

No.

In the
Supreme Court of the United States

Jermaine J. Campbell,

Petitioner,

v.

William Gittere, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix to Petition for Writ of Certiorari

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 24 2024

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

JERMAINE JAMAICA CAMPBELL, Sr.,

Petitioner-Appellant,

v.

WILLIAM GITTERE; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 23-15972

D.C. No.

3:19-cv-00576-MMD-CSD

District of Nevada,

Reno

ORDER

Before: S.R. THOMAS and SILVERMAN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 8) is denied. *See*

9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

No. 23-15972

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jermaine J. Campbell, Sr.,

Petitioner-Appellant,

v.

William Gittere *et al.*,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Nevada (Reno)
District Court Case No. 3:19-cv-00576-MMD-CSD,
Honorable Miranda M. Du, United States Chief District Judge

**Motion to Reconsider Denial of Application for Certificate of
Appealability as to Ground 3**

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INTRODUCTION

Mr. Campbell sought a certificate of appealability for two trial-counsel-ineffectiveness claims under *Strickland v. Washington*, 466 U.S. 668 (1984). This Court issued an order denying Mr. Campbell permission to appeal both claims on April 22, 2024.

Mr. Campbell now asks this Court to reconsider its prior decision as to Ground 3 only, which alleges that his trial attorney was ineffectiveness at sentencing for permitting the court to sentence Mr. Campbell to a sentencing enhancement where the factual predicate for that enhancement had not been clearly found by the jury beyond a reasonable doubt. Circuit Rule 27-10(a)(3) requires a litigant seeking reconsideration to “state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood.” Because the relevant order was a summary one-sentence order, Mr. Campbell is unable to determine the basis for the Court’s reasoning. Nonetheless, Mr. Campbell maintains his trial-counsel-ineffectiveness claim in Ground 3 meets the low bar for a certificate of appealability and is substantial.

Petitioner Jermaine Campbell is currently serving a sentence of 20

years to life based upon a factual predicate never clearly found beyond a reasonable doubt by the jury in his case.

During jury deliberations, jurors received a jury instruction that defined the crime of trafficking in a controlled substance as possessing only 4 grams or more of a controlled substance. Yet the jury was never instructed that there were three levels of trafficking under Nevada law at the relevant time: possessing at least 4 grams but less than 14 grams amounts to Level I trafficking; possessing at least 14 grams but less than 28 grams amounts to Level II trafficking; and possessing 28 grams or more amounts to Level III trafficking. NRS 435.3355 (2010). Moreover, the verdict form failed to specify what level of trafficking the jury had found Mr. Campbell guilty of. Instead, the jury merely found that Mr. Campbell was guilty of the crime of trafficking a controlled substance.

At sentencing, the judge failed to make any findings regarding the amount of drugs or state that Mr. Campbell had been found guilty of Level III trafficking. Instead, the judge simply stated Mr. Campbell was guilty of two counts of trafficking in a controlled substance and then imposed the harshest possible sentence under the law.

Trial counsel should have objected to the judge's lack of authority of sentence Mr. Campbell to Level III trafficking under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 106 (2004), where the jury did not clearly find beyond a reasonable doubt that he was guilty of each element of Level III trafficking. Trial counsel's failure to object amounted to deficient performance; but for this deficient performance, Campbell would not currently be serving 20 years to life for two counts of Level III trafficking.

The standard for acquiring a COA is not stringent. An applicant need not demonstrate the appeal will likely succeed. All that is required are facially valid contentions that the claim or arguments upon which the right to appeal are sought are subject to reasoned debate and, hence, not frivolous.

RELEVANT PROCEDURAL HISTORY**A. State Trial Court Proceedings**

On January 21, 2011, a criminal information charged Petitioner Jermaine J. Campbell with two counts of Trafficking in a Controlled Substance. ECF No. 43-6. The information alleged that Campbell was in actual or constructive possession of 28 grams or more of cocaine as well as 28 grams or more of heroin. *Id.* Campbell was primarily represented by two court-appointed attorneys: John Malone followed by John Ohlson, the latter of whom represented Campbell at trial. ECF Nos. 44-1, 44-4, 44-5.

After a two-day trial, the jury found Campbell guilty of both counts. ECF No. 46-3. The trial court sentenced Campbell to two consecutive sentences of 10 years to life along with, *inter alia*, a \$100,000 fine. ECF Nos. 46-5, 46-9. On direct appeal, court-appointed attorney Matthew Digesti presented only one issue to the Nevada Supreme Court related to the denial of a motion to suppress. ECF No. 47-29. The Nevada Supreme Court affirmed Campbell's convictions. ECF No. 47-36.

B. State Post-Conviction Proceedings

Campbell filed an in proper person Petition for Writ of Habeas Corpus in state court on October 10, 2014. The district court appointed counsel Patrick McGinnis, who then filed a supplemental petition, supplementing three of Campbell's pro se claims. ECF No. 49-14. The court held a hearing on the petition during which Campbell was represented by newly appointed counsel, Troy Jordan. ECF No. 50-1. On February 15, 2018, the court entered an order denying post-conviction relief. ECF No. 50-6. Neither McGinnis nor Jordan ordered the sentencing transcript from Campbell's underlying case.

Campbell, newly represented by counselor Karla Butko, then appealed the district court's denial to the Nevada Supreme Court. ECF No. 51-6. In the opening brief, counselor Butko noted that she had to ask that the sentencing transcript be prepared because Campbell's prior attorneys had failed to review it. *Id.* at 12-13. Butko raised in relevant part the claim at issue in this motion to reconsider:

5. The sentence imposed upon appellant is illegal, as a matter of law and under *Apprendi* and the Sixth Amendment.

Id.

The Nevada Supreme Court affirmed the lower court's denial of Campbell's post-conviction petition and did not address this claim. ECF No. 51-12. Remittitur issued on August 6, 2019. ECF No. 51-14.

SUMMARY OF ARGUMENT

This Court should reconsider its previous order denying a certificate of appealability as to Ground 3 only.

Circuit Rule 27-10(a)(3) requires a litigant seeking reconsideration to “state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood.” Because the Court's order denying a certificate of appealability was a summary one-sentence order, Mr. Campbell is unable to determine the basis for the Court's reasoning. However, Mr. Campbell respectfully suggests his claim for relief is undeniably strong enough to warrant a certificate of appealability, especially in light of the low bar for receiving one. He therefore maintains reconsideration is appropriate.

I. The certificate-of-appealability standard is a relaxed standard.

When a lower court dismisses a petition on the merits, the Court should allow an appeal if reasonable jurists could debate the outcome. Put one way, a petitioner must make “a substantial showing of the denial

of a constitutional right.” 28 U.S.C. § 2253(c)(2). Put another way, “a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (cleaned up).

“This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.” *Miller-El*, 537 U.S. at 336. Nor does it require deciding whether the petitioner will ultimately “demonstrate an entitlement to relief.” *Id.* at 337. “Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case had received full consideration, that petitioner will not prevail.” *Id.* at 338; *see also Buck v. Davis*, 137 S.Ct. 759, 774 (2017). “The court must resolve doubts about the propriety of a COA in the petitioner’s favor.” *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002).

To summarize, a petitioner needs to satisfy a lenient standard to pursue an appeal: the claim need only be reasonably debatable.

II. Mr. Campbell satisfied the relaxed certificate-of-appealability standard.

The federal district court found in relevant part that Campbell had not shown cause and prejudice to excuse the procedural default of his claim that his trial attorney was ineffective for failing to make an *Apprendi/Blakely* objection at sentencing because the claim was not substantial. To be substantial, a claim merely must have some merit or factual support. *See Martinez v. Ryan*, 566 U.S. 1, 16 (2012).

But this claim clearly had factual support—the jury was never informed of or instructed on the levels of trafficking; its verdict form failed to specify that it was finding Mr. Campbell guilty of Level III trafficking and instead merely stated he was found guilty of trafficking in a controlled substance, which the jury instructions had defined as possessing 4 grams or more of a controlled substance; and the sentencing judge merely adjudicated Mr. Campbell guilty of trafficking in a controlled substance without specifying that he was sentencing him under the statute for Level III trafficking.

Accordingly, Campbell has met the low threshold for a certificate of appealability, and respectfully requests that this Court grant his motion

to reconsider on Ground 3 and allow him to continue to vindicate his rights.

A. Reasonable jurists could agree that Mr. Campbell has made a substantial showing of the denial of a constitutional right.

Campbell had the right to receive effective assistance of counsel at sentencing. *Daire v. Lattimore*, 812 F.3d 766, 767 (9th Cir. 2016). Yet Campbell received constitutionally deficient representation at sentencing when his attorney failed to object to the sentencing court's lack of authority to sentence Campbell to Level III trafficking when the jury's verdict did not clearly reflect they had found beyond a reasonable doubt that Campbell possessed 28 grams or more of each substance.

The lower court denied relief on this claim, looking only to *Apprendi v. New Jersey* in its analysis to find that the claim was insubstantial and therefore that post-conviction counsel was not ineffective for failing to raise it. ECF No. 90 at 24-25. This analysis was cursory at best and ignored discussion of *Blakely v. Washington* and post-*Blakely* case law in Mr. Campbell's reply brief.

Instead, the lower court found that because Campbell was charged in the Information with subsection (3) of the relevant statute, the

Information was included in the jury instructions,¹ and the prosecution argued in its closing that it needed to prove Campbell “had constructive or actual possession of drugs or a mixture containing those drugs in excess of 28 grams,”² the underlying claim of ineffective assistance of trial counsel was “not substantial.” This overlooks the fact that the jury was never instructed that there are levels to drug trafficking that correspond to specific quantities of a controlled substance and its verdict form failed

¹ While the Information may have been included as an instruction, jurors are not lawyers and would therefore not be aware of the significance of the drug quantity relative to the charge. Even though the Information listed 28 grams or more, the jurors were never made aware that there were levels of drug trafficking, that 28 grams or more corresponded to Level III trafficking, or that the verdict form specifically corresponded to the charge of Level III trafficking. In other words, they were never made aware of the constitutional import of finding at least 28 grams or more of each controlled substance; instead, the definition of the crime “trafficking in a controlled substance” instructed them to find at least 4 grams, and there is simply no way to tell if all 12 jurors also found at least 28 grams as well.

² The jury was required to rely upon the jury instructions *alone*, not the prosecutor’s argument, to evaluate whether Mr. Campbell violated the law. Because the verdict form failed to specify the relevant subsection of the statute, the level of trafficking, or the corresponding drug quantity for Level III trafficking, the jury was left to look at the definition of “trafficking in a controlled substance” in the relevant jury instruction and check the box on the verdict form if only 4 grams or more had been proven beyond a reasonable doubt.

to specify the relevant subsection of the statute, instead using the general “trafficking in a controlled substance” which the jury instructions had defined as requiring proof beyond a reasonable doubt of only 4 grams or more (this is inclusive of all three levels of trafficking).

1. Reasonable jurists could agree that Mr. Campbell’s rights were violated under *Blakely v. Washington*.

The State charged Campbell with two counts of trafficking in a controlled substance. The jury was provided with the content of the State’s charges in a jury instruction:

The defendant in this matter, JERMAINE JAMAICA CAMPBELL, is being tried upon an Information which was filed on the 21st day of January, 2011, in the Second Judicial District Court, charging the said defendant, JERMAINE JAMAICA CAMPBELL, with:

COUNT I. TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(3), a felony, [] in the manner following:

That the said defendant on the 3rd day of December A.D., 2010, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, knowingly, and/or intentionally, sell, manufacture, deliver, or be in actual or constructive possession of 28 grams or more of a Schedule I controlled substance or a mixture

which contains a Schedule I controlled substance,
to wit: cocaine at Reno, Washoe County, Nevada.

COUNT II. TRAFICCKING IN A
CONTROLLED SUBSTANCES, a violation of
NRS 453.3385(3), a felony, [] in the manner
following:

That the said defendant on the 3rd day of
December A.D., 2010, or thereabout, and before
the filing of this Information, at and within the
County of Washoe, State of Nevada, did willfully,
unlawfully, knowingly, and/or intentionally, sell,
manufacture, deliver, or be in actual or
constructive possession of 28 grams or more of a
Schedule I controlled substance or a mixture
which contains a Schedule I controlled substance,
to wit: heroin at Reno, Washoe County, Nevada.

ECF No. 43-6 at 2-3; ECF No. 46-4 at 3 (Jury Instruction No. 2).

While the Information charged Campbell with trafficking in a
controlled substance and included a factual allegation that the quantity
was at least 28 grams of each substance, the jury received a definition of
trafficking in a controlled substance that required it to find only a
minimum of 4 grams beyond a reasonable doubt. The relevant jury
instruction (No. 17) provided:

The crime of TRAFFICKING IN A CONTROLLED
SUBSTANCE consists of the following elements:

(1) A person willfully, unlawfully, knowingly and/or intentionally

(2) Sells, manufacturers, delivers or brings into this state OR

(3) Is in actual or constructive possession of any controlled substance listed in schedule I, except marijuana, or any mixture which contains any controlled substance

(4) In a quantity of **four grams or more**³

For a person to be convicted of Trafficking in a Controlled Substances under NRS 453.3385, it is not necessary there by additional evidence of any activity beyond the possession of a quantity of controlled substance equal to or greater than four grams.

Heroin and cocaine are Schedule I controlled substances.

ECF No. 46-4 at 19. The jury, however, was never told that there were levels of drug trafficking that corresponded to specific quantities of the drug.⁴ In other words, while the Information may have alleged at least

³ This doesn't even reflect Level I trafficking at the time because it has no upper limit—instead, it makes any amount above 4 grams trafficking in a controlled substance.

⁴ Under the relevant statute at that time, an individual's possible sentence for trafficking in a controlled substance corresponded to the

28 grams, the instruction itself told the jury they needed to find only 4 grams to find Campbell guilty of the crime of trafficking in a controlled substance and it failed to make clear that the State had charged Campbell with Level III trafficking and that Level III trafficking required them to find 28 grams or more of each substance.⁵

quantity of drugs, with three possible levels of sentencing. The statute stated in relevant part (NRS 453.3385 (2010) (cleaned up)):

[A] person who knowingly or intentionally sells, manufacturers or brings into this State or who knowingly or intentionally in actual or constructive possession of any controlled substance which is listed in schedule I, or any mixture which contains such controlled substance, shall be punished if the quantity involved:

1. Is 4 grams or more, but less than 14 grams,
2. Is 14 grams or more, but less than 28 grams,
3. Is 28 grams or more.

⁵ While some jurors may have personally found at least 28 grams of each substance during their deliberations, their verdict does not clearly reflect this, which is the point of *Apprendi* and *Blakley*—a judge can only sentence an individual to the enhancement if it is **clear** that the jury found the requisite quantity element **beyond a reasonable doubt**. That's not the case here because the jury instructions told the jury that Mr. Campbell had been charged with trafficking in a controlled substance which required a minimum of 4 grams.

“[D]rug quantity—even though usually labeled a sentencing factor—is the ‘functional equivalent’ of an element.” *United States v. Minore*, 292 F.3d 1009, 1116 (9th Cir. 2002) (citing *Apprendi*, 530 U.S. at 494, n.19). Therefore, if a drug quantity exposes a defendant to a higher statutory maximum sentence, “it fits squarely within the usual definition of an ‘element’ of the offense.” *Apprendi*, 530 U.S. at 494 n.19.

At closing, the State began their argument by noting that they were asking the jury to find Campbell trafficked in a controlled substance of at least 28 grams. *See* ECF No. 46-2 at 118. However, the prosecutor pointed out that trafficking in a controlled substance was defined in the instructions as possession of a controlled substance “in a quantity greater than four grams.” ECF No. 46-2 at 124. The instructions themselves never advised the jury that they must find *beyond a reasonable* doubt at least 28 grams of each substance and the Information failed to make clear it had charged Mr. Campbell with Level III trafficking specifically which required 28 grams or more. Moreover, the verdict form also failed to specify that Mr. Campbell had been charged with Level III drug trafficking and that the jury MUST find beyond a reasonable doubt 28 grams or more of each substance in order to find him guilty of Level III

drug trafficking. The jury was not even made aware that there were levels of drug trafficking corresponding to specific quantities of a controlled substance. Instead, the instructions made it seem like there was merely one crime of trafficking in a controlled substance, requiring a mere 4 grams or more of each substance.

Thus, so long as the jurors all agreed that Campbell had trafficked in at least 4 grams or more of each of the controlled substances—for instance, 4.1 grams of heroin and 4.1 grams of cocaine—he was guilty of the crime of Trafficking in a Controlled substance.

Reasonable jurists could certainly agree that this violated *Apprendi* because the jury was never instructed on the specific quantity element for the charged offense⁶ and the jury had no idea that the charged offense required by statute proof of 28 grams or more.

⁶ In other words, the jury was told it was determining whether Campbell had committed trafficking in a controlled substance and that this required at least 4 grams of the controlled substance. The jury had no idea what the significance of 28 grams was (as alleged in the Information) other than that the State had randomly picked that number.

2. Reasonable jurists could agree the sentencing court was not permitted to sentence Campbell to Level III trafficking and counsel was ineffective for failing to object at sentencing.

Blakely v. Washington requires a judge to impose a sentence “*solely on the basis of the facts reflected in the jury verdict.*” 542 U.S. at 303. Yet here the judge sentenced Campbell under the greatest possible enhancement, assuming the jury had found beyond a reasonable doubt that Campbell possessed at least 28 grams of each substance as required for Level III trafficking. *See generally* ECF No. 46-7. Yet the judge made no findings that Mr. Campbell had been adjudged guilty of Level III trafficking in a controlled substance. Instead, much like the jury instruction and verdict form, the sentencing court merely found that Campbell had been adjudged guilty of trafficking in a controlled substance, as if there was one crime with no levels requiring a mere 4 grams or more of each substance.

The “statutory maximum” under *Apprendi* is the “maximum a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303 (citations omitted, emphasis in original). Moreover, “a finding of drug quantity,

when it exposes the defendant to a higher statutory maximum . . . must be made by the jury *beyond a reasonable doubt*.” *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002) (emphasis added). “*Apprendi* requires drug quantity—when it subjects a defendant to an enhanced sentence—to be both charged in the indictment and submitted to the jury.” *United States v. Westmoreland*, 240 F.3d 618, 633 (7th Cir. 2003). To submit the question of drug quantity to the jury, the jury instructions must “advise the jury that it must find the defendant guilty *beyond a reasonable doubt* of . . . the drug types and quantities described in the indictment.” *United States v. Perez-Ruiz*, 353 F.3d 1, 16 (1st Cir. 2003).

There is no doubt that the jury was instructed to find a minimum of 4 grams of each controlled substance as an element of trafficking in a controlled substance, but there is no way to tell from the general verdict form in this case whether the jury found beyond a reasonable doubt that there were at least 28 grams of each controlled substance or that it was even aware that Mr. Campbell had been charged with Level III trafficking and that this charge required 28 grams or more of each substance. As noted, the jury was not even instructed that there were levels of drug trafficking or that subsection (3) of the relevant statute

corresponded to Level III trafficking and required them to find 28 grams or more of each drug beyond a reasonable doubt. Simply put, the lower federal court's reasoning that the charging document's inclusion in the jury instructions or the prosecutor's own argument are sufficient is not supported by federal law.

Under *Blakely*, the question is whether the jury verdict *clearly* reflects the relevant factual finding beyond a reasonable doubt—a finding of at least 28 grams—so as to authorize the judge to sentence Campbell for Level III trafficking. The verdict form indicated the following:

We the jury, being duly empaneled in Count I of the above-entitled matter do find (check only one):

The defendant, guilty of trafficking in a controlled substance.

We the jury, being duly empaneled in Count II of the above-entitled matter do find (check only one):

The defendant, guilty of trafficking in a controlled substance.

ECF No. 46-3. No level of trafficking or subsection of the relevant statute is noted on the verdict form, and the relevant instruction defined trafficking in a controlled substance as requiring the jury to find beyond

a reasonable doubt at least 4 grams of each controlled substance or a mixture thereof.⁷ Without context as to the differing levels of drug quantity necessary for finding Mr. Campbell guilty of Level III trafficking under the relevant statute, the jury's verdict does not clearly reflect that it found 28 grams or more of each substance based upon the jury instructions as a whole or the general verdict form. At best, it reflects only that the jury unanimously found at least 4 grams of each substance beyond a reasonable doubt.

At the sentencing hearing on February 24, 2012, the court sentenced Campbell to two consecutive life sentences for trafficking in a controlled substance. ECF No. 46-7 at 12. The judge did not make any factual findings about the drug quantities found by the jury nor indicate that he was sentencing Mr. Campbell to Level III trafficking. *Id.* at 16.

⁷ This definition encompasses all three levels of trafficking without specifically defining them. It seems the District Attorney in Washoe County eventually realized the need to instruct the jury on the levels of trafficking and their corresponding drug quantities. *See* Order, *Barron-Aguilar v. Olsen*, 2023 WL 2772009, case no. 3:17-cv-00548-MMD-CLB, at * 12 (D. Nev. Apr. 4, 2023) (finding no *Apprendi* violation where the relevant jury instruction provided both the basic definition of trafficking in a controlled substance as being in a quantity of 4 grams or more as well as the quantities associated with the three levels of trafficking).

Trial counsel did not object to the fact that the sentencing judge did not have the authority to sentence Campbell for Level III trafficking. Where an attorney fails to object to application of a sentencing enhancement on the basis that the enhancement does not apply to a defendant, this amounts to deficient performance. In *Tilcock v. Budge*, 538 F.3d 1138 (9th Cir. 2008), the Ninth Circuit Court of Appeals found that there was “nothing strategic about [counsel] failing to object at sentencing to categorically non-qualifying convictions that would prevent a defendant from being eligible for” a sentencing enhancement. *Id.* at 1146.

In Campbell’s case, trial counsel’s failure to object at sentencing on the basis that the factual basis for a sentencing enhancement had not been found beyond a reasonable doubt had no strategic advantage and had no strategic advantage. Under the relevant statute, drug quantity acted as both an element of the offense and the basis for a sentencing enhancement. Because the jury instructions failed to make clear (1) Mr. Campbell had been charged with Level III trafficking or (2) that there even were levels of trafficking under Nevada law, it’s verdict does not reflect that it found the specific drug quantity necessary for Level III

trafficking, and reasonable jurists could certainly agree that counsel's failure to object at sentencing was patently ineffective because it was a failure to object to the violation of a constitutional right to be tried by a jury.

3. Reasonable jurists could agree that this failure to object was prejudicial.

Had trial counsel objected that the sentencing judge did not have the authority to impose a sentence for Level III trafficking, "either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal." *Burdge*, 290 F. App'x at 79. In short, had counsel objected, there is a reasonable probability that Campbell would not have received a sentence of 20 years to life.

At a minimum, reasonable jurists could debate the merits of this claim, and to receive a certificate of appealability on this issue, Mr. Campbell need not definitely establish prejudice at this stage. He therefore asks the Court to reconsider its denial of a certificate of appealability on this issue.

4. **Reasonable jurists could disagree with the district court's ruling that this claim is not substantial and could also agree that initial post-conviction counsel was ineffective for failing to raise it.**

The lower court found that this claim was without merit and therefore that post-conviction counsel was not ineffective for failing to raise it in the initial collateral proceeding, but reasonable jurists could disagree with this finding.

Appellate post-conviction counsel was the first attorney to order the sentencing transcript in this case, where she learned that trial counsel never objected at sentencing to the court's authority to sentence Campbell to Level III trafficking when the jury's verdict did not clearly reflect the jury had found the requisite drug quantity beyond a reasonable doubt. At that point, however, the Nevada courts would not entertain the claim. Had this claim been raised in the first instance by McGinnis, who was appointed to supplement Campbell's petition, there is a reasonable probability the outcome of the post-conviction proceedings would have been different and Campbell would have been resentenced. Moreover, the fact that an attorney raised this claim on post-conviction appeal shows that the claim is debatable amongst reasonable jurists.

Reasonable jurists could therefore disagree with the district court's denial of this claim, and Campbell asks that this Court reconsider its previous order and grant him a certificate of appealability on Ground 3.

CONCLUSION

For the reasons stated herein, Campbell requests this Court reconsider the denial of his previous application for a certificate of appealability as to Ground 3 and permit him to proceed on an appeal of this issue.

Dated July 2, 2024.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 22 2024

MOLLY C. DWYER, CLERK
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3:19-cv-00576-MMD-CSD

District of Nevada,
Reno

ORDER

Before: MILLER and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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).

Any pending motions are denied as moot.

DENIED.

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Application for Certificate of Appealability

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INTRODUCTION

Petitioner Jermaine Campbell is currently serving a sentence of 20 years to life based upon a factual predicate never found beyond a reasonable doubt by the jury in his case. During jury deliberations, jurors received a jury instruction that required them to find that Campbell possessed only 4 grams or more of cocaine and only 4 grams or more of heroin in order to be guilty of trafficking in a controlled substance, which was the amount required for Level I trafficking under then-existing Nevada law. Yet, the sentencing court gave Campbell the highest possible penalty under the statute for Level III trafficking, NRS 453.3385(3) (2010), sentencing him to two consecutive sentences of 10 years to life, which required the jury to clearly find beyond a reasonable doubt that he had possessed at least 28 grams of each substance.

Because the jury instructions required a finding of at least 4 grams and the general verdict form made no mention of the specific drug quantity the jury determined the State had proven beyond a reasonable doubt, trial counsel should have objected to the sentence imposed pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 106 (2004). Trial counsel's failure to object to this

obvious violation of clearly established federal law amounted to deficient performance; but for this deficient performance, Campbell would have received a sentence of 1 to 6 years on each count. NRS 453.3385(1) (2010). In addition to this patent error, Campbell is entitled to relief based upon additional errors made by trial counsel at the sentencing hearing. Counsel failed to make any argument on behalf of Campbell to persuade the court to exercise its discretion to make the sentences of 10 to life concurrent or to a term of years and failed to object to the sentencing court's reliance on impalpable and highly suspect evidence in the presentence investigation report. But for all these mistakes, there is a reasonable probability that the outcome of Campbell's sentencing hearing would have been different.

The Federal District Court of Nevada entered a written order denying Campbell federal habeas corpus relief and a certificate of appealability on June 16, 2023, even on the *Apprendi/Blakely* claim. ECF No. 99. On July 3, 2023, Campbell filed a timely Notice of Appeal. ECF No. 101.

After asking for one extension of time, Campbell now seeks a COA of the district court's denial of federal habeas corpus relief on Grounds 3

and 4 of his amended petition. *See* Ninth Circuit Rule 22-1(d).

The standard for acquiring a COA is not stringent. An applicant need not demonstrate the appeal will likely succeed. All that is required are facially valid contentions that the claim or arguments upon which the right to appeal are sought are subject to reasoned debate and, hence, not frivolous.

RELEVANT PROCEDURAL HISTORY

A. State Trial Court Proceedings

On January 21, 2011, a criminal information charged Petitioner Jermaine J. Campbell with two counts of Trafficking in a Controlled Substance under NRS § 453.3385(3) (Level III Trafficking). ECF No. 43-6. The information alleged that Campbell was in actual or constructive possession of 28 grams or more of cocaine as well as 28 grams or more of heroin. *Id.* Campbell was primarily represented by two court-appointed attorneys: John Malone followed by John Ohlson, the latter of whom represented Campbell at trial. ECF Nos. 44-1, 44-4, 44-5.

Prior to trial, Campbell moved to suppress evidence—including the alleged cocaine and heroin—found at the apartment he shared with his then-girlfriend, Ashley Loftis, who provided the consent to search the

apartment. *See* ECF No. 43-19; *see also* ECF No. 26-6 (filed under seal). After an evidentiary hearing, the trial court denied the motion to suppress. ECF No. 45-2.

After a two-day trial, the jury found Campbell guilty of both counts. ECF No. 46-3. The trial court sentenced Campbell to two consecutive sentences of 10 years to life along with, *inter alia*, a \$100,000 fine. ECF No. 46-5. Judgment was entered on February 27, 2012. ECF No. 46-9.

On direct appeal, court-appointed attorney Matthew Digesti presented only one issue to the Nevada Supreme Court, arguing that the consent to search by Ms. Loftis resulted in an unconstitutional search. ECF No. 47-29. The Nevada Supreme Court disagreed and affirmed Campbell's conviction. ECF No. 47-36. Campbell filed a *pro se* Petition for Writ of Certiorari in the United States Supreme Court, Case No. 13-8780, which was denied on April 28, 2014. His petition for rehearing was also denied on June 30, 2014.

B. State Post-Conviction Proceedings

Campbell filed an in proper person Petition for Writ of Habeas Corpus in state court on October 10, 2014. In this petition, Campbell

raised fourteen grounds for relief, but neither of the claims raised in this application for a certificate of appealability. ECF No. 48-1.

The district court appointed counsel Patrick McGinnis, who then filed a supplemental petition. ECF No. 49-14. In his supplemental petition, McGinnis supplemented three of Campbell's claims. The court held a hearing on the petition during which Campbell was represented by newly appointed counsel, Troy Jordan. ECF No. 50-1. On February 15, 2018, the court entered an order denying post-conviction relief. ECF No. 50-6. Neither McGinnis nor Jordan ordered the sentencing transcript from Campbell's underlying case.

Campbell, newly represented by counselor Karla Butko, then appealed the district court's denial to the Nevada Supreme Court. ECF No. 51-6. In the opening brief, counselor Butko noted that she had to ask that the sentencing transcript be prepared because Campbell's prior attorneys had failed to review it. *Id.* at 12-13. Butko raised in relevant part the two claims raised in this application for a certificate of appealability:

[...]

2. Trial counsel was ineffective under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to object to the use of suspect evidence at sentencing and failed to appeal the district court's imposition of sentence based upon suspect evidence.

[...]

5. The sentence imposed upon appellant is illegal, as a matter of law and under *Apprendi* and the Sixth Amendment.

Id.

The Nevada Supreme Court affirmed the lower court's denial of Campbell's post-conviction petition and did not address the two relevant claims. ECF No. 51-12. Remittitur issued on August 6, 2019. ECF No. 51-14.

SUMMARY OF ARGUMENT

The federal district court found in relevant part that Campbell had not shown cause and prejudice to excuse the procedural default of his claims that (1) his trial attorney was ineffective for failing to make an *Apprendi/Blakely* objection at sentencing regarding the court's authority to sentence Campbell to level III trafficking when the jury's verdict only found level I trafficking beyond a reasonable doubt (Ground 3); (2) his attorney was ineffective for failing to make an argument at the final

sentencing hearing on behalf of Campbell in support of concurrent sentences of 10 to life or a sentence of a term of years (as opposed to a life tail) (Ground 4(a)); and (3) that same attorney failed to object to the sentencing court's clear reliance on suspect and impalpable evidence in sentencing Campbell to consecutive terms of 10 to life (Ground 4(b)). The district court's position is not supportable.

Accordingly, Campbell has met the low threshold for a certificate of appealability, and respectfully requests that this Court allow him to continue to vindicate his rights.

I. Applicable Legal Standards

Habeas petitioners must seek a certificate of appealability ("COA") before appealing an adverse judgment. *See* 28 U.S.C. § 2253(c)(1). Section 2253(c)(2) further provides that a COA may issue "if the applicant has made a substantial showing of the denial of the constitutional right." This "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484

(2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). The Supreme Court affirmed this standard, holding:

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” This threshold question should be decided without “full consideration of the factual or legal bases adduced in support of the claims.”

Buck v. Davis, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003)).

The Supreme Court has expressed a preference for ensuring that a petitioner’s case is reviewed by an appellate court even if the claim may ultimately fail. *See Miller-El*, 537 U.S. at 337; *see also Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). Therefore, “[t]he court must resolve doubts about the propriety of a COA in the petitioner’s favor.” *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002).

Campbell’s issues for review meet the low standard for granting a certificate of appealability; jurists of reason could debate the district court’s adjudication of his constitutional claims.

II. Campbell Has Made a Substantial Showing of the Denial of his Constitutional Rights

Campbell had the right to receive effective assistance of counsel at sentencing. *Daire v. Lattimore*, 812 F.3d 766, 767 (9th Cir. 2016). Yet Campbell received constitutionally deficient representation at sentencing when his attorney failed to object to the sentencing court's lack of authority to sentence Campbell to Level III trafficking when the jury's verdict did not clearly reflect they had found beyond a reasonable doubt that Campbell possessed 28 grams or more of each substance.

The lower court denied relief on this claim, looking only to *Apprendi v. New Jersey* in its analysis to find that the claim was insubstantial and therefore that post-conviction counsel was not ineffective for failing to raise it. ECF No. 90 at 24-25. In doing so, the lower court ignored Campbell's argument in his reply brief that the sentencing court's actions violated *Blakely v. Washington*. Instead, the lower court found that because Campbell was charged in the Information with Level III trafficking, the Information was included in the jury instructions, and the prosecution argued in its closing that it needed to prove Campbell "had constructive or actual possession of drugs or a mixture containing

those drugs in excess of 28 grams,” the underlying claim of ineffective assistance of trial counsel was “not substantial.”

Whether a claim is “substantial” simply requires that it have some merit. Reasonable jurists would agree that counsel was ineffective for failing to object to the sentencing judge exceeding his authority because the jury verdict did not clearly reflect that it had found beyond a reasonable doubt that Campbell possessed 28 or more grams of each substance.

A. Post-conviction counsel’s ineffectiveness can overcome the default of a trial counsel ineffectiveness claim.

“[F]ederal habeas review of [procedurally defaulted] claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective assistance of post-conviction counsel, as set forth in *Strickland*, may provide “cause,” as provided in *Coleman*, to overcome the procedural default of a claim of ineffective assistance of trial counsel. A petitioner relying on *Martinez* must demonstrate that: (1) “the state

courts did not appoint counsel in the initial-review collateral proceeding,” or “appointed counsel in [that] proceeding was ineffective under the standards of *Strickland v. Washington*”; and (2) “the underlying claim is a substantial one, which is to say that the claim has some merit.” *Martinez*, 566 U.S. at 14 (cleaned up).

Whether an underlying trial counsel ineffectiveness claim has some merit asks whether it is “wholly without factual support.” *See Martinez*, 566 U.S. at 16. Thus, if the facts in the record provide any factual support for the claim, then it has some merit.

B. Campbell has made a substantial showing of the denial of his right to effective assistance of counsel under the Sixth and Fourteenth Amendments because counsel failed to object at sentencing in violation of *Blakely v. Washington*.

Reasonable jurists could certainly disagree with the lower court’s decision that Campbell’s trial attorney did not perform ineffectively when he failed to object to the sentencing court’s authority to sentence Campbell to Level III trafficking where the jury instructions and general verdict did not clearly reflect that the jury had found beyond a reasonable doubt that he possessed at least 28 grams of each substance.

1. **Reasonable jurists could agree that the jury was instructed that to find Campbell guilty of the crime of trafficking in a controlled substance, it need find only that Campbell possessed four grams of heroin and four grams of cocaine.**

The State charged Campbell with two counts of trafficking in a controlled substance in violation of NRS 453.3385(3)¹ (2010). The jury was provided with the content of the State's charges in a jury instruction:

The defendant in this matter, JERMAINE JAMAICA CAMPBELL, is being tried upon an Information which was filed on the 21st day of January, 2011, in the Second Judicial District Court, charging the said defendant, JERMAINE JAMAICA CAMPBELL, with:

COUNT I. TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(3), a felony, [] in the manner following:

That the said defendant on the 3rd day of December A.D., 2010, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, knowingly, and/or intentionally, sell, manufacture, deliver, or be in actual or constructive possession of 28 grams or more of a Schedule I controlled substance or a mixture

¹ Effective July 1, 2020, the Nevada legislature amended this statute to require an individual to possess at least 100 grams of a controlled substance in order to be guilty of a category B felony with a possible sentence of 2 to 20 years imprisonment. NRS 453.3385(1)(a).

which contains a Schedule I controlled substance,
to wit: cocaine at Reno, Washoe County, Nevada.

COUNT II. TRACCKING IN A
CONTROLLED SUBSTANCES, a violation of
NRS 453.3385(3), a felony, [] in the manner
following:

That the said defendant on the 3rd day of
December A.D., 2010, or thereabout, and before
the filing of this Information, at and within the
County of Washoe, State of Nevada, did willfully,
unlawfully, knowingly, and/or intentionally, sell,
manufacture, deliver, or be in actual or
constructive possession of 28 grams or more of a
Schedule I controlled substance or a mixture
which contains a Schedule I controlled substance,
to wit: heroin at Reno, Washoe County, Nevada.

ECF No. 43-6 at 2-3; ECF No. 46-4 at 3 (Jury Instruction No. 2).

While the Information charged Campbell with trafficking in a
controlled substance in a quantity of at least 28 grams, the jury received
a definition of trafficking in a controlled substance that required it to find
only a minimum of 4 grams beyond a reasonable doubt. The relevant jury
instruction (No. 17) provided:

The crime of TRAFFICKING IN A CONTROLLED
SUBSTANCE consists of the following elements:

(1) A person willfully, unlawfully, knowingly
and/or intentionally

(2) Sells, manufacturers, delivers or brings into this state OR

(3) Is in actual or constructive possession of any controlled substance listed in schedule I, except marijuana, or any mixture which contains any controlled substance

(4) In a quantity of four grams or more

For a person to be convicted of Trafficking in a Controlled Substances under NRS 453.3385, it is not necessary there by additional evidence of any activity beyond the possession of a quantity of controlled substance equal to or greater than four grams.

Heroin and cocaine are Schedule I controlled substances.

ECF No. 46-4 at 19. Under the relevant statute at that time, an individual's possible sentence for trafficking in a controlled substance corresponded to the quantity of drugs, with three possible levels of sentencing. The statute stated in relevant part:

[A] person who knowingly or intentionally sells, manufacturers or brings into this State or who knowingly or intentionally in actual of constructive possession of . . . any controlled substance which is listed in schedule I, except marijuana, or any mixture which contains such controlled substance, shall be punished . . . if the quantity involved:

1. Is 4 grams or more, but less than 14 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years and by a fine of not more than \$50,000.

2. Is 14 grams or more, but less than 28 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years by a fine of not more than \$100,000.

3. Is 28 grams or more, for a category A felony by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served, and by a fine of no more than \$500,000.

NRS 453.3385 (2010). “[D]rug quantity—even though usually labeled a sentencing factor—is the ‘functional equivalent’ of an element.” *United States v. Minore*, 292 F.3d 1009, 1116 (9th Cir. 2002) (citing *Apprendi*, 530 U.S. at 494, n.19). Therefore, if a drug quantity exposes a defendant to a higher statutory maximum sentence, “it fits squarely within the usual definition of an ‘element’ of the offense.” *Apprendi*, 530 U.S. at 494 n.19.

At closing, the State began their argument by noting that they were asking the jury to find beyond a reasonable doubt that Campbell was trafficking in a controlled substance of at least 28 grams, which was consistent with what it alleged in the Information. *See* ECF No. 46-2 at 118. However, the prosecutor pointed out that trafficking in a controlled substance was defined as possession of a controlled substance “in a quantity greater than four grams.” ECF No. 46-2 at 124. The instructions themselves never advised the jury that they must find *beyond a reasonable* doubt at least 28 grams of each substance, even if the Information made mention of that drug quantity.

Thus, so long as the jury found beyond a reasonable doubt that Campbell had trafficked in 4 grams or more of each of the controlled substances—for instance, 4.1 grams of heroin and 4.1 grams of cocaine—he was guilty of the crime of Trafficking in a Controlled substance. The jury instructions did not instruct the jury that they had to find beyond a reasonable doubt the drug quantity that was an element of Level III trafficking, i.e., 28 or more grams of each substance.

Therefore, the requisite drug quantity for Level III trafficking was not submitted to the jury because the specific jury instruction advised the

jury that it need find only 4 grams and the jury did not receive a special verdict form where it could state as such.

2. **Reasonable jurists could agree the sentencing court was not permitted to sentence Campbell to Level III trafficking where the jury's verdict did not specify the quantity of drugs found and where it was instructed to find whether there were at least 4 grams of each controlled substance.**

Blakely v. Washington requires a judge to impose a sentence “*solely on the basis of the facts reflected in the jury verdict.*” 542 U.S. at 303. Yet here the judge sentenced Campbell under the greatest possible enhancement, assuming the jury had found beyond a reasonable doubt that Campbell possessed at least 28 grams of each substance. *See generally* ECF No. 46-7.

The “statutory maximum” under *Apprendi* is the “maximum a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”² *Blakely*, 542 U.S. at 303 (citations omitted, emphasis in original). Moreover, “a finding of drug quantity,

² Campbell did not admit to there being at least 28 grams of heroin and/or cocaine in his apartment. Moreover, while a defendant may waive his *Apprendi* rights, Campbell did not formally stipulate to there being at least 28 grams of heroin and of cocaine or to the judge at any time.

when it exposes the defendant to a higher statutory maximum . . . must be made by the jury *beyond a reasonable doubt*.” *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002) (emphasis added). “*Apprendi* requires drug quantity—when it subjects a defendant to an enhanced sentence—to be both charged in the indictment and submitted to the jury.” *United States v. Westmoreland*, 240 F.3d 618, 633 (7th Cir. 2003). To submit the question of drug quantity to the jury, the jury instructions must “advise the jury that it must find the defendant guilty *beyond a reasonable doubt* of . . . the drug types and quantities described in the indictment.” *United States v. Perez-Ruiz*, 353 F.3d 1, 16 (1st Cir. 2003).

There is no doubt that the jury was instructed to find only 4 grams of each controlled substance as an element of trafficking in a controlled substance, but there is no way to tell from the general verdict form in this case whether the jury found beyond a reasonable doubt that there were at least 28 grams of each controlled substance. The lower federal court’s reasoning that the charging document’s inclusion in the jury instructions or the prosecutor’s own argument are sufficient to establish the jury found, beyond a reasonable doubt, that Campbell possessed at least 28 grams or more of each substance is not supported by federal law.

Under *Blakely*, the question is whether the jury verdict reflects the relevant factual finding beyond a reasonable doubt—a finding of at least 28 grams—yet the relevant instruction provided a drug quantity of at least 4 grams and the jury did not make any special findings about the drug quantity in their general verdict form. Instead, the verdict form indicated the following:

We the jury, being duly empaneled in Count I of the above-entitled matter do find (check only one):

The defendant, guilty of trafficking in a controlled substance.

We the jury, being duly empaneled in Count II of the above-entitled matter do find (check only one):

The defendant, guilty of trafficking in a controlled substance.

ECF No. 46-3. As noted previously, the relevant instruction defined trafficking in a controlled substance as requiring the jury to find beyond a reasonable doubt at least 4 grams of each controlled substance or a mixture thereof. Accordingly, whether the State presented evidence at Campbell's trial or argued in closing about the quantity of drugs does not establish that the jury found the specific quantity of drugs beyond a reasonable doubt since the question was not actually submitted to the

jury through the relevant jury instructions and/or verdict form.

Consequently, reasonable jurists could agree that the sentencing court did not have the authority to impose a sentence for Level III trafficking because that sentence was not based upon the facts reflected in the jury's verdict.

3. Reasonable jurists could agree that trial counsel was ineffective for failing to object to the enhancement at sentencing.

At the sentencing hearing on February 24, 2012, the court sentenced Campbell to two consecutive life sentences under NRS 453.3385(3) as charged in the indictment. He did not make any factual findings about the drug types or quantities found by the jury.

Trial counsel did not object to the fact that the sentencing judge did not have the authority to sentence Campbell for Level III trafficking where the jury's verdict was not clearly based on the finding that he possessed at least 28 grams of cocaine and 28 grams of heroin and where Campbell did not admit to possessing these quantities of the requisite substances. As discussed at length in the previous sections, the relevant jury instruction informed the jury that the quantity element of the offense required a finding of only 4 grams minimum, not 28 grams or

more, and the jury's general verdict forms did not expressly incorporate the finding of the quantity element.

Where an attorney fails to object to application of a sentencing enhancement on the basis that the enhancement does not apply to a defendant, this amounts to deficient performance. In *Tilcock v. Budge*, 538 F.3d 1138 (9th Cir. 2008), the Ninth Circuit Court of Appeals found that there was “nothing strategic about [counsel] failing to object at sentencing to categorically non-qualifying convictions that would prevent a defendant from being eligible for” a sentencing enhancement. *Id.* at 1146.

Counsel must at least evaluate if not make an argument that is “sufficiently foreshadowed in existing case law.” *Leeds v. Russell*, 75 4th 1009, 1020 (9th Cir. 2023) (quoting *Bridges v. United States*, 991 F.3d 793, 804 (7th Cir. 2021)). For instance, in an unpublished decision from this Court, *Burdge v. Belleque*, 290 F. App'x 73 (9th Cir. 2008), the Court found counsel was ineffective for failing to object to the application of Oregon's habitual offender sentencing statute on grounds that the statute did not apply to the defendant who had no prior felonies at the time of the principal offense deprived the defendant of due process. In

that case, the court found that “counsel’s failure to assert a plausible, logical interpretation of a clearly ambiguous sentencing statute constituted deficient performance” where “several states had interpreted similar sentencing statutes to apply only when a prior conviction occurred before the commission of the principal offense.” 290 F. App’x at 77-78. The failure to object “fell below an objective standard of reasonableness under prevailing professional norms and was not the product of sound trial strategy.” *Id.* at 79.

In Campbell’s case, trial counsel’s failure to object at sentencing on the basis that a sentencing enhancement does not apply to the defendant amounts to deficient performance. Under the relevant statute, drug quantity acted as both an element of the offense and the basis for a sentencing enhancement. Because the jury was required to find only that there were 4 or more grams of each controlled substance and the sentencing judge imposed the highest possible sentence under the relevant statute, trial counsel’s failure to object was patently ineffective because it was a failure to object to the violation of a constitutional right to be tried by a jury.

At a minimum, reasonable jurists could debate whether trial counsel's failure to object was ineffective and violated Campbell's constitutional rights.

4. **Reasonable jurists could agree that this failure to object was prejudicial because Campbell received the maximum possible sentence where the jury did not clearly find beyond a reasonable doubt that he possessed the 28 grams or more of each substance as required by the statute.**

Had trial counsel objected to the application of NRS 453.3385(3) (2010) to the jury's verdict, "either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal." *Burdge*, 290 F. App'x at 79. In short, had counsel objected, there is a reasonable probability that Campbell's original sentence of two consecutive life sentences would have been recalculated by the state courts. Under the relevant statute and the relevant jury instruction, the sentencing court could have sentenced Campbell to at most 1 to 6 years on each count.

5. **Reasonable jurists could disagree with the district court's ruling that this claim is not substantial and could also agree that post-conviction counsel was ineffective for failing to raise it.**

The lower court found that this claim was without merit and therefore that post-conviction counsel was not ineffective for failing to raise it, but reasonable jurists could disagree with this finding.

Appellate post-conviction counsel was the first attorney to order the sentencing transcript in this case, where she learned that trial counsel never objected at sentencing to the court's authority to sentence Campbell to Level III trafficking when the jury's verdict did not clearly reflect the jury had found the requisite drug quantity beyond a reasonable doubt. At that point, however, the Nevada courts would not entertain the claim. Had this claim been raised in the first instance by McGinnis, who was appointed to supplement Campbell's petition, there is a reasonable probability the outcome of the post-conviction proceedings would have been different and Campbell would have been resentenced.

Because this is a winning ineffective assistance of trial counsel claim, reasonable jurists could agree that post-conviction counsel was ineffective for failing to raise it. Moreover, the claim was obvious from

the sentencing transcript, which is why appellate post-conviction counsel raised it in her brief to the state supreme court.

Reasonable jurists could therefore disagree with the district court's denial of this claim, and Campbell asks that this Court grant him a certificate of appealability.

C. Campbell has made a substantial showing of the denial of his right to effective assistance of counsel under the Sixth and Fourteenth Amendments based upon counsel's failure to make any argument at sentencing in support of a shorter sentence or to object to the court's reliance on suspect evidence.

Campbell had the right to receive effective assistance of counsel at sentencing. *Daire v. Lattimore*, 812 F.3d 766, 767 (9th Cir. 2016). Yet Campbell received constitutionally deficient representation at sentencing when counsel failed to make any argument on behalf of Campbell in support of concurrent sentences or in support of a term of years (as opposed to a life tail) (Ground 4(A)). Counsel also failed to object to the judge's reliance upon suspect evidence in imposing consecutive, as opposed to concurrent, sentences, or to the judge's decision to impose a life sentence on each count when the statute permitted an alternate maximum term of 25 years. (Ground 4(B)). *See* NRS 453.3385(3)(b).

Instead, after the judge imposed consecutive 10 to life sentences, counsel requested the judge reconsider and adopt the recommendation of parole and probation for concurrent 10 to life sentences.

The lower court found that counsel's requests on behalf of Campbell to fix errors in the presentence report and counsel's statement after the court imposed its sentence, where he requested the court adopt concurrent sentences as recommended by parole and probation, were constitutionally adequate. ECF No. 99 at 28. Similarly, the court found that the sentencing court's reliance on unverified charges and Campbell's family status were not suspect, and therefore counsel did not need to object. *Id.* at 30-31. This reasoning overlooks the lengthy argument made by Campbell in his reply brief, in which he outlined how the court used prior allegations or dismissed/unknown charges of domestic violence to justify a life sentence. *See* ECF No. 90 at 34-37, 39-42.

Regardless, reasonable jurists could certainly agree that trial counsel performed deficiently given that a life sentence was on the table. It's clear no argument was made in mitigation beyond the recommendation of parole and probation and that Campbell himself had

to object or correct manifest errors in the presentence investigation report.

1. The sentencing hearings.

At the date and time originally set for sentencing, trial counsel indicated to the court that Campbell himself had corrections to make to the presentence report. ECF No. 46-6 at 4. There was no evidence that trial counsel had investigated or verified these inaccuracies, which included the number of times Campbell had been on parole, the number of times his parole had been revoked, an inaccurate conviction, and separately an inaccurate sentence on a conviction from 1995. *See id.* at 5-8.

At the continued sentencing hearing on February 24, 2012, after verifying there were no factual errors in the updated presentence report, the court appeared to give trial counsel an opportunity to speak, at which point trial counsel stated that Campbell had a statement he wanted to read to the Court. ECF No. 46-7 at 5-6.

The court then noted that procedurally he normally gave the defendant the “last say” and stated that he would first given the State an opportunity to speak. ECF No. 46-7 at 6. Trial counsel did not object at

this point to ensure he had the opportunity to argue in mitigation on Campbell's behalf. The State noted that there were two possible sentences the court could impose—10 to 25 years or 10 years to life—and then agreed with the recommendation of the Division of Parole and Probation, which recommended that Campbell be sentenced to two concurrent sentences of 10 years to life. ECF No. 46-7 at 6. The State reiterated Campbell's criminal history as detailed in the presentence report and argued that Campbell should not receive a definite term of 10 to 25 years because he had "no regard for the rules of society," would do what he wants so is "unsupervisable," and was "unwilling to take advantage of the opportunities granted him while on supervised release." ECF No. 46-7 at 8. Whether Campbell had ever had opportunities while on supervised release or tried to take advantage of those opportunities was never verified by trial counsel during the sentencing hearing.

During Campbell's allocution, he reflected on the poor choices he had made that had led him to prison but protested that those mistakes did not warrant a life sentence. *See* ECF No. 46-7 at 9 ("I made mistakes as a black man, but I have not made a mistake that deserves a life sentence.") Campbell spoke of his children and the loss of contact he had

had with them due to the poor choices he had made. *See id.* (“I have 11 kids by eight different women. The youngest are two, the oldest are 17.”); *see id.* at 10 (noting that some of his children were disappointed in him and that he had a “lot to prove to them” and “to teach them”). He stated that he had taken advantage of opportunities while on supervised release by highlighting that the violations he incurred while on probation for ten years were not caused by new crimes. *See* ECF No. 46-7 at 10 (“I started out as doing robberies and stuff like that and carrying guns, but I went through ten years of my life trying not to do it, even though I caught violations . . . [they] didn’t come with new crimes”).

Importantly, Campbell highlighted that the PSI report did not reflect his life or what he had been through *as a person*, that a confluence of bad influences had contributed to his poor decision making. If anything, during Campbell’s allocution, he attempted to advocate that he was more than a mere crime statistic and pleaded with the court to give him an opportunity to “make it to the sky” so that he would be motivated to better himself while incarcerated. ECF No. 46-7 at 11-12.

The court then sentenced Campbell to two consecutive life sentences with parole eligibility after 20 years despite recognizing that

Campbell was articulate, smart, and that there may be “an opportunity for rehabilitation.” ECF No. 46-7 at 13. In making his decision, the judge focused on a variety of unproven allegations and considerations not relevant to whether he would reoffend, stating the following:

I have to look to see if I let you out again, what's the likelihood that you'll one, reoffend, and the types of crimes. And to that, I look to the presentence investigation report and I look not just at the convictions in this case, but the other contacts you had with law enforcement and this is what concerns me.

It says [Campbell] was also arrested for the following offenses, dispositions as noted. Stockton, taking a car, vehicle without consent. But these are the crimes that concern me, particularly when you mention the fact that you've had 11 children through eight different women and there's no—I mean, other than your statement, which says you try and help them out when you're on the streets.

In 2002, battery on a spouse, ex-spouse. 2005, in Tulsa, Oklahoma, domestic assault, battery, abuse, felony battery on a police officer after former conviction, felony carrying firearms during probation, resisting an officer, FTA warrant on an assault and battery on a police officer, domestic battery.

ECF No. 46-7 at 15. After issuing the sentence, trial counsel asked the court if he could be heard and focused solely on the nature of the crime

as the basis for the Division of Parole and Probation's recommendation that the sentences be run concurrently. *See id.* at 16 (noting that he thought because the drugs were discovered in a search which was "one transaction," parole and probation recommended the sentences run concurrently).

The sentencing judge ignored this objection and imposed consecutive life sentences. *Id.* at 17.

2. Reasonable jurists could agree that trial counsel should have made an argument on behalf of Campbell at sentencing rather than Parole and Probation's recommendation after the imposition of the sentence.

Under NRS 176.015(2)(a), a judge must give defense counsel an opportunity to speak on behalf of his client. It is unclear whether the sentencing court gave trial counsel the opportunity to speak on behalf of his client but never made the statutorily permitted statement, in clear violation of prevailing norms of practice.

A criminal defense attorney's most basic function is to advocate for his client and to act as a liaison between the complexities of the legal system and the harsh realities of the world. Trial counsel not only failed to perform as an advocate at Campbell's sentencing hearings based upon

the prevailing norms of the profession—he also failed to convey to the court Campbell’s humanity and the factors weighing against concurrent sentences or a life tail. Instead, Campbell acted as his own advocate by attempting to alert the court to inaccuracies in his presentence investigation report and by making a statement on his own behalf at sentencing.

Under the American Bar Association’s Criminal Justice Standards, defense counsel has a variety of professional obligations related to sentencing. ABA Standard 4-8.3 (2022). These include:

- Becoming familiar with a client’s background, what options might be available as well as what consequences may arise if the client is convicted (subsection (a));
- Preparing before sentencing by learning the court’s practices in exercising sentencing discretion and the normal pattern of sentences for the offense involved (subsection (b));
- Presenting all arguments or evidence at the sentencing hearing that will assist the court in reaching a sentencing disposition favorable to the accused (subsection (c));
- Gathering and submitting as much mitigation information

relevant to sentencing as reasonably possible (subsection (d));

- Independently investigating the facts relevant to sentencing and seeking discovery or relevant information from third parties if necessary, and verifying information in the presentence report independently so counsel may challenge incorrect information where applicable (subsection (e));
- If necessary, objecting once the sentence has been announced (subsection (f)).

Reasonable jurists could certainly agree that counsel did not fulfill the prevailing norms of the profession when he failed to present any argument on behalf of Campbell or to incorporate mitigation evidence to support the alternate option under the statute of 10 to 25 years or to express support for the Division of Parole and Probation's recommendation of concurrent sentences.

3. Reasonable jurists could agree that trial counsel was ineffective for failing to object to the sentencing court's reliance on suspect evidence in sentencing Campbell to consecutive life sentences.

"[I]t is important for a defendant to object to his PSI at the time of sentencing because Nevada law does not provide any administrative of

judicial scheme for amending a PSI after the defendant is sentenced.” *Sasser v. State*, 130 Nev. 387, 390, 324 P.3d 1221, 1223 (Nev. 2014) (internal quotation marks and citation omitted). “Any objections that the defendant has must be resolved prior to sentencing.” 130 Nev. at 390-91, 324 P.3d at 1223 (cleaned up). While it is not clear what the process is for the district court to resolve these objections, the court may do so by amending a defendant’s PSI in the judgment of conviction. 130 Nev. at 391, 324 P.3d at 1223. Thus, if there are any issues with a presentence investigation report, it is imperative that defense counsel object prior to imposition of sentence.

Moreover, “a court cannot base its sentencing decision on information or accusations that are founded on impalpable or highly suspect evidence.” *Gomez v. State*, 130 Nev. 404, 407 (internal quotation marks and citation omitted). This means that a presentence investigation report “must not include information based on impalpable or highly suspect evidence.” *Id.* (internal quotation marks and citations omitted). The sentencing court cited to Campbell’s other “contacts” with law enforcement as part of the reason for sentencing him to two consecutive life sentences, stating:

I have to look to see if I let you out again, what's the likelihood that you'll, one, reoffend, and the types of crimes. And to that, I look to the presentence report and I look not just at the convictions in this case, but the other contacts you had with law enforcement, and this is what concerns me. [The presentence investigation report] says [Campbell] was also arrested for the following offenses, dispositions as noted. Stockton, taking a car, vehicle without consent. But these are the crimes that concern me[,] . . .

In 2002, battery on a spouse, ex-spouse. 2005, in Tulsa, Oklahoma, domestic assault, battery, abuse, felony battery on a police officer after former conviction, felony carrying firearms during probation, resisting an officer, FTA warrant on an assault and battery on a police officer, domestic battery.

ECF No. 46-7 at 15. In looking at the relevant section of the presentence investigation report, the charge for “taking a car, vehicle without consent” was dismissed and the outcome of the 2002 arrest for battery upon an ex-spouse was “unknown.” The report also indicates that the Division of Parole and Probation could not determine the disposition of the 2002 arrest for battery on an ex-spouse and that the 2005 charges out of Tulsa were dismissed.

The judge also began his remarks by citing to consideration of Ashley Loftis as a victim of Campbell, stating that Ms. Loftis “reported

to the hospital after being beaten [by Campbell].” ECF No. 46-7 at 13. Campbell objected, noting that Ms. Loftis checked into the hospital to detox before voluntarily going to rehab. *See id.* Trial counsel did not object at any point to the judge’s concerns about Campbell’s purported violence against his ex-girlfriends or family.

When trial counsel finally objected after the sentence was announced, that objection pointed to the court’s divergence from the Division of Parole and Probation’s recommendation that the sentences be run concurrently. He did not object to the court’s clear reliance upon Campbell’s purported history of contacts with law enforcement where the disposition of those arrests was either “unknown” or the charges were dismissed. The Division of Parole and Probation did not identify how they obtained this information—it did not indicate that it had obtained this information from Campbell himself or that it had obtained the information from local law agencies or local courts.

Under Nevada law, a court abuses its discretion when the sentence a defendant receives is “prejudice from consideration of information or accusations founded on impalpable or highly suspect evidence.” *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (Nev. 1982) (internal

quotation marks and citation omitted). An example where a court has relied upon impalpable or highly suspect evidence include one case where the presentence investigation report indicated the defendant was a drug trafficker based upon her contact with the narcotics division of the LVMPD, finding that this declaration was “a bald assertion, unsupported by any evidence.” *Goodson*, 98 Nev. at 495-496, 654 P.2d at 1006-1007.

In Campbell’s case, the judge diverged from the recommendation of concurrent sentences because of these previous purported contacts with law enforcement and because these offenses involved violence against domestic partners; counsel did not object that these contacts were based on impalpable or highly suspect evidence. More specifically, the judge cited to contacts with law enforcement that involved alleged violence and noted Campbell had 11 children by 8 different women, suggesting that the purported charges of domestic violence and the alleged domestic violence against Ashley Loftis in relation to the instant offense affected his decision to sentence Campbell to the largest possible sentence under the statute.

Trial counsel’s failure to object to this reliance on impalpable and highly suspect evidence, as gleaned from the presentence investigation

report, amounted to deficient performance based upon prevailing norms of practice. As mentioned above, the ABA standards for defense counsel's duties at sentencing include "Independently investigating the facts relevant to sentencing and seeking discovery or relevant information from third parties if necessary, and verifying information in the presentence report independently so counsel may challenge incorrect information where applicable." ABA Criminal Justice Standard 4-8.3(c). Trial counsel made no objections at the first sentencing hearing; instead, he left the objections to Campbell, who made corrections to the initial report.

At the beginning of the February 24, 2012 sentencing hearing, trial counsel made an objection consistent with Campbell's previous objections, stating that Campbell had pointed the correction out to him. ECF No. 46-7 at 4-5. But counsel did not object to the court's reliance upon impalpable and highly suspect evidence in the report, likely because he failed to investigate the accuracy of the information contained in the report. Moreover, the purported amount of drugs involved in this offense do not suggest Campbell was a high level trafficker, but at most a mid-level dealer. The judge's reasoning demonstrates that it was not the

drugs that he found to be a danger to the community but his belief Campbell was violent against prior domestic partners; yet the offense relies upon by the court were not verified. Reasonable jurists could certainly agree that the judge relied upon suspect and impalpable evidence and that counsel should have objected to these bases for imposing life sentences.

- 4. Reasonable jurists could agree that had trial counsel made an argument on behalf of Campbell at sentencing or objected to the court's reliance on impalpable and highly suspect evidence, there is a reasonable probability that Campbell would have received a lesser sentence.**

At sentencing, the court had the discretion to sentence Campbell to concurrent sentences and to sentence Campbell to a definite term on each count of 10 to 25 years. Moreover, the Division of Parole and Probation recommended that Campbell be sentenced to concurrent sentences of 10 years to life. Had counsel objected to the court's clear reliance on a purported history of domestic violence, there is a reasonable probability that the court would have followed that recommendation or given Campbell a term of years as opposed to life tails.

At a minimum, reasonable jurists could agree that but for counsel's

wholly absent advocacy, there is a reasonable probability Campbell would have received a shorter sentence.

5. Reasonable jurists could disagree with the district court's ruling that this claim is not substantial and could agree post-conviction counsel was ineffective

The district court found that this claim was not substantial, meaning the underlying trial ineffectiveness claim didn't even have some merit or factual support. Based on the foregoing, reasonable jurists could disagree with the finding.

As noted previously, the final hearing where the state court imposed its sentence was not transcribed until appellate post-conviction counsel requested it. Therefore, post-conviction counsel never even evaluated whether counsel rendered constitutionally adequately assistance at sentencing. Had post-conviction counsel gotten this transcript, he would have seen that counsel did not meaningfully advocate for Campbell beyond merely reiterating what parole and probation had recommended, i.e., that the two 10-to-life sentences run concurrently. He did not ask that the life tail not be imposed on Campbell and that a definite term of years be imposed instead.

Moreover, counsel didn't dissuade the judge from considering Campbell's purported history of domestic abuse as a basis to keep him incarcerated or detained for the rest of his life. Trial counsel merely reiterated the objections Campbell himself had made regarding mistakes in the presentence investigation report about his prior convictions.

Had trial counsel done anything more than parrot what Campbell had told him and parole and probation had recommended, reasonable jurists could agree that there is a reasonable probability Campbell would not currently be served 20 years to life in the Nevada Department of Corrections.

Reasonable jurists could therefore disagree with the district court's resolution of this claim.

CONCLUSION

The district court's findings on Grounds 3, 4(A), and 4(B) are insupportable. Reasonable jurists could agree that trial counsel was ineffective at sentencing for failing to object to the sentencing court's lack of authority to sentence Campbell to Level III trafficking, for failing to make an argument in mitigation for Campbell, and/or for failing to object to the sentencing court's clear reliance on suspect evidence.

For the reasons stated herein, Campbell requests this Court issue a certificate of appealability as to each challenged issue so that he can continue to seek to right the constitutional wrongs that occurred in his case.

Dated September 6, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Alicia R. Intriago

Alicia R. Intriago
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JERMAINE JAMAICA CAMPBELL, SR.,
Petitioner,
v.
WILLIAM GITTERE, *et al.*,
Respondents.

Case No. 3:19-cv-00576-MMD-CSD

ORDER

I. SUMMARY

This action is a petition for a writ of habeas corpus by Petitioner Jermaine Jamaica Campbell, Sr., an individual incarcerated at Ely State Prison, in Ely, Nevada. Campbell is represented by appointed counsel. The case is before the Court for resolution on the merits of Campbell's claims. For the reasons discussed below, the Court will deny Campbell habeas corpus relief and will deny him a certificate of appealability.

II. BACKGROUND

Campbell was convicted, following a two-day jury trial, in Nevada's Second Judicial District Court (Washoe County), of two counts of trafficking in a controlled substance. (ECF Nos. 45-6, 46-2, 46-3, 46-7.) He was sentenced to two consecutive terms of life in prison with parole eligibility after ten years. (ECF No. 46-9.) The Judgment was filed on February 27, 2012. (*Id.*)

Campbell appealed. (ECF Nos. 46-10, 47-29, 47-34.) The Nevada Supreme Court affirmed on September 18, 2013. (ECF No. 47-36.) Campbell filed a petition for certiorari in the United States Supreme Court. (ECF No. 47-50.) The United States Supreme Court

1 denied that petition on April 28, 2014 (ECF No. 47-51) and then denied a petition for
2 rehearing on June 30, 2014 (ECF No. 47-52).

3 On October 10, 2014, Campbell filed a *pro se* petition for writ of habeas corpus in
4 the state district court. (ECF No. 48-1.) On March 25, 2016, with appointed counsel,
5 Campbell filed a supplemental habeas petition. (ECF No. 49-14.) The state district court
6 held an evidentiary hearing (ECF No. 50-1), then denied Campbell's petition in a written
7 order filed on February 15, 2018. (ECF No. 50-6.) Campbell appealed. (ECF Nos. 50-2,
8 51-7.) The Nevada Supreme Court affirmed on July 10, 2019. (ECF No. 51-12.) The
9 remittitur issued on August 5, 2019. (ECF No. 51-14.)

10 On September 15, 2020, Campbell filed a *pro se* motion for modification of
11 sentence in the state district court. (ECF No. 51-15.) The state district court denied that
12 motion on October 16, 2020. (ECF No. 51-21.) Campbell appealed (ECF No. 51-24), but
13 the Nevada Supreme Court dismissed the appeal on January 8, 2021, ruling that the
14 notice of appeal was untimely filed. (ECF No. 51-25.)

15 The Court received a *pro se* petition for writ of habeas corpus from Campbell,
16 initiating this action on September 17, 2019. (ECF No. 4.) The Court granted Campbell's
17 motion for appointment of counsel and appointed the Federal Public Defender for the
18 District of Nevada to represent him. (ECF Nos. 3, 5.) With counsel, on September 21,
19 2020, Campbell filed a first amended petition for writ of habeas corpus (ECF No. 25).
20 Campbell's first amended petition, his operative petition, includes the following claims
21 (organized and stated as in the petition):

22 Ground 1: Campbell's federal constitutional rights were violated on account
23 of ineffective assistance of his trial counsel because "counsel induced
24 Campbell to reject a favorable plea based upon counsel's opinion that the
25 case would be dismissed for the State's failure to locate Ashley Loftis."

26 Ground 2: Campbell's federal constitutional rights were violated on account
27 of ineffective assistance of his trial counsel because counsel "fail[ed] to
28 argue that Ms. Loftis did not voluntarily consent to sign the waiver that
permitted the search of the apartment."

Ground 3: Campbell's federal constitutional rights were violated on account
of ineffective assistance of his trial counsel because counsel "failed to make

1 an *Apprendi* objection to the enhanced sentence beyond the one justified
2 by the jury's verdict."

3 Ground 4: Campbell's federal constitutional rights were violated on account
4 of ineffective assistance of his trial counsel because counsel was ineffective
5 at sentencing.

6 Ground 4A: "Counsel was ineffective at sentencing by failing to make
7 any argument on behalf of Mr. Campbell."

8 Ground 4B: "Counsel was ineffective at sentencing by failing to
9 object to suspect evidence cited by the judge in imposing two life
10 sentences."

11 (ECF No. 25.)

12 Respondents filed a motion to dismiss (ECF No. 42), contending that all of
13 Campbell's claims are barred by the statute of limitations and that Grounds 1, 3, 4A, and
14 4B are unexhausted in state court and/or procedurally defaulted. The Court denied
15 Respondents' motion. (ECF No. 64.)

16 Respondents then filed an answer to Campbell's amended habeas petition. (ECF
17 No. 75.) Campbell filed a reply. (ECF No. 90.)

18 **III. DISCUSSION**

19 **A. AEDPA Standard of Review**

20 28 U.S.C. § 2254(d) (enacted as part of the Antiterrorism and Effective Death
21 Penalty Act of 1996 (AEDPA)) sets forth the standard of review generally applicable to
22 claims asserted and resolved on their merits in state court:

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

27 (1) resulted in a decision that was contrary to, or involved an
28 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.

1 28 U.S.C. § 2254(d). A state court decision is contrary to clearly established Supreme
2 Court precedent, within the meaning of 28 U.S.C. § 2254(d)(1), “if the state court applies
3 a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if
4 the state court confronts a set of facts that are materially indistinguishable from a decision
5 of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
6 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v.*
7 *Taylor*, 529 U.S. 362, 405-06 (2000)). A state court decision is an unreasonable
8 application of clearly established Supreme Court precedent, within the meaning of 28
9 U.S.C. § 2254(d)(1), “if the state court identifies the correct governing legal principle from
10 [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the
11 prisoner’s case.” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The
12 “unreasonable application” clause requires the state court decision to be more than
13 incorrect or erroneous; the state court’s application of clearly established law must be
14 objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). The analysis under
15 section 2254(d) looks to the law that was clearly established by United States Supreme
16 Court precedent at the time of the state court’s decision. See *Wiggins v. Smith*, 539 U.S.
17 510, 520 (2003).

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

1 **B. Exhaustion and Procedural Default – Legal Standards**

2 A federal court may not grant relief on a habeas corpus claim not exhausted in
3 state court. See 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of
4 federal-state comity, and is designed to give state courts the initial opportunity to correct
5 alleged constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To
6 exhaust a claim, a petitioner must fairly present that claim to the highest available state
7 court and must give that court the opportunity to address and resolve it. See *Duncan v.*
8 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10
9 (1992).

10 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
11 to comply with the State’s procedural requirements in presenting his claims is barred by
12 the adequate and independent state ground doctrine from obtaining a writ of habeas
13 corpus in federal court. 501 U.S. 722, 731-32 (1991) (“Just as in those cases in which a
14 state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet
15 the State’s procedural requirements for presenting his federal claims has deprived the
16 state courts of an opportunity to address those claims in the first instance”). Where such
17 a procedural default constitutes an adequate and independent state ground for denial of
18 habeas corpus, the default may be excused only if “a constitutional violation has probably
19 resulted in the conviction of one who is actually innocent,” or if the prisoner demonstrates
20 cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496
21 (1986).

22 To demonstrate cause for a procedural default, the petitioner must “show that
23 some objective factor external to the defense impeded” his efforts to comply with the state
24 procedural rule. *Id.* at 488. For cause to exist, the external impediment must have
25 prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467,
26 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden of
27 showing not merely that the errors [complained of] constituted a possibility of prejudice,
28

1 but that they worked to his actual and substantial disadvantage, infecting his entire
2 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
3 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

4 In *Martinez v. Ryan*, the Supreme Court ruled that ineffective assistance of post-
5 conviction counsel may serve as cause, to overcome the procedural default of a claim of
6 ineffective assistance of trial counsel. 566 U.S. 1, 9 (2012). In *Martinez*, the Supreme
7 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
8 postconviction proceeding does not establish cause” to excuse a procedural default. *Id.*
9 at 15 (citing *Coleman*, 501 U.S. at 746-47). The *Martinez* Court, however, “qualif[ied]
10 *Coleman* by recognizing a narrow exception: inadequate assistance of counsel at initial-
11 review collateral proceedings may establish cause for a prisoner’s procedural default of
12 a claim of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review
13 collateral proceedings” as “collateral proceedings which provide the first occasion to raise
14 a claim of ineffective assistance at trial.” *Id.* at 8.

15 C. Ineffective Assistance of Counsel – Legal Standards

16 In *Strickland v. Washington*, the Supreme Court established a two-prong test for
17 claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the
18 attorney’s representation “fell below an objective standard of reasonableness,” and (2)
19 that the attorney’s deficient performance prejudiced the defendant such that “there is a
20 reasonable probability that, but for counsel’s unprofessional errors, the result of the
21 proceeding would have been different.” 466 U.S. 668, 688, 694 (1984). A court
22 considering a claim of ineffective assistance of counsel must apply a “strong presumption”
23 that counsel’s representation was within the “wide range” of reasonable professional
24 assistance. *Id.* at 689. The petitioner’s burden is to show “that counsel made errors so
25 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by
26 the Sixth Amendment.” *Id.* at 687. In analyzing a claim of ineffective assistance of counsel
27 under *Strickland*, a court may first consider either the question of deficient performance
28

1 or the question of prejudice; if the petitioner fails to satisfy one element of the claim, the
2 court need not consider the other. See *id.* at 697.

3 Where a state court previously adjudicated a claim of ineffective assistance of
4 counsel under *Strickland*, establishing that the decision was unreasonable is especially
5 difficult. See *Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court explained
6 that, in such cases, “[t]he standards created by *Strickland* and § 2254(d) are both highly
7 deferential . . . and when the two apply in tandem, review is ‘doubly’ so.” *Harrington*, 562
8 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); see also *Cheney*
9 *v. Washington*, 614 F.3d 987, 994-95 (2010) (double deference required with respect to
10 state court adjudications of *Strickland* claims).

11 **D. Claim-Specific Analysis**

12 **1. Ground 1**

13 In Ground 1, Campbell claims that his federal constitutional rights were violated on
14 account of ineffective assistance of his trial counsel because “counsel induced Campbell
15 to reject a favorable plea based upon counsel’s opinion that the case would be dismissed
16 for the State’s failure to locate Ashley Loftis.” (ECF No. 25 at 6.) Campbell explains his
17 claim as follows:

18 Mr. Campbell was charged with two counts of Trafficking in a
19 Controlled Substance under NRS § 453.3385(3). See 1/21/2011
20 Information [ECF No. 43-6]. If convicted after trial, he could be sentenced
to either 10 to 25 years or 10 years to life on each count.

21 Mr. Campbell was represented by John Ohlson at trial. The month
22 before the trial was set to [begin], the prosecution sent an email to Ohlson
23 with an offer of 6 to 15 years with no habitual criminal designation. See
24 10/10/2014 Pro Se Petition [ECF No. 48-1]. Rather than take this favorable
25 deal, Ohlson advised Mr. Campbell to reject it, suggesting instead that Mr.
Campbell proceed to trial because the State could not find Ms. Loftis and
that if the State could not locate her the court would likely dismiss the
charges. See 1/30/2018 Evidentiary Hearing (“EH”) [ECF No. 50-1] at 74–
75. Mr. Campbell declined the State’s offer and chose to go to trial based
on this advice.

26 Mr. Campbell was subsequently convicted after trial of both counts
27 of third-level trafficking and sentenced to consecutive terms of 10 years to
28 life. See 2/27/2012 Judgment [ECF No. 46-9].

1 (Id. at 6-7.)

2 Campbell asserted this claim in state court in Ground 9 of his state habeas petition.
3 (ECF No. 49-14 at 10-11.) The state district court held an evidentiary hearing. (ECF No.
4 50-1 (Transcript).) Ohlson testified as follows:

5 Q. [direct examination] After you lost the motion to suppress, did
6 you ever tell Mr. Campbell that you could go to—you needed to go to trial
because you'd win at trial, specifically because Ms. Loftis was unavailable?

7 A. Well, that's a number of questions. The first is, I never tell a
8 client to go to trial. I advise the client in regards to trial. They make the
decision.

9 Q. Okay. Do you remember what you advised Mr. Campbell
10 in this case?

11 A. No.

12 * * *

13 Q. [cross-examination] Mr. Ohlson, you were first admitted to
practice law in what year?

14 A. 1972.

15 Q. And you have been mostly involved in criminal defense
16 in that time?

17 A. That's right.

18 Q. Since 1972 have you ever had a case where an issue of
consent to search was tried to a jury?

19 A. No.

20 Q. Have you ever told any client that the issue of consent to
21 search would be tried to a jury?

22 A. No.

23 Q. Can you imagine why anyone would say such a thing?

24 A. Incompetence.

25 Q. And are you incompetent?

26 A. You might—

27 Q. Sir, this is your chance.

1 A. I guess that depends. At what? At practicing law, I don't think
2 I am.

3 Q. All right. Are you confident that you never told your client, Mr.
4 Campbell, that the issue of consent to search could be tried to this jury in
5 his case?

6 A. Absolutely.

7 Q. Okay. Did you tell him, or can you imagine why you would tell
8 him that if a witness on the subject of consent was unavailable for trial that
9 the judge would dismiss without a trial?

10 A. Well, I can imagine circumstances when I might tell that to a
11 client—

12 Q. Okay.

13 A. —depending on the witness.

14 Q. How about this client?

15 A. I don't recall ever saying that.

16 Q. Okay. Why would you say that, that if a witness didn't show
17 up that the judge would dismiss without a trial?

18 A. I don't know. I don't think I would.

19 Q. Okay. And in particular, if the witness that may or may not
20 show up was Ms. Loftis, and her testimony concerned consent, can you
21 imagine why you would tell a judge—a client that the judge would dismiss if
22 she didn't show up?

23 A. I think that—if that was in the context of the suppression
24 hearing, then I think it would be a different story, yes.

25 Q. Trial, sir.

26 A. Trial, no.

27 Q. No. Okay. And so, assuming you had plea bargain
28 discussions with your client, would you have—did you tell him—are you
confident you did not tell him that he should reject it, because if Ms. Loftis
did not show up for trial the case would be dismissed?

 A. I did not tell Mr. Campbell to reject a plea offer. I don't tell
clients to reject plea offers.

(Id. at 21-22, 25-27.)

Campbell, on the other hand, testified in a manner generally supporting his claim, and contrary to Ohlson's testimony; however, the state district court found Campbell's testimony to be unconvincing:

. . . Mr. Campbell's testimony was not credible under the facts of this case. It was not consistent with other assertions he's made, and was not consistent even on the stand.

(*Id.* at 123.)

The state district court denied relief on the claim, ruling as follows:

Ground (9) and Supplemental Petition Ground (9): Petitioner alleges ineffective assistance of counsel for trial counsel's advice to reject a plea deal. Specifically, Petitioner argues that Mr. Ohlson informed Petitioner of an offer from the State of 72–180 months with no habitual criminal designation, but suggested that he not take the deal and proceed to trial. Petitioner claims that Mr. Ohlson told him that they probably offered him the deal because they could not find Ms. Loftis. Petitioner also states that Mr. Ohlson told Petitioner that should the State not locate Ms. Loftis, the Court would most likely dismiss the charges. Petitioner claims he decided to proceed to trial based on this information and advice.

In *Lafler v. Cooper*, the defendant was initially willing to plead guilty and accept the State's offer. However, he proceeded to trial when his counsel convinced him that the State would be unable to establish intent because the victim had been shot below the waist. [Footnote: *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012).] Here, unlike in *Lafler*, Mr. Ohlson did not actively convince his client to act in one way or another. During the evidentiary hearing Mr. Ohlson agreed that he informed Petitioner of the plea deal, but stated that he did not tell Petitioner to reject the offer. He testified he has never done such a thing. Mr. Ohlson stated that he only advises his clients, and would not have told his client to reject a plea deal and go to trial. He also adamantly denied suggesting that the Court would dismiss the charges against Petitioner if the State could not produce Ms. Loftis as a witness. Mr. Ohlson's testimony was trustworthy and credible, and the Court accepts as true his assertions regarding his communication with his client. Therefore, Mr. Ohlson's communication and advice to Petitioner did not fall below the objective standard of reasonableness and cause prejudice against Petitioner. Thus, Ground (9) is DENIED.

(ECF No. 50-6 at 10-11.)

On the appeal in the state habeas action, Campbell changed the focus of the claim somewhat, emphasizing his argument—which is not part of Ground 1 here—that counsel was ineffective for failing to explain “joint or constructive possession liability” to Campbell

1 in connection with the plea offer. Campbell did, though, include factual allegations and
2 argument concerning the argument on which the claim is presented in this case in Ground
3 1. (ECF No. 51-7 at 22-23, 48-51.) The Nevada Supreme Court affirmed the denial of
4 relief on the claim:

5 . . . [A]ppellant argues that counsel failed to inform him that he could
6 be convicted of trafficking on a theory of constructive possession. He
7 asserts that had counsel done so, he would have accepted a favorable plea
8 offer. We conclude that substantial evidence supports the district court's
9 conclusion that appellant failed to demonstrate that counsel convinced him
10 to reject the plea offer. An attorney who represented appellant before trial
11 testified that he discussed appellant's proposed defense that he did not own
12 the drugs and concluded that it was not viable under Nevada law or the
13 evidence against appellant. Trial counsel testified that he would have
14 communicated all plea offers to appellant, and appellant agreed that the
15 offer had been communicated. Counsel did not tell appellant to reject the
16 plea offer. To the extent that appellant's testimony contradicted that of his
17 counsel, it was for the district court to assess the relative credibility of each
18 witness, and that determination receives substantial deference on appeal.
19 *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). The district
20 court did not err in denying this claim.

21 (ECF No. 51-12 at 3-4.)

22 As Campbell's claim in Ground 1 was adjudicated on its merits in state court, the
23 claim is here subject to the deferential AEDPA standard of 28 U.S.C. § 2254(d). In
24 determining whether a state court decision is "contrary to" or an "unreasonable
25 application" of federal law, under section 2254(d), the federal court looks to the state
26 courts' last reasoned decision. *Kennedy v. Lockyer*, 379 F.3d 1041, 1052 (9th Cir. 2004),
27 *cert. denied*, 544 U.S. 992 (2005). The Nevada Supreme Court affirmed the denial of
28 relief on this claim without discussion of the theory asserted by Campbell in the state
district court or in Ground 1 in this Court—that Ohlson advised him the charges would be
dismissed if Loftis was unavailable to testify at trial—so the Court looks to the reasoning
of the state district court. After holding an evidentiary hearing, the state district court found
that Ohlson "adamantly denied suggesting that the Court would dismiss the charges
against Petitioner if the State could not produce Ms. Loftis as a witness," and that Ohlson
"agreed that he informed Petitioner of the plea deal, but stated that he did not tell

1 Petitioner to reject the offer.” These findings were not unreasonable given Ohlson’s
2 testimony, which the state district court found to be credible.

3 Campbell argues that Ohlson admitted that there may be instances where he
4 would advise a client that a witness’s unavailability to testify about the legality of a search
5 might result in dismissal of charges. (ECF No. 90 at 12-13.) However, Ohlson
6 distinguished between the unavailability of a witness at a suppression hearing and the
7 unavailability of a witness at trial. (ECF No. 50-1 at 25-27 (“I think that—if that was in the
8 context of the suppression hearing, then I think it would be a different story, yes”).) In this
9 case, the prosecution made the plea offer to Campbell *after* the suppression hearing.
10 (ECF Nos. 44-14 (transcript of suppression hearing held October 6, 2011, with trial court
11 denying motion to suppress), 48-1 at 157 (plea offer transmitted to Campbell’s counsel
12 October 10, 2011).) So, when Ohlson advised Campbell about the plea offer, the search
13 had already been ruled legal and its fruits admissible. There was no suggestion in
14 Ohlson’s testimony that he might have advised Campbell that the charges would be
15 dismissed if Loftis was unavailable to testify at *trial*. The state district court reasonably
16 found that Ohlson did not mislead Campbell about the chances that the charges would
17 be dismissed on account of Loftis’ unavailability at trial, and that he did not lead Campbell,
18 by any such misleading advice, to reject the plea offer. The court’s factual findings were
19 reasonable and the court correctly applied *Lafler v. Cooper*, 566 U.S. 156 (2012). (ECF
20 No. 50-6 at 10-11.)

21 Giving the state courts’ rulings the deference required by both § 2254(d) and
22 *Strickland*, as it must, the Court determines that the state courts reasonably ruled that
23 Ohlson’s advice regarding the plea negotiations was not deficient.

24 The Court also determines that, at any rate, the state courts reasonably found that
25 Campbell did not show that he was prejudiced by Ohlson’s advice regarding the plea
26 offer. “To show prejudice from ineffective assistance of counsel where a plea offer has
27 lapsed or been rejected because of counsel’s deficient performance, defendants must
28

1 demonstrate a reasonable probability they would have accepted the earlier plea offer had
2 they been afforded effective assistance of counsel.” *Missouri v. Frye*, 566 U.S. 134, 147
3 (2012); *see also Lafler*, 566 U.S. at 163 (“In the context of pleas a defendant must show
4 the outcome of the plea process would have been different with competent advice”);
5 *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997) (“In order to prove prejudice where
6 counsel fails to inform the petitioner about a plea offer, the petitioner must prove there
7 was a reasonable probability he would have accepted the offer”). A fair-minded argument
8 can be made that the state courts were correct in concluding that Campbell did not show
9 that he was led to reject the plea offer by any improper legal advice from Ohlson. *See*
10 *Harrington*, 562 U.S. at 101.

11 In sum, the state courts’ denial of relief on the claim in Ground 1 was not contrary
12 to or an unreasonable application of *Strickland*, *Lafler*, or any other Supreme Court
13 precedent, and it was not based on an unreasonable determination of the facts in light of
14 the evidence presented. The Court denies habeas corpus relief on Ground 1.

15 2. Ground 2

16 In Ground 2, Campbell claims that his federal constitutional rights were violated on
17 account of ineffective assistance of his trial counsel because counsel “fail[ed] to argue
18 that Ms. Loftis did not voluntarily consent to sign the waiver that permitted the search of
19 the apartment.” (ECF No. 25 at 10.) Campbell explains this claim as follows:

20 On December 2, 2010, Ashley Loftis, Mr. Campbell’s then-girlfriend,
21 checked into St. Mary’s Hospital in Reno, Nevada, to detox from heroin.
22 *See* 7/1/2011 Motion to Suppress [ECF No. 43-19]. Ms. Loftis, who was
23 accompanied by her father, told hospital staff that Mr. Campbell had
24 physically assaulted her during a domestic dispute. *Id.* at 3. After Reno
25 Police arrived to speak with Ms. Loftis, she informed a detective Jennifer
26 Garnett-Hanifan that there was a large quantity of illegal drugs in the
27 apartment she shared with Mr. Campbell. *Id.* Ms. Loftis then signed a
28 permission to search form while detoxing from heroin and while taking
Ativan—a benzodiazepine—and Clonidine to treat her withdrawal
symptoms. *Id.*; *see also* Pet. Ex. 6 (filed under seal) (medical records of
Ashley Loftis) [ECF No. 27-1].

Pursuant to Detective Garnett-Hanifan’s instructions, Ms. Loftis then
called Mr. Campbell, asking that he meet her at her parents’ house. *See*
7/01/2011 Motion to Suppress at 3. Mr. Campbell then came out of their

1 shared apartment, where law enforcement arrested him on an unrelated
2 warrant. See 7/1/2011 Motion to Suppress; see *also* 10/6/2011 Motion to
3 Suppress Hearing Transcript [ECF No. 44-14]. In doing so, the police
4 removed the key chain from around Campbell's neck, took the key to the
5 apartment, and entered the apartment based upon Ms. Loftis's signed
6 consent form. *Id.* at 3–4; see 12/3/2010 Arrest Report and Declaration of
7 Probable Cause [ECF No. 4-1, pp. 123–32]. They did not ask for Mr.
8 Campbell's permission to search the apartment or inform him they planned
9 to do so. See 10/6/2011 Transcript at 26. In that apartment, law
10 enforcement found the narcotics that led to the trafficking charges contained
11 in the Washoe County District Attorney's two-count Information. See
12 1/21/2011 Information [ECF No. 43-6].

13 Defense counsel John Malone moved to suppress, arguing only that
14 the narcotics should be excluded because (1) the police failed to obtain a
15 warrant to search the apartment and (2) Mr. Campbell, a co-tenant, did not
16 consent to the search of the apartment. See 7/1/2011 Motion to Suppress.
17 In a subsequently filed in proper person motion, Campbell raised the issue
18 of Ms. Loftis's lack of consent to the search given that she was under the
19 influence of drugs at the time she signed the permission to search form,
20 thereby rendering her consent involuntary. See 7/13/2011 Pro Per Motion
21 to Suppress Evidence [ECF No. 43-21]. In support of his motion, Mr.
22 Campbell attached an affidavit from Ms. Loftis, dated February 24, 2011. *Id.*
23 The court found these to be fugitive documents and did not consider them.
24 See 10/06/2011 Pretrial Motions Hearing Transcript at 5.

25 After requesting new counsel, John Ohlson replaced John Malone;
26 Ohlson then filed a reply in support of the motion to suppress. See
27 9/28/2011 Reply in Support of Motion to Suppress [ECF No. 44-12].
28 Although counselor Malone's motion to suppress did not raise the issue of
voluntariness, Mr. Campbell filed an in pro per motion raising the issue of
Ms. Loftis's voluntariness in consenting to the search, which counselor
Ohlson then reiterated in his reply. See 7/13/2011 Pro Per Motion to
Suppress Evidence; see *also* 9/28/2011 Reply in Support of Motion to
Suppress. At the hearing on the motion to suppress, the State attempted to
raise the issue of whether Ms. Loftis's consent to the search was
voluntary—as raised in Mr. Campbell's in pro per motion and the reply—
but Ohlson objected, indicating that Ms. Loftis's “state of mind [wa]s not in
issue in th[e] case,” and specifically withdrew any issue of voluntariness that
may have been raised by Mr. Campbell in his in proper person motion or
counselor Ohlson's reply. See 10/6/2011 Hearing Transcript at 39. Yet, Ms.
Loftis's signature on the consent to search form that she provided during
her stay at St. Mary's, as well as the signature on her medical records, was
inconsistent with the signature on the lease agreement for the apartment
she co-leased with Mr. Campbell. *Compare* Pet. Ex. 6 & 10/10/2014 Pro
Per State Petition, Ex. 12.5 *with* 10/10/2014 Pro Per State Petition [ECF No.
48-1].

During the state post-conviction evidentiary hearing, it became clear
that both Malone and Ohlson were ineffective by failing to argue that Ms.
Loftis's consent to search the apartment was involuntary. The medical
records of Loftis were admitted at the post-conviction evidentiary hearing.
See Pet. Ex. 6 (filed under seal). Those records establish she had used
heroin the morning she signed the Consent to Search form yet was having

1 withdrawal symptoms and that medical personnel prescribed Ativan and
2 Clonidine to control her narcotic withdrawal symptoms. She admitted to
3 hospital staff that she was having suicidal thoughts and had been thinking
4 about hanging herself, poisoning herself with carbon monoxide, shooting
5 herself, or laying on railroad tracks to be hit by train. She also admitted she
6 had smoked heroin daily for the past year, and hospital personnel noted
7 that her thought process was “bizarre.” She also indicated that she was
8 hearing voices telling her to physically harm herself. These medical records
9 were in Ohlson’s file but never used for purposes of the motion to suppress.

10 Counsel was ineffective for failing to challenge the voluntariness of
11 Loftis’s consent to search. The medical records raise serious questions as
12 to Loftis’s state of mind at the time she gave consent to search the
13 apartment. Further evidence of Loftis’s unfocused state of mind was her
14 sloppy signature on the consent form and in her medical records, which did
15 not match the signature on the apartment lease form. The altered signature
16 is consistent with someone who is suffering with a disorganized state of
17 mind. Counsel had these records but waived the argument, which was
18 clearly a deficient performance. This deficient performance ultimately
19 prejudiced Campbell—had counsel raised this meritorious issue at the
20 hearing, there is a reasonable probability the motion to suppress would
21 have been granted and the charges against Mr. Campbell dismissed.

22 (*Id.* at 10-13.)

23 Campbell asserted this claim in state court in Ground 7 of his state habeas petition.
24 (ECF No. 49-14 at 6-10.) After the evidentiary hearing (ECF No. 50-1 (Transcript)), the
25 state district court denied relief on the claim, ruling as follows:

26 Ground (7) and Supplemental Petition Ground (7): Petitioner alleges
27 ineffective assistance of counsel for trial counsel, John Ohlson’s (“Mr.
28 Ohlson”), failure to challenge the lawful nature of Ms. Loftis’ consent to
search. Mr. Malone, before being replaced by Mr. Ohlson, wrote and filed a
Motion to Suppress that requested the Court suppress the evidence seized
from the apartment Petitioner shared with Ms. Loftis because Petitioner
objected to the search at the time of arrest. Petitioner did not agree with Mr.
Malone that his objection to the search was the ground for which the
evidence should be suppressed and subsequently filed a pro per motion to
suppress. Petitioner’s pro se motion argued that Ms. Loftis’ consent to
search was not given freely and voluntarily. Petitioner claims that Mr.
Ohlson’s failure to incorporate Petitioner’s motion to suppress at the
suppression hearing was ineffective assistance of counsel. Petitioner
claims that because the Court sustained a hearsay objection regarding one
of Ms. Loftis’ statements, and offered a continuance to counsel to prepare
according to the subsequent motion, those actions amount to evidence that
the Court would have ruled in Petitioner’s favor had counsel incorporated
his pro se motion. However, the actions identified do not support the
inferences the Petitioner now seeks to draw in hindsight. It appears that
Petitioner is looking back over every step made by his counsel and trying to
find an alternative action as a wooden means of asserting error.

"Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

[Footnote: *Strickland v. Washington*, 466 U.S. 668, 669 (1984).]

The "failure" of Mr. Ohlson to incorporate Petitioner's pro se motion must be viewed from Mr. Ohlson's perspective at the time. At the evidentiary hearing Mr. Ohlson testified that he did not incorporate Petitioner's motion because he felt as though the initial argument was much more likely to win. Although Petitioner argues to the contrary, there is no evidence to support the assertion that Ms. Loftis' consent was involuntary. In fact the overwhelming evidence is that he sought to pressure her, after the fact, to "take the fall" for his criminal misconduct.

Thus, the "failure" by Mr. Ohlson to incorporate Petitioner's pro se motion to suppress into his arguments did not fall below an objective standard of reasonableness and cause prejudice against Petitioner. Trial counsel is permitted to develop their own strategy, and do not have to follow the lead charted by their clients. There is no evidence that had Mr. Ohlson incorporated Petitioner's motion that the outcome of the suppression hearing and subsequent trial would have been any different and Ground (7) is DENIED.

(ECF No. 50-6 at 8-9.) Campbell then asserted the claim on the appeal in his state habeas action. (ECF No. 51-7 at 28-34.) The Nevada Supreme Court affirmed the denial of relief on the claim, ruling as follows:

. . . [A]ppellant argues that counsel should have challenged Ashley Loftis' consent to the search of the apartment she shared with appellant because she was under the influence of drugs when the police obtained her consent. We conclude that appellant failed to demonstrate deficient performance. Medical records showed that Loftis had used drugs before police sought her consent to search the apartment she shared with appellant. However, neither the transcript of the motion to suppress nor the testimony at the evidentiary hearing demonstrated that she was so intoxicated as to render her consent involuntary. See *McMorran v. State*, 118 Nev. 379, 383, 46 P.3d 81, 83 (2002) ("A search pursuant to consent is constitutionally permissible if the State demonstrates that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (internal quotation marks omitted)). Therefore, the district court did not err in denying this claim.

(ECF No. 51-12 at 2-3.)

1 Because the claim in Ground 2 was adjudicated on its merits in state court, the
2 Court applies the AEDPA standard.

3 Voluntary consent to a search allows the State to conduct a warrantless search
4 that would otherwise be prohibited under the Fourth and Fourteenth Amendments. See
5 *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). To determine whether consent to
6 search is voluntarily given under the Fourth Amendment, a court must look at the totality
7 of all the circumstances. See *id.* at 221.

8 The Court determines that, in light of the evidence presented in state court, the
9 Nevada Supreme Court's ruling on the claim in Ground 2 was a reasonable application
10 of *Strickland* and *Schneckloth*.

11 Campbell's counsel—John Malone, who filed the initial motion to suppress for
12 Campbell—testified at the evidentiary hearing that he made a deliberate choice not to
13 argue that Loftis's consent was involuntary:

14 Q. [direct examination] Okay. Did you ever make the argument
15 in that motion to suppress that she [Loftis] couldn't consent because she
was under the influence or on drugs at the time of the consent?

16 A. No.

17 Q. Why not?

18 A. There are lots of different reasons. Okay? I had, I believe, a
19 very strong motion under *Randolph, Georgia v. Randolph*, that second-
party consent and the ability of the co-tenant to vitiate consent. In other
20 words, if the cotenant were—under *Randolph* if the co-tenant were on the
scene and said, "I don't want you to search," they would have—they would
21 not be able to search given the first party co-tenant's consent. Was that
clear enough?

22 Q. Yes. But you're also familiar that people, if they're in an
23 intoxicated state, there's an argument that can be made that they cannot
consent, in your history as a lawyer; correct?

24 A. That's not exactly correct.

25 Q. Okay.

26 A. I mean—

27 Q. That there may be issues surrounding their consent if they're
28 intoxicated or under the influence? Do we agree on that?

1 A. Certainly there could be an issue.

2 Q. Okay. And you said there were several reasons. You noted
3 the first, that you thought your issue was strong. What were the other
4 reasons that you didn't raise the issue for intoxication or being under the
5 influence as relative to her consent?

6 A. I had about—I had reports, numerous reports, of Mr. Campbell
7 contacting Ms. Loftis while he was at the Washoe County Jail. He did so
8 using another inmate's PIN number, personal identification number, but the
9 phone calls were attributed to him. And they were, I would say devastating
10 to his case in lots of ways.

11 Q. Okay.

12 A. He was—the clear content and import of those phone calls
13 was to persuade Ms. Loftis to testify in a manner favorable to him. It
14 alternated between: Testify that you didn't give them consent, that you were
15 forced into it, that you were badgered into it, and then it went on to asking
16 her to take responsibility for the drugs. So—

17 Q. And you had a copy of these phone calls?

18 A. Yeah. Well, I had a—I had copies of the phone calls. I had—
19 and I had reports that documented each and every call and the substance
20 of the call. Some calls, in other words, that the—that Reno Police
21 Department—I believe it was Reno—the Reno Police Department
22 monitored, they reported as not having any bearing on his case. But there
23 were, I believe, right around 30 that did.

24 Q. And you felt that if you opened that door, the State would be
25 able to use those calls?

26 A. Yes. I mean, I'm a—you know, those were, in my opinion, a
27 huge problem.

28 * * *

29 Q. [cross-examination] Have you ever seen a judge rule that
30 simply being under the influence of marijuana precludes consent?

31 A. No. That—as stated, no.

32 Q. If you were to evaluate the question of whether that position
33 should be advanced, how would you—how would you rate it?

34 A. Desperate.

35 Q. Okay. And—

36 A. Can I expand?

37 Q. Yeah. Please do. Go ahead.

38

1 A. Unwilling to—unlikely to succeed, a desperate move, a pretty
2 tough bar to pass.

3 Q. Okay. Now, how about having a history of drug use? Does
4 that preclude consent?

5 A. No.

6 Q. How about having unspecified mental illness or mental
7 problems? Does that conclude—excuse me. Does that preclude a consent?

8 A. No.

9 Q. You know that you can advance more than one argument in a
10 motion?

11 A. Yes.

12 Q. So why not throw in all the—the ones you don't like, too?

13 A. There's a quote by Sun Tzu, the Chinese general, strategist,
14 tactician, who says that—and that quote is, an attack—an attack
15 everywhere is an attack nowhere. So—and I think when you're talking about
16 military strategy or trial strategy, the concept of concentrating your forces
17 on the opposition's weakest point is well settled to be the best way to win
18 that battle.

19 (ECF No. 50-1 at 99-101, 114-15.)

20 Ohlson also testified that he made a strategic decision about what arguments to
21 make in support of the motion to suppress:

22 Q. [cross-examination] Okay. Now, you had a strategy for the
23 suppression hearing; correct?

24 A. I'm sure.

25 Q. You don't remember exactly what it was, though; right?

26 A. Right.

27 Q. Okay. How do you—how do you formulate a strategy for a
28 suppression hearing? What did you do to prepare?

A. You have to work within the parameters of the facts and the
law.

Q. Okay. So you evaluate the strength of legal principles and the
strength of your facts?

A. That's right.

1 Q. Okay. Did you do that in this case?

2 A. I assume so, yes.

3 Q. Okay. There may have been other strategies around.

4 A. I don't think there's any other strategy than to evaluate the
5 facts and the law.

6 Q. Okay. All right. That sounds about right.

7 Did you consider bringing in other witnesses to the suppression
8 hearing, specifically Ms. Loftis?

9 A. I don't recall. I don't think I would have brought Ms. Loftis to a
10 hearing. I don't recall.

11 Q. Why not?

12 A. She was the State's witness.

13 Q. Okay. You didn't anticipate she would be helpful?

14 A. I did not anticipate that she would be helpful, no.

15 Q. Okay.

16 A. As I recall, she may have made some expressions that she
17 was willing to be helpful, but I—I would have been—I would have been
18 skeptical about them.

19 Q. All right.

20 (*Id.* at 27-28.)

21 It appears, from the testimony of counsel that they made a deliberate, strategic
22 decision not to assert an argument that Loftis's intoxication or mental state precluded her
23 voluntary consent to the search, primarily, perhaps, because they wanted to avoid
24 opening the door to what would have been damaging testimony by Loftis about
25 Campbell's telephone calls with her.

26 Moreover, there was evidence supporting the conclusion that Loftis was not so
27 intoxicated as to render her consent involuntary, and that there was no coercion by the
28 police. For example, Detective Garnett-Hanifan testified as follows at the hearing on
Campbell's pretrial motion to suppress:

- 1 Q. [direct examination] Where did you meet with Ms. Loftis?
- 2 A. In the emergency room of St. Mary's [Hospital].
- 3 Q. What was her physical condition at the time?
- 4 A. Apparently normal.
- 5 Q. She didn't appear to be in traction or anything like that?
- 6 A. No.
- 7 Q. What was her mental demeanor at the time from what you
- 8 could tell in speaking with her?
- 9 A. She was fine. She was being medically cleared to go into a
- 10 treatment center.
- 11 Q. Did she appear to be under the influence of drugs or alcohol
- 12 at that time?
- 13 A. No.
- 14 Q. Did she—was she able to converse with you coherently?
- 15 A. Yes.

16 (ECF No. 44-14 at 38-39.)

17 The Court therefore determines that a fair-minded argument can be made that

18 Campbell's counsel did not perform unreasonably in not making an argument that Loftis

19 did not voluntarily consent to the search, and that, at any rate, Campbell was not

20 prejudiced by his counsel not making such an argument. The Nevada Supreme Court's

21 ruling on the claim in Ground 2 was not contrary to or an unreasonable application of

22 *Strickland*, *Schneckloth*, or any other Supreme Court precedent, and it was not based on

23 an unreasonable determination of the facts in light of the evidence presented in state

24 court. The Court denies Campbell habeas corpus relief on Ground 2.

25 3. Ground 3

26 In Ground 3, Campbell claims that his federal constitutional rights were violated on

27 account of ineffective assistance of his trial counsel because counsel "failed to make an

28 *Apprendi* objection to the enhanced sentence beyond the one justified by the jury's

1 verdict.” (ECF No. 25 at 13.) Campbell explains that he was convicted of two counts of
2 trafficking in a controlled substance, in violation of NRS § 453.3385(3)—one count for
3 trafficking cocaine and one count for trafficking heroin—and that his sentence turned upon
4 the amount of each substance involved:

5 The statute provided for three levels of punishment based on the
6 quantity of drugs. Under subsection 1, if the quantity is 4 grams or more,
7 but less than 14 grams, the person would be convicted of a class B felony
8 and sentenced to imprisonment for a minimum term of not less than 1 year
9 and a maximum term of not more than 6 years and a fine of not more than
10 \$50,000. NRS § 453.3385(1) (2011). Under subsection 2, if the quantity is
11 14 grams or more, but less than 28 grams, the person would be convicted
12 of a class B felony and sentenced to imprisonment for a minimum term of
not less than 2 years and a maximum term of not more than 15 years and
by a fine or not more than \$100,000. NRS § 453.3385(2) (2011). Under
subsection 3, if the quantity of drugs is 28 grams or more, the person would
be convicted of class A felony and sentenced either to life with the possibility
of parole after 10 years or a definite term of 10 to 25, and by a fine of not
more than \$500,000. NRS § 453.3385(3) (2011).

13 (*Id.* at 14.) According to Campbell, “[t]he weight of the recovered substances in the
14 apartment shared by Mr. Campbell and Ms. Loftis was a contested fact at trial;”
15 specifically, he argues that only small portions of the substances recovered at his
16 residence were actually tested to determine what they were, and, therefore, he argues,
17 the prosecution did not prove that there was more than 28 grams of cocaine or heroin.

18 (*Id.* at 14-15.) Campbell continues:

19 While Campbell was charged in the information under subsection 3,
20 which required a finding of 28 or more grams, the jury was not instructed to
21 make the necessary finding to justify a conviction and sentence under that
22 subsection. Rather, the jury was charged to find only the quantity that
justified a conviction and sentence under subsection 1, namely four or more
grams.

23 * * *

24 Although the jury only made a specific finding that Campbell
25 possessed at least four grams, the court sentenced Campbell under
26 subsection 3 to a term of 10 to life on each count to run consecutively as a
27 class A felony based on possession of 28 or more grams of each drug. See
28 2/24/2012 Sentencing Transcript [ECF No. 46-7] at 15. However, there was
no specific factual finding from the jury that Campbell possessed 28 or more
grams to justify that enhanced sentence.

1 The imposition of this sentence was clearly erroneous as it violated
2 Campbell's rights to due process and a jury trial under *Apprendi* and its
3 progeny. Under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), other
4 than the fact of a prior conviction, any fact that increases the penalty for a
5 crime beyond the prescribed statutory maximum must be submitted to a jury
6 and proved beyond a reasonable doubt. The "maximum sentence" under
7 *Apprendi* is the maximum sentence a judge may impose solely on the basis
8 of the facts reflected in the jury verdict or admitted by the defendant. *Blakely*
9 *v. Washington*, 542 U.S. 296, 303 (2004).

6 * * *

7 Counsel did not object to the imposition of this unconstitutional
8 sentence. This was clearly deficient performance. *Apprendi* was well-settled
9 law at the time of the sentencing. There was no justification for failing to
10 object to any sentence above the jury's only specific finding of at least 4
11 grams. This deficient performance prejudiced Campbell. Had counsel
12 objected, there is more than a reasonable probability the outcome would
13 have been different. Had this issue been raised, the court would have been
14 constitutionally required to impose only that sentence that was justified
15 based on the jury's verdict, namely a sentence under NRS § 453.3385(1)
16 as a class B felony to a minimum term of not less than 1 year and a
17 maximum term of not more than 6 years.

13 (*Id.* at 15-16.)

14 Campbell did not assert this claim in his petition or his supplemental petition in his
15 state habeas action. (ECF Nos. 48-1, 49-14.) After appointment of new counsel for the
16 appeal in that action, Campbell did assert this claim on the appeal. (ECF No. 51-7 at 52-
17 57.) However, because Campbell had not raised the claim in the state district court, the
18 Nevada Supreme Court declined to consider the claim on appeal:

19 . . . [A]ppellant argues that trial and appellate counsel were
20 ineffective as to the sentencing hearing and not challenging the sentence
21 on appeal based on inadequate jury instruction. Appellant did not raise this
22 claim in his petition and we decline to consider it for the first time on appeal.
23 See *McNilton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

24 (ECF No. 51-12 at 4.) Therefore, the Nevada Supreme Court applied a state law
25 procedural bar and declined to consider the claim on its merits, and the claim is subject
26 to application of the procedural default doctrine in this case. Campbell seeks to overcome
27 the procedural default by showing, under *Martinez*, that his state post-conviction counsel
28 was ineffective for not asserting the claim in the state district court in his state habeas
action.

1 Campbell acknowledges that he “was charged in an information with two counts of
2 trafficking in a controlled substance in violation of NRS § 453.3385(3)” and that “Count
3 One charged Campbell with possessing 28 grams of cocaine and Court Two charged him
4 with possessing 28 grams of heroin.” (ECF Nos. 25 at 13, 51-12 at 15.) This was spelled
5 out in the information. (ECF No. 43-6 at 2-3.)

6 However, as Campbell points out, Jury Instruction No. 17, stated:

7 The crime of trafficking in a controlled substance consists of the
8 following elements:

9 (1) A person willfully, unlawfully, knowingly and/or
intentionally

10 (2) Sells, manufactures, delivers or brings into this state

11 Or

12 (3) Is in actual or constructive possession of any controlled
13 substance listed in schedule I, except marijuana, or any
mixture which contains any such controlled substance

14 (4) In a quantity of four grams or more

15 For a person to be convicted of Trafficking in a Controlled Substance
16 under NRS 453.3385, it is not necessary there be additional evidence of
any activity beyond the possession of a quantity of controlled substance
17 equal to or greater than four grams.

18 Heroin and Cocaine are Schedule I controlled substances.

19 (ECF Nos. 25 at 15-16, 46-4 at 19.)

20 In *Apprendi v. New Jersey*, the defendant was charged with various shootings and
21 possession of weapons. 530 U.S. 466, 469 (2000). The indictment did not charge a
22 violation of the state hate crime statute, nor did it allege the defendant acted with a racially
23 biased purpose. *See id.* The defendant entered a guilty plea agreement that reserved the
24 right for the prosecution to argue for a higher “enhanced” sentence based on the offense
25 being committed with a biased purpose. *See id.* at 469-70. Following an evidentiary
26 hearing, the trial court found the state hate crime statute applied and sentenced the
27 defendant based on that statute. *See id.* at 470-71. The sentence imposed was greater
28

1 than the sentence range for the offense charged in the indictment. See *id.* at 476. The
2 Supreme Court reversed, holding that “any fact that increases the penalty for a crime
3 beyond the prescribed statutory maximum must be submitted to a jury, and proved
4 beyond a reasonable doubt.” See *id.* at 490-92. Because the prosecution did not charge
5 the defendant under the hate crime statute, the sentence went beyond the statutory
6 maximum for the crimes that were actually charged. See *id.*

7 In this case, in contrast, Campbell was charged in the information with violation of
8 NRS § 453.3385(3), that is, with possession of 28 or more grams of cocaine, and
9 possession of 28 or more grams of heroin. (ECF No. 43-6 at 2-3.) There is no question
10 that he was sentenced within the range of sentences prescribed by statute for those
11 crimes at the time.

12 Moreover, while Jury Instruction No. 17 stated that violation of NRS § 453.3385,
13 generally, required possession of four grams or more of a controlled substance, the jury
14 instructions also correctly stated the specific charges contained in the information. (ECF
15 No. 46-4 at 3.) One of the first instructions given to the jury, Jury Instruction No. 2, stated:

16 The defendant in this matter, JERMAINE JAMAICA CAMPBELL, is
17 being tried upon an Information which was filed on the 21st day of January,
18 2011, in the Second Judicial District Court, charging the said defendant,
JERMAINE JAMAICA CAMPBELL, with:

19 COUNT I. TRAFFICKING IN A CONTROLLED SUBSTANCE, a
violation of NRS 453.3385(3), a felony, (F1050) in the manner following:

20 That the said defendant on the 3rd day of December A.D., 2010, or
21 thereabout, and before the filing of this Information, at and within the County
22 of Washoe, State of Nevada, did willfully, unlawfully, knowingly, and/or
23 intentionally, sell, manufacture, deliver, or be in actual or constructive
possession of 28 grams or more of a Schedule I controlled substance or a
mixture which contains a Schedule I controlled substance, to wit: cocaine
at Reno, Washoe County, Nevada.

24 COUNT II. TRAFFICKING IN A CONTROLLED SUBSTANCE, a
violation of NRS 453.3385(3), a felony, (F1050) in the manner following:

25 That the said defendant on the 3rd day of December A.D., 2010, or
26 thereabout, and before the filing of this Information, at and within the County
27 of Washoe, State of Nevada, did willfully, unlawfully, knowingly, and/or
28 intentionally, sell, manufacture, deliver, or be in actual or constructive
possession of 28 grams or more of a Schedule I controlled substance or a

1 mixture which contains a Schedule I controlled substance, to wit: heroin at
2 Reno, Washoe County, Nevada.

3 (*Id.*) Jury Instruction No. 21 stated, in part:

4 Each count charges a separate and distinct offense. You must
5 decide each count separately on the evidence and the law applicable to it,
6 uninfluenced by your decision as to any other count.
(*Id.* at 23.) Jury Instruction No. 23 stated:

7 Unlawful possession for sale is the unlawful possession by a person
8 for the purpose of sale of any controlled substance, or a mixture containing
a controlled substance.

9 (*Id.* at 25.) And Jury Instruction No. 4 stated, in part:

10 [Y]ou are not to single out any certain sentence, or any individual
11 point or instruction, and ignore the others, but you are to consider all the
instructions as a whole and to regard each in the light of all the others.

12 (*Id.* at 6.)

13 In the closing argument, the prosecution made the following argument, accurately
14 reflecting the instructions given to the jury:

15 The law is clear on that trafficking count, I don't have to prove he's a
16 drug dealer. I just have to prove he had constructive or actual possession
of drugs or a mixture containing those drugs *in excess of 28 grams in this*
17 *case*. He did. And I'm not telling you that because that's what I want you to
believe. I'm telling you that, because that's what the evidence is beyond a
18 reasonable doubt. Yes, it's a high burden, absolutely, one we embrace, one
we work with every day over here. It's one that is used in courts throughout
19 this country to convict people of crimes of everything from traffic tickets on
up to murder. It's the same standard of proof.

20 (ECF No. 46-2 at 149-50 (emphasis added).)

21 The jury's verdicts on Counts 1 and 2 were as follows:

22 We the jury, being duly empaneled in Count I of the above entitled
23 matter do find . . . The defendant, guilty of trafficking in a controlled
substance.

24 * * *

25 We the jury, being duly empanelled in Count II of the above entitled
26 matter do find . . . The defendant, guilty of trafficking in a controlled
substance.

27 (ECF No. 46-3 at 3-4.)
28

1 Campbell was charged with possessing, and therefore, under Nevada law,
2 trafficking, 28 or more grams of cocaine and 28 or more grams of heroin. The jury found
3 him guilty of those crimes, and the court sentenced him within the range of sentences
4 prescribed by statute for those crimes at the time of Campbell's trial. It was not
5 unreasonable for Campbell's trial counsel not to make an objection based on *Apprendi*,
6 and Campbell was not prejudiced by his counsel not doing so. The Court determines that
7 the claim of ineffective assistance of trial counsel in Ground 3 is not substantial. Campbell
8 does not show his state post-conviction counsel to have been ineffective for not asserting
9 this claim. Campbell does not overcome the procedural default of the claim under
10 *Martinez*. The claim in Ground 3 is denied as procedurally defaulted.

11 4. Ground 4A

12 In Ground 4A, Campbell claims that his federal constitutional rights were violated
13 on account of ineffective assistance of his trial counsel because his counsel was
14 ineffective at sentencing for "failing to make any argument on behalf of Mr. Campbell."
15 (ECF No. 25 at 18.)

16 Campbell did not assert this claim in his petition, or in his supplement to the
17 petition, in his state habeas action. (ECF Nos. 48-1, 49-14.) Campbell did assert this claim
18 on the appeal in his state habeas action. (ECF No. 51-7 at 13, 24, 36-38, 42.) However,
19 because Campbell did not raise the claim in the state district court, the Nevada Supreme
20 Court declined to consider the claim on its merits on the appeal. (ECF No. 51-12 at 4.)
21 The Nevada Supreme Court applied a state law procedural bar to the claim. Therefore,
22 the claim is subject to application of the procedural default doctrine in this case. Campbell
23 seeks to overcome the procedural default by showing, under *Martinez*, that his state post-
24 conviction counsel was ineffective for not asserting this claim of ineffective assistance of
25 trial counsel in Campbell's state habeas action.

26 At the sentencing hearing, Campbell's trial counsel, John Ohlson, initially made no
27 argument regarding the sentence to be imposed, but rather, informed the court that
28

1 Campbell had a statement he wished to read to the court. (ECF No. 46-7 at 6.) The State
2 then argued for the sentence recommended by the Department of Parole and Probation,
3 which was a term of life in prison with parole eligibility after ten years on each count, with
4 the two sentences running concurrently. (*Id.* at 6-8.) Campbell then gave his statement.
5 (*Id.* at 8-12.) After hearing from Campbell, the court stated that it would impose sentences
6 of life in prison with parole eligibility after ten years on each count, with the sentences to
7 be served consecutively, and the court stated its reasons for doing so. (*Id.* at 12-16.) At
8 that point, Ohlson stated:

9 Parole and probation recommended a concurrency between the two
10 sentences I think because the transaction was basically one transaction. It
11 wasn't a sale or hand-to-hand sale. It was quantity found in the search of
the house in one specific transaction. I request that you follow that
recommendation and amend your sentence.

12 (*Id.* at 16.) The court denied that request. (*Id.* at 17.)

13 Respondents point out that Ohlson did, in fact, advocate for Campbell at
14 sentencing. At an earlier hearing, Ohlson informed the court that Campbell requested
15 corrections to the pre-sentence investigation report and asked that Campbell be allowed
16 to explain; that resulted in the sentencing being continued to allow for further investigation
17 and corrections. (ECF Nos. 46-6, 75 at 19.) And, at the continued sentencing hearing,
18 Ohlson argued for further corrections to the pre-sentence investigation report. (ECF Nos.
19 46-7 at 4-5, 75 at 19.) Respondents also note that Ohlson made the request for concurrent
20 sentences. (ECF Nos. 46-7 at 16, 75 at 19.) Most importantly, though, Respondents argue
21 that Campbell does not specify any argument Ohlson should have made that might have
22 resulted in a lesser sentence. (ECF No. 75 at 19-20.)

23 The Court determines that Campbell does not show that there was any argument
24 that his trial counsel could have made, beyond the arguments he did make, that would
25 have raised any possibility of a lesser sentence. In light of the evidence presented at trial,
26 Campbell's criminal history, and the sentencing court's explanation for imposing the
27 sentence it did, and without any showing by Campbell what further argument his trial
28

1 counsel could have made to change the outcome, the Court finds this claim of ineffective
2 assistance of trial counsel to be insubstantial. Campbell does not show his state post-
3 conviction counsel to have been ineffective for not asserting this claim. Campbell does
4 not overcome the procedural default of the claim under *Martinez*. The claim in Ground 4A
5 is denied as procedurally defaulted.

6 **5. Ground 4B**

7 In Ground 4B, Campbell claims that his federal constitutional rights were violated
8 on account of ineffective assistance of his trial counsel because counsel was ineffective
9 at sentencing for “failing to object to suspect evidence cited by the judge in imposing two
10 life sentences.” (ECF No. 25 at 19.) More specifically, Campbell claims:

11 At sentencing, the court heard from Mr. Campbell and then
12 highlighted its considerations in imposing two life sentences. [See ECF No.
13 46-7 at 12–16.] The court highlighted his consideration of the uncharged
14 and disputed bad act of domestic violence against Ms. Loftis, which Mr.
15 Campbell—not his counsel—objected to. [*Id.* at 13.] The Court then relied
16 upon charges from other jurisdictions that were ultimately dismissed and
17 the fact that Mr. Campbell had 11 children by 8 different women to support
18 the court’s position that Mr. Campbell was a danger to the community. [*Id.*
19 at 15.] Counselor Ohlson did not object to the Court’s reliance on any of this
20 evidence.

21 (*Id.* at 19-20.)

22 Campbell did not assert this claim in his petition, or in his supplement to the
23 petition, in his state habeas action. (ECF Nos. 48-1, 49-14.) Campbell did assert this claim
24 on the appeal in his state habeas action. (ECF No. 51-7 at 13, 25, 34-43.) However,
25 because Campbell did not raise the claim in the state district court, the Nevada Supreme
26 Court declined to consider the claim on its merits on the appeal. (ECF No. 51-12 at 4.)
27 The Nevada Supreme Court applied a state law procedural bar to the claim. Therefore,
28 the claim is subject to application of the procedural default doctrine in this case. Campbell
seeks to overcome the procedural default by showing, under *Martinez*, that his state post-
conviction counsel was ineffective for not asserting this claim of ineffective assistance of
trial counsel in Campbell’s state habeas action. The Court, however, finds insubstantial

1 Campbell's claim that that his counsel was ineffective for not objecting to the sentencing
2 court's reliance upon the alleged improper evidence.

3 Campbell states in his claim that the sentencing judge "highlighted his
4 consideration of the uncharged and disputed bad act of domestic violence against Ms.
5 Loftis, which Mr. Campbell—not his counsel—objected to." (ECF No. 25 at 19-20.)
6 However, after Campbell objected, asserting that Loftis went to the hospital, not for
7 injuries caused by Campbell, but for drug rehabilitation, the sentencing judge stated:

8 That's right. That's right. She was. You're right. So I'll take that back. I won't
9 hold you for that.

10 (ECF No. 46-7 at 13.)

11 Campbell points out that the sentencing judge mentioned "the fact that Mr.
12 Campbell had 11 children by 8 different women." (ECF Nos. 25 at 20, 46-7 at 15.)
13 Campbell does not claim this was untrue; he refers to it as a "fact." It was Campbell,
14 himself, who first mentioned this at the sentencing hearing. (ECF No. 46-7 at 9 ("Your
15 Honor, I have 11 kids by eight different women").) Campbell does not make any showing
16 that the judge's mention of this in explaining the sentence was improper or objectionable.

17 Also, according to Campbell, the sentencing judge "relied upon charges from other
18 jurisdictions that were ultimately dismissed." (ECF No. 25 at 20.) However, the sentencing
19 judge described those as "contacts . . . with law enforcement." (ECF No. 46-7 at 15.) The
20 judge stated, referring to the presentence investigation report, "[i]t says the defendant
21 was also arrested for the following offenses, *dispositions as noted*." (*Id.* (emphasis
22 added).) The judge appears to have been aware that Campbell's contacts with law
23 enforcement did not necessarily result in convictions, and he made clear that he relied
24 upon only the information provided in the presentence investigation report. Campbell
25 makes no showing that the judge relied upon any misinformation, or "suspect evidence."

26 In short, Campbell does not make any showing that his counsel performed
27 deficiently in not objecting to the sentencing court's consideration of any of the matters
28

1 he describes, or any showing that, had his counsel objected, the outcome of the
2 sentencing would have been different. Campbell does not show his state post-conviction
3 counsel to have been ineffective for not asserting this claim. Campbell does not overcome
4 the procedural default of the claim under *Martinez*. The claim in Ground 4B is denied as
5 procedurally defaulted.

6 **E. Certificate of Appealability**

7 For a certificate of appealability (“COA”) to issue, a habeas petitioner must make
8 a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c).
9 Additionally, where the district court denies a habeas claim on the merits, the petitioner
10 “must demonstrate that reasonable jurists would find the district court’s assessment of
11 the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484
12 (2000). “When the district court denies a habeas petition on procedural grounds without
13 reaching the prisoner’s underlying constitutional claim, a COA should issue when the
14 prisoner shows, at least, that jurists of reason would find it debatable whether the petition
15 states a valid claim of the denial of a constitutional right and that jurists of reason would
16 find it debatable whether the district court was correct in its procedural ruling.” *Id.*; see
17 also *James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). Applying these standards,
18 the Court finds that a certificate of appealability is unwarranted.

19 **IV. CONCLUSION**

20 It is therefore ordered that Campbell’s Amended Petition for Writ of Habeas Corpus
21 (ECF No. 25) is denied.

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

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

24 DATED THIS 16th Day of June 2023.

25
26 
27 _____
28 MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE