOR 621 (Tr. at 58-60) (emphasizing the calls). Given those arguments, it doesn't make sense that Mr. Reed blamed the verdict on Mr. Ramet's testimony; in fact, the State's case would've been essentially the same even if Mr. Ramet hadn't taken the stand.

In short, Mr. Reed failed to appreciate the significance of these calls, which caused him to provide unreasonable plea advice.

B. Mr. Ramet's attorney had the jail calls when the plea negotiations were active.

The panel erroneously rejected this argument. It believed it wasn't clear whether Mr. Reed "had access to the jailhouse recordings before he advised Ramet to reject the plea offer." Slip op. at 4. But the record on appeal shows Mr. Reed had the calls well before the negotiations ended.

1. The defense had the calls at least by December 2006.

Mr. Reed had copies of the calls at least by December 2006. By way of reference, the State issued its criminal information against Mr. Ramet on August 24, 2006 (EOR 217), and the trial began in late May 2007. In between, Mr. Reed filed a motion to suppress the jail calls, on December 27, 2006. EOR 219-26. In the motion, Mr. Reed said the State had turned

over various calls, and he argued playing the calls meant the jury would learn Mr. Ramet was in custody when he placed them. At a hearing, the court denied the motion but said it would entertain proposed redactions. EOR 234-37.

The State submitted a written pleading regarding the redactions and attached transcripts of the calls. EOR 248-98. These transcripts include the admissions at issue in this appeal—primarily, Mr. Ramet's admission to Delsie that he took a break in between strangling Amy. EOR 274-77, 293.

As this record shows, the defense had access to the jail calls at least by December 27, 2006, when Mr. Reed filed a motion to suppress the relevant calls. *See also* Oral Argument Video, *Ramet v. Legrande*, No. 18-15206, at 19:06-19:16, *available at* https://bit.ly/2JjiLuT (last visited August 12, 2019) (hereinafter "Oral Argument Video") (undersigned counsel explains, "The motion to suppress the jail calls came in at December 27, '06, and [Mr. Reed] must've had the jail calls at that time because he filed a motion to suppress them.").

2. The negotiations didn't end until trial began in late May 2007.

As for the plea negotiations, the record on appeal doesn't disclose when the State first made a formal offer to the defense. But the negotiations stayed open until the start of trial in late May 2007.

The court held a calendar call on May 23, 2007, about a week before trial. At the hearing, the court asked if there was "any possibility this case will be negotiated?" EOR 305. The prosecutor answered, "We're discussing it, your Honor, but at this time, no." *Id.* In other words, while it seemed unlikely the parties would agree to a deal, the negotiations were still open. *See also* Oral Argument Video at 19:16-19:36 (undersigned counsel states, "There's a calendar call on May 23, 2007. At the very start of it, the court asks about negotiations. The prosecutor says, we're still discussing negotiations, but at this time it doesn't look like there's going to be a deal, and that's at EOR 305. So he did have these jail calls when the negotiations were going on.").

Mr. Ramet's testimony at the state evidentiary hearing confirms the negotiations were active at this time. As he explained, the prosecutor and Mr. Reed "were discussing" whether to reduce the 15-year minimum

"down to somewhere around a 10 or 11 or 12 or something." EOR 929. When Mr. Ramet came to court on the first day of trial, Mr. Reed told him the State was sticking to "a strict 15 to life," and Mr. Reed "again advis[ed]" Mr. Ramet "not to take it." EOR 929; *see also* EOR 930-31. Mr. Ramet followed that advice and went to trial.

The parties made a record about these negotiations at trial. The court said it understood the State made a plea offer involving "a minimum of 15 years and that offer was rejected by Mr. Ramet." EOR 344 (Tr. at 3). Mr. Reed and the prosecutor agreed. *Id.* They also explained the defense made a counteroffer, which the State rejected. *Id.*

As these events show, the deal for 15 years to life was on the table right until trial began. During that time (including around the May 23 calendar call), the parties were discussing the defense's counteroffer, but the State's original offer stayed open. Had Mr. Reed reviewed the calls and given correspondingly reasonable advice to Mr. Ramet at any time between December 2006 and late-May 2007, there's a reasonable probability Mr. Ramet would've been able to take the deal. The panel's contrary conclusion is wrong.

C. The panel improperly raised this issue sua sponte.

There was never a suggestion Mr. Reed didn't have the jail calls during the plea negotiations until the panel raised this issue at oral argument. The State has never claimed it delayed producing the calls until after the negotiations concluded. Nor did the lower court mention that possibility. The panel improperly raised and decided this issue without the benefit of briefing from the parties or analysis from the lower court.

Generally, this Court will "refrain from considering an issue that a party has failed to raise" on appeal. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1071 (9th Cir. 2012). Nor will the Court usually "entertain[] arguments on appeal that were not presented or developed before the district court." *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992 (9th Cir. 2010). And while it's often said that a court of appeals may affirm a lower court for any reason supported by the record (*see, e.g.*, *Welch v. Fritz*, 909 F.2d 1330, 1331 (9th Cir. 1990)), an appellate court generally shouldn't do so unless the lower court had a chance to consider the issue (*see Plains All American Pipeline L.P. v. Cook*, 866 F.3d 534, 545 (3d Cir. 2017)).

Here, the State didn't argue below or on appeal that the plea negotiations ended before Mr. Reed got the jail calls. Nor did the lower court address that possibility. Accordingly, the panel should've considered the issue forfeited or waived. At the very least, the panel should've ordered supplemental briefing on this yet-to-be-raised question to allow Mr. Ramet a chance to address it. *See, e.g.*, *Hall*, 697 F.3d at 1070, 1072 (explaining the panel ordered supplemental briefing about an issue it raised at oral argument); *Alcatraz v. I.N.S.*, 384 F.3d 1150, 1161-62 (9th Cir. 2004) (similar).

D. At the very least, the panel should've remanded for a hearing.

The record on appeal demonstrates Mr. Reed had the jail calls at least by December 27, 2006, and the plea negotiations were active until the start of trial in late May 2007. Thus, Mr. Reed had plenty of time to (1) review the calls, (2) realize they contained definitive proof of first-degree murder, and (3) give Mr. Ramet the advice any reasonable attorney would've given him: take the deal. Mr. Ramet has met his burden of proof on this issue. But were there any doubt, the panel should've remanded for a hearing.

When a petitioner raises an ineffectiveness claim in a federal habeas proceeding, the petitioner "must prove all facts underlying [the] claims . . . by a preponderance of the evidence." *Alcala v. Woodford*, 334 F.3d 862, 869 (9th Cir. 2003). Thus, as the panel implied, Mr. Ramet had to prove by a preponderance of the evidence that Mr. Reed had the jail calls at a time when Mr. Ramet could've taken the deal (or, to be precise, when there was a reasonable probability the State would've allowed Mr. Ramet to take the deal). As Mr. Ramet has demonstrated in this rehearing petition, he's met that burden, and he's entitled to relief.

Even if the panel isn't convinced Mr. Ramet has met his burden on the current record, the panel at least should've remanded for a hearing. *See, e.g.*, *Norris v. Risley*, 878 F.2d 1178, 1183 (9th Cir. 1989). On remand, Mr. Ramet would be able to prove, definitively, that Mr. Reed had the jail calls while the offer was open. To that end, Mr. Ramet is submitting a contemporaneous motion for leave to expand the record on appeal. The proposed expanded record includes a declaration from a staff investigator regarding a relevant conversation with Sandra DiGiacomo, the lead prosecutor at Mr. Ramet's trial. Were the panel to remand for a hearing, Mr. Ramet would present this evidence (and more), which would

provide dispositive proof Mr. Reed had the jail calls before the offer lapsed. The panel should therefore reconsider its decision.

II. The Court should grant en banc rehearing regarding the standards governing *Lafler* claims.

While panel rehearing is particularly appropriate, the Court should also grant en banc rehearing to address a separate erroneous legal conclusion in the panel opinion.

Mr. Ramet maintains no reasonable attorney would've advised him to turn down the deal. That is true regardless of the jail calls; even setting that evidence aside, the undisputed facts of the case didn't rationally support a manslaughter verdict, so the advice to go to trial was fundamentally flawed.

In Nevada, voluntary manslaughter is a killing that occurs "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible." NRS 200.040(2); *see also* NRS 200.060; EOR 647. Not just any provocation will do—there must be a "serious and highly provoking injury . . . sufficient to excite an irresistible passion in a reasonable person." NRS 200.050; EOR 647; *see also Collins v. State*,

405 P.3d 657, 667 (Nev. 2017) (stating the provocation must be "extreme"). In other words, "[t]he heat of passion . . . must be such an irresistible passion as naturally would be aroused in the mind of an ordinarily reasonable person" "of average disposition" "in the same circumstances." EOR 648.

Here, the alleged "provocation" involved Mr. Ramet's daughter verbally insulting him and throwing a glass object at him. EOR 554 (Tr. at 129-30), 571-72 (Tr. at 199-202); *see also* EOR 181, 195. There is no way a rational juror would think these insults were an "extreme," "serious and highly provoking injury" that would arouse an "irresistible passion" in "an ordinarily reasonable person" "of average disposition." To put it bluntly, ordinarily reasonable parents with average dispositions don't fly into homicidal fits when their daughters yell at them. Because no reasonable lawyer could think there was a colorable manslaughter argument under these undisputed facts, Mr. Reed provided deficient performance by suggesting Mr. Ramet go to trial. *See* OB at 22-29.

The panel rejected this argument. In its view, Mr. Ramet was "arguing that Reed performed ineffectively because he gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial,"

which the panel believed was insufficient to state a claim under *Lafler*. Slip op. at 5. This reasoning contradicts governing precedent.

The Sixth Amendment protects a defendant's right to the effective assistance of counsel. To satisfy that requirement, an attorney's representation must fall within the admittedly "wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). If an attorney's advice fits within that "wide range," the attorney has satisfied constitutional demands. But if the attorney makes a decision that can't be justified as an "exercise of reasonable professional judgment," the attorney performs deficiently. *Id.* at 690.

The panel's reasoning violates these well-known benchmarks. If an attorney's strategic choice is based on a "grave[] miscalculat[ion]" (slip op. at 5) about whether the undisputed facts of the case can rationally support a defense, then the attorney's decision doesn't fall within the "wide range of reasonable professional assistance" and cannot be justified as an "exercise of reasonable professional judgment" (*Strickland*, 466 U.S. at 689-90). The panel's reasoning was therefore inconsistent with *Strickland*: when an attorney bases a strategic decision on a "grave[] miscalculat[ion]" no reasonable attorney would've made, the attorney

commits a mistake within the heartland of deficient performance.

The panel's decision also conflicts with *Lafler* and its companion case, *Missouri v. Frye*, 566 U.S. 134 (2012). As those decisions explain, the normal *Strickland* standards apply to ineffectiveness claims in the plea context. *See, e.g.*, *Frye*, 566 U.S. at 149 (applying "the deficient performance prong of *Strickland*"); *see also Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012) (stating *Frye* and *Lafler* "merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in *Strickland*" and therefore didn't "break new ground"). Yet the panel implies something more than *Strickland* deficient performance is necessary to prove a *Lafler* claim. Its reasoning therefore contradicts *Lafler*.

The opinion justifies its rationale by quoting *Lafler*'s cautionary advisement that "'an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance.'" Slip op. at 5. The word "necessarily" does a lot of work in that sentence. True, some erroneous strategic predictions won't qualify for relief. For example, an attorney might reasonably predict the defense will be able to convince the jury of their version of events, even though the jury might ultimately adopt the

prosecution's story. But some erroneous strategic predictions will, in fact, amount to deficient performance. For example, if an attorney predicts a particular defense will be successful, even though the undisputed facts of the case can't possibly support that defense, the attorney's prediction is unreasonable. That applies here: Mr. Reed unreasonably thought Amy's insults were a "serious and highly provoking injury" that would cause an "ordinarily reasonable" father "of average disposition" to kill his daughter. That advice counts as deficient performance.

The panel's reasoning also conflicts with published Ninth Circuit opinions predating *Lafler*. For example, in *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002), the Court stated a petitioner can show deficient performance when an attorney makes a "gross error" in advising the petitioner to turn down a deal. *Id.* at 880; *see also Womack v. Del Papa*, 497 F.3d 998, 1003 (9th Cir. 2007) (stating a "gross mischaracterization of the likely outcome" would warrant relief). To be clear, the "gross error" standard is artificially high: *Lafler* abrogated that standard and replaced it with the normal *Strickland* test. But in the alternative, if the "gross error" standard remains intact, Mr. Reed's advice satisfies it: his prediction of "a really good shot at a manslaughter" was a "gross error" in light

of the lack of serious provocation. Nonetheless, the panel rejected the notion that a "gross error" can satisfy *Lafler*; as the panel put it, even a "grave[] miscalculat[ion]" is insufficient. Slip op. at 5. The decision therefore conflicts with binding authority from this Court.

In all, Mr. Ramet established Mr. Reed's advice was sufficiently incompetent to constitute deficient performance. By concluding that even a "grave[] miscalculat[ion]" by a lawyer wouldn't warrant relief, the panel contradicted governing standards from the U.S. Supreme Court and this Court. Rehearing en banc is therefore appropriate.

CONCLUSION

The panel or the en banc Court should rehear this case.

Dated August 12, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jeremy C. Baron
Jeremy C. Baron
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Daniel Ramet
No. 1007820
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender

APP.0027

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 18-15206

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,127.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/Jeremy C. Baron **Date** 8/12/2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

APP.0028

NOT FOR PUBLICATION

FILED

MAY 28 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL A. RAMET, Petitioner-Appellant, v. ROBERT LEGRANDE; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 18-15206 D.C. No. 3:14-cv-00452-MMD-WGC MEMORANDUM*

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

Argued and Submitted May 15, 2019
San Francisco, California

Before: McKEOWN and GOULD, Circuit Judges, and LASNIK,** District Judge.

Daniel Ramet appeals the district court's dismissal of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Ramet contends that he received ineffective assistance of counsel in connection with plea negotiations. We review

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

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

a district court's decision on a habeas corpus petition de novo. *Rodriguez v. McDonald*, 872 F.3d 908, 918 (9th Cir. 2017). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

Ramet was convicted of the first-degree murder of his daughter by a jury in the Nevada state district court for Clark County. He was sentenced to life without the possibility of parole. Before trial, the state had offered Ramet a plea deal of life in prison with the possibility of parole after 15 years. Ramet's trial counsel, Norman Reed, recommended that Ramet reject the deal on Reed's belief that Ramet had a strong chance of obtaining a conviction for manslaughter. Ramet argues that Reed erred by advising him to reject the state's plea offer.

Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, we must deny habeas relief on any claim adjudicated on the merits in a state court proceeding unless the proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

A criminal defendant is entitled to reasonable assistance of counsel during a criminal prosecution, including during plea-bargaining. *See Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

Strickland requires a petitioner to show (1) that trial counsel's performance was so deficient it denied him the counsel guaranteed by the Constitution and (2) that there is a reasonable probability that, but for the deficient performance, the outcome would have been different. 466 U.S. at 687. The Nevada Supreme Court rejected Ramet's ineffective assistance of counsel claim, concluding that Ramet could not show either deficient performance or prejudice. The district court denied Ramet's habeas corpus petition on the deficient performance prong and did not reach the prejudice prong.

Ramet contends that the Nevada Supreme Court and the district court erred in finding that Reed's performance was not deficient because, Ramet argues, Reed's advice was based on a mistake of law.[1] Ramet argues that Reed did not understand that under Nevada law, manslaughter requires "a serious and highly provoking injury" that is "sufficient to excite an irresistible passion in a reasonable person." Nev. Rev. Stat. § 200.050. The record does not support Ramet's contention. Reed's arguments at trial show that he understood the elements of the different degrees of murder and voluntary manslaughter. Reed emphasized to the jury that, although manslaughter requires provocation to be objectively reasonable,

[1] We reject the state's argument that Ramet's mistake-of-law argument is unexhausted and procedurally improper. The claim Ramet raised in his federal habeas corpus petition and the claim presented to the Nevada Supreme Court were substantially equivalent to the claim raised on this appeal. *See Picard v. Connor*, 404 U.S. 270, 278 (1971).

the jury must place the reasonable person in the defendant's circumstances. To that end, Reed focused on the multitude of stressors that Ramet had endured at the time of the killing. It therefore appears that Reed understood that Ramet's subjective provocation would not alone support a manslaughter conviction but that his strategy was to emphasize the conditions in which Ramet found himself. The district court correctly observed that "[t]here is no evidence that [Reed's] advice to Ramet included an 'incorrect legal rule,'" and the Nevada Supreme Court's conclusion that Reed was not deficient on this basis is not an unreasonable application of Supreme Court law.

Ramet also contends that the district court erred in concluding that the Nevada Supreme Court reasonably concluded that Reed's advice to reject the state's plea offer was properly based on the facts known to him at the time. After Ramet was arrested, he made several incriminating statements about the killing in phone calls to his other daughter. These phone calls were recorded and later produced by the state in discovery. Ramet argues that Reed "must not have looked at" the "jailhouse phone calls" because if he had, Reed would have concluded that Ramet did not have a viable shot at a manslaughter defense and would have advised Ramet to accept the state's plea offer. But Ramet's claim fails because he did not meet his burden to show that Reed had access to the jailhouse recordings before he advised Ramet to reject the plea offer. *See Burt v. Titlow*, 571 U.S. 12,

22–23 (2013).

In substance Ramet is arguing that Reed performed ineffectively because he gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial. But "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance." *Lafler*, 566 U.S. at 174. The Nevada Supreme Court reasonably concluded that Reed's advice to Ramet to reject the state's plea deal—which was premised on Reed's belief that Ramet had a good shot at a manslaughter conviction at trial—"falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

AFFIRMED.

APP.0033

No. 18-15206

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Daniel A. Ramet,

Petitioner-Appellant,

v.

Robert LeGrande, et al.,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Nevada (Reno)
District Court Case No. 3:14-cv-00452-MMD-WGC
Honorable Miranda M. Du, United States District Judge

Motion to expand the record on appeal in connection with petition for panel rehearing and rehearing en banc

Rene L. Valladares
Federal Public Defender,
District of Nevada
*Jeremy C. Baron
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(702) 388-6577 | jeremy_baron@fd.org

*Counsel for Daniel A. Ramet

ARGUMENT

Mr. Ramet respectfully requests the Court expand the record on appeal in connection with his contemporaneous petition for panel rehearing and rehearing en banc. Mr. Ramet proposes to expand the record to include new declarations, one from himself, another from a staff investigator documenting statements made by Sandra DiGiacomo, the lead prosecutor at Mr. Ramet's trial. These declarations are relevant to Mr. Ramet's request that the panel rehear this case to fix a factual mistake it introduced sua sponte in its decision.

This Court has "'inherent authority in extraordinary cases'" to consider documents that were not submitted to the district court below, even if the Court could not otherwise take judicial notice of those documents. *United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007) (elisions omitted); *accord Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970). Mr. Ramet respectfully suggests his rehearing petition justifies expanding the record.

As Mr. Ramet's rehearing petition explains, this case involves a claim under *Lafler v. Cooper*, 566 U.S. 156 (2012), that Mr. Ramet's attorney (Norman Reed) unjustifiably told him to turn down a plea deal. One of the arguments in support of the claim revolves around jailhouse phone calls. Mr. Reed testified Mr. Ramet made damaging admissions during his trial testimony, and Mr. Reed didn't see those statements coming; had Mr. Reed known in advance how Mr. Ramet was going to testify, he would've told Mr. Ramet to take the plea deal. But Mr. Ramet had made identical admissions in recorded jailhouse phone calls the State turned over to the defense before trial. Any reasonable attorney would've reviewed those calls carefully, understood the devastating nature of Mr. Ramet's admissions, and advised Mr. Ramet to take the deal.

The panel rejected this claim based on a factual issue it raised for the first time at oral argument. In the panel's view, Mr. Ramet hadn't met his burden to demonstrate Mr. Reed had access to the phone calls when the plea negotiations were open. As the panel saw it, Mr. Ramet's argument relied on Mr. Reed having possession of the calls at a time when the deal was on the table; if the State pulled the deal before it turned over the calls, perhaps Mr. Reed's advice couldn't be considered

deficient. The panel concluded Mr. Ramet hadn't met his burden to prove Mr. Reed had the calls at the relevant time, so it rejected this claim.

Mr. Ramet's rehearing petition asks the panel to reconsider this factual issue, which is an issue neither the State nor the lower court previously addressed. As the petition explains, the existing record on appeal demonstrates at least by a preponderance of the evidence that Mr. Reed had the jail calls by December 2006, and the relevant plea offer (for 15 years to life) remained open to the defense until the start of trial in late May 2007. On that basis alone, the panel should grant rehearing.

Nevertheless, if the panel isn't convinced that the existing record resolves this factual question in Mr. Ramet's favor, Mr. Ramet proposes the panel grant rehearing and remand this case for an evidentiary hearing. Mr. Ramet respectfully proposes expanding the record on appeal so he can make an offer of proof regarding additional evidence he would intend to present at a hearing.

First, Mr. Ramet proposes expanding the record to include a declaration he recently signed. Mr. Ramet recalls the first time he discussed the plea negotiations in depth with his attorneys was in January 2007, which was after the defense received the jail calls. Exhibit A ¶ 3. Mr.

Ramet also recalls the plea deal was open until the start of trial; he had a conversation with Mr. Reed about whether to accept the deal right before trial began. *Id.* ¶¶ 4-5. Notably, Mr. Ramet's declaration is consistent with the testimony he provided at the state evidentiary hearing, as well as with other relevant evidence, all of which Mr. Ramet describes in the rehearing petition.

Second, Mr. Ramet proposes expanding the record to include a declaration from a staff investigator memorializing a recent telephone conversation between undersigned counsel and Sandra DiGiacomo, the lead prosecutor at Mr. Ramet's trial. Ms. DiGiacomo doesn't recall the exact date when the State offered the plea deal to the defense, but she confirmed the plea offer (for 15 years to life) was open right until the start of trial (and even throughout voir dire). Exhibit B ¶ 5. Again, Ms. DiGiacomo's recollection is consistent with Mr. Ramet's account, as well as the other relevant evidence regarding the timing of the negotiations.

(Unfortunately, Mr. Reed has since passed away, so Mr. Ramet is unable to approach him about his recollection regarding the timeline.)

Mr. Ramet respectfully suggests this situation is sufficiently "extraordinary" to warrant expanding the record on appeal. *W.R. Grace*, 504

F.3d at 766. Specifically, the panel sua sponte raised a factual issue and resolved it in the State's favor even though the State forfeited or waived the issue, and even though the lower court didn't address it. Had the issue been raised earlier (for example, had the State raised it in its answer in the lower court), Mr. Ramet would've had the opportunity to introduce these dispositive declarations and request a corresponding hearing. But as things stand, the panel rejected Mr. Ramet's claim based on an un-briefed factual assumption that Mr. Ramet can definitively prove is wrong. Given the extraordinary nature of this situation, it's appropriate for the Court to consider these new declarations.

CONCLUSION

The Court should expand the record on appeal.

Dated August 12, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jeremy C. Baron
Jeremy C. Baron
Assistant Federal Public Defender

APP.0039

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Daniel Ramet
No. 1007820
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender

EXHIBIT A

EXHIBIT A

DECLARATION OF DANIEL A. RAMET

I, Daniel A. Ramet, hereby declare as follows:

1. I am the petitioner for habeas corpus relief in *Ramet v. LeGrande*, Case No. 18-15206 (9th Cir.). I am claiming my trial attorney provided ineffective assistance under *Lafler v. Cooper*, 566 U.S. 156 (2012), for advising me to turn down a plea offer in this case.

2. I first heard about the plea offer in December 2006. I recall receiving a phone call around that time from my lead trial attorney, Norman Reed. He explained the State had offered me a plea deal.

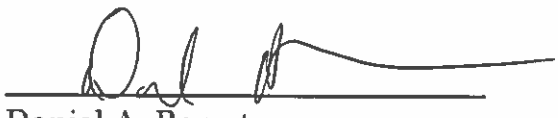
3. Mr. Reed met with me in person in January 2007, along with my second-chair trial attorney, Kimberly Breitling. They discussed the plea deal with me, which would've involved me serving a sentence of 15 years to life. I testified in my state post-conviction evidentiary hearing that Mr. Reed was mocking the offer at one point; he made those comments during this meeting in January 2007.

4. I recall Mr. Reed engaged in additional negotiations with the State in May 2007 in the weeks or days leading up to trial. I believe he was attempting to convince the State to agree to a minimum sentence between 10 or 12 years. On or about the morning before trial started, Mr. Reed told me the State was unwilling to accept a deal for anything less than 15 years to life. Mr. Reed advised me again at that time to turn down the plea deal and proceed to trial.

5. As far as I was aware, the plea deal never expired and was open right until the start of trial. Mr. Reed never told me the plea deal had an expiration date.

I declare under penalty of perjury that the forgoing statement is true.

Executed on June 4th, 2019, in Lovelock, Nevada.



Daniel A. Ramet

EXHIBIT B

EXHIBIT B

DECLARATION OF MARIBEL YANEZ

I, Maribel Yanez, hereby declare as follows:

1. I am a staff investigator with the non-capital habeas unit of the Federal Public Defender, District of Nevada ("FPD").

2. The FPD represents Daniel Ramet in his federal habeas proceedings, which he is litigating in the United States Court of Appeals for the Ninth Circuit. *Ramet v. Legrande*, Case No. 18-15206. I have been assigned to assist with the investigation of the case.

3. As part of my investigation, I was present for a telephone conversation on July 2, 2019, between Mr. Ramet's attorney, Jeremy C. Baron, and the lead prosecutor in Mr. Ramet's case, Sandra DiGiacomo.

4. Ms. DiGiacomo said she remembered Mr. Ramet's case but did not have the physical case file accessible to her.

5. Ms. DiGiacomo said she recalled the plea negotiations in Mr. Ramet's case. She said she did not remember the exact date the prosecution presented its plea offer (which involved a sentence of 15 years to life) to the defense. However, she said she recalled the parties continued to engage in plea negotiations during the weeks leading up to trial, and indeed right up until the very start of the trial. She said the State's plea offer (for 15 years to life) remained open up until the very start of the trial. She said she recalled speaking to the defense about the offer even while in the middle of voir dire.

I declare under penalty of perjury that the forgoing statement is true.

Executed on August 8, 2019, in Las Vegas, Nevada.

Maribel Yanez

APP.0044

NOT FOR PUBLICATION

FILED

MAY 28 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL A. RAMET, Petitioner-Appellant, v. ROBERT LEGRANDE; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 18-15206 D.C. No. 3:14-cv-00452-MMD-WGC MEMORANDUM*

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

Argued and Submitted May 15, 2019
San Francisco, California

Before: McKEOWN and GOULD, Circuit Judges, and LASNIK,** District Judge.

Daniel Ramet appeals the district court's dismissal of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Ramet contends that he received ineffective assistance of counsel in connection with plea negotiations. We review

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

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

a district court's decision on a habeas corpus petition de novo. *Rodriguez v. McDonald*, 872 F.3d 908, 918 (9th Cir. 2017). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

Ramet was convicted of the first-degree murder of his daughter by a jury in the Nevada state district court for Clark County. He was sentenced to life without the possibility of parole. Before trial, the state had offered Ramet a plea deal of life in prison with the possibility of parole after 15 years. Ramet's trial counsel, Norman Reed, recommended that Ramet reject the deal on Reed's belief that Ramet had a strong chance of obtaining a conviction for manslaughter. Ramet argues that Reed erred by advising him to reject the state's plea offer.

Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, we must deny habeas relief on any claim adjudicated on the merits in a state court proceeding unless the proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

A criminal defendant is entitled to reasonable assistance of counsel during a criminal prosecution, including during plea-bargaining. *See Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

Strickland requires a petitioner to show (1) that trial counsel's performance was so deficient it denied him the counsel guaranteed by the Constitution and (2) that there is a reasonable probability that, but for the deficient performance, the outcome would have been different. 466 U.S. at 687. The Nevada Supreme Court rejected Ramet's ineffective assistance of counsel claim, concluding that Ramet could not show either deficient performance or prejudice. The district court denied Ramet's habeas corpus petition on the deficient performance prong and did not reach the prejudice prong.

Ramet contends that the Nevada Supreme Court and the district court erred in finding that Reed's performance was not deficient because, Ramet argues, Reed's advice was based on a mistake of law.[1] Ramet argues that Reed did not understand that under Nevada law, manslaughter requires "a serious and highly provoking injury" that is "sufficient to excite an irresistible passion in a reasonable person." Nev. Rev. Stat. § 200.050. The record does not support Ramet's contention. Reed's arguments at trial show that he understood the elements of the different degrees of murder and voluntary manslaughter. Reed emphasized to the jury that, although manslaughter requires provocation to be objectively reasonable,

[1] We reject the state's argument that Ramet's mistake-of-law argument is unexhausted and procedurally improper. The claim Ramet raised in his federal habeas corpus petition and the claim presented to the Nevada Supreme Court were substantially equivalent to the claim raised on this appeal. *See Picard v. Connor*, 404 U.S. 270, 278 (1971).

the jury must place the reasonable person in the defendant's circumstances. To that end, Reed focused on the multitude of stressors that Ramet had endured at the time of the killing. It therefore appears that Reed understood that Ramet's subjective provocation would not alone support a manslaughter conviction but that his strategy was to emphasize the conditions in which Ramet found himself. The district court correctly observed that "[t]here is no evidence that [Reed's] advice to Ramet included an 'incorrect legal rule,'" and the Nevada Supreme Court's conclusion that Reed was not deficient on this basis is not an unreasonable application of Supreme Court law.

Ramet also contends that the district court erred in concluding that the Nevada Supreme Court reasonably concluded that Reed's advice to reject the state's plea offer was properly based on the facts known to him at the time. After Ramet was arrested, he made several incriminating statements about the killing in phone calls to his other daughter. These phone calls were recorded and later produced by the state in discovery. Ramet argues that Reed "must not have looked at" the "jailhouse phone calls" because if he had, Reed would have concluded that Ramet did not have a viable shot at a manslaughter defense and would have advised Ramet to accept the state's plea offer. But Ramet's claim fails because he did not meet his burden to show that Reed had access to the jailhouse recordings before he advised Ramet to reject the plea offer. *See Burt v. Titlow*, 571 U.S. 12,

22–23 (2013).

In substance Ramet is arguing that Reed performed ineffectively because he gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial. But "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance." *Lafler*, 566 U.S. at 174. The Nevada Supreme Court reasonably concluded that Reed's advice to Ramet to reject the state's plea deal—which was premised on Reed's belief that Ramet had a good shot at a manslaughter conviction at trial—"falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

AFFIRMED.

APP.0049

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

APP.0050

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			$	$
Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

APP.0053

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANIEL A. RAMET, Petitioner, v. ROBERT LeGRANDE, *et. al,* Respondents.	Case No. 3:14-cv-00452-MMD-WGC ORDER

Before the Court for a decision on the merits is an application for a writ of habeas corpus filed by Daniel A. Ramet, a Nevada prisoner. (ECF No. 9.)

I. PROCEDURAL BACKGROUND[1]

On June 4, 2007, a jury in the state district court for Clark County, Nevada, found Ramet guilty of first degree murder. After a sentencing hearing the following day, the jury imposed a sentence of life without possibility of parole. The court entered a judgment of conviction on August 31, 2007. Ramet appealed.

On June 4, 2009, the Nevada Supreme Court affirmed the conviction in an opinion that discussed in detail only one of Ramet's claims of error, that being his claim that testimony concerning his refusal to consent to a search of his home, coupled with the prosecutor's reference to it in closing argument, violated his Fourth Amendment rights. The Nevada Supreme Court found any error in admission of that evidence harmless, and it summarily denied the remainder of Ramet's claims in a footnote.

[1]This procedural background is derived from the exhibits filed under ECF Nos. 10-14 and this Court's own docket.

On December 11, 2009, Ramet filed a proper person state habeas petition, which the state district court ultimately denied without appointing counsel to represent Ramet. The Nevada Supreme Court reversed the district court, finding the state district court erred in failing to appoint counsel, and remanded to the district court for further proceedings. Appointed counsel filed a supplemental petition. The state district court held an evidentiary hearing and subsequently denied the petition. Ramet appealed. On July 22, 2014, the Nevada Supreme Court affirmed the denial of relief.

On August 28, 2014, this Court received Ramet's federal habeas petition. With the assistance of appointed counsel, Ramet filed an amended petition on May 11, 2015. On October 2, 2015, respondents filed a motion to dismiss, which the Court granted in part and denied in part – that is, the Court concluded that Claim Ten was unexhausted and that claims for relief in Claim Four that are not premised on ineffective assistance of counsel (IAC) must be dismissed as procedurally defaulted,

In addition, the Court concluded that the IAC claims in Claims Four and Six are also procedurally defaulted, but reserved judgment as to whether Ramet could demonstrate cause and prejudice to overcome the default of those claims. Thereafter, Ramet abandoned Claim Ten and the parties briefed the remaining claims on the merits.

II. FACTUAL BACKGROUND

The Nevada Supreme Court gave this summary of the facts of Ramet's case in its opinion deciding his direct appeal:

> Ramet killed his 20-year-old daughter, Amy Ramet, in the home they shared. Ramet strangled Amy for a minute or two and then stopped; she moved, and he checked for a pulse, and then he strangled her for "another couple of minutes." He continued to live in his home with Amy's body for three weeks, sending text messages from her cell phone to allay the fears of his younger daughter, Delsie, and his ex-wife, Bernadette.
>
> After not being able to speak with Amy for three weeks, Bernadette and Delsie became so worried that they filed a missing person's report. Three days later, unsatisfied with the police's efforts, they decided to break into Ramet's home. Bernadette broke a window with a baseball bat and a foul smell came out, prompting them to call the police. Shortly thereafter, the police arrived at Ramet's home and the officers asked to perform a welfare check on Amy. Ramet refused, claiming it was a "search and

> seizure issue." The police obtained a search warrant and discovered Amy's badly decomposed body in Ramet's home. Ramet was arrested and he confessed to killing his daughter.

Ramet v. State, 209 P.3d 268, 269 (Nev. 2009).

III. STANDARDS OF REVIEW

This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

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

28 U.S.C. § 2254(d).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id*. at 409. "[A] federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411.

The Supreme Court has explained that "[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773

(2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

"[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004); *see also Miller-El*, 537 U.S. at 340 ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)."). Because *de novo* review is more favorable to the petitioner, federal courts can deny writs of habeas corpus under § 2254 by engaging in *de novo* review rather than applying the deferential AEDPA standard. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

IV. ANALYSIS OF CLAIMS

A. Claim One

In Claim One, Ramet alleges that he was denied his rights under the Fourth and Fourteenth Amendment because the prosecutor improperly elicited testimony about his invocation of his Fourth Amendment rights. In addressing this issue, the Nevada Supreme Court noted as follows:

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> At trial, the State presented testimony from two officers regarding Ramet's refusal to consent to a search of his home. On the stand, Officer Yant testified that Ramet's statements that he did not want the police in his house because "it would be a search and seizure issue" made the police even more suspicious. Officer Yant repeated Ramet's statement that "it would be a search and seizure issue" two more times. Officer Bertges also repeated Ramet's statement during his testimony.
>
> In addition, evidence of Ramet's refusal to submit to a search was used by the State to incriminate Ramet. During closing argument, the prosecuting attorney commented on Ramet's refusal: "[a]nd when the police come to the house on two different occasions, he won't even let them conduct a welfare check. He's hiding something."

Ramet, 209 P.3d at 269.

The Nevada Supreme Court then concluded that the admission of the evidence and the State's argument violated Ramet's constitutional rights under *Griffin v. California*, 380 U.S. 609 (1965). *Id*. at 269-70. The court also held, however, the error was harmless under *Chapman v. California*, 386 U.S. 18 (1967), due to the "overwhelming evidence of Ramet's guilt." *Id*. at 270.

In *Griffin*, the Court held that the trial court's and the prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. 380 U.S. at 614. While Ramet's claim alleges a violation of his rights under the Fourth Amendment, respondents do not dispute the Nevada Supreme Court's constitutional error determination. Instead, they argue that this Court must defer to the state supreme court's determination that the error was harmless under *Chapman*.

To determine whether a constitutional error is harmless under *Chapman*, a reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. If a state court finds an error harmless, the federal habeas court reviews that determination under the deferential AEDPA standard, which means that relief is not available for the error "unless the state court's harmlessness determination itself was unreasonable." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)).

And, even if the federal court determines the state court's application of *Chapman* was unreasonable, the petitioner is still not entitled to relief unless he can establish that

the constitutional error "resulted in 'actual prejudice.'" *Ayala*, 135 S.Ct. at 2197 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Under *Brecht*, the federal court can grant relief only if it has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). That is, "[t]here must be more than a 'reasonable possibility' that the error was harmful." *Ayala*, 135 S.Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637).

In finding the Fourth Amendment violation harmless, the Nevada Supreme Court noted that "Ramet confessed during trial that he strangled his daughter, stopped and checked her pulse, and then continued to strangle her." *Ramet*, 209 P.3d at 270. Ramet argues that the state court's decision was unreasonable and that he can meet the *Brecht* standard because the error had a "deep impact" on his defense and "was particularly harmful because the evidence of first-degree murder was weak." (ECF No. 41 at 11.[2])

In this regard, he contends that evidence that he invoked his Fourth Amendment rights suggested that he was being cold and calculated, which undermined his defense that killing Amy was the result of a spur-of-the-moment impulse and that he immediately regretted it. Also damaging to that defense, however, was evidence that Ramet kept Amy's corpse in the house for several weeks and went to great lengths to conceal her death from his other daughter and ex-wife. And, given that Ramet now concedes that the evidence proved second degree murder (ECF No. 41 at 23-25), this contention has merit only if there was more than a reasonable probability that the jury relied upon the invocation of his Fourth Amendment rights to find that the murder was premeditated and deliberate. *See* NRS § 200.030. The time lag between the murder and Ramet's attempts to prevent the police from entering his home precludes such a conclusion.

Ramet also points to the extensive amount of testimony the State elicited on the subject, the fact that a juror submitted a question to Ramet about it at the conclusion of

[2]References to page numbers for documents filed electronically are based on CM/ECF pagination.

his testimony, and the prosecutor's references to it in closing argument, all of which, according to him, demonstrate the importance of the evidence to the State's case. This is also unavailing. The State elicited the improper testimony in its case-in-chief, prior to, and without knowing, that Ramet would subsequently provide the incriminating testimony cited by the Nevada Supreme Court in its harmless error analysis. And while the prosecutor stated in closing argument that Ramet's refusal to allow the police into his house showed that he was "hiding something," the prosecutor did not explicitly argue that it showed premeditation or deliberation. There is no dispute that the evidence was harmful to the defense, but here again, there is not a reasonable probability that it prompted the jury to find first degree murder rather than second degree murder.

In summary, Ramet fails to convincingly demonstrate that evidence and argument regarding the invocation of his Fourth Amendment rights had a significant impact on the jury's verdict. Claim One is denied.

B. Claim Two

In Claim Two, Ramet alleges that he was provided ineffective assistance of counsel, in violation of his rights under the Sixth and Fourteenth Amendment, because trial counsel failed to accurately advise him of the consequences of going to trial. In support of this claim, Ramet alleges that the State offered a plea bargain that would have resulted in him serving fifteen years to life that he turned down on the advice of counsel. After trial, the jury sentenced him to life without parole.

Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must satisfy two prongs to obtain habeas relief — deficient performance by counsel and prejudice. 466 U.S. at 687. With respect to the performance prong, a petitioner must carry the burden of demonstrating that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Id*. at 688. "'Judicial scrutiny of counsel's performance must be highly deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*,

556 U.S. 111, 124 (2009) (citation omitted). In assessing prejudice, the court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent [counsel's] errors." *Id*. at 696.

In addressing this claim in Ramet's state post-conviction proceeding, the Nevada Supreme Court identified *Strickland* as the federal law governing the claim. (ECF No. 14-2 at 2.) The court adjudicated the claim as follows:

> [A]ppellant argues that counsel was ineffective for discouraging him from accepting the State's guilty plea offer. Appellant has failed to demonstrate deficiency. The reasonableness of counsel's actions [is] evaluated as of the time of the action, not through "the distorting effects of hindsight." *Strickland,* 466 U.S. at 689. Counsel testified that he had based his recommendation to reject the plea offer on the evidence and appellant's own words, and that it was only after hearing appellant's testimony at trial, the full contents of which he "didn't see ... coming," that he realized he should have counseled him to accept the plea offer. Further, appellant's case is distinguishable from *Lafler v. Cooper,* in which the parties stipulated that counsel was deficient where counsel's advice was based upon a misunderstanding of the legal requirements to obtain a conviction. 566 U.S. [156], 132 S. Ct. 1376, 1384 (2012). Here, the parties did not stipulate that counsel was deficient, and there is no allegation that counsel misunderstood the applicable law. Accordingly, appellant failed to demonstrate by a preponderance of the evidence that counsel's advice, at the time it was given, was objectively unreasonable. We therefore conclude that the district court did not err in denying this claim.

(*Id*. at 3.)

In *Lafler*, the allegation was that petitioner had rejected favorable plea offers "after his attorney convinced him that the prosecution would be unable to establish his intent to murder" because the victim "had been shot below the waist." *Lafler*, 566 U.S. at 161. The Supreme Court confirmed that the *Strickland* test applies to the plea bargaining process when a defendant rejects a plea offer and elects to go to trial. *Id*. at 163. The Court also rejected the notion that a fair trial "wipes clean any deficient performance by defense counsel during plea bargaining." *Id*. at 169-70. As the Nevada Supreme Court noted, however, the question whether counsel's performance fell below the *Strickland* standard was not an issue decided in *Lafler*. *Id*. at 163. Thus, other than stating that counsel's advice was concededly deficient, the Supreme Court in *Lafler* did not provide any standards under which lower courts are to evaluate the sufficiency of a trial counsel's

performance in rendering plea advice. *See id*. at 174 (stating that deficient performance had been conceded by all parties, so there is no need to address what type of performance would be required to find counsel to be constitutionally ineffective).

The Court in *Lafler* did note, however, that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance." *Id*. In the case below, the Sixth Circuit had "found that respondent's attorney had provided deficient performance by informing respondent of 'an incorrect legal rule.'" *Id*. at 162. The *Lafler* Court suggested that respondent's counsel may not have provided ineffective assistance if he simply thought the fact that the shots hit victim below the waist "would be a persuasive argument to make to the jury to show lack of specific intent," as opposed to believing that it precluded a "convict[ion] for assault with intent to murder as a matter of law." *Id*. at 174.

Similarly, the Ninth Circuit has held that, in the plea advice context, "[c]ounsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision." *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002). In *Turner*, the defendant alleged ineffective assistance, in part, because counsel advised him that 15 years to life was the worst possible outcome, and that his case was not a "death penalty" case. *Id*. at 880-81. Consequently, the defendant turned down a second-degree murder plea offer and went to trial, where he was convicted of first-degree murder and robbery and subsequently sentenced to death. *Id*. at 861.

The court held that the defendant "was informed that he was subject to the death penalty, and of the plea offer," in contrast to cases where an attorney failed to advise his client of a plea offer or misled his client about the law. *Id*. at 881 "That counsel and [the defendant] chose to proceed to trial based on counsel's defense strategy and presumably sincere prediction that the jury would not award a sentence of death, does not demonstrate that Turner was not fully advised of his options." *Id.* The Ninth Circuit has also held that although "a mere inaccurate prediction, standing alone, would not constitute ineffective assistance, the gross mischaracterization of the likely outcome . . . combined

with the erroneous advice on the possible effects of going to trial, falls below the level of competence required of defense attorneys." *Womack v. Del Papa*, 497 F.3d 998, 1003 (9th Cir. 2007) (internal quotation marks omitted) (quoting *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986)).

In this case, Ramet was charged with open murder, which included first degree murder, second degree murder, and voluntary manslaughter as possible verdicts. (ECF No. 12-3 at 5.) Other than specifically-enumerated types of murder not pertinent here, the difference between first degree murder and second degree murder, in Nevada, is that the former requires that the killing be "willful, deliberate, and premeditated." *Byford v. State,* 994 P.2d 700, 719 (Nev. 2000). Voluntary manslaughter requires "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." NRS § 200.050.

In a non-capital case, the possible sentences resulting from a first degree murder conviction are (1) life without the possibility of parole, (2) 20 years to life, or (3) 20 years to 50 years. NRS § 200.030(4)(b). A second degree murder conviction allows for parole eligibility after serving ten years, while a voluntary manslaughter conviction results in a sentence of one to ten years. NRS §§ 200.030(5), 200.080.

At the outset of Ramet's trial, the trial judge and the parties confirmed for the record that the State had extended a plea offer of fifteen years to life that Ramet rejected. (ECF No. 11-10 at 3.) The trial court made sure that Ramet was aware of the possible sentences he faced if convicted of first degree murder. (*Id*.)

Ramet's counsel, Norman Reed, testified at the state post-conviction evidentiary hearing that it "was a very bad idea" for him to discourage Ramet from taking the deal and that he "got it wrong." (ECF No. 13-28 at 15.) Reed elaborated on that by testifying that he "looked at the evidence and thought that . . . we really had a good shot at a manslaughter," but "in retrospect . . . evaluating the evidence and hearing [Ramet's] testimony . . ., it was very ill-advised to have told him to turn down such a good offer." (*Id*.

at 16.) Regarding the chances of a manslaughter verdict, Reed testified that their defense strategy was that Ramet had killed his daughter in a heat of passion, without premeditation or deliberation. (*Id*. at 18.) As for Ramet's trial testimony, counsel testified that "it played out" in a way he "completely didn't see . . . coming" and that if he had had a "better handle" on that, he "would've told [Ramet] to take the deal." (*Id*.)

Ramet testified at the post-conviction evidentiary hearing that, prior to trial, Reed "was mocking the [State's] offer saying that they were adding five years for an enhancement on some charge that was going to be made up." (*Id*. at 34.) He further testified that he (Ramet) was aware that the punishment for second degree murder was ten to 25 years or ten to life and that he probably would have taken a deal with a minimum sentence of 10 years, but that the State never offered less than 15 years. (*Id*. at 34-37.) He also testified, however, that he would have first conferred with "Mr. Reed, who I had a lot of confidence in and trust in." (*Id*. at 36.)

Given Ramet's confession to the police and statements Ramet made to his daughter in recorded phone calls, Reed's assessment of Ramet's chances at trial was clearly misguided. For one, he underestimated the possibility that the State would be able to prove first degree murder. Most notable was Ramet's admission to his daughter that he had stopped strangling Amy when she passed out, but resumed when she "came to a little bit." (ECF Nos.10-12 at 4 and 10-14 at 4.) The State relied on this point to argue that the murder was premeditated and deliberate. (ECF No. 12-2 at 6.)

Secondly, Reed overestimated the likelihood of a manslaughter verdict. The defense's case relied on evidence that Ramet was deeply depressed and suicidal at the time of the killing. (ECF No. 12 at 29-36.) His wife had divorced him after meeting another man online. (*Id*.) He had lost his long-time job as a bartender at a casino and was out of money. (*Id*.) His house was in foreclosure and lacked power and running water. (*Id*.) He had no money for food, and had to live off of dog and cat food. (*Id*.) Amy, who had recently moved back into Ramet's house, was unhappy about the living conditions. (*Id*. at 37.) On the day of the killing, Amy was upset because there was no food. (*Id*.) After unsuccessfully

calling friends to bring her food, she came out of the bedroom, threw a glass object at Ramet, and then began berating him — telling him that he was a loser and that he should just kill himself. (*Id*.) Ramet "snapped" and "strangled her." (*Id*.)

Based on these circumstances, Reed had at least some reason to believe the State would not be able to prove premeditation and deliberation, but he was unjustifiably-optimistic in predicting a "good shot at manslaughter." As hurtful as Amy's insults may have been, they were hardly "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person." *See* NRS § 200.050. And, because the definition incorporates a "reasonable person" standard, evidence that Ramet was emotionally distraught, with his personal life was in shambles, was not necessarily relevant.

Notwithstanding the foregoing, this Court is not convinced that Reed's performance fell below the *Strickland* standard as applied in the plea bargaining context. There is no evidence that his advice to Ramet included an "incorrect legal rule," as contemplated in *Lafler*. And, while Reed inaccurately predicted the outcome of Ramet's trial, the record does not demonstrate "gross error on the part of counsel" — i.e., the type of error necessary to conclude that Reed was unconstitutionally deficient in advising Ramet to turn down the plea offer. *Turner*, 281 F.3d at 881 (citation omitted).

Ramet was informed by counsel and the trial court that a first degree murder conviction was a possible outcome and that such a conviction could result in a life sentence without possibility of parole. In addition, Reed was not unreasonable in believing, prior to trial, that the State would not be able to satisfy the elements of first degree murder.[3] It was Ramet's testimony at trial that provided the strongest evidence of premeditation and deliberation, including his admission that he "look[ed] for a pulse"

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[3]Indeed, Ramet argues at length in his reply brief, in support of Claim One, that the State's case for first-degree murder was weak. (ECF No. 41 at 16-25.)

before strangling Amy for "another couple of minutes."[4] (ECF No. 12 at 43-44.) Accordingly, it was also not unreasonable for Reed to predict that the worst likely outcome resulting from going to trial would be a second degree murder conviction with a ten to life sentence — i.e., five years less than the State's plea offer.

In sum, Reed's advice to Ramet with respect to the State's offer was not outside the "wide range" of reasonable professional assistance. *Strickland*, 466 U.S. at 687. Moreover, as the Supreme Court has stated, "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 134 S.Ct. 10, 13 (2013). Because the Nevada Supreme Court's decision denying relief is reasonable and supported by the record, Ramet is not entitled to federal habeas relief on Claim Two.

C. Claim Three

In Claim Three, Ramet alleges that he did not knowingly or voluntarily waive his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and the admission of his involuntary confession violated his Fifth and Fourteenth Amendment rights. In support of this claim, he contends that, before his confession to law enforcement, he had stayed up all night surrounded by police and that, during the interrogation, the police applied psychological pressure, discouraged him from getting an attorney, gave him legal advice instead of providing him an attorney, and refused to allow him to contact his daughter until he confessed. According to Ramet, his will was overborne, so he confessed.

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[4]Ramet made several admissions in his trial testimony that were significantly more damaging than his statements to the police and to his daughter. For example, when asked on cross-examination what he did when Amy moved a little bit after he choked her initially, Ramet replied:

> As I said, I tried to make a decision, check her, see what was going on or not, and I figure at this time that she might be near dead, you know, so I'm looking for a pulse . . ..

(ECF No. 12 at 44.) This was presumably an example of testimony that Reed "didn't see coming."

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As mentioned, the Nevada Supreme Court rejected several of Ramet's claims in a footnote to its opinion on direct appeal.[5] *Ramet*, 209 P.3d at 268 n.1. This claim was among them. *See id*.

"[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." *Fare v. Michael C*., 442 U.S. 707, 724–25 (1979) (citing *Miranda*, 384 U.S. at 475-477). The U.S. Supreme Court has held that "[t]he voluntariness of a waiver of [the privilege against self-incrimination] has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). "[C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary . . .." *Connelly*, 479 U.S. at 167 (internal quotation marks omitted). And, while the mental condition of the defendant may be a significant factor in the "'voluntariness' calculus," that does not mean that "a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'" *Id*. at 164.

The state court record does not support Ramet's claims of police coercion. Ramet claims that before his arrest the police had him "under siege" in his house for ten hours. (ECF No. 9 at 21.) What the record shows, however, is the following. Police were called regarding a domestic disturbance at Ramet's home and, upon arriving around 8:00 p.m., found Ramet's ex-wife, holding a baseball bat, and his daughter in front of the house. (ECF No. 11-11 at 13, 19.) The police also noted "a very foul odor" coming from a broken window that smelled of "a decomposing human body." (*Id*. at 14, 20.) After officers

[5]The Nevada Supreme Court summarily denied five of Ramet's direct appeal arguments in the footnote. Even though the court did not explain its reasons for rejecting these arguments, this Court must presume that the court adjudicated Ramet's federal law claims on the merits for the purposes of 28 U.S.C. § 2254(d). *See Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

knocked on the front door for several minutes, Ramet answered the door, but denied the officers entry into the house. (*Id*. at 13-16, 20-22.) The officers then posted themselves on each side of the house "just to make sure Daniel didn't try to leave." (*Id*. at 23.) Later in the evening, detectives set up a command post at a junior high school across the street. (*Id*.) Once the detectives obtained a search warrant, the SWAT team arrived about 4:15 a.m., pulled an armored vehicle up onto Ramet's front lawn, and used a bullhorn to tell Ramet to exit his house. (*Id*. at 16-17.) Ten to fifteen minutes later, Ramet came out of the house and was arrested without incident. (*Id*.)

With respect to the interrogation, the transcript and videotape of the event show that police detectives clearly advised Ramet of his *Miranda* rights prior to questioning him and repeatedly acknowledged throughout the interview that he had the right to remain silent and the right to state-provided counsel. (ECF Nos. 10-8/15). Police provided Ramet with food, something to drink, and a restroom break. (*Id*.) The videotape also supports a finding that the detectives were non-confrontational and did not, at any point, apply undue pressure to obtain a confession. (ECF No. 15.) In addition, the transcript does not support Ramet's claim that the detectives would not allow him to call his daughter until he confessed. They advised him that they would allow him to speak with her, to the extent she was willing, at the conclusion of the interview, but they did not condition that opportunity on him confessing to the murder. (ECF No. 10-8 at 32-33, 54-55.) In addition, Ramet's vague references to an attorney or wanting to talk to someone about his "psychological situation" were not sufficient to invoke his right to counsel. (*Id*. at 9-11, 18-19.) *See Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that a "suspect must unambiguously request counsel" to require that officers stop questioning).

Here, the totality of the circumstances surrounding the interrogation show Ramet's waiver of his *Miranda* rights was voluntary, knowing and intelligent. In addition, he has not shown that his confession was the product of police coercion. The Nevada Supreme Court's denial of Ground Three was based on a reasonable determination of the facts and

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was neither contrary to, nor an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d).

Claim Three is denied.

D. Claim Four

In Claim Four, Ramet alleges that police failed to honor his invocation of his right to remain silent, in violation of his Fifth, Sixth, and Fourteenth Amendment rights, and that trial and direct appeal counsel were ineffective for failing to raise this claim, in violation of his Sixth and Fourteenth Amendment rights. According to Ramet, he invoked his right to remain silent when the police arrived at his home and, therefore, any subsequent statements made to the police should have been suppressed. He also claims that the police coached his daughter to question him about Amy's death, so his statements to her in their phone conversations should have also been suppressed.

In deciding respondents' motion to dismiss, this Court determined that this claim is procedurally defaulted, but gave Ramet the opportunity to demonstrate that the default of the IAC claims should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). (ECF No. 34 at 4-6.) The Supreme Court recently confirmed that *Martinez* is confined to defaulted claims of ineffective assistance of trial counsel and declined to extend the holding to defaulted claims of ineffective assistance of appellate counsel. *See Davila v. David*, 137 S. Ct. 2058, 2070 (2017). Thus, only the default of Ramet's ineffective assistance of trial counsel claims may be excused under *Martinez*.

In *Martinez*, the Supreme Court held that, in collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial, ineffective assistance of post-conviction counsel in that proceeding may establish cause for a prisoner's procedural default of such a claim. *Martinez*, 566 U.S. at 9. Ramet must show not only post-conviction counsel's ineffectiveness but also "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. Because these determinations are intertwined with the ultimate merit of Claim Four, the Court

deferred ruling on the cause and prejudice issue until the merits of the claim were briefed. (ECF No. 34 at 6.)

As discussed above in relation to Claim Three, Ramet did not invoke his Fifth Amendment rights after being given the *Miranda* warning prior to police questioning. He contends in Claim Four, that the police were nonetheless not permitted to question him because he had invoked his right to remain silent when the police first contacted him at his home. Ramet is incorrect.

An invocation of the right to remain silent, like the right to counsel, must be unambiguous. *Berghuis*, 560 U.S. at 381-82. This requirement applies regardless of whether the statements allegedly invoking the privilege occur before or after the suspect receives a *Miranda* warning. *Sessoms v. Grounds*, 776 F.3d 615, 621 (9th Cir. 2015). Here, Ramet claims he invoked his right to remain silent when police came to his house on the domestic disturbance call, but cites to no evidence to support this claim other than police reports of that incident. (ECF No. 9 at 29.) Those reports indicate that, after the police knocked on his door for several minutes, Ramet opened the door and spoke with police, answering several questions. (ECF Nos. 10-4, 10-5, and 10-7.) While the reports show that he refused to allow the police in his house and kept telling them to leave, there is no indication that he expressly invoked his right to remain silent. *See Salinas v. Texas*, 133 S. Ct. 2174, 2179-82 (2013) (discussing "the express invocation requirement" and confirming that "[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.").

Even assuming Ramet's interaction with the police at his home could be construed as an invocation of his right to remain silent, his post-*Miranda* statements to the police and to his daughter were nonetheless admissible. Ramet relies on *Mosley v. Michigan*, 423 U.S. 96, 97 (1975), to claim that the police were required to honor his right to cut off questioning. (ECF No. 9 at 29.) In *Mosley*, however, "the Supreme Court rejected the proposition that its earlier decision in *Miranda* barred law enforcement officials from ever questioning a suspect after the suspect had invoked his right to remain silent," advocating

instead "a case-by-case approach that takes the concerns of the *Miranda* Court into account." *United States v. Hsu*, 852 F.2d 407, 409 (9th Cir. 1988).

Relying on *Mosley*, the court in *Hsu* held that the defendant's right to cut off questioning was scrupulously honored where the defendant asserted his right to remain silent during an initial interrogation, then answered questions during a second interrogation after being advised again of his *Miranda* rights. *Id*. at 412. The court focused on "the provision of a fresh set of *Miranda* rights" as "the most important factor" in arriving at that conclusion. *Id*. at 411. The court also noted "the change of scenery" between the two interrogations as another important factor. *Id*. at 412. Both of those circumstances were present in Ramet's case.

Because Ramet voluntarily waived his right to remain silent after being given the *Miranda* warning, his confession to the police and his statements to his daughter in subsequent phone calls were admissible at trial. The claim that counsel was ineffective in failing to argue that Ramet had invoked his right to remain silent, as grounds for suppressing either, is without merit for the purposes of *Martinez*.[6] Thus, Claim Four is dismissed as procedurally defaulted.

E. Claim Five

In Claim Five, Ramet contends that the State failed to prove the victim's death was the result of criminal agency, in violation of his rights under the Fourth and Fourteenth Amendment. In support of this claim, Ramet argues that the only evidence establishing that he was responsible for Amy's death, were his own admissions, which in the absence of sufficient independent evidence, is not sufficient to establish *corpus delicti* under Nevada law. *See Sheriff, Washoe Cty. v. Middleton*, 921 P.2d 282, 286 (Nev. 1996). Ramet contends that there was insufficient evidence at both the preliminary hearing and the trial to establish *corpus delicti*.

[6]To be clear, trial counsel did file motions to suppress with respect to Ramet's confession to the police and his phone calls to his daughter, both of which were denied. (ECF Nos. 10-35, 10-36, and 10-(41-44).) Ramet's claim is that counsel was ineffective in failing to argue, in support of those motions, that Ramet had invoked his right to remain silent.

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Under Nevada law, the *corpus delicti* of murder requires proof of two elements: (1) the fact of death; and (2) the criminal agency of another responsible for that death. *Hooker v. Sheriff, Clark Cty.*, 506 P.2d 1262, 1263 (Nev. 1973). In addition, "[t]he *corpus delicti* of a crime must be proven independently of the defendant's extrajudicial admissions." *See Doyle v. State*, 921 P.2d 901, 910 (Nev. 1996), *overruled on other grounds by Kaczmarek v. State*, 91 P.3d 16, 29 (Nev. 2004). At a minimum, this requires a prima facie showing by the State "'permitting the reasonable inference that a crime was committed.'" *Id.* (citation omitted). The identity of the perpetrator is not an element of *corpus delicti*. *State v. Fouquette*, 221 P.2d 404, 418 (Nev.1950)

In deciding respondents' motion to dismiss, this Court concluded that Claim Five presents a federal issue under *Jackson v. Virginia*, 443 U.S. 307 (1979). (ECF No. 34 at 8.) Under *Jackson*, the reviewing court asks "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." *Jackson*, 443 U.S. at 319 (citation omitted). Under AEDPA, "there is a double dose of deference that can rarely be surmounted." *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011); *see Parker v. Matthews*, 132 S. Ct. 2148, 2152 (2012) (per curiam) (describing habeas review of sufficiency claims as applying a "twice-deferential standard"); *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam) (explaining that sufficiency claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference"). "[T]o grant relief, [the Court] must conclude that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." *Boyer*, 659 F.3d at 965.

Here, respondents argue that the *corpus delicti* rule is not grounded in the U.S. Constitution and, instead, is a creature of state law, the application of which is not reviewable in federal habeas corpus proceedings. With respect to Ramet's claim in relation to the preliminary hearing, this Court agrees that his challenge to the sufficiency

of the evidence does not provide grounds for habeas relief. Indeed, Ramet would not be entitled to habeas relief even if the State deprived him of a preliminary hearing altogether. *See Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) ("[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause"); *United States v. Studley*, 783 F.2d 934, 937 (9th Cir.1986) (conviction affirmed despite violation of statutory probable cause requirement).

As for the sufficiency of evidence at trial, Ramet cannot establish the that the Nevada Supreme Court's denial of his claim was objectively unreasonable.[7] For one, the *corpus delicti* rule he relies upon applies to *extrajudicial* confessions. *See Doyle*, 921 P.2d at 910; *see also United States v. Kerley*, 838 F.2d 932, 939-40 (7th Cir.1988) (observing that the *corpus delicti* rule is a "vestige of a time when brutal methods were commonly used to extract confessions, sometimes to crimes that had not been committed"). Here, Ramet testified at trial that he strangled his daughter. (ECF No. 12 at 37-38.) Thus, the State did not need to rely upon his extrajudicial admissions to establish criminal agency.

Also, in conducting its *Jackson* analysis, "'a reviewing court must consider all of the evidence admitted by the trial court,' regardless whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (quoting *Lockhart v. Nelson*, 488 U.S. 33, 41 (1988). Thus, even if the state trial court violated the *corpus delicti* rule in admitting Ramet's confession, the confession must nonetheless be factored into this Court's *Jackson* analysis. Because overwhelming evidence presented at trial establishes that Amy's death was the result of a criminal act, Claim Five fails.

F. Claim Six

In Claim Six, Ramet alleges that trial counsel was ineffective, in violation of his Sixth and Fourteenth Amendment rights, for failing to request an instruction that the State was required to prove *corpus delecti* beyond a reasonable doubt. Ramet contends that he was prejudiced because "the jury was never instructed that it had to find, beyond a

[7]The Nevada Supreme Court summarily rejected the claim in the aforementioned footnote. *Ramet*, 209 P.3d at 268 n.1.

reasonable doubt and independent of Mr. Ramet's confession, that Ms. Ramet's death was caused by criminal agency." (ECF No. 9 at 41-42.) Like Claim Four, this claim is procedurally defaulted. (ECF No. 34 at 7.) Thus, as described in relation to Claim Four, Ramet must show the claim has "some merit" in order for this Court to reach the merits.

He cannot make such a showing because Nevada law does not require the State to prove *corpus delicti* both beyond a reasonable doubt *and* independent of the defendant's confession. The Nevada Supreme Court has explained that, under the *corpus delicti* rule, "the nature and degree of independent proof required to corroborate a defendant's admission" is "'not . . . beyond a reasonable doubt,'" but rather, "'[a] slight or prima facie showing, permitting the reasonable inference that a crime was committed.'" *Doyle*, 921 P.2d at 910 (quoting *People v. Alcala*, 685 P.2d 1126, 1136 (Cal. 1984)).

Ramet's trial counsel did not perform below the *Strickland* standard, nor can Ramet show prejudice, by virtue of counsel's failure to request a jury instruction not countenanced by Nevada law. Thus, Claim Six is without merit for the purposes of *Martinez* and is, therefore, dismissed as procedurally defaulted.

G. Claim Seven

In Claim Seven, Ramet alleges that trial counsel was ineffective, in violation of his Sixth and Fourteenth Amendment rights, for failing to adequately investigate his mental health and failing to adequately present this issue to the jury. According to Ramet, a mental health expert "would have been able to explain how [his] severe depression affected his mental state" and "would have been able to put [his] actions in context for the jury in a way that no lay witness could." (ECF No. 9 at 42.) He further alleges that "[a]n expert also may have shown that additional defenses were available to Mr. Ramet based on his mental state." (*Id.*)

The Nevada Supreme Court addressed this claim in affirming the lower court's denial of this claim in Ramet's state post-conviction proceeding. (ECF No. 14-2.) Having identified *Strickland* as the federal law standard, the state supreme court held as follows:

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> [A]ppellant argues that counsel was ineffective for failing to adequately investigate his mental health through a psychological or psychiatric evaluation. Appellant has failed to demonstrate prejudice. Appellant failed to produce an expert witness or report at his evidentiary hearing to indicate what the results of an evaluation would have been. Accordingly, appellant failed to demonstrate a reasonable probability of a different outcome had counsel obtained a psychological or psychiatric evaluation. We therefore conclude that the district court did not err in denying this claim.

(ECF No. 14-2 at 3-4.)

The Nevada Supreme Court's adjudication of the claim is entitled to deference under § 2254(d). "[T]he presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995). More importantly, Ramet has presented no evidence setting forth the testimony an expert witness would have provided or demonstrating that it actually would have supported his defense. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (no ineffective assistance of counsel for failing to retain expert where petitioner did not offer evidence that expert would have provided). In addition, mere conjecture as to the availability of a favorable expert opinion is not sufficient to show prejudice. *See Grisbv v. Blodgett*, 130 F.3d 365, 373 (9th Cir.1997) ("Speculation about what an expert could have said is not enough to establish prejudice.").

Claim Seven is denied.

H. Claim Eight

In Claim Eight, Ramet claims he was denied his right to due process by the improper admission of evidence that he took Amy, then 17 years-old, and her best friend out drinking. During the direct examination of the friend, the prosecutor asked: "Did you ever go anywhere with the defendant as you got into high school?" (ECF No. 11-12 at 27.) She responded: "Yes, he would take us, me and Amy, downtown to watch the bands and drink." (*Id*.) After a bench conference, the trial court struck the comment (*id*. at 28), but Ramet claims that it was nonetheless unduly prejudicial because the jury had learned that he not only had killed his daughter, but that he also had encouraged her to drink

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alcohol when she was a minor. He further alleges that the trial court's instruction to strike the statement was insufficient to cure the harm caused by this testimony.

This claim is one of the claims the Nevada Supreme Court rejected in the footnote to its opinion on direct appeal. *Ramet*, 209 P.3d at 268 n.1.

A state trial court's admission of evidence under state evidentiary law will form the basis for federal habeas relief only where the evidentiary ruling "so fatally infected the proceedings as to render them fundamentally unfair" in violation of the petitioner's due process rights. *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *see also Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) ("The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process.") (citation omitted).

The U.S. Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990). The Court has declined to hold that evidence of other crimes or bad acts "so infused the trial with unfairness as to deny due process of law." *Estelle v. McGuire*, 502 U.S. 62, 75 & n.5. (1991); s*ee also Spencer v. Texas*, 385 U.S. 554, 564-64 (1967) (rejecting argument that due process requires the exclusion of prejudicial evidence). In sum, "[t]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." *Holley*, 568 F.3d at 1101. The Ninth Circuit in *Holley* noted that the Supreme Court **"**has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ" and that "[a]bsent such 'clearly established Federal law,' we cannot conclude that the state court's ruling was an 'unreasonable application.'" *Id*. (citing *Carey v. Musladin*, 549 U.S. 70, 77(2006)

Based on *Holley*, Ramet's claim is foreclosed by the absence of clearly established Federal law "ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley,* 568 at 1101**.** This Court cannot conclude that the state court's ruling on this issue was either contrary

to, or an "unreasonable application" of, clearly established Federal law. And, even without the deference required under AEDPA, the claim fails because there is no possibility that the evidence had "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

Claim Eight is denied.

I. Claim Nine

In Claim Nine, Ramet contends he was denied his right to due process by the prosecutor's improper remarks suggesting that he had committed other serious offenses. Ramet cites to the prosecutor's comment during closing argument wherein the prosecutor provided examples of Ramet "minimizing" his past conduct and then stated, "And then with the most serious offense of his life he again —." (ECF No. 12-2 at 8.) At that point, trial counsel objected to the prosecutor's mischaracterization, pointing out, "[t]here's no other evidence of any other offense in his life." (*Id*.) Ramet claims that the trial court exacerbated the effect of the comment by stating: "Objection is noted but overruled. I think that killing is pretty serious. I think it's a fair comment." (*Id*.)

This claim is also one of the claims the Nevada Supreme Court rejected in a footnote to its opinion on direct appeal. *Ramet*, 209 P.3d at 268 n.1.

"Improper argument does not, per se, violate a defendant's constitutional rights." *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993) (citations omitted). Habeas corpus relief is available on grounds of improper argument only when the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 171 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Relief will be granted when the prosecutorial misconduct amounts to constitutional error, and such error is not harmless under *Brecht*. *Thompson v. Borg*, 74 F.3d 1571, 1577 (9th Cir. 1996) ("Only if the argument were constitutional error would we have to decide whether the constitutional error was harmless.")

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This Court is not convinced that the comment was sufficient to cause the type of harm that would provide grounds for habeas relief. Placed in context, the comment was referring to "offenses" in a broader sense, not criminal offenses. Even though the trial court's ruling appears to have missed the point of the objection, the comment was so fleeting as to have no appreciable prejudicial impact. Thus, it did not render the trial so unfair that it violated Ramet's right to due process. The Nevada Supreme Court's rejection of the claim was not unreasonable.

Claim Nine is denied.

V. CONCLUSION

For the reasons set forth above, Ramet's petition for habeas relief is denied.

Certificate of Appealability

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

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

Having reviewed its determinations and rulings in adjudicating Ramet's petition, the Court finds that the *Slack* standard is met with respect to one claim on the merits. Reasonable jurists could debate the Court's decision to deny Claim Two, above. The Court therefore will grant a certificate of appealability as to that issue. The Court declines

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to issue a certificate of appealability for its resolution of any procedural issues or any of Ramet's remaining habeas claims.

It is therefore ordered that Ramet's amended petition for writ of habeas corpus (ECF No. 9) is denied. The Clerk will enter judgment accordingly.

It is further ordered that a certificate of appealablity is granted as to the following issue:

> Whether Claim Two, alleging a violation of the Sixth and Fourteenth Amendment due to trial counsel's inaccurate advice about the consequences of going to trial, fails on the merits.

A certificate of appealability is otherwise denied.

DATED THIS 24th day of January 2018.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL ANTHONY RAMET,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 62993
District Court Case No. C225406

FILED
AUG 26 2014
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 22nd day of July, 2014.

06C225406
CCJA
NV Supreme Court Clerks Certificate/Judgn
4180595

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this August 18, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL ANTHONY RAMET,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62993

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

On appeal from the denial of his December 11, 2009, petition, appellant argues that the district court erred in denying some of his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant argues that counsel was ineffective for discouraging him from accepting the State's guilty plea offer. Appellant has failed to demonstrate deficiency. The reasonableness of counsel's actions are evaluated as of the time of the action, not through "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Counsel testified that he had based his recommendation to reject the plea offer on the evidence and appellant's own words, and that it was only after hearing appellant's testimony at trial, the full contents of which he "didn't see . . . coming," that he realized he should have counseled him to accept the plea offer. Further, appellant's case is distinguishable from *Lafler v. Cooper*, in which the parties stipulated that counsel was deficient where counsel's advice was based upon a misunderstanding of the legal requirements to obtain a conviction. 566 U.S. ___, ___, 132 S. Ct. 1376, 1384 (2012). Here, the parties did not stipulate that counsel was deficient, and there is no allegation that counsel misunderstood the applicable law. Accordingly, appellant failed to demonstrate by a preponderance of the evidence that counsel's advice, at the time it was given, was objectively unreasonable. We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for failing to adequately investigate his mental health through a psychological or psychiatric evaluation. Appellant has failed to demonstrate prejudice. Appellant failed to produce an expert witness or report at his evidentiary hearing to indicate what the results of an evaluation would have been. Accordingly, appellant failed to demonstrate a reasonable probability of a different outcome had counsel obtained a psychological or psychiatric

evaluation. We therefore conclude that the district court did not err in denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Stefany Miley, District Judge
Lizzie R. Hatcher
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

JOC

FILED

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ORIGINAL

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DANIEL ANTHONY RAMET
#0488132

Defendant.

CASE NO. C225406

DEPT. NO. XV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crime of MURDER (Category A Felony), in violation of NRS 200.010, 200.030; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of FIRST DEGREE MURDER (Category A Felony), in violation of NRS 200.010, 200.030; thereafter, on the 27TH day of August, 2007, the Defendant was present in court for sentencing with his counsel, NORMAN J. REED, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in the jury's verdict and in addition to the $25.00 Administrative Assessment Fee,

RECEIVED

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CLERK OF THE COURT

JUDGMENT ENTERED

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$3,142.75 Restitution, and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED as follows: TO LIFE in the Nevada Department of Corrections without the possibility of parole; with FOUR HUNDRED SIXTY-FOUR (464) DAYS credit for time served.

DATED this 30th day of August, 2007

SALLY LOEHRER
DISTRICT JUDGE

CC