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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 7 2020

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

EDWARD G. RODRIGUEZ,

No. 20-16050

Petitioner-Appellant,

D.C. No. 3:15-cv-00339-MMD

v.

District of Nevada,
Reno

TIMOTHY FILSON; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

ORDER

Respondents-Appellees.

Before: McKEOWN and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

1

2

3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 * * *

6

EDWARD G. RODRIGUEZ,

Case No. 3:15-cv-00339-MMD-WGC

7

Petitioner,

ORDER

8

v.

9

TIMOTHY FILSON, *et al.*,

10

Respondents.

11

12 **I. SUMMARY**

13

Petitioner Edward G. Rodriguez filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This matter is before the Court for adjudication of the merits of the remaining grounds in the counseled amended petition (“Amended Petition”). For the reasons discussed below, the Court denies the Amended Petition, denies a certificate of appealability, and directs the Clerk of the Court to enter judgment accordingly.

14

II. BACKGROUND

15

Rodriguez’s conviction is the result of events that occurred in Washoe County, Nevada on or about December 10, 2006. (ECF No. 24-9.) Rodriguez was charged with the murder of Pamela Sue Carter by means of strangulation and/or suffocation. (*Id.*) Rodriguez pleaded not guilty to the charge. (ECF No. 24-10 at 4-5.) During the third day of trial, Rodriguez indicated that it was “in his best interest to enter some type of plea.” (ECF No. 25-2 at 67.) Rodriguez pleaded guilty to first-degree murder in return for the State dropping the weapon enhancement. (*Id.* at 67, 75.) During the state district court’s plea canvass, Rodriguez explained that Carter owed him money and that he bound and gagged her as a threat to get her to repay him. (*Id.* at 74-75.) Carter was still alive when Rodriguez left her residence, and Rodriguez believed that Carter’s husband would

1 simply find her and remove her gag in the morning. (*Id.* at 75.) Rodriguez was sentenced
2 to life without the possibility of parole. (ECF No. 25-3 at 2.) Rodriguez did not appeal his
3 judgment of conviction.

4 Rodriguez filed a state habeas petition on April 28, 2008. (ECF No. 25-7.) The
5 state district court held an evidentiary hearing on January 21, 2014. (ECF No. 25-17.)
6 Thereafter, on January 30, 2014, the state district court entered an order denying
7 Rodriguez's petition. (ECF No. 25-18.) The Nevada Court of Appeals affirmed on April
8 14, 2015. (ECF No. 26-5.) Remittitur issued on May 11, 2015. (ECF No. 26-6.)

9 Rodriguez filed a pro se federal habeas petition and a counseled first amended
10 petition on June 26, 2015 and February 6, 2017, respectively. (ECF Nos. 1-1, 23.)
11 Respondents moved to dismiss the Amended Petition. (ECF No. 27.) This Court granted
12 the motion in part. (ECF No. 33.) Specifically, this Court concluded that Grounds 1(a)
13 and 3 were unexhausted. (*Id.* at 11.) Thereafter, Rodriguez moved to dismiss Grounds
14 1(a) and 3. (ECF No. 37.) This Court granted the motion. (ECF No. 38.) Respondents
15 answered the remaining grounds in Rodriguez's Amended Petition on August 27, 2018.
16 (ECF No. 43.) Rodriguez replied on November 27, 2018. (ECF No. 46.)

17 In his remaining grounds for relief, Rodriguez asserts the following violations of his
18 federal constitutional rights: (Ground 1(b)) his trial counsel failed to inform him that he
19 had the right to a direct appeal; and (Ground 2) his trial counsel failed to investigate and
20 present mitigating evidence on his behalf at sentencing. (ECF No. 23 at 10-13.)

21 **III. LEGAL STANDARD**

22 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in
23 habeas corpus cases under the Antiterrorism and Effective Death Penalty Act
24 ("AEDPA"):

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

App. 0004

- (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.

6 A state court decision violates clearly established Supreme Court precedent “if
7 the state court applies a rule that contradicts the governing law set forth in [the Supreme
8 Court’s] cases” or “if the state court confronts a set of facts that are materially
9 indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*, 538 U.S.
10 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*
11 *v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable
12 application of clearly established Supreme Court precedent “if the state court identifies
13 the correct governing legal principle from [the Supreme] Court’s decisions but
14 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting
15 *Williams*, 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state
16 court decision to be more than incorrect or erroneous. The state court’s application of
17 clearly established law must be objectively unreasonable.” *Id.* (quoting *Williams*, 529
18 U.S. at 409-10) (internal citation omitted).

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

1 **IV. DISCUSSION**

2 Rodriguez's remaining grounds for relief involve claims that his trial counsel was
3 ineffective. In *Strickland*, the Supreme Court propounded a two-prong test for analysis
4 of claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1)
5 that the attorney's "representation fell below an objective standard of reasonableness,"
6 and (2) that the attorney's deficient performance prejudiced the defendant such that
7 "there is a reasonable probability that, but for counsel's unprofessional errors, the result
8 of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668,
9 688, 694 (1984). A court considering a claim of ineffective assistance of counsel must
10 apply a "strong presumption that counsel's conduct falls within the wide range of
11 reasonable professional assistance." *Id.* at 689. The petitioner's burden is to show "that
12 counsel made errors so serious that counsel was not functioning as the 'counsel'
13 guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, to establish
14 prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the
15 errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.
16 Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial
17 whose result is reliable." *Id.* at 687.

18 Where a state district court previously adjudicated the claim of ineffective
19 assistance of counsel under *Strickland*, establishing that the decision was unreasonable
20 is especially difficult. See *Harrington*, 562 U.S. at 104-05. In *Harrington*, the United
21 States Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential,
22 and when the two apply in tandem, review is doubly so. *Id.* at 105; see also *Cheney v.*
23 *Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal quotation marks omitted)
24 ("When a federal court reviews a state court's *Strickland* determination under AEDPA,
25 both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme Court's
26 description of the standard as doubly deferential.") The Supreme Court further clarified
27 that, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were
28 ///

1 reasonable. The question is whether there is any reasonable argument that counsel
2 satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

3 In Rodriguez's appeal of the denial of his state habeas petition, the Nevada Court
4 of Appeals noted that:

5 The district court conducted an evidentiary hearing and received testimony
6 from Rodriguez, his trial counsel, and his sister. The district court found that
7 Rodriguez failed to demonstrate that trial counsel had a legal duty to inform
8 him of the right to a direct appeal, that further trial preparation would have
9 produced helpful information, or that further sentencing preparation would
have produced mitigation witnesses whose testimony would have led to a
lesser sentence. And the district court concluded that Rodriguez failed to
meet his burden to prove ineffective assistance of counsel.

10

11 (ECF No. 11-4 at 2-3.) The Nevada Court of Appeals then held that because the district
12 court's factual findings were supported by substantial evidence, Rodriguez failed to
13 show that he was deprived of effective assistance of counsel. (*Id.*)

14 The Nevada Court of Appeal's rejection of Rodriguez's *Strickland* claims was
15 neither contrary to nor an unreasonable application of clearly established law as
16 determined by the United States Supreme Court. The Court will address the two
17 remaining ineffective assistance of counsel grounds in turn below.

18

A. Ground 1(b)

19 In Ground 1(b), Rodriguez alleges that his federal constitutional rights were
20 violated when his trial counsel failed to inform him that he had the right to a direct appeal.
21 (ECF No. 23 at 10.) Rodriguez explains that a rational defendant would have wanted to
22 appeal the maximum sentence he received, so his trial counsel's duty to discuss an
23 appeal with him was triggered. (ECF No. 46 at 9.)

24

25 During Rodriguez's change of plea canvass, the following colloquy took place
between Rodriguez and the state district court:

26

27 THE COURT: If the jury were to find you guilty, you could appeal. Do
28 [Rodriguez]: you understand that?

Yes, I do. Can I appeal now that - - because of - - if my
pleading guilty, is that still appealable?

1 THE COURT: No. The jury will not hear and decide the remainderer
2 [sic] of your trial if the Court accepts your guilty plea.
Do you understand that?

3 [Rodriguez]: Yes, I do, Your Honor.

4 | (ECF No. 25-2 at 71.) Rodriguez did not appeal his judgment of conviction.

5 Over six years later, during Rodriguez's post-conviction evidentiary hearing,
6 Rodriguez testified that his trial counsel "never brought any appeal issues up, or
7 [Rodriguez] would have [taken] back [his] sentence in a heartbeat." (ECF No. 25-17 at
8 5, 33.) Rodriguez did not ask his trial counsel to file an appeal because he "didn't know
9 about an appeal" until he was informed of such by other inmates. (*Id.* at 33.) Rodriguez
10 would have "appeal[ed] the Motions to Suppress" because he "knew [his] Miranda rights
11 weren't read." (*Id.*)

12 Rodriguez's trial counsel testified at the evidentiary hearing that he did not
13 "remember [Rodriguez] asking [him] to file an appeal." (ECF No. 25-17 at 45, 53.)
14 Rodriguez's trial counsel "was a little surprised based on [his] experience that
15 [Rodriguez] got the max[imum]" sentence, but he explained that "[j]ust because you
16 don't like the sentence, that is not really the basis for appeal." (*Id.* at 53.) Although he
17 acknowledged that Rodriguez was unhappy with the sentence he received, there were
18 no appealable issues that stood out to Rodriguez's trial counsel because the state
19 district court thoroughly canvassed Rodriguez before accepting his plea. (*Id.* at 54, 58.)

20 The state district court, finding that Rodriguez was not credible (ECF No. 25-18
21 at 3), held that “there is no evidence or reasonable inference from evidence or legal
22 argument that there would be any ground for appeal in this case” and that Rodriguez
23 “entered his guilty plea freely and voluntarily without threats or promises or any kind and
24 with an understanding of the nature of the offense and the consequences of his guilty
25 plea.” (ECF No. 25-17 at 68.)

26 The *Strickland* “test applies to claims . . . that counsel was constitutionally
27 ineffective for failing to file a notice of appeal.” *Roe v. Flores-Ortega*, 528 U.S. 470, 477
28 (2000). When counsel “disregards specific instructions from the defendant to file a notice

1 of appeal,” counsel has acted unreasonably. *Id.* However, “where the defendant neither
2 instructs counsel to file an appeal nor asks that an appeal not be taken” the question is
3 “whether counsel in fact consulted with the defendant about the appeal.” *Id.* at 478.
4 Consulting means “advising the defendant about the advantages and disadvantages of
5 taking an appeal, and making a reasonable effort to discover the defendant’s wishes.”
6 *Id.* However, “[i]f counsel has not consulted with the defendant, the court must in turn
7 ask . . . whether counsel’s failure to consult with the defendant itself constitutes deficient
8 performance.” *Id.* Following the rejection of a bright-line rule, the Supreme Court
9 concluded that “counsel has a constitutionally imposed duty to consult with the
10 defendant about an appeal when there is reason to think either (1) that a rational
11 defendant would want to appeal . . . , or (2) that this particular defendant reasonably
12 demonstrated to counsel that he was interested in appealing.” *Id.* at 480. An example of
13 the first instance imposing a duty to consult is where “there are nonfrivolous grounds for
14 appeal.” *Id.* Where the defendant pleaded guilty, “the court must consider such factors
15 as whether the defendant received the sentence bargained for as part of the plea and
16 whether the plea expressly reserved or waived some or all appeal rights.” *Id.* And in
17 order “to show prejudice in these circumstances, a defendant must demonstrate that
18 there is a reasonable probability that, but for counsel’s deficient failure to consult with
19 him about an appeal, he would have timely appealed.” *Id.* at 484.

20 Rodriguez never gave his trial counsel specific instructions to file a notice of
21 appeal, and it is not clear from the record that Rodriguez’s trial counsel consulted him
22 about appealing. Thus, the question here is whether Rodriguez’s trial counsel’s duty to
23 consult Rodriguez about an appeal was triggered. *Flores-Ortega*, 528 U.S. at 480. The
24 Nevada Court of Appeals reasonably determined that the state district court’s finding
25 that Rodriguez failed to demonstrate that his trial counsel’s duty to inform him of the
26 right to a direct appeal was triggered was supported by substantial evidence.

27 First, there was no reason for Rodriguez’s trial counsel to think that “a rational
28 defendant would want to appeal.” *Id.* at 480. As Rodriguez’s trial counsel testified at the

1 post-conviction evidentiary hearing, there were no appealable issues that stood out to
2 him and “[j]ust because you don’t like the sentence, that is not really the basis for
3 appeal.” (ECF No. 25-17 at 53-54.) Indeed, Rodriguez was sentenced to life without the
4 possibility of parole (ECF No. 25-3 at 2), which Rodriguez acknowledged was a possible
5 sentence he faced as a result of his plea. (See ECF No. 25-1 at 4-5.) Further,
6 Rodriguez’s guilty plea agreement provided that he understood that he had “the right to
7 appeal from adverse rulings on pretrial motions only if the State and the Court
8 consent[ed] to [his] right to appeal,” and that, “[i]n the absence of such an agreement,
9 [he] understand[ed] that any substantive or procedural pretrial issue or issues which could
10 have been raised at trial [were] waived by [his] plea.” (ECF No. 25-1 at 4.) Similarly,
11 during Rodriguez’s guilty plea canvass, the state district court asked if Rodriguez
12 understood that “if the Court accepts [his] plea of guilty, there will be no issues for the
13 appellate court to consider.” (ECF No. 25-2 at 71.) Rodriguez answered in the
14 affirmative. (*Id.*) These facts weigh against a finding that Rodriguez’s trial counsel had
15 a reason to think that Rodriguez would have wanted to appeal his judgment of
16 conviction.

17 Second, there was no reason for Rodriguez’s trial counsel to think that Rodriguez
18 “was interested in appealing.” *Flores-Ortega*, 528 U.S. at 480. Rodriguez asserts that
19 his statements during the plea canvass wherein he asked whether he could appeal his
20 guilty plea triggered his trial counsel’s duty to talk to him about appealing. (ECF No. 46
21 at 10.) It cannot be concluded that this question made to the state district court two
22 months prior to his sentencing hearing demonstrated Rodriguez’s interest in appealing
23 his judgment of conviction. It was merely a question about his right to appeal his plea in
24 response to a statement by the state district court that Rodriguez could appeal a guilty
25 verdict. (See ECF No. 25-2 at 71). This clarification of his rights was not an indication to
26 this trial counsel that he wanted to appeal, especially since Rodriguez had yet to be
27 sentenced.

28 ///

1 Accordingly, because the Nevada Court of Appeals reasonably determined that
2 Rodriguez failed to demonstrate deficiency on the part of his trial counsel for not advising
3 him of his right to appeal, *Strickland*, 466 U.S. at 688, Rodriguez is denied federal
4 habeas relief for Ground 1(b).

5 **B. Ground 2**

6 In Ground 2, Rodriguez alleges that his federal constitutional rights were violated
7 when his trial counsel failed to investigate and present mitigating evidence on his behalf
8 at sentencing. (ECF No. 23 at 12.) Specifically, Rodriguez asserts that his trial counsel
9 should have presented his sister, Sandra Florez, as a mitigating witness to testify about
10 his nonviolent character. (*Id.*) Rodriguez contends that he received a harsher sentence
11 than he otherwise would have if his trial counsel had properly prepared for the
12 sentencing hearing and presented mitigating evidence. (ECF No. 46 at 13.)

13 During Rodriguez's sentencing hearing, Rodriguez's trial counsel explained that
14 "there were four letters that were faxed to [his] office [the day before]... and some [other
15 letters that were sent later that evening] that [he] presented to the Court." (ECF No. 25-
16 4 at 3.) Rodriguez's trial counsel "ask[ed] the Court to consider [those letters] in
17 mitigation of sentence." (*Id.* at 4.) The State summarized those letters: "you have letters
18 from his ex-wife and other relatives asking for leniency, your honor, indicating that he's
19 a caring and loving husband, that they're basically shocked by this, didn't think he was
20 capable of it." (*Id.* at 13.) Rodriguez's trial counsel argued that "Rodriguez did ultimately
21 take responsibility for his actions," that Rodriguez's "intention was never that someone
22 was going to die," and that an appropriate sentence would be "the life term with parole
23 beginning after 20 years." (*Id.* at 4.)

24 At his post-conviction evidentiary hearing, Rodriguez testified that he did not meet
25 or talk to his trial counsel between his change of plea hearing and his sentencing
26 hearing, so he never had the chance to discuss any type of mitigation with him. (ECF
27 No. 25-17 at 5, 30.) Rodriguez did not know that he "was supposed to present witnesses"
28 or other evidence at his sentencing hearing, so "he never brought it up" with his trial

1 counsel. (*Id.* at 30-31.) Rodriguez did, however, request that his ex-wife “gather up some
2 letters” to be presented to the state district court. (*Id.* at 31.)

3 Rodriguez’s trial counsel testified at the post-conviction evidentiary hearing that
4 he did not remember what he did to prepare for Rodriguez’s sentencing. (ECF No. 25-
5 17 at 45, 51.) However, he explained that “if [he] had letters from somebody, [he] would
6 have probably been the one to ask somebody to write a letter on behalf of [the] client.”
7 (*Id.* at 55.)

8 Rodriguez called Sandra Florez, his sister, to testify at his post-conviction
9 evidentiary hearing that he was never violent and was, in fact, “a great older brother,
10 caring, loving, hard working.” (ECF No. 25-17 at 60-61, 65.) Florez was never contacted
11 by anyone to speak on Rodriguez’s behalf at his sentencing hearing, but she admitted
12 that she was not in attendance for that hearing and did not remember why she failed to
13 attend. (*Id.* at 61, 64.)

14 Following the presentation of witnesses and argument at the post-conviction
15 evidentiary hearing, the state district court found that Rodriguez’s trial counsel was not
16 deficient, explaining that Rodriguez’s trial counsel “made an argument in mitigation on
17 behalf of his client, . . . he opposed the State’s position at sentencing[, and h]e presented
18 letters to the Court in further mitigation.” (ECF No. 25-17 at 74.) The state district court
19 further reasoned that “[t]he only potential witness who has been identified during this
20 hearing is . . . Ms. Florez,” and “Ms. Florez testified she knows nothing about the
21 circumstances of the murder,” that Rodriguez “never advised her of his interest in having
22 her appear to testify at the sentencing,” and that she “did not appear [at Rodriguez’s
23 sentencing] and she has no reason for why she didn’t appear.” (*Id.*)

24 Counsel’s performance at the penalty phase is measured against “prevailing
25 professional norms.” *Strickland*, 466 U.S. at 688. And this Court “must avoid the
26 temptation to second-guess [counsel’s] performance or to indulge ‘the distorting effects
27 of hindsight.’” *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (citing *Strickland*,
28 466 U.S. at 689). But “judicial deference to counsel is predicated on counsel’s

1 performance of sufficient investigation and preparation to make reasonably informed,
2 reasonably sound judgments." *Id.* When challenging a trial counsel's actions in failing to
3 present mitigating evidence during a sentencing hearing, the "principal concern . . . is
4 not whether counsel should have presented a mitigation case[, but instead] . . . whether
5 the investigation supporting counsel's decision not to introduce mitigating evidence . . .
6 was *itself reasonable.*" *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (emphasis in
7 original).

8 The Nevada Court of Appeals reasonably determined that the state district court's
9 finding that Rodriguez failed to demonstrate that further sentencing preparation would
10 have produced mitigating witnesses whose testimony would have led to a lesser
11 sentence was supported by substantial evidence. Rodriguez's trial counsel did not
12 remember what he did to prepare for Rodriguez's sentencing, but he explained that he
13 probably asked individuals to write letters on Rodriguez's behalf. (ECF No. 25-17 at 51,
14 55.) These letters from Rodriguez's family asked for leniency for Rodriguez, indicating
15 that he was a caring person. (See ECF No. 25-4 at 13.) Although Rodriguez's mitigating
16 evidence was not presented in the form that Rodriguez allegedly desired—live
17 testimony—Rodriguez's trial counsel presented this mitigating evidence in a strategic,
18 reasonable manner. *Harrington*, 562 U.S. at 106 ("Rare are the situations in which the
19 wide latitude counsel must have in making tactical decisions will be limited to any one
20 technique or approach."); see also *Strickland*, 466 U.S. at 688-89 ("No particular set of
21 detailed rules for counsel's conduct can satisfactorily take account of the variety of
22 circumstances faced by defense counsel or the range of legitimate decisions regarding
23 how best to represent a criminal defendant."). In addition to these letters, Rodriguez's
24 trial counsel also made arguments in support of mitigation: Rodriguez's trial counsel
25 argued that Rodriguez took responsibility for his actions and never intended for the
26 victim to die. (ECF No. 25-4 at 4.) Accordingly, the Nevada Court of Appeals reasonably
27 determined that Rodriguez's trial counsel was not deficient. *Strickland*, 466 U.S. at 688.
28 ///

1 Further, regarding prejudice, Florez's testimony at the post-conviction evidentiary
2 hearing about Rodriguez being a "caring, loving, hard working" individual appears to
3 mirror the mitigating letters presented to the state district court. (ECF No. 25-17 at 60-
4 61.) As such, Rodriguez fails to demonstrate that the addition of Florez's opinion about
5 his character would have changed his sentence. *Strickland*, 466 U.S. at 694; see also
6 *Djerf v. Ryan*, 931 F.3d 870, 881 (9th Cir. 2019) ("Strickland prejudice is not established
7 by mere speculation."); *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987)
8 (denying an ineffective-assistance-of-counsel claim based on counsel's refusal to call
9 witnesses because the defendant "offers no indication of . . . how their testimony might
10 have changed the outcome of the hearing"). Therefore, the Nevada Court of Appeals
11 reasonably determined that Rodriguez failed to demonstrate prejudice. *Strickland*, 466
12 U.S. at 694.

13 Thus, because the Nevada Court of Appeals reasonably determined that
14 Rodriguez's ineffective-assistance-of-counsel claim lacked merit, Rodriguez is denied
15 federal habeas relief for Ground 2.¹

16 **V. CERTIFICATE OF APPEALABILITY**

17 This is a final order adverse to Rodriguez. As such, Rule 11 of the Rules Governing
18 Section 2254 Cases requires this Court to issue or deny a certificate of appealability
19 ("COA"). Therefore, this Court has *sua sponte* evaluated the claims within the Petition for
20 suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281
21 F.3d 851, 864-65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue
22 only when the petitioner "has made a substantial showing of the denial of a constitutional
23

24 ¹Rodriguez requested that this Court "[c]onduct an evidentiary hearing at which
25 proof may be offered concerning the allegations in [his] [A]mended [P]etition and any
26 defenses that may be raised by [R]espondents." (ECF No. 23 at 14.) Rodriguez fails to
27 explain what evidence would be presented at an evidentiary hearing, especially since an
28 evidentiary hearing was held before the state district court on Rodriguez's state habeas
petition. Additionally, this Court has already determined that Rodriguez is not entitled to
relief, and neither further factual development nor any evidence that may be proffered at
an evidentiary hearing would affect this Court's reasons for denying relief. Accordingly,
Rodriguez's request for an evidentiary hearing is denied.

1 right." With respect to claims rejected on the merits, a petitioner "must demonstrate that
2 reasonable jurists would find the district court's assessment of the constitutional claims
3 debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v.*
4 *Estelle*, 463 U.S. 880, 893 & n.4 (1983)). Applying this standard, the Court finds that a
5 certificate of appealability is unwarranted.

6 VI. CONCLUSION

7 It is therefore ordered that the First Amended Petition for Writ of Habeas Corpus
8 by a Person in State Custody Pursuant to 28 U.S.C. § 2254 (ECF No. 23) is denied.

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

10 The Clerk of Court is directed to enter judgment accordingly and close this case.

11 DATED THIS 6th day of May 2020.

12 
13 MIRANDA M. DU
14 CHIEF UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 | EDWARD G. RODRIGUEZ,¹

12 Petitioner,

13 |

14 | TIMOTHY FILSON, et. al.,

15 | Respondents.

Case No. 3:15-cv-00339-MMD-WGC

**FIRST AMENDED PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254**

Petitioner, Edward Rodriguez, by and through his attorney of record, T. Kenneth Lee, Assistant Federal Public Defender, files this First Amended Petition for Writ of Habeas Corpus by a person in State Custody Pursuant to 28 U.S.C. § 2254.²

22 ¹ The state court and the Nevada Department of Corrections (NDOC) have
23 Petitioner last name as Rodriquez. *See, e.g.*, Ex. 20. NDOC does, though, list
24 Rodriguez as an alias last name. From Petitioner's *pro se* filings it appears that
Rodriguez is the appropriate spelling. As a result, undersigned counsel will adopt
Rodriguez as well.

25 ² The exhibits referenced in this First Amended Petition are identified as "Ex."
26 Petitioner reserves the right to file supplemental exhibits as needed and relevant.
27 Additionally, if Respondents have additional exhibits they believe are necessary for
this Court's review of the grounds raised herein or in a Motion to Dismiss, should
Respondents file one, Petitioner would have no objection to Respondents beginning
their numbering from the end of exhibits attached hereto. For example, if Petitioner's

1 **I. Procedural History**

2 On day three of Edward Rodriguez's (Rodriguez) jury trial, Rodriguez changed
3 his plea to guilty to the offense of murder. *See* Ex. 19, Tr.9/12/07 at 66-77; *see also*
4 Ex. 18. Rodriguez was subsequently sentenced to life without the possibility of parole
5 and was given two hundred and ninety-six (296) days of credit for time served. Ex.
6 20. Rodriguez is currently serving his sentence at Lovelock Correctional Center in
7 Lovelock, Nevada.

8 **A. Justice Court Proceedings**

9 Rodriguez was charged with one count murder by way of Criminal Complaint
10 in the Justice Court of Reno Township on January 18, 2007. Exs. 2, 3. Rodriguez
11 was arraigned on January 26, 2007, and the Washoe County Public Defender was
12 appointed. Exs. 1a, 4.

13 Due to a conflict, the Public Defender was removed from the case and Kevin
14 Van Ry appointed on March 14, 2007. Exs. 5, 6.

15 On March 21, 2007, and April 3, 2007, Rodriguez with Attorney Van Ry
16 appeared for Rodriguez's preliminary hearing. *See generally* Ex. 7, Tr/3/21/07. At this
17 hearing, the State presented the testimonies of Ellen Clark, Thomas Nigri, Donald
18 Carter, Randall Baker, Donald Martinez, Benjamin Rodriguez, Phillip Rodriguez,
19 Lisa Rodriguez, Tonya Baptista, Lawrence McMillen, Christiaan Reichert, Lisa
20 Harris, Jeffrey Riolo, Donicio Gonzales, and Ron Chalmers. *See generally* Ex. 7,
21 Tr.3/21/07. Rodriguez waived his right to testify and call witnesses during the
22 Preliminary Examination. *Id.*, Tr.3/21/07 at 189. The Court found probable cause,
23 and the case was bound over to the Second Judicial District Court. *Id.*, Tr.3/21/07 at
24
25

26 last exhibit attached to his amended petition was numbered 55, then Respondents'
27 supplemental exhibits would begin at 56. Petitioner believes this would aid the
Court, and would prevent the parties from identifying the same document by different
numbers, which could cause confusion.

1 191. An Amended Complaint, charging one count of Murder, was filed in open court
2 during these proceedings. Ex. 8.

3 **B. Trial Court Proceedings**

4 The Information was filed in the Second Judicial District Court on April 11,
5 2007. Ex. 9.

6 Rodriguez, present with appointed counsel Kevin Van Ry, was arraigned on
7 April 18, 2007. *See generally* Ex. 10, Tr.4/18/07. Rodriguez waived his right to a
8 speedy trial. *Id.*, Tr.4/18/07 at 3.

9 The State sought to amend the Information to incorporate aiding and abetting
10 to the charged offense. Exs. 11, 12, 14. The Amended Information was filed on
11 September 6, 2007. Ex. 15.

12 Trial commenced on September 10, 2007, and concluded on September 12,
13 2007, after Rodriguez entered a guilty plea. Exs. 16-19. Rodriguez was arraigned on
14 the Amended Information during the first day of trial. Ex. 16, Tr.9/10/07 at 4.

15 On November 9, 2007, Rodriguez was sentenced to life in prison without the
16 possibility of parole and was given 296 days of credit for time served. Ex. 21,
17 Tr.11/9/07 at 16-17. The Judgment was also entered on this date. Ex. 20.

18 Rodriguez did not file a direct appeal.

19 **C. Nevada District Court Habeas Proceedings (State Post-Conviction)**

20 On April 28, 2008, Rodriguez's *Pro Se* Motion for Withdrawal of Attorney of
21 Record or, in the Alternative, Request for Records/Court Case Documents; *Pro Se*
22 Motion for the Appointment of Counsel & Request for Evidentiary Hearing; Affidavit
23 in Support of Motion to Proceed *In Forma Pauperis*; Motion for Leave to Proceed *In*
24 *Forma Pauperis*; and timely *Pro Se* Petition for Writ of Habeas Corpus (Post-
25 Conviction) were filed. Exs. 22-27. Rodriguez raised the following issues:

26 1) Petitioner was denied effective assistance of counsel at the
27 appeal stage of the proceedings in violation of his Fifth, Sixth,
and Fourteenth Amendments to the U.S. Constitution.

1 Counsel never informed petitioner of his statutory right to a
2 direct appeal nor did counsel provide petitioner an
3 understanding of what a direct appeal was or the positive
consequences therefrom; or, the procedures related to effecting
a direct appeal. Petitioner had a statutory right on appeal to:

- 4 a. challenge the constitutional validity of the statute on
which the conviction was based;
- 5 b. challenge the sentence imposed on Constitutional or
other grounds; and
- 6 c. present a challenge to procedures employed prior to
plea entry, etc.

7 2) Petitioner was denied effective assistance of counsel, a fair
8 jury trial, and, equal protection of the law in violation of the
9 Fifth, Sixth, and Fourteenth Amendments to the U.S.
Constitution. Petitioner's court appointed counsel filed to:

- 10 a. Interview potentially crucial witnesses;
- 11 b. Contact any possible witnesses to formulate and raise a
defense strategy;
- 12 c. Determine and interview prosecution witnesses;
- 13 d. Conduct discovery;
- 14 e. Consult with any potential expert witnesses;
- 15 f. Conduct proper Pre-Trial investigation in order to
formulate and choose available defense strategy;
- 16 g. Determine and discuss potential defense witnesses;
- 17 h. Determine and discuss potential defense evidence;
- 18 i. Make any factual or legal investigation to determine if
a defense could be launched;
- 19 j. To discuss a "diminished capacity" defense; and
- 20 k. Consult adequately with petitioner in a manner
determined to be far above the level of ensuring
petitioner was adequately informed and fully
understood each and every facet and stage of the
proceeding.

21 3) Petitioner was denied effective assistance of counsel, a fair
jury trial, and equal protection of the law in violation of the
22 Fifth, Sixth, and Fourteenth Amendments of the U.S.
Constitution. Petitioner's court appointed counsel failed to file
motions to suppress evidence after petitioner asked Counsel
on 3/21/07, 418/07, 6/1/07, 8/24/07, and on 9/4/07.

23 4) Petitioner was denied effective assistance of counsel, a fair
trial, Due process, and equal protection of the law in violation
of the Fifth, Sixth, and Fourteenth Amendments of the U.S.
Constitution. Petitioner entered into the plea agreement
solely relying upon counsel's advice. Counsel failed to inform
petitioner of the total and overall ramifications of a negative
nature, when entering a guilty plea; ie. Range of punishment
he faced post-sentencing as petitioner would not be classified

1 and treated differently by the prison system by reason of the
2 nature or his crime and anticipated enhancement. Counsel
3 misrepresented the outcome of the proceedings in order to
coerce petitioner into entering into the plea agreement and a
guilty plea.

4

5) Petitioner was denied effective assistance of counsel, a fair
trial, due process, and equal protection of the law in violation
of the Fifth, Sixth, and Fourteenth Amendments of the U.S.
Constitution. Petitioner entered into the plea agreement
solely relying upon Counsel's advice.

6)

7) The Court and Counsel denied petitioner a fair jury trial, due
process, and equal protection of the law in violation of the
8 Fifth, Sixth, and Fourteenth Amendments to the Constitution.
The Court failed to fully and properly canvas Petitioner to
9 elicit a factual basis for petitioner's guilty plea and to properly
ensure petitioner fully understood:

10

11 a. The plea agreement contents;
b. The ramifications of the sentence to be imposed;
c. The ramifications of the plea to be entered;
d. Waiving his self incrimination rights;
e. Waiving his right to a fair jury trial; moreover, the court
failed to properly canvas petitioner to ensure;

12

13 a. Petitioner entered into the plea agreement to
plead guilty willfully, knowingly and voluntarily
asserting coercion or misrepresentation of
ineffective counsel;
b. Petitioner knew all possible consequences of
pleading guilty including "the range of possible
punishments" that may be imposed and possible
future negative ramifications therefrom;
c. Petitioner knew the seriousness of the crime to
which he is pleading guilty and what the state
would have to prove and satisfy a jury that
petitioner committed the crime.

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22) Petitioner was denied effective assistance of counsel, a fair
jury trial, due process and equal protection of the law during
the sentencing phase of the proceedings in violation of the
23 Fifth, Sixth, and Fourteenth Amendments of the U.S.
Constitution. Counsel did nothing more than stand by and
24 agree with the state's position at sentencing. Counsel as
25 essentially required failed to:
26

27 a. call witnesses to testify on Petitioner's behalf;
b. present any mitigating evidence;

10 | Ex. 24.

Jenny Huback was appointed on September 3, 2008, to represent Rodriguez in his post-conviction proceedings. Ex. 28. Attorney Huback requested an investigator and Private Investigator Kenneth Peele was appointed. Exs. 29, 30. Additionally, Attorney Huback requested and was granted the appointment of a DNA expert to conduct an independent examination of the DNA evidence used at trial. Exs. 31-33. Attorney Huback did not file a supplement to Rodriguez's *pro se* state post-conviction petition. *See* Ex. 35.

18 An Evidentiary was held on this matter on January 21, 2014. *See generally*
19 Ex. 34, Tr.1/21/14. After hearing the testimonies of Rodriguez, Van Ry (Rodriguez's
20 trial attorney), Sandra Florez (Rodriguez's sister), and arguments of counsel the
21 Court denied relief. *Id.*, Tr.1/21/14 at 73.

22 The Findings of Fact, Conclusions of Law and Judgment was filed on January
23 30, 2014. Ex. 35. The Notice of Entry of Order was filed on April 9, 2014. Ex. 41.

24 Rodriguez filed a *Pro Se* Notice of Appeal on February 18, 2014. Exs. 36, 37.
25 The Nevada Supreme Court docketed this appeal as case number 65067. The case
26 was remanded for appointment of counsel on March 6, 2014. Ex. 38. Thomas Qualls
27 was subsequently appointed. Exs. 39, 40.

1 Attorney Qualls raised the following issues:

2 1. Trial counsel provided ineffective assistance of
3 counsel in failing to inform Rodriguez as to his appeal
4 rights, and the District Court misinformed Rodriguez that
5 he had no right to appeal, in violation of his right to appeal,
6 violating Rodriguez's rights to due process, equal
 protection, and a fair trial under the Fifth, Sixth, and
 Fourteenth Amendments to the U.S. and Nevada
 constitutions.

7 2. Trial counsel provided ineffective assistance of
8 counsel where he did not sufficiently prepare for the
9 murder trial, including his failure to sufficiently explore a
10 potential alibi witness, in violation of Rodriguez's rights to
11 due process, equal protection, and a fair trial, under the
 Fifth, Sixth, Eighth, and Fourteenth Amendments to the
 U.S. and Nevada constitutions.

12 3. Trial counsel provided ineffective assistance of
13 counsel where he did not sufficiently prepare for the
14 sentencing hearing, including his failure to procure
15 available mitigation witnesses, in violation of Rodriguez's
16 Rights to due process, equal protection, and a fair trial,
 under the Fifth, Sixth and Fourteenth Amendments to the
 U.S. and Nevada constitutions.

17 4. During the Evidentiary Hearing, the District Court
18 made a ruling on the Petitioner's claims, including claims
19 related to the plea canvass, without the benefit of a
20 transcript of the plea canvass, in violation of Rodriguez's
21 rights to due process, equal protection, and a fair trial,
 under the Fifth, Sixth, Eighth, and Fourteenth
 Amendments to the U.S. and Nevada constitutions.

22 5. The cumulative effect of the various errors alleged
23 herein resulted in violations of Rodriguez's rights under the
24 State and Federal constitutional guarantees of due process
 of law, equal protection of the laws, and a reliable sentence
 pursuant to U.S. Const. V, VI, VIII, & VIX.

26 | Ex. 42.

1 The State filed its Answering Brief on November 13, 2014. Ex. 44. Counsel
2 replied on January 13, 2015. Ex. 45.

3 The appeal was transferred to the Court of Appeals of Nevada on February 9,
4 2015. Ex. 46. The Order of Affirmance was filed on April 14, 2015, and the Remittitur
5 issued on May 11, 2015. Exs. 47, 48.

6 **D. Federal Court – 28 U.S.C. § 2254 Federal Habeas Corpus**

7 Rodriguez mailed his *pro se* Petition for a Writ of Habeas Corpus Pursuant to
8 28 U.S.C. § 2254 by a Person in State Custody and an Application to Proceed *In*
9 *Forma Pauperis* on June 15, 2015. ECF no. 1, ECF no. 1-1. This Court denied
10 Petitioner's request to proceed *in forma pauperis* on July 1, 2015. ECF no. 3.
11 Petitioner's *pro se* Request for Appointment of Counsel was filed on July 10, 2015.
12 ECF no. 4. On November 13, 2015, this Court appointed the Federal Public Defender
13 to represent Rodriguez. ECF no. 6. Undersigned counsel entered his appearance on
14 December 14, 2015. ECF no. 8.

15 Due to the limited time remaining to file a timely 28 U.S.C. §2254 petition and
16 the need to protect the available remedies, undersigned counsel filed a supplement
17 to Rodriguez's *pro se* Petition on December 18, 2015. ECF no. 10. Respondents filed
18 a Motion to Strike Supplement to *Pro Se* Petition and the parties litigated this issue.
19 ECF nos. 12, 13, 14, 15, 16. On September 28, 2016, this Court granted Rodriguez's
20 request to supplement his *pro se* federal habeas corpus petition—finding “Rodriguez
21 appears to have acted in good faith in filing the supplement, and there is no
22 indication that respondents will be prejudiced.” ECF no. 20 at 2-3.

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1 This Amended Petition follows.

2 **II. Grounds for Relief**

3 **GROUND ONE**

4 Trial counsel provided ineffective assistance of counsel in
5 failing to inform Rodriguez as to his appeal rights, and the
6 district court misinformed Rodriguez that he had no right
7 to appeal, in violation of Rodriguez's rights to Due Process,
8 Equal Protection, and a Fair Trial, under the Fifth, Sixth,
9 Eighth, and Fourteenth Amendments to the U.S.
10 Constitution.

11 **Statement of Exhaustion:** This claim was presented to, and decided upon by
12 the Nevada Court of Appeals on appeal of the denial of post-conviction relief. *See* Exs.
13 42, 47.

14 **A.** Trial court denied Rodriguez his constitutional
15 right to direct appeal when it misinformed him that
16 he had no such right.

17 **Statement in Support of Claim:** Nevada has established a process of appellate
18 review that must comply with the federal due process and equal protection clauses.
19 *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 17-18 (1955) (finding that if an appeal is open
20 to those that can pay for it, an appeal must be provided for an indigent); *Douglas v.*
21 *California*, 372 U.S. 353 (1963). However, Rodriguez was denied his right to appellate
22 review.

23 At the change of plea hearing, during the court's colloquy with Rodriguez the
24 following exchange took place:

25 **Court:** If the jury were to find you guilty, you could
26 appeal. Do you understand that?

27 **Rodriguez:** Yes, I do. **Can I appeal now that** — because of
28 — if my pleading guilty, is that still
29 appealable?

Court: No. The jury will not hear and decide the remainder[] of your trial if the Court accepts your plea of guilty. Do you understand that?

Ex. 19, Tr.9/12/07 at 70 (emphasis added). The trial court was wrong.

The failure to properly advise Rodriguez of his appellate rights denied him his entire right to an appellate judicial proceeding under Nevada law. As a result, he was unable to challenge his sentence. *See, e.g.*, Ex. 34, EvidHrg.1/21/14 at 52 (Attorney Van Ry was shocked that Rodriguez got the maximum sentence). The trial court thereby denied Rodriguez his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. The writ should be granted and Rodriguez should be granted his direct appeal.

B. Trial counsel denied Rodriguez his constitutional right to direct appeal when counsel failed to inform Rodriguez that he had the right to appeal.

Statement in Support of Claim: Trial counsel's duty to the defendant extends to consultation over whether to file an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (1984) ("counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.") At the evidentiary hearing on the post-conviction habeas petition, Rodriguez testified that his trial counsel, Attorney Van Ry, never discussed his right to appeal with him and that he was not aware of his right to appeal. Attorney Van Ry did not contradict this, and did not remember discussing an appeal with Rodriguez. Further, during the change of plea hearing, the District Court erroneously informed Mr. Rodriguez he had no appeal rights.

Even the State admitted that this was a viable claim, though it took issue with the prejudice aspect. Finally, the District Court denied this claim on the record at the

1 evidentiary hearing, despite the fact that it had an incomplete record. The Court
2 explained that the change of plea hearing had not been transcribed, and therefore, it
3 admitted, it was unable to review the hearing prior to making its ruling. It is telling
4 that the Court did not even mention this issue in its written order.

5 It is one of the burdens of trial counsel to inform a convicted client of the right
6 to appeal. That duty includes informing the client of the procedure for filing the
7 appeal as well as the advantages and disadvantages of filing an appeal. *Lozada v.*
8 *State*, 871 P.2d 944 (1994). Prejudice has been presumed, for purposes of establishing
9 ineffective assistance of counsel, when counsel fails to inform a criminal defendant of
10 the right to appeal. *Lozada*, 871 P.2d at 948-949. With regards to the right to appeal
11 from a guilty plea, the Nevada Supreme Court has held that an attorney still has a
12 constitutional duty to advise a defendant of his appeal rights in certain
13 circumstances, including when the defendant has viable appeal issues.

14 The fact that Attorney Van Ry does not even remember going over or
15 explaining Rodriguez's appellate rights is troubling given, it is one of the burdens of
16 trial counsel to inform a convicted client of the right to appeal. That duty includes
17 informing the client of the procedures for filing the appeal as well as the advantages
18 and disadvantages of filing an appeal. Prejudice has been presumed, for ineffective
19 assistance of counsel, when counsel fails to inform a criminal of the right to appeal.
20 The failure to properly advise Rodriguez of his appellate rights denied him his entire
21 right to an appellate judicial proceeding under Nevada law. The writ should issue
22 and Rodriguez should be granted his direct appeal.

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1 GROUND TWO

2 Rodriguez was denied his right to the effective assistance
3 of counsel under the Sixth and Fourteenth Amendments to
4 the United States Constitution.

5 The Sixth and Fourteen Amendments guarantee the accused the right to
6 counsel at trial. However, the right to counsel encompasses more than a warm body
7 sitting next to the accused; the right entails the right to effective assistance of
8 counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of
9 ineffective assistance of counsel, a petitioner must show: (1) that counsel's
10 performance was professionally unreasonable; and (2) there "is a reasonable
11 probability that, but for counsel's unprofessional errors, the result would have been
12 different." *Id.* at 694. "A reasonable probability is a probability sufficient to
13 undermine the confidence in the outcome." *Id.*

14 Applying the *Strickland* test, Rodriguez can demonstrate he was denied his
15 Constitutional right to the effective assistance of counsel.

16 A. Trial counsel performed deficiently in failing to
17 investigate and present mitigation evidence on
18 Rodriguez's behalf at sentencing.

19 Statement of Exhaustion: This claim was presented to, and decided upon by
20 the Nevada Court of Appeals on appeal of the denial of post-conviction relief. *See* Exs.
21 42, 47.

22 Statement in Support of Claim: The defense not only has the right, but has
23 the obligation to put on a case in mitigation. *Wiggins v. Smith*, 539 U.S. 510 (2003).
24 No strategic reason exists in the record for defense counsel's failure to present a more
25 complete case in mitigation, including mitigation witnesses, such as Sandra Florez,
26 Rodriguez's sister, who could have testified to his nonviolent character. *See, e.g.*, Ex.
27 34, Tr.1/21/14 at 59-60, 64. Accordingly, defense counsel's performance at sentencing

1 was constitutionally inadequate, pursuant to *Wiggins*. Rodriguez was also prejudiced
2 by this failure, as he received a significantly harsher sentence than he otherwise
3 would have if counsel had properly prepared for the sentencing hearing.

4 Any contrary decision by a state court would be contrary to, or an unreasonable
5 application of, clearly established federal law, and/or would involve an unreasonable
6 determination of facts. *See* 28 U.S.C. § 2254(d)(1) and (2). The writ should be granted
7 and Rodriguez's sentence should be vacated.

8 GROUND THREE

9 Rodriguez's plea was not knowing, voluntary, and
10 intelligent, and thus is constitutionally invalid.

11 **Statement of Exhaustion:** This claim was presented to, and decided upon by
12 the Nevada Court of Appeals on appeal of the denial of post-conviction relief. *See* Exs.
13 42, 47.

14 **Statement in Support of Claim:** There is no question that a criminal defendant
15 can pled guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969). However, the plea must
16 be entered into knowingly, voluntarily, and intelligently — with an understanding of
17 the elements of the offense and the consequences of the plea. Looking at the totality
18 of the circumstances here, it is clear Rodriguez's plea was not entered into knowingly,
19 voluntarily, and intelligently.

20 Three days into trial, Attorney Van Ry informed Rodriguez that things were
21 "not looking good" and that he (Rodriguez) was looking at "20 to life plus 20 to life for
22 the enhancement." Ex. 34, Tr.1/21/14 at 15, 25, 35; ECF no. 1-01 at 9. Scared,
23 Rodriguez turned to Attorney Van Ry for advice. *See id; see also* Ex. 34, Tr.1/21/14
24 at 24-25. Attorney Van Ry told Rodriguez that if he pled guilty the State would
25 dismiss the weapon enhancement; that the worst sentence he could get would be 20
26 to life; and that the judge could consider a lesser included offense and could sentence
27

1 Rodriguez to the ten year flat sentence the State originally offered him. *See, e.g.*, Ex.
2 34, Tr.1/21/14 at 16-18, 24, 33, 37; *See also* ECF no. 1-01 at 8-A, 9.

3 With Attorney Van Ry's incorrect sentencing information/promise in mind,
4 feeling like Attorney Van Ry had not represented him at trial, and knowing that
5 Attorney Van Ry had done "very little" in preparation for his murder trial — having
6 at best spent two hours with him, and having never gone over the discovery with him
7 — Rodriguez was left with no choice but to enter into an unknowing, involuntary, and
8 unintelligent plea. *See, e.g.*, Ex. 34, Tr.1/21/14 at 8, 10, 19-23, 25-27, 35-36, 46, 49;
9 *see also* ECF no. 1-01 at 5, 7, 13; ECF no. 10 at 6-8. Any decision by a state court that
10 Rodriguez entered into a knowing, voluntary, and intelligent plea would be contrary
11 to, or an unreasonable application of, clearly established federal law, and/or would
12 involve an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d)(1) and (2).
13 The writ should be granted and Rodriguez's conviction and sentence should be
14 vacated.

15 III. PRAYER FOR RELIEF

16 Accordingly, Petitioner respectfully requests that this Court:

- 17 1. Issue a writ of habeas corpus to have Rodriguez brought before the
Court so that he may be discharged from his confinement;
- 18 2. Conduct an evidentiary hearing at which proof may be offered
concerning the allegations in this amended petition and any defenses
that may be raised by respondents' and
- 19 3. Grant such other and further relief as, in the interests of justice may
be appropriate.

22 DATED this 6th day of February, 2017.

23 Respectfully submitted
24 RENE L. VALLADARES
25 Federal Public Defender

26 /s/ T. Kenneth Lee
27 T. KENNETH LEE
Assistant Federal Public Defender

1 **DECLARATION UNDER PENALTY OF PERJURY**

2 I declare under penalty of perjury under the laws of the United States of
3 America and the State of Nevada that the facts alleged in this petition are true and
4 correct to the best of counsel's knowledge, information, and belief.

5

6 DATED this 6th day of February, 2017.

7

8 _____
9 /s/ T. Kenneth Lee
10 T. KENNETH LEE
11 Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

2 In accordance with the Rules of Civil Procedure, the undersigned hereby
3 certifies that on this 6th day of February, 2017, a true and correct copy of the
4 foregoing, was filed electronically with the United States District Court. Electronic
5 service of the foregoing document shall be made in accordance with the master service
6 list as follows:

7 Matthew S. Johnson
8 Deputy Attorney General
9 100 North Carson Street
Carson City, NV 89701
MJohnson@ag.nv.gov

/s/ Dayron Rodriguez

An Employee of the
Federal Public Defender,
District of Nevada

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD GOMEZ RODRIGUEZ,
Appellant,
vs.
E.K. McDANIEL, WARDEN, ELY
STATE PRISON; AND THE STATE OF
NEVADA,
Respondents.

No. 65067

FILED

APR 14 2015

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Edward Gomez Rodriguez initially contends that the district court erred by denying his claims that trial counsel was ineffective for failing to inform him of his right to an appeal, prepare for trial by investigating a potential alibi witness, and prepare for sentencing by procuring mitigation witnesses. We review the district court's resolution of ineffective-assistance claims *de novo*, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The district court conducted an evidentiary hearing and received testimony from Rodriguez, his trial counsel, and his sister. The district court found that Rodriguez failed to demonstrate that trial counsel had a legal duty to inform him of the right to a direct appeal, that further trial preparation would have produced helpful information, or that further

sentencing preparation would have produced mitigation witnesses whose testimony would have led to a lesser sentence. And the district court concluded that Rodriguez failed to meet his burden to prove ineffective assistance of counsel.

Our review of the record reveals that the district court's factual findings are supported by substantial evidence and are not clearly wrong, and Rodriguez has not demonstrated that the district court erred as a matter of law. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); *see also Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 799-800 (2011) (discussing the limited circumstances in which trial counsel has a constitutional duty to inform a client who has pleaded guilty about a direct appeal); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner must prove the facts underlying his claim of ineffective-assistance by a preponderance of the evidence). Accordingly, we conclude that Rodriguez has not demonstrated that he was deprived of effective assistance of counsel.

Second, Rodriguez contends that the district court erred by denying his petition without the benefit of the plea canvass transcript because a review of the transcript would have revealed that the court misinformed Rodriguez about his right to an appeal. However, Rodriguez's claim in the court below was that counsel was ineffective for failing to inform him of his right to an appeal—not that the court misinformed him of his right to an appeal. We conclude that the record considered by the court was sufficient to address the claims that Rodriguez did raise in his petition and that the district court did not err by denying the petition without considering the plea canvass transcript.

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Finally, Rodriguez contends that the cumulative effect of the various trial errors alleged in his petition violated his rights to due process of law, equal protection of the laws, and a reliable sentence. However, this claim was not raised in the court below and we decline to consider it here. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

Having concluded that the district court did not err by denying Rodriguez's petition, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Second Judicial District Court, Dept. 6
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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NOV 09 2007

HOWARD W. CONVERS, CLERK
By: *Stephanie*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR07-0559

vs.

Dept. No. 6

EDWARD GOMEZ RODRIQUEZ,

Defendant.

JUDGMENT

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

That Edward Gomez Rodriguez is guilty of the crime of Murder, a violation of NRS 200.010 and NRS 200.030, NRS 195.020 and NRS 193.165, a felony, as charged in the Amended Information, and that he be punished by imprisonment in the Nevada State Prison for the term of Life Without the Possibility of Parole. The Defendant is further ordered to pay the statutory Twenty-Five Dollar (\$25.00) administrative assessment fee, submit to DNA testing and pay the One Hundred Fifty Dollar (\$150.00) fee if not previously ordered, restitution in the amount of Eleven Thousand Sixty-Three Dollars and Twenty-Six Cents (\$11,063.26) and reimburse the County of Washoe the sum of Five Hundred Dollars (\$500.00) for legal representation by the Washoe County Public Defender's Office. The



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1 Defendant is given credit for two hundred ninety-six (296) days time served.

2 DATED this 9th day of November, 2007.

3 
4 DISTRICT JUDGE

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