

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

AUG 24 2023

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

JACOB SMITH,

Petitioner-Appellant,

v.

ISIDRO BACA, Warden; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 20-15278

D.C. No.  
3:14-cv-00512-MMD-CLB

**MEMORANDUM\***

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

Submitted August 21, 2023\*\*  
San Francisco, California

Before: BUMATAY, KOH, and DESAI, Circuit Judges.

Nevada state inmate Jacob Smith appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for first-degree murder. A screening panel of this court granted Smith's application for a certificate

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

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

of appealability with respect to his claim that the state justice court violated his right to self-representation at his preliminary hearing under *Faretta v. California*, 422 U.S. 806 (1975), and whether that claim was properly exhausted. We did not previously grant a certificate of appealability regarding Smith's self-representation claim stemming from the state district court. We review de novo the district court's denial of a habeas corpus petition. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

1. Assuming that Smith properly exhausted his claim, the federal district court correctly held that Smith cannot show that the state court's decision was contrary to federal law. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *see also* *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) ("[A] federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim."). Under the Antiterrorism and Effective Death Penalty Act, habeas relief is warranted only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court," or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Here, Smith challenges the justice court's decision to not allow him to proceed pro se during the preliminary hearing. He cannot show that this decision was contrary to clearly established Federal law because the Supreme Court has not spoken on whether *Farettta* rights apply at a preliminary hearing. Smith identifies no dispositive Supreme Court case on this point. While *Farettta* established the right to self-representation *at trial*, 422 U.S. at 834, no Supreme Court case extends that right of self-representation to a preliminary hearing. Accordingly, we cannot say that the justice court's decision was contrary to Federal law under *Farettta*.

2. Under Circuit Rule 22-1(e), we construe Smith's briefing on the uncertified issues regarding *Farettta* rights at trial before the state district court, prosecutorial misconduct,<sup>1</sup> and burden of proof as a motion to expand the certificate of appealability. After considering Smith's amended arguments, we deny the motion. Smith cannot make a substantial showing of the denial of a constitutional right. *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) (quoting *Nardi v. Stewart*, 354 F.3d 1134, 1138 (9th Cir. 2004)).

**AFFIRMED.**

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<sup>1</sup> On August 16, 2023, the court received Smith's *pro se* motion to amend his opening brief to amend his uncertified issues to include prosecutorial misconduct. Dkt. No. #76. We **GRANT** the motion and accept Smith's amended arguments regarding uncertified issues. Dkt. No. #77.

1  
2  
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 \* \* \*

6 JACOB SMITH,

7 v.

Petitioner,

9 ISIDRO BACA, *et al.*,

10 Respondents.

Case No. 3:14-cv-00512-MMD-CLB

11 ORDER

12 **I. SUMMARY**

13 Petitioner Jacob Smith, a Nevada prisoner, filed a counseled first amended petition  
14 for writ of habeas corpus (“Amended Petition”) (ECF No. 18) pursuant to 28 U.S.C.  
15 § 2254<sup>1</sup>. This matter comes before the Court for a final decision. For the reasons  
16 discussed below, the Court denies the Amended Petition.

17 **II. BACKGROUND**

18 Smith challenges a 2007 judgment of conviction entered by the Second Judicial  
19 District Court for Washoe County (“state district court” or “trial court”), pursuant to a jury  
20 verdict, for the first-degree murder of Richard Duarte with a deadly weapon. On May 9,  
21 2006, Duarte was killed in Sparks, Nevada, by a gunshot wound to the head. (ECF No. 22-  
22 15 at 2.) Smith was sentenced to a term of life without the possibility of parole with a like  
23 consecutive term for the weapon enhancement. (ECF No. 22-6.) Smith appealed, and the  
24 Nevada Supreme Court affirmed in May 2009. (ECF No. 22-15.)

25 Smith filed a state petition for writ of habeas corpus seeking post-conviction relief.  
26 (ECF No. 23.) The state district court denied relief. (ECF No. 23-10.) Smith appealed, and

27  
28 <sup>1</sup> Respondents have filed an answer (ECF No. 36), and Smith has replied (ECF  
No. 39).

1 the Nevada Supreme Court affirmed in September 2014. (ECF No. 23-16.)

2 In October 2014, Smith initiated this federal habeas corpus proceeding *pro se*.  
 3 (ECF No. 1.) The Court appointed counsel to represent him. (ECF No. 5.) Counsel filed  
 4 the amended petition in May 2016. Respondents then sought dismissal (ECF No. 24),  
 5 which the Court denied and ordered Respondents to file an answer. (ECF No. 30.)

6 **III. STANDARD OF REVIEW**

7 The standard of review generally applicable in habeas corpus cases is set forth in  
 8 the Antiterrorism and Effective Death Penalty Act (“AEDPA”):

9 An application for a writ of habeas corpus on behalf of a person in custody  
 10 pursuant to the judgment of a State court shall not be granted with respect  
 11 to any claim that was adjudicated on the merits in State court proceedings  
 12 unless the adjudication of the claim –

13 (1) resulted in a decision that was contrary to, or involved an  
 14 unreasonable application of, clearly established Federal law, as  
 15 determined by the Supreme Court of the United States; or  
 16 (2) resulted in a decision that was based on an unreasonable  
 17 determination of the facts in light of the evidence presented in the  
 18 State court proceeding.

19 28 U.S.C. § 2254(d). A state court decision is “contrary to” clearly established federal law  
 20 if it applies a rule that contradicts the governing law established in Supreme Court cases  
 21 or if the decision addresses facts materially indistinguishable from a Supreme Court case  
 22 but reaches a different conclusion. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state  
 23 court decision is an unreasonable application of clearly established Supreme Court  
 24 precedent “if the state court identifies the correct governing legal principle from [the  
 25 Supreme] Court’s decisions but unreasonably applies that principle to the facts of the  
 26 prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quotation omitted). “[C]learly  
 27 established Federal law for purposes of § 2254(d)(1) includes only the holdings, as  
 28 opposed to the dicta, of [the Supreme] Court’s decisions.” *White v. Woodall*, 572 U.S. 415,  
 419 (2014) (quotation omitted). An “‘unreasonable application of’ those holdings must be  
 ‘objectively unreasonable,’ not merely wrong; even ‘clear error’ will not suffice.” *Id.* (quoting  
*Lockyer*, 538 U.S. at 75–76). Where no Supreme Court decision squarely addresses “the

1 specific question presented" by a habeas petitioner, the state court's decision cannot be  
 2 contrary to, nor an unreasonable application of, Supreme Court precedent. *Lopez v.*  
 3 *Smith*, 574 U.S. 1, 4 (2014) (per curiam).

4 To obtain federal habeas relief, "a state prisoner must show that the state court's  
 5 ruling on the claim being presented in federal court was so lacking in justification that there  
 6 was an error well understood and comprehended in existing law beyond any possibility for  
 7 fairminded disagreement." *White*, 572 U.S. at 419–20 (quoting *Harrington v. Richter*, 562  
 8 U.S. 86, 103 (2011)). The Supreme Court has explained "that even a strong case for relief  
 9 does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S.  
 10 at 102 (citing *Lockyer*, 538 U.S. at 75); see also *Cullen v. Pinholster*, 563 U.S. 170, 181  
 11 (2011) (describing the standard as a "difficult to meet" and "highly deferential," which  
 12 "demands that state-court decisions be given the benefit of the doubt" (internal quotation  
 13 marks and citations omitted)). When a state court summarily rejects a claim, it is the  
 14 petitioner's burden to show that "there was no reasonable basis for the state court to deny  
 15 relief." *Richter*, 562 U.S. at 98.

16 **IV. DISCUSSION**

17 The Amended Petition asserts five grounds for relief. (ECF No. 18 at 11–25.) The  
 18 Court will address each ground in turn.

19 **A. Ground 1 – Right to Self-Representation**

20 Smith's Amended Petition contends:

21 The Trial Court Denied Smith his Right to Self-Representation, in Violation  
 22 of Smith's Fourth, Fifth, and Fourteenth Amendment rights, by Denying  
 23 Smith's Unequivocal Request for Self-Representation Based on Smith's  
 24 Incomplete Knowledge of Legal Proceedings Which is an Improper Basis for  
 25 the Denial.

26 (ECF No. 18 at 11.)<sup>2</sup>

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27 <sup>2</sup>Although the headings in the Amended Petition and reply state that Ground 1 is  
 28 based on violations of Smith's rights under the Fourth, Fifth, and Fourteenth Amendments,  
 Smith's arguments for this claim only address the right to self-representation under the  
 Sixth Amendment. (See ECF No. 18 at 11–15; ECF No. 39 at 5–12.) Given that Smith  
 presents no principled argument in support of claims under the other amendments, the  
 Court limits its analysis to the Sixth Amendment.

1                   **1.     Background Relevant to Ground 1**

2                   In March 2007, Smith invoked his right to self-representation at the justice court  
 3 level before his preliminary hearing. (ECF No. 19-7 at 5–14.) The justice court conducted  
 4 a *Farett*a canvass of Smith and then stated that argument would be heard. (*Id.* at 14–24.)

5                   THE COURT: Okay. I think we've been through everything we need to go  
 6 through. Okay, I will hear argument, Mr. Smith.

7                   THE DEFENDANT: Argument that says I want this case dismissed.

8                   THE COURT: No. On why you should be able to represent yourself.

9                   THE DEFENDANT: Because that's my right, my constitutional right, I want  
 10 to represent myself . . .

11                   THE COURT: The question before me is whether the defendant should be  
 12 allowed to represent himself at this stage of the proceedings . . . [a]nd  
 13 basically I have to ask the following questions.

14                   First, does the defendant appear to understand the nature of the  
 15 proceedings? I believe he does. I think clearly from his ability to answer the  
 16 questions coherently, he does.

17                   Secondly, is he voluntarily exercising an informed free will? I think his will is  
 18 free. *My problem here is I don't know how informed the defendant is. I don't*  
*think he understands the significance of the proceeding as expressed when*  
*I asked him to argue to the Court in support of his motion, because I said:*  
*Mr. Smith, argue. His response was that he wanted to argue for his case to*  
*be dismissed. And that right there shows me that he does not understand*  
*the nature of the legal proceedings.*

19                   So at this time I'm going to deny your motion. *You can remake the motion*  
*before the District Court if this case proceeds further, if there is sufficient*  
*evidence to hold you, so that you don't necessarily lose anything.*

20                   (*Id.* at 24–27 (emphasis added).) Thereafter, the preliminary hearing went forward, and  
 21 the justice court bound the case over to the state district court for trial. (*Id.* at 127–28.)

22                   In May 2007, two weeks before trial, Smith complained to the trial court that he  
 23 "never talked to [his] lawyer." (ECF No. 19-10 at 5.) The judge responded, "I hear stuff like  
 24 that all the time, and it's pretty obvious . . . that you two have talked . . . Maybe he's not  
 25 saying what you want him to hear, but I'm positive that you have talked." (*Id.*)

26                   On the first day of trial, June 4, 2007, defense counsel informed the trial court that  
 27 Smith wanted to make a record regarding counsel's representation. (ECF No. 20 at 5.)  
 28 Smith again complained about his counsel:

1 THE DEFENDANT: [my counsel] [a]re generally being ineffective in helping  
2 me. And I tried to voice this opinion already, and they're still representing  
3 me. I've received really no help.

4 I've tried to offer them notes. They never took my notes. I don't know what  
5 my exact defense is in this case. I just I feel they're not helping me. They  
6 filed no motions. And I wanted to file some motions, but anything that I do,  
7 my understanding, would be through a fugitive document.

8 So I just want to put on the record that I feel this is ineffective assistance of  
9 my counsel. That's pretty much it.

10 (Id. at 5–6.) Smith also told the judge, “I just don’t feel we’re prepared for trial at all. . . .

11 And I just – I feel misrepresented.” (Id. at 10.)

12 As the parties continued to discuss whether the defense was ready for trial, defense  
13 counsel reminded the judge that Smith previously attempted to waive counsel and  
14 represent himself during the justice court proceeding:

15 MR. CALVERT: Mr. Smith made a motion at the preliminary hearing to  
16 represent himself, and a *Faretta* hearing was handled on that, and it was  
17 denied at that time.

18 I got information through my investigator that it appeared Mr. Smith still  
19 wanted to pursue representing himself, and so we raised that issue at the  
20 arraignment phase.

21 I don’t know if you remember when we were in here. He told me before the  
22 case was actually called that he didn’t want to do that anymore. So we went  
23 through an arraignment in which the Court had to enter a plea of not guilty  
24 on his behalf and set a trial date for him within 60 days.

25 (Id. at 6–7.) The prosecutor also noted that Smith requested self-representation and a  
26 speedy trial during the justice court proceedings. (Id. at 11.) He understood that Smith was  
27 no longer seeking to waive counsel, but Smith did not waive his speedy trial right. (Id. at  
28 12 (stating, “after [Smith] was bound over, as I understand from Mr. Calvert, he is no longer  
requesting to represent himself”)). The prosecutor expressed his belief that “Smith  
probably would never be happy” with his counsel and asked that the trial proceed as  
scheduled. (Id. at 13–14.) Smith denied the prosecutor’s assertion, claiming “I never had  
a conflict with them.” (Id. at 15.) The state district court denied a continuance and the trial  
began the same day. (Id. at 16–17.)

1 In Smith's direct appeal, the Nevada Supreme Court provided the relevant  
 2 background and held as follows:

3 A preliminary examination was held on March 29, 2007, in the Justice Court  
 4 of Sparks Township. During the preliminary hearing, the district court heard  
 Smith's motion to waive counsel and represent himself.

5 Justice of the Peace Mary Kandaras conducted a self-representation  
 6 canvass at the preliminary hearing. After conducting the canvass, Kandaras  
 7 denied Smith's motion to represent himself because she determined that  
 Smith was not legally qualified to represent himself. Upon the denial of  
 Smith's motion, Kandaras conducted a preliminary hearing and bound Smith  
 over for trial.

8 Smith argues that the justice court abused its discretion in denying his  
 9 motion and request to represent himself, which forced continued legal  
 10 representation upon him. Smith further argues that the justice court abused  
 11 its discretion because it denied his motion based on the belief that he did not  
 12 understand the nature or significance of the legal proceedings. Smith  
 13 contends that the justice court's stated reason for denying his motion for self-  
 14 representation was in violation of our holding in *Graves v. State*, 112 Nev.  
 118, 124, 912 P.2d 234, 238 (1996) (holding that when conducting a canvas,  
 the only question for the court to examine is whether the defendant  
 "competently and intelligently" chose self-representation, not whether he  
 was able to "competently and intelligently" represent himself). Smith  
 therefore argues that because the justice court abused its discretion, his  
 conviction in the district court is invalid.

15 Without conceding that Smith's argument is correct, the State argues that  
 16 Smith waived his right to self-representation by failing to renew his motion to  
 17 waive counsel at the district court level. The State further contends that by  
 18 failing to renew his motion Smith acquiesced to his publicly appointed  
 19 counsel because the justice court informed him of his right to renew the  
 20 motion. We agree with the State's argument in light of our recent decision in  
*Hooks v. State*, 124 Nev. [sic], 176 P.3d 1081, 1086–87 (2008) (holding  
 that it was reversible error for a district court to fail to perform a *Farella*  
 canvass when a criminal defendant asserted the right to self-representation  
 even if a canvass had been performed by the justice court).

21 In reviewing a lower court's denial of a motion to waive counsel and  
 22 represent one's self, we will reverse a conviction only if the court abused its  
 23 discretion. See *Gallego v. State*, 117 Nev. 348, 362, 23 P.3d 227, 236–37  
 (2001).

24 A criminal defendant has an unqualified right to self-representation under  
 25 U.S. Const. amend. VI and Nev. Const. art. 1 §8, as long as the defendant  
 26 has given a "voluntary and intelligent waiver of the right to counsel." *Lyons*  
 27 v. *State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990) (*abrogated on other*  
 28 *grounds by Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001)). "However,  
 a defendant may be denied his right to self-representation where his request  
 is untimely, the request is equivocal, the request is made solely for the  
 purpose of delay, the defendant abuses his right by disrupting the judicial  
 process, or the defendant is incompetent to waive his right to counsel." *Tanksley v. State*, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997).

When a criminal defendant chooses self-representation in Nevada, district courts are required to instruct defendants pursuant to Supreme Court Rule 253, which sets forth numerous factors relevant to a defendant's decision to waive his right to counsel. Specifically, SCR 253 requires the district court to conduct a "canvass" of the defendant to determine whether the defendant understands the consequences of his/her decision, and whether the decision of the defendant is given voluntarily. A district court abuses its discretion if it fails to perform a canvass under SCR 253 when a criminal defendant asserts the right to self-representation. The district court is required to conduct a canvass under SCR 253 when a criminal defendant asserts his right to self-representation, even if a canvass was previously performed by the justice court and failure to do so constitutes an abuse of discretion. *Hooks* at [sic], 176 P.3d at 1086–87.

However, when a motion for self-representation has been made in the justice court, a criminal defendant must reassert a claim to self-representation at the district court level. Although Smith asserted his right to self-representation in the justice court, and the justice court arguably erred in denying his motion, Smith failed to reassert his right in the district court even after the justice court told him he had the right to do so. Without an affirmative assertion of his right, the district court has no reason to perform a canvass. Therefore, the district court had no obligation to act without Smith's assertion of his right. Thus, we conclude that Smith's failure to reassert his claim to self-representation in the district court was a waiver of his Sixth Amendment right to self-representation.

(ECF No. 22-15 at 3–6.)

## 2. The Parties' Positions on Ground 1

Smith asserts that "state trial court" violated his constitutional rights by denying his request for self-representation. (ECF No. 18 at 15.) He claims the justice court incorrectly found that he did not understand the significance of the proceeding; thus, his motion to waive counsel was erroneously denied and his right to self-representation was violated. (*Id.* at 11–13.) According to Smith, the record shows he was competent and voluntarily exercised his informed free will; thus, the justice court erred in denying his request based on his lack of legal ability. He further argues that he reiterated his desire for self-representation to the trial court by complaining that his attorneys were not adequately assisting him, yet the court disregarded the complaints. (*Id.* at 14 ("In the end, Smith goes to trial with attorneys he did not want, he did not trust, and with whom he had developed an irreconcilable relationship.")) Smith claims he held fast to the desire to represent himself, and his *Faretta* right was violated. (*Id.* at 15.) This violation, Smith asserts, constitutes

1 “structural error” that cannot be deemed harmless.

2 Respondents argue that the Nevada Supreme Court did not unreasonably apply  
3 constitutional standards when it found that Smith’s failure to reassert a request for self-  
4 representation in the state district court was a waiver of his *Faretta* right. (ECF No. 36 at  
5 3–4.) They point out that the Nevada Supreme Court’s factual findings are presumed  
6 correct, and an express finding of waiver was made. Respondents contend that there is  
7 no established federal law requiring state courts to assert a defendant’s right to self-  
8 representation when he fails to do so. Because Smith failed to assert his *Faretta* right after  
9 he was bound over for trial, Respondents insist that the state district court had no reason  
10 to canvass Smith on his ability or desire to proceed without counsel, and the Nevada  
11 Supreme Court did not unreasonably apply *Faretta*.

### 12                   **3.       Analysis of Ground 1**

13                   The Sixth Amendment guarantees the right to assistance of defense counsel in all  
14 criminal prosecutions. U.S. Cost. amend. VI. The Sixth Amendment also encompasses  
15 the right to self-representation at trial and to refuse the assistance of counsel. *Faretta*, 422  
16 U.S. at 834. Because the right to counsel is guaranteed, a defendant’s exercise of the  
17 right to self-representation necessarily requires a valid waiver of the right to counsel.  
18 *Sandoval v. Calderon*, 241 F.3d 765, 774 (9th Cir. 2001) (noting that “the right to self-  
19 representation does not attach until asserted,” unlike the right to counsel which “attaches  
20 unless affirmatively waived”). A waiver of the right to counsel must be unequivocal  
21 because that right is “automatic,” and the assistance of counsel must be available whether  
22 the defendant has requested such assistance or not. *Adams v. Carroll*, 875 F.2d 1441,  
23 1444 (9th Cir. 1989) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

24                   The Ninth Circuit has referred to the right to self-representation as “disfavored”  
25 when compared to the important benefits expressly offered by the right to counsel.  
26 *Sandoval*, 241 F.3d at 774. A court may properly deny a defendant’s request for self-  
27 representation “if the *Faretta* demand is untimely, equivocal, made for the purpose of  
28 delay, or is not knowingly and intelligently made.” *Id.* Supreme Court precedent has also

1 limited *Faretta*'s holding in material respects. *Id.* (citing *Martinez v. Court of Appeal of*  
 2 *California*, 528 U.S. 152, 154 (2000) (holding that *Faretta* does not extend to a defendant  
 3 on direct appeal from a criminal conviction); *McKaskle v. Wiggins*, 465 U.S. 168, 182–83  
 4 (1984) (a *pro se* defendant may waive his *Faretta* rights by agreeing or acquiescing to  
 5 standby counsel's unsolicited participation at trial)).

6       Smith has not shouldered his burden of establishing that the Nevada Supreme  
 7 Court's decision rejecting his *Faretta* claim was contrary to or an unreasonable application  
 8 of clearly established federal law. The Nevada Supreme Court held that, even if the justice  
 9 court erred in denying his motion, Smith was required to renew his *Faretta* request at the  
 10 district court level, but he "failed to reassert his right in the district court even after the  
 11 justice court told him he had the right to do so." (ECF No. 22-15 at 5–6.) The record amply  
 12 supports the Nevada Supreme Court's conclusion that Smith waived his *Faretta* right by  
 13 failing to renew a request for self-representation during the state district court proceedings.  
 14 During two hearings before the trial court, the parties referenced Smith's initial request for  
 15 self-representation, albeit in the context of Smith's perceived shortcomings of defense  
 16 counsel. (ECF No. 19-9 at 4; ECF No. 20 at 5–17.) Smith directly addressed the trial court  
 17 in both hearings but did not renew the *Faretta* motion. (*Id.*) In fact, on the first day of trial,  
 18 both defense counsel and the prosecutor expressly informed the trial court that Smith no  
 19 longer wished to represent himself. (ECF No. 20 at 6–12.) Smith said nothing to refute  
 20 counsel or the prosecutor's statements and explicitly denied having any conflict with  
 21 counsel. (*Id.* at 15.)

22       Requiring a defendant to reassert his right to self-representation before the trial  
 23 court comports with *Faretta*'s safeguard that a defendant unequivocally waive his right to  
 24 counsel. See *Faretta*, 422 U.S. at 835; *Adams*, 875 F.2d at 1444. Smith claims he  
 25 reiterated his desire for self-representation before the trial court. (ECF No. 39 at 7–8 (citing  
 26 (ECF No. 20 at 5).) However, the cited portion of the trial transcript demonstrates that  
 27 Smith did not clearly request or express any desire for self-representation. Complaining  
 28 about one's counsel is *not* a request for self-representation. Because Smith never

1 reasserted a *Faretta* request before the trial court, the Nevada Supreme Court's finding of  
 2 waiver was a reasonable determination of the facts.

3 In light of the facts and foregoing authorities, the Nevada Supreme Court's ruling  
 4 was not contrary to, nor an unreasonable application of, clearly established federal law,  
 5 and was not based on an unreasonable determination of the facts in light of the evidence.  
 6 See 28 U.S.C. § 2254(d). Ground 1 provides no basis for habeas relief.

7 **4. New Claim Regarding the Justice Court's Denial of Smith's  
 8 *Faretta* Motion**

9 Upon careful review of Smith's arguments and appellate briefs, it appears that his  
 10 reply presents a new claim—the *justice court's* erroneous denial of Smith's motion for self-  
 11 representation violated his *Faretta* right, which encompasses a right to self-representation  
 12 *at a preliminary hearing*. Smith argues in his reply that both Respondents and the Nevada  
 13 Supreme Court failed to address his argument that he was entitled to represent himself at  
 14 his preliminary hearing. (ECF No. 39 at 9–12.) He maintains that his request for self-  
 15 representation in the justice court met the *Faretta* standard as it was unequivocal,  
 16 knowing, and voluntary; thus, “the court's denial of his request to represent himself violated  
 17 his right to conduct his own defense *at his preliminary hearing*.” (ECF No. 39 at 8–9  
 18 (emphasis added).) Smith claims the denial of self-representation at his preliminary  
 19 hearing is structural error that cannot be deemed harmless and the Nevada Supreme  
 20 Court's decision is both contrary to and an unreasonable application of *Faretta*.

21 The pleading standard for federal habeas petitions is “more demanding” than the  
 22 notice pleading standard applied in other civil cases. *Mayle v. Felix*, 545 U.S. 644, 655  
 23 (2005) (noting that Fed. R. Civ. P. 8(a) requires only “fair notice” while Habeas Rule 2(c)<sup>3</sup>  
 24 demands more—“it is the relationship of the facts to the claim asserted that is important”).  
 25 Rule 2(c) “requires a more detailed statement,” as it “instructs the petitioner to ‘specify all  
 26 the grounds for relief available to [him]’ and to ‘state the facts supporting each ground.’”

27  
 28 

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<sup>3</sup>All references to a “Habeas Rule” or the “Habeas Rules” in this order identify the  
 Rules Governing Section 2254 Cases in the United States District Courts.

1 *Id.* at 649. New claims may not be presented for the first time in the federal reply.  
 2 *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). Moreover, a petitioner may  
 3 not pursue claims that were not previously exhausted in the state courts as he must fairly  
 4 present both the operative facts and federal legal theories supporting his claims. 28 U.S.C.  
 5 § 2254(b)(1)(A).

6       Smith's new claim differs from what he presented in the Amended Petition and on  
 7 direct appeal. The Amended Petition discusses the justice court's denial of his *Faretta*  
 8 motion but claims the *trial court* violated Smith's *Faretta* right. (ECF No. 18 at 11–15.)  
 9 Smith's opening brief to the Nevada Supreme Court also discusses the justice court's  
 10 denial of his *Faretta* motion, claiming the trial court "refused to continue the trial" and "[n]o  
 11 *Faretta* canvas was ever given" despite Smith's repeated complaints of inadequate  
 12 assistance of counsel. (ECF No. 22-12 at 12–13.) The brief paraphrases *Faretta* and  
 13 states, "[i]t is no answer to the [Smith's] challenge to say that he acquiesced in accepting  
 14 his court-appointed counsel." (*Id.* at 16.) The appellate reply brief reiterates that he did not  
 15 acquiesce to representation by court-appointed counsel. (ECF No. 22-14 at 8.) Nowhere  
 16 in the amended petition or appellate briefs did Smith argue that his *Faretta* right extended  
 17 to his preliminary hearing and was violated when the justice court denied his motion.

18       Smith's federal reply clearly presents a discrete legal theory alleging that the justice  
 19 court violated his right to self-representation at his preliminary hearing by denying his  
 20 *Faretta* motion. The reply focuses on Supreme Court precedent holding that the right to  
 21 counsel applies at all critical stages of prosecution, and the preliminary hearing is a critical  
 22 stage.<sup>4</sup> Smith did not cite to any of these cases in his Amended Petition or appellate briefs.  
 23 A claim that a defendant was denied the right of self-representation *at a preliminary*  
 24 *hearing* is markedly different from a claim that a defendant was denied the right of self-  
 25 representation *at trial*. As such, the new claim was not fairly presented to the state courts  
 26 and is therefore unexhausted. See *Picard v. Connor*, 404 U.S. 270, 277–78 (1971).

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<sup>4</sup>ECF No. 39 at 9 (citing *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013); *Iowa v. Tovar*,  
 541 U.S. 77, 80–81 (2004); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970)).

1 Assuming for the sake of discussion that Smith's new theory was exhausted in the  
2 state courts and properly presented in the Amended Petition, it would be subject to  
3 deferential review under AEDPA. Where a state court addresses claims in a written  
4 decision but does not expressly address all of the claims a petitioner presented, deferential  
5 review under AEDPA still applies to review of the state court's implicit rejection of the  
6 claims that were not discussed. *Johnson v. Williams*, 568 U.S. 289, 300–01 (2013). A  
7 federal court "must determine what arguments or theories . . . could have supported the  
8 state court's decision; and then it must ask whether it is possible fairminded jurists could  
9 disagree that those arguments or theories are inconsistent with the holding in a prior  
10 decision of this Court." *Richter*, 562 U.S. at 102. "If such disagreement is possible, then  
11 the petitioner's claim must be denied." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558  
12 (2018). Applying this deferential standard, the Court finds that Smith's new claim would  
13 not entitle him to relief.

14 Smith's new claim rests on two premises: (1) the *Faretta* right to self-representation  
15 encompasses a preliminary hearing, and (2) a violation of the right to self-representation  
16 at the preliminary hearing stage is structural error. Neither premise is clearly established  
17 under Supreme Court precedent.

18 First, the Nevada Supreme Court could have held that *Faretta*'s general principle  
19 about the right to self-representation at trial does not establish a clearly specific rule  
20 regarding self-representation at a preliminary hearing. See *Lopez*, 574 U.S. at 4. *Faretta*  
21 only explicitly addressed a defendant's request to represent himself *at trial*. 422 U.S. at  
22 807–11, 815–16 (noting "that a defendant has a constitutionally protected right to  
23 represent himself *in a criminal trial*" (emphasis added)). The Supreme Court has not  
24 established that the right to self-representation extends to pre-trial proceedings such as  
25 preliminary hearings. *E.g.*, *Martinez*, 528 U.S. at 154 (*Faretta*'s "specific holding was  
26 confined to the right to defend oneself *at trial*" (emphasis added)); *Nero v. Allison*, 757 F.  
27 Supp. 2d 971, 975 (C.D. Cal. 2010) (denying petitioner's § 2254 claim that his right to self-  
28

1 representation was violated when trial court refused to allow him to represent himself at  
2 the preliminary hearing). Smith points to no Supreme Court case holding as much.

3 Second, even assuming that the justice court erroneously denied Smith's *Faretta*  
4 motion, the Nevada Supreme Court could have held that such error is not structural, thus  
5 requiring automatic reversal, and concluded that justice court's error was harmless.  
6 *Faretta* and its progeny have not established that, on federal habeas review, an erroneous  
7 denial of self-representation at the preliminary hearing stage is structural error and  
8 precluded from harmless error analysis. For purposes of federal habeas, "[m]ost  
9 constitutional mistakes call for reversal only if the government cannot demonstrate  
10 harmlessness." *Glebe v. Frost*, 574 U.S. 21, 23 (2014) (citing *Neder v. United States*, 527  
11 U.S. 1, 8 (1999)) (emphasis in original). On direct review, clearly established federal law  
12 provides that a denial of the *Faretta* right at *trial* is structural error and is not subject to  
13 harmless error analysis. *McKaskle*, 465 U.S. at 177 n.8. However, there is no Supreme  
14 Court precedent pronouncing that, on federal habeas review, an erroneous denial of the  
15 right to self-representation at a preliminary hearing is structural error. Smith cites no  
16 Supreme Court case to support his assertion. And he does not attempt to challenge any  
17 implicit harmless-error determination in the Nevada Supreme Court's decision.

18 Given the lack of specific Supreme Court case law supporting Smith's new claim,  
19 the Nevada Supreme Court could have concluded that there is no right of self-  
20 representation at a preliminary hearing and any error by the justice court was harmless.  
21 Fairminded jurists could disagree whether such a holding is inconsistent with prior  
22 Supreme Court precedent. Because disagreement is possible, Smith's claim must be  
23 denied. See *Beaudreax*, 138 S. Ct. at 2558. The Nevada Supreme Court's implicit  
24 rejection of Smith's new claim was neither contrary to nor an unreasonable application of  
25 clearly established federal law as determined by the U.S. Supreme Court based on the  
26 record and argument presented to that court.

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## A. Grounds 2–4 – Prosecutorial Misconduct

In Grounds 2 through 4, Smith argues that the Washoe County District Attorney committed various acts of misconduct. The standard set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986), is the “clearly established law” governing claims of prosecutorial misconduct for purposes of habeas review under AEDPA. *Parker v. Matthews*, 567 U.S. 37, 45 (2012). “[A] prosecutor’s improper comments will be held to violate the Constitution only if they ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Id.* (quoting *Darden*, 477 U.S. at 181). *Darden* explained “it is not enough that the prosecutor’s remarks were undesirable or even universally condemned.” 477 U.S. at 180–81 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). To determine whether a prosecutor’s comments rise to the level of a due process violation, a reviewing court must examine the entire proceedings and place the prosecutor’s remarks in their proper context. *Boyde v. California*, 494 U.S. 370, 384–85 (1990); *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”).

16        The *Darden* standard “is a very general one, leaving courts ‘more leeway . . . in  
17 reaching outcomes in case-by-case determinations.’” *Parker*, 567 U.S. at 48 (quoting  
18 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Nevertheless, AEDPA “recognizes  
19 . . . that even a general standard may be applied in an unreasonable manner.” *Panetti v.*  
20 *Quarterman*, 551 U.S. 930, 953 (2007). Federal courts may find “an application of a  
21 principle unreasonable when it involves a set of facts different from those of the case in  
22 which the principle was announced.” *Id.*

## 1. **Ground 2 – Coercion and Intimidation of Witnesses**

24 Smith argues that prosecutors committed misconduct by allowing detectives to  
25 coerce and intimidate potentially exculpatory witnesses Natalie Wolfe, Smith's girlfriend,  
26 and Joshua Wolfe, her brother. He claims his Sixth Amendment right to compulsory

1 process and Fourteenth Amendment right to due process were violated.<sup>5</sup>

2 Smith's counsel did not invoke the rule of exclusion before trial.<sup>6</sup> As a result, two  
 3 investigating detectives sat in the courtroom throughout trial. Both Natalie and Joshua  
 4 testified at the preliminary hearing and at trial. Natalie was extensively questioned at trial  
 5 about her inconsistent statements to the police. (ECF No. 20-1 at 174–202, ECF No. 21  
 6 at 8–53.) She admitted that she initially lied to the police and they told her she was lying.  
 7 (ECF No. 21 at 24.) She testified that the detectives threatened to take her children away  
 8 and charge her with a crime, such as perjury, aiding and abetting, or being an accessory  
 9 to Duarte's murder, if she did not cooperate with the police or later changed her statement.  
 10 (*Id.* at 24–28.) However, she also testified that the threats did not change her testimony.  
 11 (*Id.* at 52–53 (“Q. But what I'm saying is: Did it change your testimony in any way  
 12 yesterday? Did it make you tell a lie? A. No. I told the same thing. . . . Q. Well, it didn't  
 13 affect your testimony. Would you agree with that? A. Right.”).) Joshua was also examined  
 14 about his inconsistent statements to the police. (ECF No. 21 at 231–52; ECF No. 21-1 at  
 15 2–20.) He testified that he was initially “leaving stuff out,” which prompted detectives to  
 16 pressure him “to tell the truth,” but no one subsequently pressured him to change his story,  
 17 and he had not done so. (ECF No. 21 at 250.) Joshua further testified that he saw a vehicle  
 18 driven by an unidentified African-American male arrive at the scene (*id.* at 240–42), which  
 19 supported Smith's alternative theory that unidentified African-American male shot Duarte.

20 On direct appeal, the Nevada Supreme Court summarily concluded that this claim  
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22 <sup>5</sup>Smith further asserts in passing that his rights to equal protection and a fair trial  
 23 were violated. (ECF No. 18 at 16; see also ECF No. 22 at 23–24, Direct Appeal Opening  
 24 Brief (alleging violations of the “federal constitutional guarantees of due process, equal  
 25 protection of the laws, a fair trial, and a reliable sentence due to State's witnesses  
 26 intimidating witnesses” (citing U.S. Const. V, VI, VIII & XIV).) However, Smith's arguments  
 for this claim only address the rights to compulsory process and due process. (ECF No. 18  
 at 17–18; ECF No. 39 at 13–15.) As such, the Court limits its analysis to compulsory  
 process and due process. See also, *supra*, note 1.

27 <sup>6</sup>Defense counsel attempted to invoke the exclusionary rule after Natalie began  
 28 testifying, but the state district court held that it was “too late” and denied the motion. (ECF  
 No. 20-1 at 183–86.)

1 did not warrant reversal. (ECF No. 22-15 at 3 n.1.)<sup>7</sup>

2 Here, Smith claims the detectives' presence coerced Natalie and caused her to  
 3 alter her testimony in a manner unfavorable to Smith. (ECF No. 18 at 15–18.) He argues  
 4 that the detectives also threatened Joshua. Respondents counter that Smith fails to show  
 5 any misconduct by the prosecution or law enforcement. (ECF No. 36 at 4–6.) They argue  
 6 that the parties thoroughly examined Natalie at trial on whether she lied to the police and  
 7 whether she felt intimidated by the detectives' presence in the courtroom, and she testified  
 8 that the detectives' conduct did not change her testimony. Respondents further point out  
 9 that Joshua did, in fact, testify on Smith's behalf at trial. Smith replies that by allowing  
 10 detectives to engage in misconduct, the prosecution violated its heightened duty to ensure  
 11 the fairness and integrity of trial proceedings. (ECF No. 39 at 13–15.)<sup>8</sup>

12 The Compulsory Process Clause of the Sixth Amendment provides an accused  
 13 individual the "right to offer the testimony of witnesses, and to compel their attendance, if  
 14 necessary." *Washington v. Texas*, 388 U.S. 14, 18–19 (1967). As "a fundamental element

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16 <sup>7</sup>This argument was one of seven the Nevada Supreme Court summarily rejected  
 17 in a footnote:

18 Smith also raises the following arguments on appeal: 1) the district court  
 19 erred in failing to give defense counsel additional time to prepare, 2) Smith's  
 20 counsel was ineffective because he failed to invoke the rule of exclusion,  
 21 3) the prosecutor committed misconduct by helping the police to continue  
 22 coercing defense witnesses, 4) the prosecutor unlawfully shifted the burden  
 23 of proof to Smith, 5) the prosecutor committed misconduct by misinforming  
 24 the jury on the legal standard of first-degree murder, 6) the district court erred  
 25 by refusing to give a jury instruction on circumstantial evidence, and 7)  
 26 Smith's conviction should be reversed because of cumulative error. After  
 27 careful review, we conclude that none of these separate arguments warrant  
 28 reversal.

(ECF No. 22-15 at 3, n.1.)

29 <sup>8</sup>Smith cites *Berger v. United States*, 295 U.S. 78, 88 (1935), in alleging the  
 30 prosecutors violated their heightened duty. *Berger* involved a federal criminal conviction—  
 31 not a *state* criminal conviction on habeas review. Although *Berger* discussed prosecutorial  
 32 responsibility, the decision reversed the federal conviction without expressly articulating a  
 33 constitutional basis for the reversal, and nothing in that decision indicates that the  
 34 Supreme Court was articulating a constitutional standard. Federal courts monitor the  
 35 conduct of federal prosecutors as an exercise of supervisory power that is broader than  
 36 review for constitutional error. See, e.g., *Donnelly*, 416 U.S. at 642. *Berger* does not guide  
 37 the Court's analysis of Ground 2.

1 of due process of law," the right to compulsory process is incorporated against the states  
2 through the Due Process Clause of the Fourteenth Amendment. *Id.* at 19. The U.S.  
3 Supreme Court has established that the government deprives due process of law when it  
4 "effectively dr[ives a] witness off the stand." *Webb v. Texas*, 409 U.S. 95, 98 (1972)  
5 (holding that petitioner's due process right was violated when the trial judge admonished  
6 and singled out a defense witness about the risks of perjury in "unnecessarily strong  
7 terms"). Under *Webb*, "substantial government interference with a defense witness's free  
8 and unhampered choice to testify amounts to a violation of due process." *Ayala v.  
9 Chappell*, 829 F.3d 1081, 1111 (9th Cir. 2016) (quotation omitted).

10 The Nevada Supreme Court's decision summarily rejecting Smith's claim of witness  
11 intimidation withstands deferential review under AEDPA. See *Richter*, 562 U.S. at 98  
12 (where state court summarily rejects a claim, petitioner must show that "there was no  
13 reasonable basis for the state court to deny relief"). The record does not suggest that the  
14 prosecutors or detectives effectively drove Nicole or Joshua off the stand or changed their  
15 testimony. Both witnesses testified under oath that the police pressured them to tell the  
16 truth, and both stated that their testimony was truthful. Joshua testified consistent with  
17 Smith's alternative theory that an unidentified African-American male shot Duarte, and  
18 parts of Natalie's testimony were either exculpatory or equivocal. Smith does not describe  
19 how and when these witnesses' testimony changed from exculpatory to inculpatory. Smith  
20 has failed to show that the detectives' admonitions regarding perjury were overly harsh or  
21 that their pressure tactics had any effect on Nicole or Joshua's testimony. In light of their  
22 testimony, the Nevada Supreme Court could have reasonably found that Nicole and  
23 Joshua were not intimidated by the detectives. Given that the Nevada Supreme Court  
24 could reasonably so find, the conclusion that Smith had not demonstrated a due process  
25 violation is neither contrary to nor an unreasonable application of *Darden* or *Webb*.

26 The Nevada Supreme Court's ruling was not contrary to, or an unreasonable  
27 application of, clearly established federal law, and was not based on an unreasonable  
28 determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d). The Court

1 denies Smith relief with respect to Ground 2.

2                   **2.     Ground 3 – Burden Shifting**

3                   Smith asserts that the prosecutor committed prosecutorial misconduct by  
 4 impermissibly shifting the burden of proof, in violation of his Fifth, Sixth, and Fourteenth  
 5 Amendment rights, when the prosecutor questioned Smith’s failure to present evidence  
 6 proving his innocence.

7                   Smith waived his right not to testify, against counsel’s advice, and testified at trial.  
 8 (ECF No. 21-1 at 21–23.) During cross-examination, Smith asserted that there was “hard  
 9 physical evidence to prove [his] innocence,” including surveillance videos from casinos  
 10 and a liquor store on the night of the murder. (*Id.* at 78–79.) The prosecutor posed  
 11 questions to Smith and stated the following:

- 12                  • “Is there anything you can pinpoint, like show the jury this hard physical evidence  
 13                    you have to prove your innocence?” (*Id.* at 78.)
- 14                  • “So this hard evidence you have, and this story that you have told here today and  
 15                    to the police back on July 14th, there’s nothing to what we call [*sic*] corroborated.  
 16                    There’s no other evidence to show your story rather than the other witnesses in this  
 17                    case is the correct version. Wouldn’t you agree with that?” (*Id.* at 80–81.)
- 18                  • “Well, I’m still looking for that hard evidence, Mr. Smith.” (*Id.* at 122.)

19                  During his closing argument, the prosecutor argued that Smith must have killed Duarte  
 20 because Smith never told his girlfriend that he did not commit the murder. (ECF No. 22 at  
 21 36 (“Not to this day has he ever told Natalie he didn’t commit the murder.”).) Natalie  
 22 testified that she did not ask Smith what happened regarding the gunshot and he never  
 23 told her what happened. (ECF No. 21 at 42–43.)

24                  During the defense summation, Smith’s counsel reminded the jury of the State’s  
 25 burden:

26                  The State said something very interesting when Mr. Clifton started with his  
 27 cross. What hard evidence do you have, Mr. Smith, to prove your  
 28 innocence? Ladies and gentlemen, we’re in the United States. Mr. Smith  
 doesn’t have to prove anything. He didn’t have to take the stand. The burden  
 of proof is not on him. This isn’t Iraq. This isn’t Russia. We have a system in

1 place where the State has to prove each and every element of the charge  
 2 against the defendant beyond a reasonable doubt. Not maybe, not what if,  
 3 not perhaps, and certainly not a defendant having to prove his own  
 4 innocence. That's not what we do in this country.

5 (ECF No. 22 at 65–66.) In addition, the jury instructions stated, “[t]he burden rests upon  
 6 the prosecution to establish every element of the crime with which the defendant is  
 7 charged, and every element of the crime must be established beyond a reasonable doubt.”  
 8 (ECF No. 22-1 at 11.)

9 On direct appeal, Smith argued that the prosecutor committed misconduct by  
 10 unlawfully shifting the burden of proof to Smith. (ECF No. 22-12 at 24–26.) The Nevada  
 11 Supreme Court summarily rejected his claim. (ECF No. 22-15 at 3 n.1.)

12 In Ground 3, Smith repeats his claim that the prosecutor impermissibly shifted the  
 13 burden of proof, asserting that the prosecutor badgered him with impermissible questions  
 14 implying that he had an obligation to provide the jury with evidence and otherwise prove  
 15 his innocence. (ECF No. 18 at 18–19.) Respondents argue that the prosecutor’s questions  
 16 and statements, when viewed in the context of the entire trial, do not amount to a due  
 17 process violation. (ECF No. 36 at 6–7.) Respondents point out that Smith’s counsel re-  
 18 directed the jury’s attention to the appropriate burden of proof during his closing argument,  
 19 and the jury instructions clearly and correctly articulated the burden of proof in a criminal  
 20 trial. Smith’s reply contends that the burden shifting was not cured by the jury instructions  
 21 or counsel’s re-direction of the jury because the damage was done by the time counsel  
 22 addressed the issue during the defense summation and the prosecution had already  
 23 interfered with his right to the presumption of innocence. (ECF No. 39 at 15–16.)

24 The Due Process Clause of the Fourteenth Amendment “protects the accused  
 25 against conviction except upon proof beyond a reasonable doubt of every fact necessary  
 26 to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).  
 27 The Fifth Amendment “forbids either comment by the prosecution on the accused’s silence  
 28 or instructions by the court that such silence is evidence of guilt.” *Griffin v. California*, 380  
 U.S. 609, 615 (1965). Where a defendant “did in fact testify at trial, the prosecutor’s

comment cannot be said to have shifted the burden of proof." *United States v. Garcia-Guzar*, 160 F.3d 511, 522 (9th Cir. 1998) (rejecting claim that prosecutor's statement violated *In re Winship*'s requirement that each element be proved beyond a reasonable doubt) (citing *United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993) (holding that defendant's "Fifth Amendment right not to testify was not implicated because he did in fact testify at trial," and he "opened the door" by arguing that prosecutor's decision not to call witness was evidence of weakness in government's case; thus, prosecutor's comment concerning defendant's power of subpoena and failure to call witness did not shift the burden of proof)).

On the record and arguments presented to the Nevada Supreme Court, its rejection of Smith's burden shifting claim withstands deferential review under AEDPA and *Darden*. Smith waived his Fifth Amendment right to silence and testified at trial. By testifying that there was physical evidence proving his innocence, the Nevada Supreme Court could have reasonably found that Smith opened the door to the prosecutor's questions and argument regarding his failure to provide such exculpatory evidence. The Court is not persuaded by Smith's unsupported argument that the "damage was done" by the prosecutor's summation and neither the jury instructions nor trial counsel's summation were sufficient to re-direct the jury as to the burden of proof. Supreme Court precedent recognizes jury instructions "as definitive and binding statements of law" and holds that prosecutors' arguments are "not to be judged as having the same force as an instruction from the court." See *Boyde*, 494 U.S. at 384–85. Smith fails to identify any facts to overcome this presumption.

Additionally, the Nevada Supreme Court could reasonably have held that the prosecutor's assertion in closing argument—Smith must have killed Duarte because Smith never told Natalie that he didn't commit the murder—was permissibly drawn from Natalie's testimony. Prosecutors may argue about inferences that are reasonably drawn from the evidence. *Ayala*, 829 F.3d at 1115. Natalie testified that Smith never told her what happened, and she did not ask. Even if the prosecutor's argument is understood as

1 directing the jury's attention to an inappropriate inference, that would not establish that the  
 2 Nevada Supreme Court's rejection of this claim "was so lacking in justification that there  
 3 was an error well understood and comprehended in existing law beyond any possibility for  
 4 fairminded disagreement." *Parker*, 567 U.S. at 47 (quoting *Richter*, 562 U.S. at 103).  
 5 Because the Nevada Supreme Court could reasonably have made the factual findings  
 6 identified herein, a conclusion that Smith has not demonstrated a due process violation  
 7 under *Darden*'s broad general standard is neither contrary to nor an unreasonable  
 8 application of that standard.

9       The Nevada Supreme Court's ruling rejecting Ground 3 was not contrary to, or an  
 10 unreasonable application of, clearly established federal law, and was not based on an  
 11 unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d).  
 12 The Court denies Smith relief with respect to Ground 3.

13                   **3.       Ground 4 – Misstating Elements of First-Degree Murder**

14       Smith contends the prosecutor violated his right to due process, a fair trial, and the  
 15 requirement that the State prove his guilt beyond a reasonable doubt by misinforming the  
 16 jury of the proper elements of first-degree murder.

17       During closing arguments, the prosecutor described to the jury the legal standard  
 18 for proving the three mental state requirements necessary to support a first-degree murder  
 19 conviction—willfulness, deliberation, and premeditation:

20                   Malice aforethought and premeditation can be a thought of the mind,  
 21 successive thoughts of the mind, like: "I'm going to pull this trigger." Your  
 22 mind must have told your finger to pull it. You've got your premeditation.  
 You've got that premeditation because he decided, and it was deliberation,  
 and he decided to pull that trigger.

23 (ECF No. 22 at 40:18–23.) He continued, "[w]hen you shoot someone in the head, you  
 24 pull that trigger, it's pretty hard to claim it was an accident. It's pretty hard to claim it wasn't  
 25 deliberate. It's pretty hard to claim you didn't intent to pull your index finger back on that  
 26 trigger. That's premeditation. That's deliberation." (*Id.* at 44:2–7.) The prosecutor also  
 27 stated, "[w]hen somebody shoots somebody in the head, they know this could kill them.  
 28 They know that. It's automatic. You're going to have your deliberation when you pull the

1 trigger that close to somebody with a gun to the head." (*Id.* at 46:13–16.) He further  
2 argued, "if you know in your heart and in your mind that those guns were in this defendant's  
3 possession before that shooting, you have to convict him of first-degree murder." (*Id.* at  
4 53:24–54:3.)

5 Jury Instruction #17 laid out the three mental elements required to prove first-  
6 degree murder:

7 Murder of the first degree is murder which is perpetrated by means of any  
8 kind of willful, deliberate, and premeditated killing. All three elements--  
9 willfulness, deliberation, and premeditation--must be proven beyond a  
reasonable doubt before an accused can be convicted of first-degree  
murder.

10 Willfulness is the intent to kill. There need be no appreciable space of time  
11 between formation of the intent to kill and the act of killing.

12 Deliberation is the process of determining upon a course of action to kill as  
13 a result of thought, including weighing the reasons for and against the action  
and considering the consequences of the action. . . .

14 Premeditation is a design, a determination to kill, distinctly formed in the  
15 mind by the time of the killing.

16 Premeditation need not be for a day, an hour, or even a minute. It may be  
17 as instantaneous as successive thoughts of the mind. For if the jury believes  
from the evidence that the act constituting the killing has been preceded by  
and has been the result of premeditation, no matter how rapidly the act  
follows the premeditation, it is premeditated.

18 (ECF No. 22-1 at 18–19.) The jury instructions also included the elements of murder with  
19 malice aforethought, the distinction between the two degrees of murder, the definition of  
20 first-degree murder, manslaughter, voluntary manslaughter, and involuntary  
21 manslaughter. (*Id.* at 14–22.) The state district court further instructed the jury that: (1) it  
22 was their "duty as jurors to follow the law as [the trial judge] state[d] it to [the jury],  
23 regardless of what [any juror] may think the law is or ought to be" (*Id.* at 2); (2) the burden  
24 "rests upon the prosecution to establish every element of the crime with which the  
25 defendant is charged, and every element of the crime must be established beyond a  
26 reasonable doubt" (*Id.* at 11); (3) counsel's statements and arguments are not evidence  
27 (*Id.* at 28); and (4) the jury's "decision should be the product of sincere judgment and  
28

1 sound discretion in accordance with these rules of law" (*Id.* at 33).

2 In Smith's direct appeal, he argued that the prosecutor committed misconduct by  
 3 misinforming the jury of the legal standard for first-degree murder. (ECF No. 22-12 at 26–  
 4 28.) The Nevada Supreme Court summarily rejected his claim. (ECF No. 22-15 at 3 n.1.)<sup>9</sup>

5 Here, Smith asserts that the prosecutor's closing arguments conflated the three  
 6 mental state requirements—willfulness, deliberation, and premeditation—with a general  
 7 intent requirement that an act be the product of a willful moving of the muscles. (ECF  
 8 No. 18 at 20–22.) Smith also claims the prosecutor reduced the elements of first-degree  
 9 murder to gun possession. Respondents assert that, in light of the testimony and evidence  
 10 adduced at trial, any misstatement of law by the prosecutor did not constitute a denial of  
 11 due process. (ECF No. 36 at 7–8.) Respondents point to multiple key pieces of evidence,  
 12 including Smith's own testimony. He testified that he arranged a meeting with Duarte  
 13 before the murder and he admitted he had the murder weapon after the shooting, although  
 14 he said he did not pull the trigger. (ECF No. 21-1 at 51:23–53:4.) Respondents further  
 15 argue that the state district court cured any misstatements with the correct jury  
 16 instructions. Smith replies that the prosecutor's arguments implied that a single volitional  
 17 act of pulling a “trigger” satisfies all three mental state requirements. (ECF No. 39 at 19–  
 18 21.) Smith replies that the prosecutor improperly urged the jury to disregard the necessary  
 19 elements for a first-degree murder conviction because the prosecutor's arguments  
 20 eliminated the distinctions between grades of intentional killing.

21 The *Darden* standard applies to claims that a prosecutor of presented misleading  
 22 arguments to the jury. A prosecutor's improper comments violate the Constitution only if  
 23 they “so infected the trial with unfairness as to make the resulting conviction a denial of  
 24 due process.” *Parker*, 567 U.S. at 45 (quoting *Darden*, 477 U.S. at 181–83); see also  
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26 <sup>9</sup>Smith raised this claim for the second time in his post-conviction appeal arguing  
 27 that “the State misstated the law in closing argument at trial.” (ECF No. 23-16 at 3–4.) The  
 28 Nevada Supreme Court held that the claim “could have been raised in [his] direct appeal,”  
 and he “failed to demonstrate good cause for his failure to do so.” (*Id.* (citing NRS  
 34.810(1)(b).) Because the claim was raised on direct appeal, it is exhausted.

1 *Runningeagle v. Ryan*, 686 F.3d 758, 781 (9th Cir. 2012) (improper argument “does not,  
 2 per se, violate a defendant’s constitutional rights”). Where misstatements are made during  
 3 closing argument, they are generally less harmful because they are subject to objection  
 4 and correction by the trial court. *Boyde*, 494 U.S. at 384. “A jury is presumed to follow its  
 5 instructions,” and to accept the law as stated by the court, not as stated by counsel.  
 6 *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012) (quotation omitted).

7 In light of the state court record, the Nevada Supreme Court reasonably could have  
 8 held that the jury instructions cured any prosecutorial misstatement of the first-degree  
 9 murder elements. Assuming for the purposes of this discussion that the prosecutor  
 10 misstated the law, the record indicates that the state district court properly instructed the  
 11 jury on Nevada law regarding murder. Smith does not argue otherwise. Nor does he  
 12 explain why the jury instructions were insufficient to cure any purported misstatements.  
 13 Smith has not overcome the presumption that the jury followed its instructions. See  
 14 *Blueford*, 566 U.S. at 606. Given that the Nevada Supreme Court could reasonably find  
 15 that any improper statements did not render the trial fundamentally unfair, a conclusion  
 16 that Smith has not demonstrated a due process violation under *Darden*’s broad general  
 17 standard is neither contrary to nor an unreasonable application of that standard.

18 The Nevada Supreme Court’s ruling rejecting Ground 4 was not contrary to, or an  
 19 unreasonable application of, clearly established federal law, and was not based on an  
 20 unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d).  
 21 The Court denies Smith relief with respect to Ground 4.

22 **B. Ground 5 – Ineffective Assistance of Counsel**

23 Smith argues that he received ineffective assistance from his trial attorneys in  
 24 violation of the Sixth and Fourteenth Amendments. The Sixth Amendment right to counsel  
 25 includes “the right to the effective assistance of counsel.” *Garza v. Idaho*, 139 S. Ct. 738,  
 26 743–44 (2019) (quotation omitted). In *Strickland v. Washington*, 466 U.S. 668 (1984), the  
 27 Supreme Court established a two-prong test for habeas claims alleging ineffective  
 28 assistance of counsel (“IAC”). Under *Strickland*, a petitioner must show that (1) “counsel’s

1 representation fell below an objective standard of reasonableness," and (2) "any such  
 2 deficiency was 'prejudicial to the defense.'" *Garza*, 139 S. Ct. at 743–44 (quoting  
 3 *Strickland*, 466 U.S. at 687–88, 692). A court considering an IAC claim must apply a  
 4 "strong presumption that counsel's conduct falls within the wide range of reasonable  
 5 professional assistance." *Strickland*, 466 U.S. at 689. A habeas petitioner bears the  
 6 burden of showing "that counsel made errors so serious that counsel was not functioning  
 7 as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To  
 8 establish prejudice, it is not enough for the petitioner "to show that the errors had some  
 9 conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must  
 10 be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*  
 11 at 687. A court may first consider either the question of deficient performance or the  
 12 question of prejudice; if the petitioner fails to satisfy either question, the court need not  
 13 consider the other. *Id.* at 697.

14 Where a state court previously adjudicated an IAC claim under *Strickland*,  
 15 establishing that the decision was unreasonable is especially difficult. See *Richter*, 562  
 16 U.S. at 104–05. In *Richter*, the Supreme Court instructed:

17 The standards created by *Strickland* and § 2254(d) are both "highly  
 18 deferential," [*Strickland*, 466 U.S.] at 689; *Lindh v. Murphy*, 521 U.S. 320,  
 19 333, n.7, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply  
 20 in tandem, review is "doubly" so, *Knowles [v. Mirzayance*, 556 U.S. 111, 123  
 21 (2009)]. The *Strickland* standard is a general one, so the range of reasonable  
 22 applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal  
 habeas courts must guard against the danger of equating unreasonableness  
 under *Strickland* with unreasonableness under § 2254(d). When § 2254(d)  
 applies, the question is not whether counsel's actions were reasonable. The  
 question is whether there is any reasonable argument that counsel satisfied  
*Strickland's* deferential standard.

23 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010)  
 24 ("When a federal court reviews a state court's *Strickland* determination under AEDPA,  
 25 both AEDPA and *Strickland's* deferential standards apply; hence, the Supreme Court's  
 26 description of the standard as 'doubly deferential.'").

27 **1. Ground 5(a) – Failing to Invoke the Rule of Exclusion**

28 Ground 5(a) is a companion claim to Ground 2, alleging ineffective assistance of

1 counsel for failing to invoke the rule of exclusion, which resulted in two detectives  
 2 intimidating Natalie while she testified at trial. The facts relevant to this claim are set forth,  
 3 *supra*, in the discussion of Ground 2.

4 Smith called his trial counsel as witnesses during the evidentiary hearing for his  
 5 state petition. (ECF No. 23-9 at 4–21 (testimony of Jenny Hubach), 97–130 (testimony of  
 6 John Calvert).) The state district court asked Hubach why she did not invoke the rule of  
 7 exclusion, and Hubach testified that the trial court typically asks the parties at the outset  
 8 of trial whether they wish to invoke, but that did not happen in this case. (*Id.* at 19.) When  
 9 asked by the state district court why he did not invoke before the trial began, Calvert could  
 10 not provide an explanation. (*Id.* at 110.) Both attorneys testified they did not think about  
 11 the exclusionary rule until Natalie’s testimony discussed intimidation by the detectives,  
 12 which alerted the attorneys that the detectives were present in the courtroom and their  
 13 presence was a problem. (*Id.* at 19–20, 110–111.) Calvert attempted to invoke the  
 14 exclusionary rule while Natalie was testifying, but the trial court denied the motion. (*Id.* at  
 15 110–11; see also ECF No. 20-1 at 183–86.)

16 In his post-conviction appeal, the Nevada Supreme Court provided the relevant  
 17 background and held as follows:

18 On appeal from the denial of his May 26, 2010, petition, appellant argues  
 19 that the district court erred in denying his claims of ineffective assistance of  
 20 trial counsel. To prove ineffective assistance of counsel, a petitioner must  
 21 demonstrate that counsel’s performance was deficient in that it fell below an  
 22 objective standard of reasonableness, and resulting prejudice such that  
 23 there is a reasonable probability that, but for counsel’s errors, the outcome  
 24 of the proceedings would have been different. *Strickland v. Washington*, 466  
 25 U.S. 668, 687–88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d  
 26 504, 505 (1984) (adopting the test in *Strickland*). Both components of the  
 27 inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must  
 28 demonstrate the underlying facts by a preponderance of the evidence,  
*Means v. State*, 120 Nev. 1001, 1012, 108 P.8d 25, 88 (2004).

29 First, appellant argues that counsel was ineffective for failing to timely invoke  
 30 the exclusionary rule, which resulted in the intimidation of a witness while  
 31 she was testifying at trial by other witnesses who would have been excluded.  
 32 Appellant has failed to demonstrate prejudice. Appellant failed to satisfy his  
 33 burden of proof at the evidentiary hearing when he presented no evidence  
 34 that the testifying witness was in fact intimidated into changing her  
 35 testimony, what her testimony would have been had she not been  
 36 intimidated, or how it would have affected the outcome at trial. We therefore

1 conclude that the district court did not err in denying this claim.  
2  
(ECF No. 23-16 at 2–3.)

3 Here, Smith argues that trial counsel's failure to timely invoke the rule of exclusion  
4 constitutes “per se ineffectiveness,” and prejudice is shown in Natalie’s testimony because  
5 she repeatedly voiced a fear of law enforcement, yet she had to endure the detectives’  
6 stares while testifying. (ECF No. 18 at 23–25.) Respondents counter that Smith cannot  
7 show prejudice under *Strickland*’s second prong because he has not demonstrated how  
8 Natalie’s testimony would have been different in the detectives’ absence, and she  
9 repeatedly affirmed that her testimony was truthful. (ECF No. 36 at 9–11.) Considering the  
10 totality of the evidence presented against Smith, including additional witnesses who  
11 corroborated Natalie’s testimony, Respondents maintain that Smith fails to show how the  
12 outcome of his trial would have been different with the rule of exclusion in force. Smith  
13 replies that he has shown prejudice because the detectives’ presence during Natalie’s  
14 testimony allowed the prosecution to tailor or alter their subsequent testimony to render  
15 Natalie’s testimony incredible. (ECF No. 39 at 22–24.)

16 The Nevada Supreme Court’s conclusion that Smith failed to demonstrate prejudice  
17 on Ground 5(a) was neither contrary to nor an objectively unreasonable application of  
18 *Strickland*’s prejudice prong on the record and arguments presented to that court.<sup>10</sup>  
19 Natalie testified that the detectives’ presence in the courtroom and prior threats did not  
20 change the substance of her testimony. The state district court held that Smith identified  
21 no specific evidence to show the detectives actually intimidated any witness. (See ECF  
22 Nos. 23-9, 23-10.) The Nevada Supreme Court agreed, concluding that Smith had not  
23 shown prejudice and the state district court did not err in denying the claim. (ECF No. 23-  
24 16 at 2–3.) Smith does not identify what portions of Natalie’s testimony changed based on  
25 the detectives’ intimidation or what portions were rendered incredible. Nor does he identify  
26

27  
28 

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<sup>10</sup>Given this prejudice holding, the Nevada Supreme Court did not need to reach  
*Strickland*’s performance prong and did not do so.

1 what portions of the detectives' testimony was tailored to Natalie's. Smith has not  
 2 demonstrated how trial counsel's failure to invoke the exclusionary rule had any  
 3 conceivable effect on the outcome of the trial. See *Strickland*, 466 U.S. at 693. Under  
 4 AEDPA, Smith has failed to meet his burden of showing that the Nevada Supreme Court  
 5 unreasonably applied *Strickland* on the state court record.

6 The Nevada Supreme Court's ruling on this IAC claim was not contrary to, or an  
 7 unreasonable application of, clearly established federal law, and was not based on an  
 8 unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d).  
 9 The Court denies Smith with respect to Ground 5(a).

10 **2. Ground 5(b) – Failing to Object to Prosecutor's Misstatements**

11 Ground 5(b) is a companion claim to Ground 4, alleging ineffective assistance of  
 12 counsel for failing to object to the prosecutor's misstatement of the mental state elements  
 13 required for first-degree murder. The prosecutor's purported misstatements relevant to  
 14 this claim are set forth, *supra*, in the discussion of Ground 4.

15 During the evidentiary hearing, Smith's post-conviction counsel did not ask either  
 16 trial attorney why they did not object to the prosecutor's misstatements. (See ECF No. 23-  
 17 9 at 4–21 (Hubach's testimony), 97–130 (Calvert's testimony).) The state district court  
 18 asked Hubach why she did not object, but Hubach did not recall. (*Id.* at 16.) The court also  
 19 asked Calvert whether he remembered the prosecutor discussing or paraphrasing his  
 20 opinion of the meaning of premeditation and deliberation, but Calvert did not. (*Id.* at 125.)

21 The Nevada Supreme Court rejected Ground 5(b) on post-conviction appeal:

22 [A]ppellant argues that counsel was ineffective for failing to object to the  
 23 prosecutor's misstatement of law in closing argument concerning the  
 24 definitions of willfulness, premeditation, and deliberation. Appellant has  
 25 failed to demonstrate deficiency or prejudice. Despite carrying the burden of  
 26 proof, appellant failed to question either trial counsel at his evidentiary  
 27 hearing about their decision not to object to the misstatement of the law. See  
 28 *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280–81 (1996) (noting  
*Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), *abrogated on other  
 grounds by Harte v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6  
 (2000)) [sic]. Further, appellant failed to provide this court with complete trial  
 transcripts such that this court cannot review the district court's conclusion  
 that he was not prejudiced. See *Greene v. State*, 96 Nev. 555, 558, 612 P.2d

1 686, 688 (1980) (“The burden to make a proper appellate record rests on  
2 appellant.”). We therefore conclude that the district court did not err in  
denying this claim.

3 (ECF No. 23-16 at 3.)

4 Smith argues that counsel should have strenuously objected when the prosecutor  
5 misstated and misapplied the elements of willfulness, premeditation, and deliberation in  
6 his closing because there was no strategic reason to alleviate the State’s burden of proof.  
7 (ECF No. 18 at 23–25.) Smith contends that deficient performance and prejudice are  
8 patent in the record because the prosecutor’s statements precluded the jury from finding  
9 the mens rea required for conviction. Respondents assert that Smith has failed to meet  
10 his burden of showing either deficient performance or prejudice. (ECF No. 36 at 11–12.)  
11 Because he never challenged his trial counsel regarding their failure to object,  
12 Respondents claim Smith cannot overcome the presumption that counsel’s inaction might  
13 be considered sound trial strategy. Smith replies that the prosecutor confused the jury  
14 thereby allowing the jury to convict Smith of first-degree murder without deliberating on  
15 the required elements. (ECF No. 39 at 24–25.)

16 Courts “must indulge a strong presumption that counsel’s conduct falls within the  
17 wide range of professional assistance; that is, the defendant must overcome the  
18 presumption that, under the circumstances, the challenged action might be considered  
19 sound trial strategy.” *Strickland*, 466 U.S. at 689 (internal quotation omitted); *Richter*, 562  
20 U.S. at 109–10 (“There is a ‘strong presumption’ that counsel’s attention to certain issues  
21 to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’”) (quoting  
22 *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)). As the Ninth Circuit has explained, “[b]ecause  
23 many lawyers refrain from objecting during opening statement and closing argument,  
24 absent egregious misstatements, the failure to object during closing argument and  
25 opening statement is within the ‘wide range’ of permissible professional legal conduct.”  
26 *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013) (on habeas review, holding  
27 that state court did not unreasonably apply *Strickland* in denying IAC claim alleging  
28

1 counsel was ineffective for failing to object to prosecutor's improper comments) (quotation  
2 omitted). Where a petitioner fails to present evidence or testimony addressing a reason  
3 for trial counsel's challenged act or omission and why counsel's decision was  
4 unreasonable under the circumstances, a state court may reasonably to conclude the  
5 petitioner failed to rebut the presumption that counsel rendered adequate assistance.  
6 *Gentry v. Sinclair*, 705 F.3d 884, 899–900 (9th Cir. 2013) (rejecting IAC claim based on  
7 counsel's failure to offer mitigating evidence of petitioner's mental condition because  
8 petitioner failed to provide declaration or affidavit from counsel addressing reason counsel  
9 failed to present such evidence) (quoting *Strickland*, 466 U.S. at 690).

10 Based on the record and arguments presented on post-conviction appeal, as well  
11 as the previous discussion of Ground 4, the Nevada Supreme Court's conclusion that  
12 Smith failed to demonstrate deficient performance on Ground 5(b) was neither contrary to  
13 nor an objectively unreasonable application of *Strickland*. The Nevada Supreme Court's  
14 decision points out that Smith failed to question either of his trial attorneys about their  
15 decision not to object to the prosecutor's misstatement of law, despite carrying the burden  
16 of proof. (ECF No. 23-16 at 3.) The post-conviction evidentiary hearing was held nearly  
17 six years after the trial. (ECF No. 23-9.) Even if Smith had inquired of his trial attorneys,  
18 *Strickland*'s performance prong measures the objective reasonableness of counsel's  
19 performance, not counsel's subjective state of mind. See 466 U.S. at 688. Smith's trial  
20 attorneys may have determined that the prosecutor's misstatements were not egregious  
21 and thus decided not to object to avoid highlighting them. This is an acceptable defense  
22 strategy. See *Cunningham*, 704 F.3d at 1159. Smith bears the burden of proof on both  
23 state and federal post-conviction review. Given his failure to present any evidence or  
24 testimony addressing trial counsel's failure to object, he has not presented any proof to  
25 overcome the strong presumption of adequate performance. As such, it was not  
26 unreasonable for the Nevada Supreme Court to conclude that counsel provided adequate  
27 assistance. See *Gentry*, 705 F.3d at 900.

28 Because the Court finds that the Nevada Supreme Court's decision on *Strickland*'s

1 deficient performance prong was not unreasonable, the Court declines to address the  
 2 prejudice prong.<sup>11</sup> See *Strickland*, 466 U.S. at 697.

3 Under AEDPA's doubly-deferential standard, Smith has failed to demonstrate that  
 4 the Nevada Supreme Court's denial of this claim contradicted or unreasonably applied  
 5 controlling Supreme Court authority or amounted to an unreasonable determination of the  
 6 facts under section 2254(d). Ground 5(b) thus provides no basis for habeas relief.

7 **V. CERTIFICATE OF APPEALABILITY**

8 District courts are required to issue or deny a certificate of appealability when it  
 9 enters a final order adverse to a habeas petitioner, rather than waiting for a notice of  
 10 appeal and request for certificate of appealability to be filed. Fed. § 2254 R. 11(a); 9th Cir.  
 11 R. 22-1(a). Generally, a petitioner must make "a substantial showing of the denial of a  
 12 constitutional right" to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack*  
 13 *v. McDaniel*, 529 U.S. 473, 483–84 (2000). Where a district court denies relief on  
 14 procedural grounds without reaching the underlying constitutional claim, the court applies  
 15 a two-step inquiry to decide whether a certificate of appealability is appropriate. *Payton v.*  
 16 *Davis*, 906 F.3d 812, 820 (9th Cir. 2018). A petitioner must show both that jurists of reason  
 17 would find it debatable (1) "whether the petition states a valid claim of the denial of a  
 18 constitutional right," and (2) "whether the district court was correct in its procedural ruling."  
 19 *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack*, 529 U.S. at 484). To  
 20 meet the threshold inquiry, a petitioner has the burden of demonstrating that the issues  
 21 are debatable among jurists of reason; that a court could resolve the issues differently; or  
 22 that the questions are adequate to deserve encouragement to proceed further. See *Allen*

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23  
 24 <sup>11</sup>The Nevada Supreme Court held that it was unable to review the state district  
 25 court's conclusion regarding prejudice because Smith failed to provide complete trial  
 26 transcripts on appeal. Federal courts have a duty to conduct an independent review of the  
 27 record, *Nasby v. McDaniel*, 853 F.3d 1049, 1052 (9th Cir. 2017) (citation omitted), and its  
 28 review under AEDPA is not limited to the record actually before the Nevada Supreme  
 Court but instead extends to all material in the state court record. *McDaniels v. Kirkland*,  
 813 F.3d 770, 780–81 (9th Cir. 2015) (en banc) (discussing *Pinholster*, 563 U.S. at 181).  
 This Court does not decline to reach Smith's arguments regarding prejudice based on any  
 deficiency in the appellate record before the Nevada Supreme Court, but simply finds there  
 is no need to do so because Smith failed to establish deficient performance.

1 *v. Ornoski*, 435 F.3d 946, 950–951 (9th Cir. 2006). In this case, no reasonable jurist would  
2 find this Court’s denial of the Amended Petition debatable or wrong. The Court therefore  
3 denies Smith a certificate of appealability.

## 4 || VI. CONCLUSION

5       Based on the foregoing, it is ordered that Petitioner Jacob Smith's first amended  
6 petition for writ of habeas corpus (ECF No. 18) is denied in its entirety.

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

8 It is further ordered that the Clerk of Court is directed to enter final judgment  
9 accordingly and close this case.

10 DATED THIS 23<sup>rd</sup> day of January 2020.

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MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEP 22 2023

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

JACOB SMITH,

Petitioner-Appellant,

v.

ISIDRO BACA, Warden; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 20-15278

D.C. No.  
3:14-cv-00512-MMD-CLB

ORDER

Before: BUMATAY, KOH, and DESAI, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Fed. R. App. P. 40. To appeal to the United States Supreme Court, Petitioner must file a petition for a writ of certiorari directly in the Supreme Court, rather than a Notice of Appeal in the U.S. Court of Appeals for the Ninth Circuit. A petition for certiorari in the Supreme Court does not require a certificate of appealability. Any petition for writ of certiorari must meet the requirements set forth by the U.S. Supreme Court. The petition for panel rehearing is therefore DENIED.