No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

JOSEPH ANTONETTI,

Petitioner,

v.

FILSON, et al., *Respondents*.

MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code ' 3006A(d)(7) and Rule 39 of this Court, Petitioner Joseph Antonetti asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees and costs and to proceed *in forma pauperis*. Petitioner, who is currently serving a sentence of life without parole followed by multiple consecutive sentences in state prison, was represented both in the district court and in the U.S. Court of Appeals for the Ninth Circuit by appointed counsel pursuant to an order of the district court under 18 U.S.C. § 3006A(a)(2)(B).

Undersigned counsel was the appointed counsel of record for Mr. Antonetti in the district court and in the Ninth Circuit.

Dated: August 20, 2022

Respectfully submitted,

/s/ Mark D. Eibert

MARK D. EIBERT
Post Office Box 1126
Half Moon Bay, CA 94019-1126
Counsel of Record for Petitioner Joseph Antonetti

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

JOSEPH ANTONETTI,

Petitioner, v.

FILSON, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARK D. EIBERT
Post Office Box 1126
Half Moon Bay, CA 94019-1126
Telephone: (650) 638-2380
Fax: (650) 712-8377

Counsel of record for Petitioner
JOSEPH ANTONETTI

QUESTION PRESENTED

Did the courts below err in denying a Certificate of Appealability to review the holdings of the district court and the Nevada Supreme Court that Mr. Antonetti's trial counsel was not ineffective for failing to object to the testimony of a medical examiner to a report that he did not author of an autopsy in an apparent murder case that he did not perform or attend as a violation of his rights under the Confrontation Clause as determined by *Crawford v. Washington,* 541 U.S. 36 (2004) and other, prior and subsequent Supreme Court precedents?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

Statutes and Rules

Other Authorities

I. PRAYER FOR RELIEF

Mr. Joseph Antonetti respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision denying his request for a Certificate of Appealability (hereafter a "COA") from the denial of his habeas corpus petition under 28 U.S.C. § 2254. The basis of this petition is that the Ninth Circuit's denial of a COA is

(1) contrary to the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution and in conflict with the standards for a COA set by 28 U.S.C. § 2253(c)(2) and by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003) and *Slack v. McDaniel,* 529 U.S. 473 (2000), and

(2) contrary to the Confrontation Clause of the Sixth Amendment to the United States Constitution as determined by this Court's binding precedents under *Crawford v. Washington,* 541 U.S. 36 (2004) and other prior and subsequent Supreme Court precedents, and

(3) as inexplicable as it was unexplained, in violation of this Court's authority in *Jackson v. Felkner,* 562 U.S. 594 (2011).

In the alternative, the state and federal courts below have decided and important question of federal law that has not been, but should be, settled by this Court.

II. OPINION BELOW

A two-judge panel of the Ninth Circuit denied Mr. Antonetti's petition for a COA in an Order that was final and unpublished. *Joseph Antonetti v. Filson,* No. 22-15031 (9th Cir. June 24, 2022), *Appendix A.*

III. JURISDICTION

On June 24, 2022, a two-judge panel of the Court of Appeals for the Ninth

Circuit issued an unpublished Order denying Mr. Antonetti's petition for a COA. *Appendix A.* This is the final judgment for which a writ of certiorari is sought.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime… nor be deprived of life, liberty, or property, without due process of law….

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE

A. Jurisdiction of Courts of First Instance

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

B. Facts Material to the Questions Presented

Mr. Joseph Antonetti was charged with attempting to murder Suzanne Smith by shooting her on November 5, 2002. The State alleged that she had rented a room in her house to Mr. Antonetti and he shot her multiple times when she demanded he move out of her house.

Mr. Antonetti was later separately charged with the murder of Mary Amina and the

attempted murder of her boyfriend Daniel Stewart on December 1, 2002. The State alleged that Mr. Antonetti accompanied his acquaintance Michael Bartoli to the Stewart-Amina apartment to recover a shotgun that had been taken from Bartoli and was now in the possession of Amina's brother. Difficulties occurred that led to an argument, and Mr. Antonetti allegedly shot Amina and Stewart while Bartoli was present.

The two cases were not alleged to be related in any way other than the fact that Mr. Antonetti was charged with both and the same gun—which was never found—was allegedly used in both incidents. The trial court granted a defense motion to sever the two cases as totally unrelated, but later—after the Amina trial had begun--allowed the prosecution to use the evidence of the Smith shooting in the Amina trial, which was tried first.

Mr. Antonetti's defense was that he possessed a different gun at the Amina/Stewart Bartoli shooting and Bartoli had the gun used in the prior shooting, so Mr. Antonetti could not have been the killer.

Dr. Ronald Knobloc testified as a forensic pathologist about the autopsy of Mary Amina. Specifically, he testified that Amina had a gunshot wound to the right of her nose and the top of her head; that she was shot from a distance of two to three feet based on the gunshot residue on her face, that either gunshot could have been fatal, that she had an "intermediate" amount of methamphetamine in her system at the time of death (although she still could have died from that amount), that the shooting was probably a surprise to the victim due to the lack of defensive wounds, that the bullets were small caliber and not a 9 millimeter or .45 caliber, that methamphetamine makes people unpredictable, and that she was the victim of a homicide. His testimony was also the foundation for the admission of a number of highly inflammatory and prejudicial autopsy photographs. *Id.* at 82.

But Dr. Knobloc did not perform the autopsy, nor was he present when it was performed. A Dr. Donna Smith, who no longer worked in the Clark County Coroner's Office,

did all that, and no showing was made or even attempted that she was unavailable to testify at trial. Everything Dr. Knobloc testified to was from a report she prepared of the autopsy and her grand jury testimony.

Mr. Antonetti's attorney did not object to his testimony under either the Confrontation Clause or for lack of foundation.

At the time of Mr. Antonetti's trial, *Crawford v. Washington*, 541 U.S. 36 (2004) was pending before the Supreme Court and oral argument in this Court had already occurred. *Crawford* was definitively decided while Mr. Antonetti's direct appeal was pending.

The state supreme court rejected Mr. Antonetti's claim of ineffective assistance of counsel on two grounds, that (1) "*Crawford* was finally decided a year after the medical examiner testified at [Mr.] Antonetti's trial and counsel cannot be faulted for failing to anticipate the decision, and (2) "while the witness described the evidence noted during the autopsy and noted the conclusions, he provided his own independent opinion based on injuries documents during the autopsy." *Appendix C.*

The district court below agreed with the state court on the grounds that (1) although *Crawford* was before the Supreme Court at the time of Mr. Antonetti's trial (in fact oral argument had already occurred in this Court) it was not yet clearly established Supreme Court law, and (2) that *Crawford* did not clearly establish that autopsy reports are testimonial. *Appendix B.* It also denied a COA without explanation. *Id.*

The two-judge Ninth Circuit panel denied the request for a COA with no meaningful explanation, stating in full:

> 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.

Appendix A.

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously holding that "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." *Appendix A.*

A. Applicable Legal Standards For COAs

AEDPA permits the federal district courts and court of appeal to issue a COA on an issue when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2)-(3). The Ninth Circuit itself has explained what it takes under this Court's authority to meet this standard:

> In *Barefoot [v. Estelle,* 463 U.S. 880 (1983)], the [Supreme] Court established several ways in which a petitioner can make the 'substantial showing of the denial of a constitutional right.' To meet this threshold inquiry, Slack [v. McDaniel, 529 U.S. 473,] 120 S. Ct. [1595] at 1604 [2000], the petitioner 'must demonstrate *that the issues are* ***debatable*** *among jurists of reason; that a court* ***could*** *resolve the issues [in a different manner];* ***or*** *that the questions* ***are adequate to deserve encouragement*** to proceed further."… *We will resolve any doubt about whether the petitioner has met the Barefoot standard in his favor.*…
> …At this preliminary stage, we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus. Indeed, the Supreme Court has cautioned that, in examining a petitioner's application to appeal from the denial of a habeas corpus petition, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor."… In non-capital as well as capital cases, the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus.…

Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000) (emphasis added; citations omitted). The court went on to say that even "an issue apparently settled [against petitioner] by the law of our circuit remained debatable for purposes of issuing a COA." *Id.* at 1026. "[I]t is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to *reconsider* circuit law that apparently forecloses relief." *Id.* (emphasis added). The purpose of the COA requirement is not to set a much higher bar for habeas appeals than other criminal appeals, or to prevent the court of appeals from hearing argument on issues that may at first glance appear to lack merit, but to prevent the wasting of judicial resources on issues that are truly *frivolous*. See *id.* at 1025. Indeed, "the showing a petitioner must make to be heard on appeal is less than that to obtain relief." *Id. See also Tennard v. Dretke*, 542, U.S. 274, 282, 288 (2004); *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle,* 463 U.S. 880, 893 & n. 4 (1983); 2 CEB, *Appeals and Writs in Criminal Cases*, § 4.190 (2d ed. 2003).

As demonstrated below, the Ninth Circuit failed to meet this standard.

B. The *Crawford* Issue In This Case More Than Meets This Standard

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court declared that the Confrontation Clause applies to certain out of court statements introduced at trial *regardless* of the law of evidence. *Id.* at 50-51. *Crawford* involved a woman's taped statement to the police that incriminated her husband. She did not testify at trial because of the marital privilege. This Court held that among the out of court statements to which Confrontation Clause protections apply is "pretrial statements that declarants would reasonably expect to be used prosecutorially," and "statements that were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later

trial." *Id.* at 51-52. Accordingly, this Court ruled that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, *and* the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54, 59.

This Court also addressed the historical hearsay exception, saying "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records…." *Id.* at 56. This Court went on to say that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence…." *Id.* at 61.

This Court added that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62.

This Court's ultimate holding was that "[w]here testimonial evidence is at issue…the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. The conviction was reversed.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009). the trial court admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police was cocaine. This Court held that those affidavits were "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment and *Crawford*, *supra*. The affidavits fell within the "core class of testimonial statements" for *two separate reasons*: because they were affidavits, *and* because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 2532. Thus, "[a]bsent a showing of the analysts' unavailability to testify at trial *and*

that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be 'confronted with' the analysts at trial. *Crawford, supra*, at 54." *Id.* at 2532 (emphasis in original).

This Court also addressed the argument that defense counsel might have had a tactical reason for not objecting to the introduction of the forensic report on confrontation clause grounds:

> Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Id. at 2536. This Court noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials….. One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Id.* at 2537. This Court explicitly said that "[t]he same is true of many of the other types of forensic evidence commonly used in criminal prosecutions." *Id.* at 2538.

Finally, this Court expressly rejected the argument that the forensic reports were admissible as business records, because unlike ordinary business records, if the regularly conducted business activity is the production of evidence for use at trial, the authors of such records are subject to cross-examination in spite of the business records exception. *Id.* at 2538.

Importantly, *this Court in Melendez-Diaz pointed out that this had been made clear* ***66 years earlier*** *by the clearly established Supreme Court precedent of Palmer v. Hoffman, 318 U.S. 109, 114-15 (1943*), where this Court held that a report whose "primary utility is in litigating" does not fall within the business record exception and therefore an accident report

was inadmissible. *Id.* (emphasis added).

Equally importantly, this Court in *Melendez-Diaz* recognized that its holding was merely a "rather *straightforward application* of our holding in *Crawford*," *Id.* at 2532-33 (emphasis added). This Court repeated this observation two more times, saying "[i]n faithfully applying *Crawford* to the facts of this case, we are ***not*** overruling 90 years of settled jurisprudence," *id.* at 2533 (emphasis added) and noting that "[t]his case involves little more than the application of our holding in *Crawford*." *Id.* at 2542. All *Melendez-Diaz* did was to point out the obvious fact that there was not a "forensic evidence" exception to *Crawford*. *Id.* at 2536-38. And both the majority and the dissent in *Melendez-Diaz* also noted that multiple state courts had already adopted the *Melendez-Diaz* rule *based on their own understanding of what Crawford required*—without waiting for *Melendez-Diaz* to guide them. *Melendez-Diaz,* 129 S. Ct. at 2540-42 & n. 11 (citing state cases from 10 different states) (majority opinion), 2557 (dissent, noting that the prior state cases were from courts that considered themselves "bound by *Crawford*" to apply the same rule as *Melendez-Diaz*).

This Court also rejected the argument that the defendant's ability to subpoena an absent declarant is an adequate substitute for their production by the prosecution because "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Id.* at 2540.

The Third Circuit in 2009 also applied *Melendez-Diaz* to physician reports of examinations of victims of sexual assault. *Gov't of Virgin Islands v. Vicars*, 340 Fed. Appx. 807 (3d Cir. 2009). Also applicable is *Davis v. Washington*, 547 U.S. 813, 827, 830 (2006) (holding statements to a 911 operator not testimonial, but a victim's later statements to police testimonial).

This Court again repeated the holding of *Crawford* and *Melendez-Diaz* in *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705 (2011). The forensic report there was a blood alcohol test. This Court repeated the its prior holdings that a forensic analyst who did not participate in or observe the test could not testify about the report, that the Confrontation Clause required the testimony of the analyst who actually performed the test so he could be cross-examined; that such reports are "within the core class of testimonial statements" described in *Davis* and *Crawford*; that having an opportunity to cross-examine another analyst about the report was not sufficient under the Confrontation Clause; and that "the 'obvious reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause."

This Court also specifically held that the fact that the testifying witness is "qualified as an expert witness" (one of the points relied on by the state courts in the case at bar) was *not* sufficient under the Confrontation Clause. *Id.* at 661-663.

This Court's holding was this: "when the State elected to introduce Caylor's certification, Caylor [the author of the report and the one who performed the test] became a witness [that] Bullcoming had the right to confront. *Our precedent cannot sensibly be read any other way*." *Id.* (emphasis added).

In this case, a doctor who did not perform and was not present at the autopsy testified, based entirely on the out of court report and statements of another pathologist, that (1) Amina's death was a homicide caused by the gunshot wounds, (2) she was shot with a small caliber gun (like the one Mr. Antonetti allegedly used to shoot Smith), (3) she was shot from very close range, and (4) that being shot was a surprise to her, among other things. Obviously, without this testimony the jury could not have determined that her death was a murder (as opposed to death from the methamphetamine that he also testified *could* have killed her), and the jury would have been far less likely to identify Mr. Antonetti as the

shooter given the facts of the case. In addition, the gruesome and highly prejudicial autopsy photographs could not have been admitted.

All trial counsel had to do was object under either the Confrontation Clause or under lack of foundation to Dr. Klobloc's testimony. He was ineffective for failing to do so.

The Nevada Supreme Court's first ground for upholding Mr. Antonetti's conviction—that *Crawford* had not yet been decided and was therefore not binding Supreme Court precedent—is belied by this Court's own explanation that *Crawford* was merely a continuation of more than six decades of prior Supreme Court Confrontation Clause precedent. It's second ground—that "while the witness described the evidence noted during the autopsy and noted the conclusions, he provided his own independent opinion based on injuries documents during the autopsy" is a misreading of the record—the witness was clearly telling the jury what the autopsy report authored by an absent doctor said and concluded. And it also ignored the fact that even if some of it had been his own conclusion based on the report, those conclusions were still based on hearsay by the absent doctor. And this Court has made clear that being an expert does not allow a witness to get around the Confrontation Clause and testify to someone else's report. *See Appendix C.*

The district court agreed with the state court that *Crawford* was not yet clearly established federal law even though oral argument had already occurred here at the time of Mr. Antonetti's trial, and was made final during Mr. Antonetti's direct appeal, and is wrong for the same reason. It also held that *Crawford* did not clearly establish that autopsy reports are testimonial. This even though the autopsy report was undeniably a forensic report prepared by a coroner in a murder case, performed on a victim that had been shot in the head, and was prepared in anticipation of its use in a murder trial. This Court's precedents clearly applied in such a case. Again, the district court denied a COA without explanation. *See Appendix B.*

As noted above, this Court itself held that *Crawford* merely affirmed decades of prior Supreme Court jurisprudence, and the subsequent decision that forensic reports are

testimonial was merely a "straightforward application" of *Crawford.* The best judge of what Supreme Court precedent is clearly established at a given time is this Court itself, and it said that the precedent had been "clearly established" since at least 1943, 60 years before Mr. Antonetti's trial.

In addition, Mr. Antonetti's direct appeal was not decided until December 20, 2005. Supreme Court rulings are applicable to cases still on direct appeal. *Griffith v. Kentucky,* 479 U.S. 314 (1987). Thus, even if the trial court had overruled the objection, the appellate courts—including this Court—would have had to rule in Mr. Antonetti's favor on this issue. It was therefore ineffective not to preserve this then-very timely issue for appeal.

Surely, this was a classic case of an important issue about which jurists of reason could disagree. It is also an important question of federal law that has not been, but should be, settled by this Court.

For the reasons and under the applicable legal standards for granting a COA set forth above, a certificate of appealability should be granted by both the district court and the Ninth Circuit. Their failure to do so violated both the statute and the binding precedents cited above that set the standards for the granting of COAs.

C. Failure To Explain

Finally, by denying COAs without any meaningful explanation, the district court and the Ninth Circuit both handed down rulings that were "as inexplicable as they were unexplained," contrary to this Court's stern admonition in *Jackson v. Felkner,* 562 U.S. 594 (2011).

Thus, the Ninth Circuit's Order was erroneous for three separate and independent reasons—it misconstrued and misapplied this Court's binding precedent in *Crawford,* its predecessors and its progeny, it mistakenly denied a COA contrary to controlling laws

governing them, and it failed to adequately explain an otherwise inexplicable order denying a COA.

VII. CONCLUSION

For the foregoing reasons, petitioner Joseph Antonetti respectfully requests that this petition for writ of certiorari be granted.

Dated: August 20, 2022

Respectfully submitted,

/s/ Mark D. Eibert

MARK D. EIBERT
Counsel for Petitioner JOSEPH ANTONETTI

APPENDIX A

UNPUBLISHED ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUNE 24, 2022

FILED

JUN 24 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH ANTONETTI, Petitioner-Appellant, v. FILSON; et al., Respondents-Appellees.	No. 22-15031 D.C. No. 3:17-cv-00621-MMD-CLB District of Nevada, Reno ORDER

Before: BENNETT and FORREST, 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.

APPENDIX B

OPINION AND JUDGMENT OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF NEVADA

DECEMBER 9, 2021

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

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSEPH ANTONETTI,

Petitioner,

v.

FILSON, *et al.*,

Respondents.

JUDGMENT IN A CIVIL CASE

Case Number: 3:17-cv-00621-MMD-CLB

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

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

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

IT IS ORDERED AND ADJUDGED that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 19) is denied.

IT IS FURTHER ORDERED that a certificate of appealability is denied. Judgment is entered accordingly, and this case is closed.

Date: December 9, 2021

CLERK OF COURT

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JOSEPH ANTONETTI, Petitioner, v. FILSON, *et al.*, Respondents.	Case No. 3:17-cv-00621-MMD-CLB ORDER

I. SUMMARY

Petitioner Joseph Antonetti, who is serving, *inter alia*, two consecutive sentences of life without the possibility of parole after a jury found him guilty of, *inter alia*, first-degree murder with the use of a deadly weapon, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (*See* ECF No. 28-23.) This matter is before this Court for adjudication of the merits of the remaining grounds in Antonetti's petition, which allege that the state district court admitted improper evidence, the prosecution improperly commented on Antonetti's failure to testify and failed to turn over evidence, trial and appellate counsel were ineffective, and cumulative error. (ECF No. 19 ("Petition").) For the reasons discussed below, this Court denies the Petition and a Certificate of Appealability.

II. BACKGROUND[1]

Daniel Stewart testified that he was living with his girlfriend, Mary Amina, in Las Vegas, Nevada on December 1, 2002. (ECF No. 27-38 at 62-63.) Prior to that date,

[1]The Court makes no credibility findings or other factual findings regarding the truth or falsity of this evidence from the state court. This Court's summary is merely a backdrop to its consideration of the issues presented in the case. Any absence of mention of a specific piece of evidence does not signify the Court overlooked it in considering Antonetti's claims.

Stewart and Amina had been helping Mike Bartoli retrieve his stolen shotgun from Amina's brother who had recently purchased it from Amina's ex-boyfriend. (*Id.* at 68-74.) On the night of December 1, 2002, Bartoli and Antonetti went to Stewart and Amina's apartment. (*Id.* at 74-75, 103.) Bartoli demanded that Stewart and Amina go with him to meet Amina's brother at a bar to retrieve the shotgun, but Stewart and Amina refused. (*Id.* at 76-77.) Bartoli got angry and threatened to take Stewart and Amina's property. (*Id.* at 77.) After Amina yelled at Bartoli, Antonetti said, "[y]ou don't know who we are. We are from North Town." (*Id.*) Amina responded, "[y]ou don't know who you're dealing with neither (sic)." (*Id.* at 78.) Antonetti then "pulled out a gun and shot" Stewart and Amina, killing Amina. (*Id.*) Stewart identified Antonetti as the shooter in a photographic lineup. (*Id.* at 83; ECF No. 28-1 at 143-46.)

A jury found Antonetti guilty of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and possession of a firearm by an ex-felon. (ECF Nos. 28-6; 28-4 at 20.) The jury imposed a sentence of life without the possibility of parole for the first-degree murder conviction. (ECF No. 28-12.) And the state district court imposed a consecutive sentence of life without the possibility of parole for the first-degree murder deadly weapon enhancement, two consecutive sentences of 96 to 240 months for attempted murder and the deadly weapon enhancement, and 28 to 72 months for possession of a firearm by an ex-felon. (ECF No. 28-23.) The Nevada Supreme Court denied Antonetti's direct appeal and, in relevant part,[2] affirmed the denial of his state habeas petition. (ECF Nos. 30-2, 33-13.)

III. LEGAL STANDARD

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

[2]Antonetti's state habeas petition was reversed and remanded, in part, "for the purpose of determining whether Antonetti established good cause to excuse his delay in asserting claims related to" a different judgment of conviction. (ECF No. 33-13 at 12–13.)

> 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.

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation omitted).

The Supreme Court has instructed that "[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 stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at

75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the 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).

IV. DISCUSSION

A. Ground 1—prior shooting

In ground 1, Antonetti alleges that his Fifth and Fourteenth Amendment rights were violated when the state district court improperly admitted evidence of the prior shooting of Suzanna Smith. (ECF No. 19 at 33.)

1. Background information

Suzanna Smith testified that Antonetti was staying at her house on November 5, 2002. (ECF No. 28 at 178-79.) Antonetti overheard Smith talking to a friend "about the reasons [she] wanted him to move out of [her] house." (*Id.* at 183.) Smith and Antonetti argued, and Antonetti shot Smith nine times. (*Id.* at 184-85.) Jennifer Eversole, Smith's neighbor, testified that she called 9-1-1, and, after law enforcement arrived, Eversole heard Smith say that Antonetti shot her. (*Id.* at 195-98.) Detective James Stelk testified that he responded to the hospital and "overheard [Smith] tell the medical staff that she'd been shot by Joey Antonetti." (*Id.* at 173-74.) James Krylo, a firearms examiner, testified that he "compare[d] the cartridge cases from the November [shooting of Smith] to the cartridge cases from the December" shooting of Amina and Stewart and determined that the cartridges were "fired from the same gun." (*Id.* at 215, 220-221.) Bartoli testified that he confronted Antonetti a few days after the shooting of Amina and Stewart, and Antonetti told him, *inter alia*, that "[h]e was staying with some girl; got into an argument with her. She tried to call the police on him. He said he shot her" with the same gun that he used to shoot Amina and Stewart. (ECF No. 27-38 at 174, 176.)

Before trial, the state district court granted Antonetti's motion to sever the charges arising from the shooting of Amina and Stewart from the charges arising from the shooting of Smith, explaining "there's no common plan" because "[o]ne is a domestic violence" and

the other "is an enforcement to try to get property back." (ECF No. 27-6 at 14.) The State then moved to allow evidence of the shooting of Smith as a bad act at Antonetti's trial on the shootings of Amina and Stewart. (ECF No. 27-10.) At the hearing on the motion, the state district court determined that the evidence was admissible because "the identity issue [was] relevant" and "the probative value of [the] evidence [was] substantially outweighed by the risk of prejudice." (ECF No. 27-34 at 30-31.)

2. State court determination

In affirming Antonetti's judgment of conviction, the Nevada Supreme Court held:

> Antonetti argues that the district court erred by allowing the State to introduce evidence of the unrelated November shooting during trial. Antonetti urges that the two incidents were not part of a common scheme or plan, that the November shooting did not demonstrate motive, opportunity, or identity, and was more prejudicial than probative.
>
> NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of the person in order to show that he acted in conformity therewith." However, evidence of other crimes or wrongs may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."
>
> Notwithstanding that prior bad acts evidence is admissible for limited purposes, "this court has often looked upon the admission of prior bad acts evidence with disfavor because the evidence is often irrelevant and prejudicial, and forces a defendant to defend against vague and unsubstantiated charges." *Rhymes v. State*, 120 Nev. ___, ___, 107 P.3d 1278, 1280 (2005). Therefore, the State bears the burden of establishing the evidence's admissibility at a hearing outside the presence of the jury by demonstrating: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Id.* at ___, 107 P.3d at 1281 (quoting *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). "[T]he decision to admit or exclude such evidence is within the discretion of the trial court and will not be overturned absent a showing that the decision is manifestly incorrect." *Id.*
>
> Where questions are raised as to the credibility of witnesses' trial identification, the need for additional evidence to establish identity is enhanced. *Reed v. State*, 95 Nev. 190, 193, 591 P.2d 274, 276 (1979). If the identity of a perpetrator is in issue, evidence of prior crimes may be admitted in order to prove identity provided the prejudicial effect is outweighed by the evidence's probative value. *See Mayes v. State*, 95 Nev.

> 140, 142, 591 P.2d 250, 251 (1979). Additionally, the prior bad act must demonstrate "characteristics of conduct" unique and common to the defendant and the perpetrator whose identity is in issue. *See generally Coty v. State*, 97 Nev. 243, 627 P.2d 407 (1981).
>
> The November shooting was primarily used to show the identity of the shooter. This was clearly relevant to Antonetti's defense that he was not present at the time the shooting occurred. Because identity was a key issue at trial, we conclude the probative value of the identity of the November shooting outweighed any prejudice to Antonetti.
>
> Therefore, we conclude that the district court did not err in allowing the admission of evidence of the November shooting.

(ECF No. 30-2 at 3-5.)

3. Conclusion

"A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005), *as amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005). "[C]laims deal[ing] with admission of evidence" are "issue[s] of state law," *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009), and "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764 (1990). Therefore, the issue before this Court is "whether the state proceedings satisfied due process." *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). In order for the admission of evidence to provide a basis for habeas relief, the evidence must have "rendered the trial fundamentally unfair in violation of due process." *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)). Not only must there be "no permissible inference the jury may draw from the evidence," but also the evidence must "be of such quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920 (emphasis in original) (citation omitted).

The introduction of evidence that Antonetti shot Smith less than a month before the shootings of Amina and Stewart was detrimental to Antonetti. However, it cannot be concluded that the admission of this evidence rendered his trial fundamentally unfair in violation of due process. *See Estelle*, 502 U.S. at 67; *Sublett*, 63 F.3d at 930; *Jammal*, 926 F.2d at 920. As the Nevada Supreme Court reasonably noted, this evidence was

admitted for the permissible purpose under Nevada law of showing the shooter's identity. *See* NRS § 48.045(2) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as . . . identity."). Antonetti's defense was that Stewart, who testified that Antonetti shot him with a 9-millimeter gun, was mistaken when he identified him as the shooter because although he possessed a 9-millimeter gun on the night of the shooting, Amina and Stewart were shot with a .25-caliber gun. Antonetti alleged that Bartoli must have shot Amina and Stewart and accused Antonetti to protect himself. However, because Smith, who identified Antonetti as the person who shot her, was shot with the same gun as Amina and Stewart, evidence of Smith's shooter assisted in identifying Anima and Stewart's shooter.

Further, "[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court." *Yarborough*, 568 F.3d at 1101 (citing 28 U.S.C. § 2254(d)); *see also Dowling v. United States*, 493 U.S. 342, 352 (1990) (explaining that the Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly"). And importantly, the Supreme Court "has not yet made a ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Id.*

Antonetti is not entitled to federal habeas relief for ground 1.

B. Ground 2—admission of custodial telephone calls

In ground 2, Antonetti alleges that his Fifth and Fourteenth Amendment rights were violated when the state district court improperly admitted his custodial telephone

calls regarding an attempted escape because those telephone calls contained vulgar, sexual, and threatening comments.[3] (ECF No. 19 at 36-37.)

Antonetti included this claim in the appeal of his judgment of conviction, but the Nevada Supreme Court did address it in its order of affirmance. (*See* ECF Nos. 29-27 at 32-35; 30-2.) 28 U.S.C. § 2254(d) generally applies to unexplained as well as reasoned state-court decisions: "[w]hen 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." *Harrington*, 562 U.S. at 99. When the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court "determine[s] what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme] Court." *Id.* at 102.

1. Background information

Kevin Strobeck, a detention sergeant with the Las Vegas Metropolitan Police Department, testified that he found evidence that Antonetti was planning an escape from the Clark County Detention Center prior to trial. (ECF No. 28 at 237, 243.) After finding that evidence, Strobeck listened to approximately 100 telephone calls Antonetti made from the Clark County Detention Center. (*Id.* at 243-45.) Antonetti's counsel objected to the admission of those telephone calls because they "ma[d]e Mr. Antonetti seem like a menace because of the way he talks on the telephone" and Strobeck could "say what was said in the phone calls." (ECF No. 28-1 at 6-7.) The state district court ruled that the State would be allowed to play the telephone calls to the jury, explaining that it was convinced that the prosecutors did "everything possible to pare [the telephone calls]

[3]This Court previously dismissed "the portion of Ground 2 related to the evidence of an escape and related phone calls." (ECF No. 43 at 4.)

down and just get to the essentials of proving there was an attempted escape." (*Id.* at 17.)

The State played portions of nine telephone calls for the jury. In those calls, Antonetti made, *inter alia*, the following comments: "[y]ou're fucking retarded"; "I'm not even playing, you worthless mother-fucker. You better not have no punk ass bitch telling you you [sic] better not call, something like that, some tweaker shit"; "I'll beat Jack up"; "[f]uck that, bitch"; "[h]e's like a hooker on the boulevard"; "[r]etard, retard. God, man, I love that dude. Why is he such a slackard? And short. And he ain't got no chin, fucker"; "[m]other-fucker, you heard me. I didn't stutter, hooker. Spread your cheeks"; "[f]ucking little short wannabee." (*Id.* at 27-31, 36, 39, 45.) After the telephone calls were played, Antonetti's counsel moved for a mistrial. (*Id.* at 64.) The state district court denied the motion, ruling that the comments were "harmless references, joking." (*Id.* at 66.)

2. Conclusion

As discussed in ground 1, the Supreme Court "has not yet made a ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Yarborough*, 568 F.3d at 1101. And it is not clear how this evidence necessarily prevented a fair trial in violation of due process. *See Jammal*, 926 F.2d at 920. Accordingly, fairminded jurists would not disagree that denial of this ground is consistent with prior United States Supreme Court decisions. *See Harrington*, 562 U.S. at 102. Antonetti is not entitled to federal habeas relief for ground 2.[4]

[4]In ground 3, Antonetti alleged that his Fifth, Sixth, and Fourteenth Amendment rights were violated when the state district court excluded bad act evidence by Bartoli. (ECF No. 19 at 38.) In his opposition to the State's motion to dismiss the petition, Antonetti stated, "[t]he state is correct that Ground 3 was procedurally barred by the Nevada Supreme Court." (ECF No. 40 at 7.) As such, this Court noted in its order on the motion to dismiss that "Antonetti . . . withdrew Ground 3 as procedurally barred." (ECF No. 43 at 2 n.2.) However, Antonetti later noted in his reply that "the State did not address this claim in its Answer," so "[f]or the reasons set forth in the Amended Petition, habeas relief must be granted." (ECF No. 51 at 7.) Because Antonetti withdrew ground 3—or failed to move for reconsideration of this Court's order finding that he withdrew ground 3 if he did not intend to do so—this Court will not address ground 3.

C. Ground 6—reference to failure to testify

In ground 6, Antonetti alleges that his Fifth and Fourteenth Amendment rights were violated when the prosecutor referenced his failure to testify. (ECF No. 19 at 47.)

1. Background information

During closing arguments, the prosecutor said: "The issue is: Who shot them? That's what we have been here for the last four days asking ourselves: Who shot these people? Was it Mr. Bartoli? Or was it this defendant? Well, there were only four people in that apartment that night; only four people that could tell us." (ECF No. 28-3 at 49.) Antonetti's counsel objected, and a bench conference was held. (*Id.*) The prosecutor continued: "Four people in that apartment . . . the night of the shooting. The first person, Mary Amina, is dead. She was killed on that night. She can't tell you what happened." (*Id.*) The prosecutor then outlined Stewart's and Bartoli's testimonies and discussed the evidence presented against Antonetti, "the fourth person that was there." (*Id.* at 49-57.)

After closing arguments, outside the presence of the jury, Antonetti's counsel explained that he had objected based on "a Fifth Amendment violation." (*Id.* at 115.) The state district court commented: "Certainly there was no mention about the defendant's right to remain silent being commented on. There was [sic] four witnesses and the State did not go into that." (*Id.*)

2. Standard for prosecutorial misconduct generally

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see also Brown v. Borg*, 951 F.2d

---

Ground 4 was dismissed. (ECF No. 43 at 6.) Ground 5 will be discussed with ground 8(a)(2).

1011, 1017 (9th Cir. 1991) ("Improprieties in closing arguments can, themselves, violate due process."). A court must judge the remarks "in the context in which they are made." *Boyde v. California*, 494 U.S. 370, 385 (1990). "[P]rosecutorial misconduct[ ] warrant[s] relief only if [it] 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

3. Standard for comments on failure to testify

The Fifth Amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also Malloy v. Hogan*, 378 U.S. 1, 6 (1964) ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the State."). A prosecutor's comments on a defendant's failure to testify violates the self-incrimination clause of the Fifth Amendment. *See Griffin v. California*, 380 U.S. 609, 615 (1965); *see also United States v. Robinson*, 485 U.S. 25, 32 (1988) ("Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated."). While the prosecution violates *Griffin* when it "direct[ly] comment[s] about the defendant's failure to testify," the prosecution only violates *Griffin* when it "indirect[ly] comment[s about the defendant's failure to testify] . . . 'if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006) (quoting *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987)). "Reversal is warranted [for *Griffin* error] only where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal." *Id.* (internal quotation marks omitted); *see also Lincoln*, 807 F.2d at 809 ("[C]ourts will not reverse when the prosecutorial comment is a single, isolated

incident, does not stress an inference of guilt from silence as a basis of conviction, and is followed by curative instructions.").

4. State court determination

In affirming Antonetti's judgment of conviction, the Nevada Supreme Court held:

> During closing argument, the prosecutor referred to the fact that there were only four people in the apartment the night of the shootings, and that only four people could tell the jury who the shooter was. Antonetti's attorney immediately objected and the jury convened an off the record discussion at the bench. After the bench discussion, the State made no further comment on Antonetti's failure to testify.
>
> Antonetti argues that his conviction should be overturned because the prosecution improperly commented on his failure to testify during closing argument. Specifically, the prosecutor's statement implied that Antonetti was one of four people who could have explained what happened in the apartment on the night of the shooting.
>
> "Indirect references to a defendant's failure to testify are constitutionally impermissible if 'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.'" *Barron v. State*, 105 Nev. 767, 779 783 P.2d 444, 451-52 (1989). "The context of the prosecutor's comment must be taken into account in determining whether a defendant should be afforded relief." *Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1008 (2000). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comment standing alone." *Knight v. State*, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting *U.S. v. Young*, 470 U.S. 1, 11 (1985)).
>
> We conclude that the prosecutor's statement, when viewed in context, was not an impermissible comment on Antonetti's refusal to testify. *See Bean v. State*, 81 Nev. 25, 36, 398 P.2d 251, 258 (1965)). The statement was merely a prelude to a summary of the testimony from witnesses the State has presented at trial. *See Septer v. Warden*, 91 Nev. 84, 87-88, 540 P.2d 1390, 1392 (1975). Moreover, the statement was not "manifestly intended to be a comment" on Antonetti's failure to testify. Nor, was it "of such a character that the jury would naturally and necessarily take it to be a comment" on Antonetti's failure to testify. We therefore hold that the statement did not amount to prosecutorial misconduct; nor did it infringe upon Antonetti's rights as a criminal defendant.

(ECF No. 30-2 at 6-8.)

5. Conclusion

As the Nevada Supreme Court reasonably determined, the prosecutor's statement that there were "only four people that could tell" what happened the night of the shooting was given as a prelude to its summaries of two of the individuals who were present during the shooting: Stewart and Bartoli. Viewed in context, the comment was not manifestly intended to call attention to Antonetti's failure to testify and was not of such a character that the jury would have taken the comment as referring to Antonetti's failure to testify. *See Hovey*, 458 F.3d at 912; *cf. United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) ("The prosecutor in this case was simply trying to explain the rationale for his burden of proof, rather than calling attention to Gray's decision not to testify."). Accordingly, the Nevada Supreme Court reasonably concluded that the prosecutor's statement was not an impermissible comment in violation of *Griffin*, so there was no prosecutorial misconduct. Antonetti is not entitled to federal habeas relief for ground 6.

D. Ground 7—*Brady*

In ground 7, Antonetti alleges that his Fifth and Fourteenth Amendment rights were violated because the prosecution failed to turn over or present his 9-millimeter gun that was impounded upon his apprehension by law enforcement. (ECF No. 19 at 48.) Antonetti explains that this evidence was exculpatory because it was his defense that "he pulled the 9-millimeter gun that was the only gun Stewart saw, so Bartoli must have pulled and shot the .25 caliber gun that killed Amina and wounded Stewart." (*Id.* at 49.)

1. Background information

Stewart testified that Antonetti shot him and Amina with a black or blue 9-millimeter gun. (ECF No. 27-38 at 62, 107–09.) Stewart saw Antonetti pull out the gun and watched it "extensively," explaining that he was certain it was not silver and was, indeed, a 9-millimeter gun.[5] (*Id.* at 113–14.) However, the evidence presented at

[5]Contrary to Stewart's testimony, Bartoli testified that Antonetti initially pulled out a 9-millimeter gun without a clip during the argument with Amina and Stewart, but Antonetti

Antonetti's trial was that a .25-caliber gun was used to shoot Amina and Stewart—not a 9-millimeter gun. (ECF Nos. 28 at 91, 121; 28-1 at 231–32.) The .25-caliber gun used to shoot Amina and Stewart was never found. (ECF No. 28-1 at 232.) When Antonetti was apprehended by law enforcement, a black Taurus 9-millimeter semi-automatic handgun was found "in the near vicinity." (*Id.* at 72, 82.) Law enforcement impounded that 9-millimeter gun, but it was not presented as evidence at Antonetti's trial. (*Id.* at 80-81.) Consistent with his defense, the prosecution played a recorded telephone call from Antonetti made at the Clark County Detention Center, in which Antonetti stated, "I didn't even have [a small caliber] gun. I had a much bigger gun . . . a nine millimeter." (*Id.* at 163-64.)

2. Standard for a *Brady* claim

"[T]he suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The materiality of the evidence that has been suppressed is assessed to determine whether prejudice exists. *See Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir. 2006). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

---

later "pull[ed] out another gun," a .25 semi-automatic, and shot Amina and Stewart. (ECF No. 7-38 at 143, 168-69, 171-72.)

Accordingly, "[a] 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Bagley*, 473 U.S. at 678).

3. State court determination

In affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held:

> Antonetti claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over evidence related to his possession of a handgun not used in the shooting. This claim is repelled by the record. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). As noted in Antonetti's petition, the State introduced evidence that, during Antonetti's arrest, officers recovered a weapon that was not the same caliber of weapon that was used in the shooting.

(ECF No. 33-13 at 4.)

4. Conclusion

The Nevada Supreme Court reasonably determined that the failure to turn over the 9-millimeter gun to the defense was not a violation of *Brady* because Antonetti fails to demonstrate prejudice. The 9-millimeter gun itself was immaterial. The prosecution introduced evidence that law enforcement recovered a black 9-millimeter gun—the description of which matched Stewart's description of the gun Antonetti brandished the night of the shooting—during Antonetti's arrest. That evidence supported Antonetti's defense that Stewart mistakenly thought Antonetti was the shooter because he was in possession of a 9-millimeter gun, but it was Bartoli who shot Amina and Stewart with a .25-caliber gun and accused Antonetti to protect himself.

Antonetti argues that evidence that a 9-millimeter gun was recovered during his arrest was not enough because "if the jury ha[d] seen it, and seen that it matched the gun described by the surviving victim but not the caliber of the bullets that entered the victims' bodies, it would have provided powerful evidence to support the defense that it was Bartoli, not [him], who shot the victims." (ECF No. 51 at 17.) This conclusory argument lacks merit. Due to this evidence of the 9-millimeter gun's existence and

description, there is no reasonable probability that, had the 9-millimeter gun itself been turned over to the defense and presented to the jury, the result of Antonetti's trial would have been different. *See Bagley*, 473 U.S. at 682.

Antonetti is not entitled to federal habeas relief for ground 7.

E. Grounds 5 and 8—effective assistance of trial counsel

In ground 5, 8(a),[6] 8(b), and 8(c), Antonetti makes various allegations regarding his trial counsel's effectiveness. (ECF No. 19 at 42, 50-51.)

1. Standard for effective assistance of trial counsel

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

Where a state district court previously adjudicated the claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult. *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the United

[6]This Court has divided ground 8(a) into subparts: 8(a)(1) and 8(a)(2).

States Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential, and when the two apply in tandem, review is doubly so. *See id.* at 105; *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal quotation marks omitted) ("When a federal court reviews a state court's *Strickland* determination under AEDPA, both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme Court's description of the standard as doubly deferential."). The Supreme Court further clarified that, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

2. Grounds 5 and 8(a)(2)

In grounds 5 and 8(a)(2), Antonetti alleges that his Sixth Amendment right to counsel was violated because counsel failed to object to the medical examiner's testimony on the grounds that it violated the Confrontation Clause. (ECF No. 19 at 42, 50.)

a. Background information

Dr. Ronald Knoblock, a medical examiner at the Clark County Coroner's Office, testified that he reviewed Dr. Donna Smith's autopsy report of Amina, autopsy photographs, and grand jury testimony because Dr. Smith was no longer employed by the Clark County Coroner's Office at the time of Antonetti's trial. (ECF No. 28 at 76-78.) Dr. Knoblock testified that Dr. Smith performed the autopsy of Amina on December 3, 2002, and that her "external observations were that [Amina] had a gunshot wound of entrance on the right side of her nose . . . [and] a gunshot wound of entrance on the top of her head." (*Id.* at 79.) Dr. Knoblock reported that he was able to identify stippling around the wound on Amina's face, which indicated that the gun was "within two to three feet or so of" Amina when she was shot. (*Id.*) Dr. Knoblock then explained the trajectory of the two bullets after they entered Amina, explained that either wound could have been fatal, and reported that Amina's toxicology report showed methamphetamine in her system. (*Id.* at 80-82.) Dr. Knoblock concurred with Dr. Smith's conclusion that the cause

of Amina's death was multiple gunshot wounds to the head and that the manner of death was homicide. (*Id.* at 87.)

b. State court determination

In affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held:

> Antonetti claimed that counsel should have objected to the medical examiner's testimony because it violated *Crawford v. Washington*, 541 U.S. 36 (2004). We conclude that Antonetti failed to demonstrate that trial counsel acted deficiently for two reasons. First, *Crawford* was decided a year after the medical examiner testified at Antonetti's trial and counsel cannot be faulted for failing to anticipate the decision. *See Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008) ("[C]ounsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where the theory upon which the court's later decision is based is available, although the court had not yet decided the issue." (internal quotation marks omitted)). Second, while the witness described the evidence noted during the autopsy and noted the conclusions, he provided his own independent opinion based on the injuries documented during the autopsy. This testimony did not violate the Confrontation Clause. *See Vega v. State*, 126 Nev. 332, 340 P.3d 632, 638 (2010). Therefore, the district court did not err in denying this claim.

(ECF No. 33-13 at 10-11.)

c. Conclusion

Antonetti's trial took place in November 2003. (*See* ECF No. 27-37 at 2.) Four months later, on March 8, 2004, the United States Supreme Court determined that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Consequently, as the Nevada Supreme Court reasonably concluded, Antonetti's counsel could not have based a challenge to Dr. Knoblock's testimony on *Crawford*. It is true, as Antonetti argues, that *Crawford* was argued before the United States Supreme Court shortly before his trial took place, so counsel should have been aware of the issues in *Crawford* and objected to Dr. Knoblock's testimony for preservation purposes.

(ECF No. 51 at 9.) However, even if *Crawford* was under consideration at the time of Antonetti's trial, he fails to demonstrate that counsel acted deficiently in not raising an argument that was, at the time, unsupported by law. *See Pinkston v. Foster*, 506 Fed. App'x 539, 542 (9th Cir. 2013) ("It was not deficient performance for [petitioner's] appellate counsel not to argue what was, at the time, a losing proposition."). Further, *Crawford* did not clearly establish that autopsy reports are testimonial. *See Meras v. Sisto*, 676 F.3d 1184 (9th Cir. 2012). Thus, because the Nevada Supreme Court's determination constituted an objectively reasonable application of *Strickland*'s performance prong, Antonetti is not entitled to federal habeas relief on ground 5.

3. Ground 8(a)(1)

In ground 8(a)(1), Antonetti alleges that his Sixth Amendment right to counsel was violated because counsel failed to object to the introduction of Jamie Heller's hearsay testimony during the prosecutor's opening statements. (ECF No. 19 at 50.)

a. Background information

During the prosecutor's opening statement, she commented:

> When the defendant was apprehended, he was with his girlfriend and she's a young woman, goes by the name of Jamie Heller. She will be called as a witness in this case.
>
> She's in love with the defendant, and I'm sure you will sense, when you see her testimony, that she is not thrilled about being called as a witness by the State of Nevada.
>
> But Jamie did give an interview to detectives and she explained that her boyfriend had been hanging out with a guy by the name of Michael Bartoli; and she said she knew something about a murder of a young woman and that a young man had gotten shot.
>
> She said that Bartoli and the defendant had gone to the apartment and that the dead girl had a bad mouth, as she put it.
>
> She also explained that she knew something about the two being shot by a small caliber weapon.

(ECF No. 27-38 at 21.)

At trial, outside the presence of the jury, the prosecution said that it intended to call Heller to testify, but Heller and her counsel informed the state district court that Heller intended to "invoke her privilege against self-incrimination." (ECF No. 28-1 at 128-29,

132.) The prosecution offered Heller immunity, but Heller refused to testify. (*Id.* at 131, 218-222.) However, Detective Dan Long testified that Heller "was arrested at the same time and same place as Mr. Antonetti" and that he interviewed her. (ECF No. 28-1 at 135, 152.)

b. State court determination

In affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held:

> Antonetti claimed that trial counsel was ineffective for failing to object to the prosecutor's reference to hearsay evidence during opening arguments. Antonetti failed to demonstrate that counsel acted unreasonably or that he was prejudiced because the prosecutor's statements properly referred to evidence the State intended to introduce at trial. *See Greene v. State*, 113 Nev. 157, 170, 931 P.2d 54, 62 (1997) ("A prosecutor has a duty to refrain from stating facts in opening statement that he [or she] cannot prove at trial."), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *see also Garner v. State*, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962) (noting that appellate courts rarely find error when prosecutor's statement about "certain proof, which is later rejected, will be offered"). Therefore, the district court did not err in denying this claim.

(ECF No. 33-13 at 5-6.)

c. Conclusion

As the Nevada Supreme Court reasonably determined, the prosecutor's opening statement was an objective summary of the testimony she reasonably expected from Heller. Because Heller had not yet indicated her refusal to testify, Antonetti's counsel had no basis to object to the prosecutor's opening statement regarding Heller's expected testimony. Therefore, because the Nevada Supreme Court's determination constituted an objectively reasonable application of *Strickland*'s performance prong, Antonetti is not entitled to federal habeas relief for ground 8(a)(1).

4. Ground 8(b)

In ground 8(b), Antonetti alleges that his Sixth Amendment right to counsel was violated because counsel failed to investigate, secure, and present the 9-millimeter gun to the jury. (ECF No. 19 at 51.)

a. State court determination

In affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held:

> Antonetti claimed that trial counsel should have presented evidence of his possession of a handgun that was not alleged to have been used in the shootings. We conclude that Antonetti failed to demonstrate that trial counsel acted unreasonably or that he was prejudiced because the fact that he had a different weapon at the time of his arrest, a week after the shooting, does not preclude his use of a different weapon earlier. Therefore, the district court did not err in denying this claim.

(ECF No. 33-13 at 6.)

b. Conclusion

It is true that defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, Antonetti fails to articulate what investigation counsel should have made regarding the 9-millimeter gun. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations . . . do not warrant habeas relief."). And regarding securing and presenting the 9-millimeter gun to the jury, as was discussed in ground 7, Antonetti fails to establish how presentation of the 9-millimeter gun itself was necessary. There was evidence presented that law enforcement impounded a 9-millimeter gun—the sole gun Antonetti argues he brought to Amina and Stewart's apartment and was not used to shoot Amina and Stewart. That evidence was beneficial to Antonetti's defense. Accordingly, Antonetti fails to demonstrate that additional evidence in the form of the 9-millimeter gun itself would have changed the result of his trial. Because the Nevada Supreme Court's determination constituted an objectively reasonable application of *Strickland*'s prejudice prong, Antonetti is not entitled to federal habeas relief for ground 8(b).

5. Ground 8(c)

In ground 8(c), Antonetti alleges that his Sixth Amendment right to counsel was violated because counsel failed to object to Detective Long's testimony interpreting

Antonetti's "code words" during his custodial telephone calls on the grounds that Detective Long was not an expert and there was no foundation established for his interpretations. (ECF No. 19 at 51.)

a. Background information

Detective Long testified that he listened to "[m]ore than 500" telephone calls made by Antonetti. (ECF No. 28-1 at 135, 155.) After reading the transcripts of some of those calls to the jury, Detective Long testified that "inmates sometimes speak in code languages." (*Id.* at 169.) Detective Long explained that Antonetti used several code words for gun: "[t]hey begin by using the word 'thingy'. [sic] They use toothbrush. I believe, at one time, they used paperwork." (*Id.*) Detective Long also explained that Antonetti's code word for ammunition was "batteries." (*Id.* at 171.) Antonetti's counsel "object[ed] to supposition on thingies." (*Id.*) The state district court responded, "[y]ou can certainly cross-examine on it. He says in his experience and looking at the whole thing." (*Id.*)

b. State court determination

In affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held:

> Antonetti argued trial counsel should have objected to lay opinion testimony during the Amina/Stewart trial about the coded slang Antonetti used in jail phone calls. Antonetti failed to demonstrate deficient performance or prejudice because trial counsel objected to the detective's testimony in which he defined some of the coded words Antonetti used in the conversations, the district court sustained the objection, the context of many of the coded calls indicates that the language refers to firearms or illicit items absent the opinion testimony, and there was sufficient evidence of Antonetti's guilt even without testimony about his recorded phone calls. Therefore, the district court did not err in denying this claim.

(ECF No. 33-13 at 9.)

c. Conclusion

Counsel objected to Detective Long's testimony concerning his beliefs regarding Antonetti's code word for guns. As such, counsel's performance was reasonable.

Further, Antonetti fails to demonstrate prejudice since the state district court permitted Long's testimony based on his "experience" and familiarity with the telephone calls. Because the Nevada Supreme Court's determination constituted an objectively reasonable application of *Strickland*'s performance and prejudice prongs, Antonetti is not entitled to federal habeas relief for ground 8(c).

F. Ground 9—effective assistance of appellate counsel

In ground 9, Antonetti alleges that his Sixth Amendment right to counsel was violated because appellate counsel failed to challenge the introduction of evidence of the escape plot on direct appeal. (ECF No. 19 at 52.)

1. Background information

As mentioned in ground 2, detention officer Strobeck testified that he found evidence that Antonetti and several other inmates were planning an escape from the Clark County Detention Center prior to Antonetti's trial. (ECF No. 28 at 237, 243.) Strobeck explained that he "found a hole in the window" of a module at the Clark County Detention Center and other officers "located a rope and some hack saw blades and some saws and some gloves." (*Id.* at 238, 242.) Strobeck contacted Antonetti regarding the attempted escape and found that Antonetti "had several cuts on his hand, consistent with scraping against his glass." (*Id.* at 240.)

2. Standard for effective assistance of appellate counsel

When the ineffective assistance of counsel claim is based on appellate counsel's actions, a petitioner must show "that [appellate] counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them" and then "that, but for his [appellate] counsel's unreasonable failure to file a merits brief, [petitioner] would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

3. State court determination

In affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held:

> Antonetti claimed that appellate counsel should have challenged the introduction of evidence about his escape attempt. We conclude that Antonetti failed to demonstrate deficient performance or prejudice because evidence that Antonetti attempted to escape custody was admissible to show his consciousness of guilt. *See Reese v. State*, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979). Therefore, the district court did not err in denying this claim.

(ECF No. 33-13 at 7.)

4. Conclusion

Because the Nevada Supreme Court, the final arbiter of Nevada law, determined that evidence of Antonetti's attempted escape was admissible under Nevada law, Antonetti fails to demonstrate that inclusion of this ground in his direct appeal would have been successful. *See Smith*, 528 U.S. at 285. Thus, because the Nevada Supreme Court reasonably determined that Antonetti failed to demonstrate prejudice, Antonetti is not entitled to federal habeas relief for ground 9.[7]

G. Ground 11—cumulative error

In ground 11, Antonetti alleges that he is entitled to habeas relief based on cumulative error. (ECF No. 19 at 53.) In affirming Antonetti's judgment of conviction, the Nevada Supreme Court held that "if any errors were committed at trial, they were harmless in light of substantial evidence of guilt," so "Antonetti's cumulative error argument lacks merit." (ECF No. 30-2 at 15.) And in affirming, in part, and reversing, in part, the denial of Antonetti's state habeas petition, the Nevada Supreme Court held: "Antonetti claimed that the cumulative effect of counsel's errors warrants relief. As Antonetti failed to demonstrate any error, we conclude that no relief is warranted on this claim." (ECF No. 33-13 at 11.)

[7]In ground 10, Antonetti alleged that he is entitled to habeas relief because he is innocent. (ECF No. 19 at 52.) In his opposition to the State's motion to dismiss the petition, Antonetti withdrew ground 10. (ECF No. 40 at 6.) As such, this Court noted in its order on the motion to dismiss that Antonetti withdrew "Ground 10 as unexhausted." (ECF No. 43 at 2 n.2.) However, Antonetti included ground 10 in his reply, noting that "[t]he State did not address this [ground] in its Answer, so nothing more needs to be added." (ECF No. 51 at 7.) Because Antonetti withdrew ground 10, Respondents had no need to answer it, and this Court will not address it.

Cumulative error applies where, "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004) (explaining that the court must assess whether the aggregated errors "'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" (citing *Donnelly*, 416 U.S. at 643). Because there are no errors to accumulate, Antonetti is not entitled to federal habeas relief for ground 11.[8]

V. CERTIFICATE OF APPEALABILITY

This is a final order adverse to Antonetti. Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability ("COA"). Therefore, this 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 this Court's procedural ruling was correct. *See id*.

Applying these standards, this Court finds that a certificate of appealability is unwarranted.

///

///

[8]Antonetti requests that an evidentiary hearing be conducted. (ECF No. 19 at 53.) Antonetti fails to explain why an evidentiary hearing is needed or what evidence would be presented at an evidentiary hearing. Antonetti's request for an evidentiary hearing is denied.

VI. CONCLUSION

It is therefore ordered that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 19) is denied.

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

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

DATED THIS 9th Day of December 2021.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER OF THE SUPREME COURT OF NEVADA

JUNE 15, 2017

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ANTONETTI, A/K/A JOSEPH ANTOINETTI, A/K/A JOSEPH GOZDZIEWICZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68312

FILED

JUN 15 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from judgments of the district court denying postconviction petitions for writs of habeas corpus.[1] Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

A jury convicted appellant Joseph Antonetti of first-degree murder with the use of a deadly weapon for the death of Mary Amina, attempted murder with the use of a deadly weapon for the attempt on Daniel Stewart's life, and felon in possession of a firearm. The district court entered the judgment of conviction on February 27, 2004. This court affirmed the judgment of conviction. *Antonetti v. State*, Docket No. 42917 (Order of Affirmance, December 20, 2005). In a separate trial, a jury convicted Antonetti of the attempted murder of Suzanne Smith. The district court entered the judgment of conviction on July 22, 2004. This

[1]Appellant was initially represented by counsel in this appeal but he later moved to dismiss counsel and proceed pro se.

court affirmed the judgment of conviction. *Antonetti v. State,* Docket No. 43221 (Order of Affirmance, December 20, 2005).

Antonetti filed petitions and supplemental petitions challenging both judgments. Antonetti filed a timely pro se petition challenging the Amina/Stewart judgment on October 23, 2006. The district court appointed counsel and a supplemental petition was filed in 2009. Antonetti also filed a pro se petition challenging the Smith judgment in 2009. The district court denied that petition as successive, but this court reversed, concluding that the district court could not deny the petition as successive as it had not yet resolved an earlier petition (filed in 2006). *See Antonetti v. State,* Docket No. 53197 (Order of Reversal and Remand, June 5, 2009). Moreover, this court noted that the 2009 petition in the Smith case also challenged a different judgment of conviction than the 2006 petition. *Id.* at 3 n.4. Upon remand, counsel was appointed to represent Antonetti with respect to the petitions in both cases. After two substitutions of counsel, a supplemental petition was filed in 2014, which raised claims related to both cases. The district court denied the petitions on August 21, 2015. Antonetti contends that the district court erred.

Petitions challenging the Amina/Stewart judgment

2006 Petition

In the 2006 petition, Antonetti claimed that the State and district court erred in admitting evidence of the Smith shooting, the prosecution committed misconduct by commenting on Antonetti's failure to testify, the State failed to provide notice of the grand jury proceedings, and the State failed to disclose inducements offered to a witness. These

claims were previously rejected by this court on the merits, *see Antonetti v. State*, Docket No. 42917, Order at 2-11, and further consideration of them is barred, *see Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (explaining that reconsideration of claims denied on their merits is barred by the law-of-the-case doctrine).[2]

Antonetti also claimed the State improperly elicited hearsay testimony about an anonymous tip, the district court erred in not admitting bad act testimony about a State witness, and a sleeping juror deprived him of a fair trial. These claims are procedurally barred as they could have been raised in prior proceedings and Antonetti failed to demonstrate good cause for not raising these claims earlier. *See* NRS 34.810(1)(b)(3).

Next, Antonetti claimed that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over evidence related to his possession of a handgun not used in the shooting. This claim is repelled by the record. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). As noted in Antonetti's petition, the State introduced evidence that, during Antonetti's arrest, officers recovered a weapon that was not the same caliber of weapon that was used in the shooting.

---

[2]Antonetti also claimed that this court failed to conduct adequate review of his direct appeal and misapprehended material facts related to his direct appeal. This argument was previously considered by this court, *see Antonetti v. State*, Docket No. 42917 (Order Denying Rehearing, February 14, 2006), and further consideration of it is barred, *see Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99.

Antonetti also made several claims of ineffective assistance of trial and appellate counsel.[3] To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*); *see also Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id.* at 690. A petitioner is entitled to an evidentiary hearing when the claims asserted are more than bare allegations and are supported by specific factual allegations not belied or repelled by the record that, if true, would entitle the petitioner to relief. *See Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008).

First, Antonetti claimed that trial counsel was ineffective for failing to object to the prosecutor's reference to hearsay evidence during opening arguments. Antonetti failed to demonstrate that counsel acted

---

[3]To the extent that Antonetti raises these claims independent of a claim of ineffective assistance of trial or appellate counsel, these claims are procedurally barred pursuant to NRS 34.810(1)(b), and Antonetti failed to demonstrate good cause and actual prejudice.

unreasonably or that he was prejudiced because the prosecutor's statements properly referred to evidence the State intended to introduce at trial. *See Greene v. State*, 113 Nev. 157, 170, 931 P.2d 54, 62 (1997) ("A prosecutor has a duty to refrain from stating facts in opening statement that he [or she] cannot prove at trial."), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *see also Garner v. State*, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962) (noting that appellate courts rarely find error when prosecutor's statement about "certain proof, which is later rejected, will be offered"). Therefore, the district court did not err in denying this claim.

Second, Antonetti claimed that trial counsel should have presented evidence of his possession of a handgun that was not alleged to have been used in the shootings. We conclude that Antonetti failed to demonstrate that trial counsel acted unreasonably or that he was prejudiced because the fact that he had a different weapon at the time of his arrest, a week after the shooting, does not preclude his use of a different weapon earlier. Therefore, the district court did not err in denying this claim.

Third, Antonetti claimed that trial counsel should have investigated jail phone calls by Michael Bartoli, a witness for the State. We conclude that Antonetti fails to demonstrate that the district court erred in denying this claim because Antonetti did not describe what evidence counsel should have uncovered by examining Bartoli's recorded calls.

Fourth, Antonetti claimed that trial counsel should have sought a continuance to prepare for testimony about the Smith shooting

and his attempted escape. Antonetti, however, does not identify what further evidence counsel may have discovered and introduced had counsel sought a continuance. Therefore, he did not meet his burden of demonstrating that counsel's performance was deficient or that he was prejudiced. The district court thus did not err in denying this claim.

Fifth, Antonetti claimed that appellate counsel should have challenged the introduction of evidence about his escape attempt. We conclude that Antonetti failed to demonstrate deficient performance or prejudice because evidence that Antonetti attempted to escape custody was admissible to show his consciousness of guilt. *See Reese v. State*, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979). Therefore, the district court did not err in denying this claim.

Sixth, Antonetti claimed that appellate counsel should have argued that the cumulative effect of erroneous evidentiary rulings and instances of prosecutorial misconduct warranted relief. Antonetti failed to demonstrate deficient performance or prejudice. Several of the trial errors underlying this claim were raised on appeal, but this court concluded they were harmless or did not constitute error. *See Antonetti*, Docket No. 42917, Order at 2-11. As to the remaining part of this claim, Antonetti merely listed the omitted errors without further argument about whether counsel's failure to raise them as cumulative error was unreasonable or explanation as to how the errors worked in conjunction to prejudice him. To that extent, we decline to consider this ineffective-assistance claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.3d 3, 6 (1987) (declining to consider claims not supported by cogent argument or relevant legal authority).

Seventh, Antonetti claimed that trial counsel failed to inform him of his right to testify before the grand jury pursuant to *Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989). Because Antonetti did not identify what evidence he intended to offer during grand jury proceedings that would have prevented his indictment, he failed to demonstrate prejudice. Therefore, the district court did not err in denying this claim.

Eighth, Antonetti contended that trial counsel failed to suppress evidence illegally seized from his vehicle. Antonetti failed to demonstrate that trial counsel neglected to pursue a meritorious motion to suppress evidence. Officers discovered Antonetti's vehicle while lawfully searching a home pursuant to the homeowner's consent. *See State v. Plas*, 80 Nev. 251, 254, 391 P.2d 867, 868 (1964) ("[A] waiver and consent, freely and intelligently given, converts a search and seizure which otherwise would be unlawful into a lawful search and seizure."). As he did not assert that the officers lacked probable cause to search the vehicle in which they found him, Antonetti has not pleaded sufficient facts to show that the search of his vehicle was unreasonable. *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (providing that police may search a readily mobile vehicle without a warrant so long as they have probable cause to do so). Therefore, the district court did not err in denying this claim.

Ninth, Antonetti claimed that trial counsel should have presented expert testimony on methamphetamine use as every eyewitness to the shooting had ingested methamphetamines. He also asserted counsel should have requested a special instruction on addict-witness testimony. We conclude that Antonetti failed to demonstrate that he was prejudiced by counsel's omissions. Although the witnesses had used

methamphetamine, their testimony was consistent that Antonetti shot the victims and was corroborated by the forensic evidence showing that the weapon used in the shooting had been used in an earlier shooting by Antonetti. Therefore, the district court did not err in denying this claim.

September 2009 supplement

In the 2009 supplemental petition, Antonetti argued trial counsel should have objected to lay opinion testimony during the Amina/Stewart trial about the coded slang Antonetti used in jail phone calls. Antonetti failed to demonstrate deficient performance or prejudice because trial counsel objected to the detective's testimony in which he defined some of the coded words Antonetti used in the conversations, the district court sustained the objection, the context of many of the coded calls indicates that the language refers to firearms or illicit items absent the opinion testimony, and there was sufficient evidence of Antonetti's guilt even without testimony about his recorded phone calls. Therefore, the district court did not err in denying this claim.[4]

November 2014 supplement

In his November 2014 supplemental petition, Antonetti first claimed that trial counsel should have subpoenaed Bartoli's phone calls sooner so that counsel could have used the contents of those calls to impeach Bartoli. Antonetti's claim does not describe the contents of the

---

[4]Antonetti also claimed in the 2006 petition that trial counsel should have objected to this testimony. We conclude that he failed to demonstrate that the district court erred in denying this claim for the reasons discussed above.

recorded phone calls or how they would undermine Bartoli's trial testimony. As such, he failed to demonstrate deficient performance or prejudice. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Second, Antonetti claimed that trial counsel should have objected to Tiffany Amina's testimony identifying her sister, Mary, from an autopsy photograph. Antonetti failed to demonstrate deficient performance. The testimony was brief, was not objectionable, and was not unnecessarily cumulative. *See* NRS 48.035(2) (providing that relevant evidence may be excluded if its probative value is substantially outweighed by undue delay, waste of time or needless presentation of cumulative evidence). Therefore, the district court did not err in denying this claim.

Third, Antonetti claimed that counsel should have objected to the medical examiner's testimony because it violated *Crawford v. Washington*, 541 U.S. 36 (2004). We conclude that Antonetti failed to demonstrate that trial counsel acted deficiently for two reasons. First, *Crawford* was decided a year after the medical examiner testified at Antonetti's trial and counsel cannot be faulted for failing to anticipate the decision. *See Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008) ("[C]ounsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where the theory upon which the court's later decision is based is available, although the court had not yet decided the issue." (internal quotation marks omitted)). Second, while the witness described the evidence noted during the autopsy and noted the conclusions, he provided his own independent opinion based on the

injuries documented during the autopsy. This testimony did not violate the Confrontation Clause. *See Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010). Therefore, the district court did not err in denying this claim.

Fourth, Antonetti claimed that trial counsel should have objected, pursuant to *Crawford*, to the firearms examiner's testimony. We conclude that Antonetti failed to demonstrate that trial counsel acted deficiently. The firearm examiner's testimony described his own analysis and conclusions and did not describe the work of another expert. Therefore, the district court did not err in denying this claim.

Fifth, Antonetti claimed that the cumulative effect of counsel's errors warrants relief. As Antonetti failed to demonstrate any error, we conclude that no relief is warranted on this claim.

Petitions challenging the Smith judgment

2008 Petition

Antonetti filed a pro se petition for a writ of habeas corpus challenging his conviction stemming from the Smith shooting on September 23, 2008. The district court dismissed the petition as procedurally barred for failure to reference the 2006 petition in violation of NRS 34.810(4). This court reversed the district court order concluding that the petition was not successive because the 2006 petition challenged the Amina/Stewart judgment whereas the 2008 petition was the first petition challenging the Smith judgment. *Antonetti v. State*, Docket No. 53197 (Order of Reversal and Remand, June 5, 2009).

Antonetti filed his 2008 petition more than one year after the remittitur from his direct appeal issued on January 17, 2006. *Antonetti v.*

State, Docket No. 43221 (Order of Affirmance, December 20, 2005). Therefore, the petition was untimely filed and procedurally barred absent a demonstration of good cause and prejudice. *See* NRS 34.726(1).

First, Antonetti contends that the district court erred in failing to consider the ineffective assistance of postconviction counsel as good cause. He asserts that counsel had been appointed to represent him in both cases as of 2009 but had failed to file supplemental pleadings related to the 2008 petition. This argument lacks merit because the ineffective assistance of postconviction counsel is not good cause where, as here, the appointment of counsel in postconviction proceedings was not statutorily or constitutionally required. *See Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

Second, Antonetti attributed the delay in filing to the failure to inform him of the status of his direct appeal. The record does not repel this assertion. It is unclear when Antonetti learned that his judgment of conviction had been affirmed or whether he could have reasonably learned of the denial at an earlier time. This information is critical to ascertain whether a petition could have reasonably met the stringent deadline imposed by NRS 34.726 given that a petitioner is not likely to pursue postconviction relief while he reasonably believes his direct appeal is pending. *See Hathaway*, 119 Nev. at 254, 71 P.3d at 507. As the record is unclear when Antonetti learned or should have learned of the resolution of his direct appeal, an evidentiary hearing is necessary to determine whether he actually believed his direct appeal was still pending when he filed this petition and whether that belief was objectively reasonable.

Therefore, we reverse the district court's decision to deny this good cause claim without conducting an evidentiary hearing.

November 2014 supplement

As to the claims related to the Smith judgment asserted in the 2014 supplemental petition, we conclude that the district court erred in denying these claims for the reasons discussed above.

Having considered Antonetti's claims and concluded that remand is necessary for the purpose of determining whether Antonetti established good cause to excuse his delay in asserting claims related to the Smith judgment, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Jessie Elizabeth Walsh, District Judge
Joseph Antonetti
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[5]We have considered all pro se documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.